

In the Matter of

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
COBURN GORE PORT OF ENTRY
COBURN GORE, MAINE

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 16 FSIP 38

ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (Union or NTEU) 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, 5 U.S.C. § 7119, between it and the Department of Homeland Security, U.S. Customs and Border Protection, Coburn Gore Port of Entry, Coburn Gore, Maine (Employer) concerning a dispute over work schedules for Customs and Border Protection (CBP) officers stationed at the Coburn Gore POE and a Memorandum of Understanding (MOU) on the implementation of those schedules.

Following an investigation of the Union's request for assistance, the Panel directed the parties to submit the issues to a Panel representative for mediation-arbitration. In accordance with the directive, on June 1, 2016, the parties convened a mediation session, in Portland, Maine, with Panel Member David E. Walker. Mediation continued via teleconference, on June 21, 2016, with the undersigned, Acting Executive Director Donna M. DiTullio, during which the parties agreed to a 12-6/8 compressed schedule^{1/} for the officers and all provisions in the MOU, except for one matter.^{2/} In resolving the remaining issue, I have considered the entire record in the case, including the parties' final offers, post-hearing statements of position, and documentary evidence.

1/ A 12-6/8 schedule consists of 6 12-hour work days and 1 8-hour work day during a biweekly pay period with 3 regular days off (RDO).

2/ The undersigned was designated by Panel Chairman Mary E. Jacksteit to serve as arbitrator in this case.

BACKGROUND

U.S. Customs and Border Protection is a major component of the Department of Homeland Security. In support of its mission, which is to prevent terrorists and terrorist weapons from entering the U.S., the Agency is charged with the interdiction of drugs and other contraband and the prevention of illegal entry of individuals. The vast majority of the Union's approximately 25,000-employee bargaining unit consists of CBP officers who primarily are responsible for screening passengers and cargo at 300+ Ports of Entry (POEs). The parties' National Collective Bargaining Agreement (NCBA), which was to expire on May 11, 2014, remains in effect until a successor is implemented. Chapter 141 of NTEU represents 360 employees in New England and Canada. Of those, approximately 51 CBP officers are assigned to the Jackman POE; some officers assigned to Jackman are stationed at five other locations in St. Aurelie, St. Juste, St. Pamphile, St. Zacharie and Coburn Gore. The parties have negotiated CWS agreements for officers stationed at those locations, except Coburn Gore.^{3/}

In a previous case filed by the Union under the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6120 *et seq.*, Department of Homeland Security, Customs and Border Protection, Coburn Gore Port of Entry, Coburn Gore, Maine and Chapter 141, National Treasury Employees Union, Case No. 15 FSIP 79 (December 15, 2015), the Panel concluded that the Employer had not met its burden of establishing that the Union's proposed 12-6/8 compressed work schedule (CWS) for CBP officers is likely to cause an adverse impact on agency operations. Accordingly, the Panel directed the Employer to bargain over the proposal. During the parties' subsequent negotiations, they reached an *interim* resolution concerning compressed schedules for Coburn Gore. They agreed to implement, effective January 24, 2016, a 10-line schedule (with one line left blank to reflect a vacant CBP officer position) that consists of five 12-6/8 CWS; and four 12-6/8 hybrid schedules where the work hours begin on one day and end on the next (*i.e.*, 4 p.m. to 4 a.m.). The parties' subsequent efforts, including mediation, to negotiate permanent work schedules for the officers were

^{2/} All CBP officers at Jackman work a 12-6/8 CWS. St. Aurelie, St. Juste, Pamphile and St. Zachary employees work either 14- or 15-hour shifts with 1 8- or 10-hour-day per pay period.

unsuccessful, however, and the Union filed a request for Panel assistance.

ISSUE AT IMPASSE

The sole issue in dispute is whether the Coburn Gore CBP officers should be permitted to work a 12-6/8 CWS at their discretion.

THE PARTIES' POSITIONS

1. The Union

The Union proposes the following wording for inclusion in the MOU:

An employee may opt into or out of the CWS schedule effective with the start of the next BR&P bid cycle^{4/} occurring on or about October 1st of each calendar year. The employee shall provide notice of opting into or out of the CWS by not later than September 1 of the current BR&P bid cycle.

The proposal would allow employees, once a year, to opt in or out of working the 12-6/8 CWS. Essentially, the Union contends that when a new employee is hired to work at the Coburn Gore POE, the employee should be able to determine, on a voluntary basis, whether to have a 12-6/8 CWS. A compressed schedule is not a stated condition of employment within any agency policy or job vacancy announcement. Rather, it is, with respect to Coburn Gore, a negotiated entitlement. Furthermore, the Union

^{4/} Under Article 13, Bid, Rotation and Placement, each year on September 1st, the agency identifies and posts the bid opportunity announcements at each POE, having provided the Union with such notice 30-days prior. Employees then begin the annual process of bidding on the posted work assignments which include an expression of preference for a particular shift or schedule in a work unit. Management then selects qualified employees bidding on assignments in seniority order. Work unit schedules typically consist of "lines" which reflect the work hours for a bi-weekly pay period. These lines may consist of work hours under compressed schedule or so-called 6101 compliant schedules, which are 8-hour tours of duty. In Coburn Gore, the parties have agreed that all "lines" will consist of 12-6/8 compressed schedules.

maintains that nothing in the Federal Employees Flexible and Compressed Work Schedules Act (Act), 5 U.S.C. § 6120, *et seq.* mandates employee participation in a compressed schedule and the Union asserts that employees cannot be compelled to work a CWS; therefore, an employee should be permitted to opt in or out of working the schedule.

Employees' personal circumstances may change during the course of employment and they may need to adjust their work schedules to contend with those changes. Article 13, Bid, Rotation and Placement, allows employees annually to bid on the work unit where they would like to be assigned, thereby allowing employees to change work location for the upcoming year. A similar opportunity should apply to CWS participation. Title 5 U.S.C. 6127(b)(2) of the Act allows an agency to exempt an employee from working a compressed schedule if it would impose a personal hardship on an employee. The Union contends that there are life circumstances that may not rise to the definition of a personal hardship but which justify exemption and its proposal would permit employees to effectively deal with those situations. While the parties already have agreed to include a provision in the MOU that permits an officer, for "personal/hardship reasons," to opt out from working the CWS at any time, the Union's proposal addresses situations where an employee may want to change work schedules, for non-hardship reasons. It would limit such opportunity to once-a-year, thereby giving the Employer a measure of predictability in work hours for the upcoming year. Finally, the Union has developed examples of schedules where 9 or 10 officers are on board and one or two would work a 6101 compliant schedule (8-hour tour) while the others work a 12-6/8 CWS. It asserts that under those hypothetical schedules, no overtime would be generated and all shifts would be covered adequately, thereby demonstrating that the Employer's fears that the Union proposal would result in overtime costs and inadequate staffing of shifts are unfounded. The Union is willing to work with management on an ongoing basis to arrive at scheduling solutions that permit once-a-year opt in/opt out opportunities without requiring overtime or resulting in adverse impact to the Agency's mission of level of service.

2. The Employer

The Employer opposes including the Union's wording in the MOU. In essence, it contends that the parties already have agreed to a provision which permits an employee assigned to the CWS to opt out from working the schedule for reasons based on

personal or family hardship.^{5/} While management concurrence is needed for an employee to cease working under the CWS, the parties have made a process available to employees who want to opt out of the CWS at any time, and is not limited to a once-a-year opportunity.

Allowing employees, at their discretion, to abandon the compressed schedule in favor of an 8-hour tour of duty would negatively impact management's ability to align staffing with the workload.^{6/} Coburn Gore is a small POE and it currently does not meet the minimum staffing level. There are seven officers working at Coburn Gore and that number will be reduced further to five in September 2016, with the anticipated departure of two officers. While hiring efforts are underway, Coburn Gore may be operating at a minimum staffing level or below for some time. When all CBP officers work the 12-6/8 CWS negotiated by the parties, which includes a nine-line schedule, there would not be any increased cost to the Employer, in terms of overtime expenditures or a need to backfill gaps in coverage with

5/ Paragraph 2 in the MOU provides, in pertinent part:

The Coburn Gore CWS shall be comprised of a 12/6-8 schedule as negotiated and incorporated at Attachment 1 to this MOU.

a. An employee assigned to the CWS may not terminate his or her participation unless s/he requests a personal/family hardship in writing. The employee will, upon request, submit a written explanation and supporting documentation. If approved by the Agency, CWS participation will cease as of the next pay period and the employee will be assigned to a 6101 schedule.

6/ Article 14, Alternative Work Schedules, Section 6, provides, in part, that:

Flexible and compressed work schedules established through local negotiations must reasonably align to staffing and workload requirements, and not adversely impact operations or result in increased operating costs (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule) [].

officers from the Jackman POE.^{7/} Allowing even one officer to work an 8-hour schedule would result in gaps in coverage that would have to be backfilled by requiring overtime from officers stationed at Coburn Gore or assigning officers from Jackman, who would have to travel 140 miles roundtrip to cover the work. Sample schedules created by management, which show the effects of increasing numbers of CBP officers moving from the 12-6/8 CWS to an 8-hour schedule demonstrate that the Union's proposal would significantly increase the cost of agency operations because, unless all employees are on either the 12-6/8 CWS or an 8-hour schedule, there will be a need to backfill coverage through overtime or the assignment of other CBP officers from Jackman. Furthermore, not only would the Union's proposal impact staffing, it also would require two separate schedules, one for those on CWS and one for 6101 compliant schedules, and employees would not rotate through all of the lines. This creates an unfair result whereby those electing an 8-hour tour would not be required to rotate through the CWS lines.

The parties have negotiated agreements for the POEs in Jackman,^{8/} St. Zacharie, St. Aurelie, St. Juste and St. Pamphile, as well as other locations in Maine, that require management concurrence on employee requests to depart from a compressed schedule. The Union has failed to demonstrate a need for a different result at the Coburn Gore POE.

OPINION

The difficulties in staffing remote locations on the nation's northern border are well known to the point where legislation recently has been introduced in the Senate to help agencies, such as CBP, address chronic staffing shortages in geographic locations where it is difficult to fill positions and retain employees by permitting incentives such as retention and relocation bonuses and special pay rates. At the Coburn Gore

^{7/} This assumes a bi-weekly period when no leave was taken by any officer and, therefore, no need to cover schedules with overtime or through other means.

^{8/} The parties' agreement covering Jackman also includes a provision that permits an employee to request an exemption from participation in the CWS schedule for other than personal/family hardship reasons. The exemption, however, would require management concurrence and a denial could not be grieved under the parties negotiated grievance procedure.

POE, management has faced challenges to maintaining minimum staffing levels and to covering the work at the location as efficiently as possible with available personnel. The 12-hour compressed schedule, which the Union vigorously sought for CBP officers, has been in place as an *interim* resolution, since January 24, 2016, and with the parties' recent agreement, it now has become the permanent schedule for all CBP officers. Presumably, the Union proposed the schedule because of employee interest in it, and as a benefit which may serve to retain employees at Coburn Gore. Union representatives stated that they were unaware of any employee who wanted to be relieved from working the 12-hour CWS since its implementation in January.

The Employer has submitted examples of schedules covering a bi-weekly period which show the effect of having lines which are staffed by increasing numbers of officers on an 8-hour tour, presumably those who may have opted out of the CWS as they would be permitted under the Union's proposal. The schedules demonstrate that when officers move from a CWS to an 8-hour schedule, there is an increase in overtime costs and expenditures related to travel by Jackman-assigned officers who must drive to Coburn Gore to cover work. Gaps in coverage are created; it is not possible to cover a 12-hour time frame with an 8-hour tour unless there is backfill by other officers working overtime or coming from Jackman. Clearly, the situation is exacerbated due to the small number of officers who work at Coburn Gore. There may be a different outcome at a POE staffed by a larger number of employees where there may be less negative impact on management's ability to cover work when two separate schedules—CWS and 6101 compliant—are being used. Comparability data reveals that other similarly small POEs in Maine, by agreement of the parties, limit an employee's ability to opt out of a CWS unless the employee can demonstrate there is a need due to personal/family hardship. Although employees at those locations may not opt out of a CWS at their discretion, they still have available a mechanism whereby they may seek to remove themselves from a CWS. The same process is available to employees at Coburn Gore. Based upon the small size of the Coburn Gore POE, comparability data, and evidence submitted by the Employer that shows the adverse effect of allowing employees to opt out of the 12-hour CWS, it does not appear feasible to allow employees, at their discretion, to do so.

DECISION

The Union shall withdraw its proposal.

Donna M. DiTullio

Donna M. DiTullio
Arbitrator

July 15, 2016
Annapolis, Maryland