

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 INSTITUTION
SANDSTONE
SANDSTONE, MINNESOTA

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 683

Case No. 23 FSIP 027

ARBITRATOR'S OPINION AND DECISION

The American Federation of Government Employees, Local 683 (Union), filed this request for Panel assistance on March 16, 2023, under § 6131 of the Federal Employees Flexible and Compressed Work Schedules Act (the Act) of 1982, 5 U.S.C. § 6120, *et seq.* This case involves the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution in Sandstone, Minnesota (FCI Sandstone or Agency).

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through a mediation-arbitration proceeding with the undersigned in Sandstone, Minnesota. The parties were informed that if a settlement was not reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, on May 10, 2023, I conducted a mediation-arbitration proceeding with representatives of the parties. Because the mediation portion of the proceeding failed to result in the voluntary settlement of the dispute, I am required to issue a final decision resolving the parties' dispute in accordance with 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of the Panel's regulations. In reaching this decision, I have considered the entire record.

BACKGROUND

FCI Sandstone is a low-security federal prison for male offenders. It is operated by the Federal Bureau of Prisons (BOP), a division of the United States Department of Justice. FCI Sandstone is located approximately 100 miles northeast of Minneapolis/St. Paul. The Union represents approximately 64 Correctional Services bargaining unit employees impacted by this proposed schedule termination. The parties are currently covered under the Master Collective Bargaining Agreement (CBA) between the BOP and the American Federation of Government Employees, Council of Prison Locals, effective July 21, 2014 – July 20, 2017, extended to May 2026. The parties are also covered by a 2015-Local Supplemental Agreement and the Correctional Services “Custody” CWS Agreement, dated February 20, 2001.

Under the CBA, Article 18, Section b., the national parties agreed that requests for flexible and/or compressed work schedules may be negotiated at the local level, and any agreements reached by the local parties must be forwarded to the Office of General Counsel in Washington, D.C. for review and approval. In February 2001, the Agency and Union requested and received approval from the BOP Office of General Counsel to implement a 4-10 CWS (i.e., employees work four 10-hour shifts each week) for 24 bargaining unit posts within the Correctional Services Department. Prior to that approval, all Correctional Services Department schedules were 5-8s (i.e., employees work 5 8-hour shifts each week). The offering of the 4-10 CWS began with the July 1, 2001-Quarterly roster.

The Agency is a 24-hour operation using three watch shifts each day: (1) Morning Watch, 12:00am to 8:00am; (2) Day Watch, 8:00am to 4:00pm; and (3) Evening Watch, 4:00pm to 12:00am. The Agency has had a significant shortage of personnel for several years. As all of the Correctional Services Department posts are responsible for inmate custody, they are mission critical and must be covered. When a post goes unassigned after bidding, the typical response is to cover it with overtime or reassign employees from other departments. Similarly, when an officer is on leave or away for training, coverage with overtime becomes necessary.

In December 2022, for the first time since the Correctional Services Department CWS agreement was approved and implemented in 2001, the Agency advised the Union that it considered the CWS to be too costly and that the Agency intended to terminate it. On March 9, 2023, the Agency issued a letter to the Union, formally declaring the need to terminate the 4-10 CWS as it was having an adverse agency impact by creating “a significant increase in cost in agency

operations.”¹ Specifically, the Acting Warden stated that the 4-10 CWS results in 134.5 hours of dual coverage per week, which “equates to the agency losing the equivalent of over three full-time officers per week in coverage.”

ISSUE AT IMPASSE

The sole issue before me is whether the finding on which the Agency has based its determination to terminate the 4-10 CWS within the Correctional Services Department is supported by evidence that the 4-10 CWS is causing an adverse agency impact.²

PARTIES' POSITIONS

1. The Agency's Position

The Agency takes the position that the 4-10 CWS within the Correctional Services Department is having an adverse agency impact as defined by 5 U.S.C. § 6131(b).³ Specifically, the Agency argues that the 4-10 CWS has caused an increase

¹ When asked at the hearing, how the adverse agency impact was discovered after more than 20 years under the 4-10 CWS, the Agency advised that a new Regional Director had requested review of all CWSs in light of the staffing shortages, which have been ongoing for several years.

² 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).

³ Following the mediation arbitration, the Agency informed me that there were only 21 overlapping 4-10 posts at issue in their March 9th declaration of adverse agency impact. They clarified that the following 4-10 posts within the Correctional Services Department are not overlapping and are therefore not part of the Agency's declaration: (1) Visiting Room Officer, (2) Front Lobby Officer, and (3) Special Housing Unit (SHU) 4. The Agency reserved the right to declare an adverse agency impact for these posts in the future.

in cost of agency operations in accordance with 5 U.S.C. §§ 6131 (b)(3). The Agency's March 9th adverse agency impact declaration identified the 134.5 hours of dual overlapping coverage resulting from the 4-10 CWS as an increase in the Agency's operation costs. The Agency at the mediation-arbitration further stated it wanted to give the Warden deference to assign posts and removing the 4-10 CWS would result in more posts being assigned on the roster.

The Agency claims their evidence shows that the 4-10 CWS is causing an increase in overtime. Specifically, the Agency claims that without the 4-10 CWS it would use 104 hours less of overtime each week. The Agency's Tab 8 provides a 7-day comparison of the current schedule and the Agency's proposed schedule of only 8-hour schedules. The comparison uses the 2nd Quarter roster and Daily Roster Reports from Sunday, March 5th to Saturday, March 11th in identifying 89 unassigned posts and 264:15 hours of overtime required to cover them. For that same week, the Agency's proposed schedule identifies 74 unassigned posts and 160 hours of overtime needed for their coverage. The Agency claims that this comparison shows that the current 4-10 CWS results in an additional 15 unassigned posts and 104 hours of overtime coverage.

2. The Union's Position

The Union takes the position that the 4-10 CWS has not had an adverse impact on the Agency. In the alternative, the Union claims the Agency has failed to demonstrate an adverse impact that meets its burden under the Act. Specifically, the Union claims that the Agency would not save money by removing the 4-10 CWS as there will be the same number of hours worked. The Union argues that because the 4-10 CWS is not responsible for the Agency's understaffing issues, removing them would not correct that deficit.

Additionally, the Union argues it is because of the 2 hours of overlapping coverage from the 4-10 CWS that the Agency has been able to maintain operations with a significant staffing deficiency. Typically, according to the Union, 4-10 CWS officers are assigned for the two hours beyond an 8-hour post to relieve another officer covering a vacancy. The Union maintains that without the 2 hours of relief by the 4-10 CWS officer, the covering officer would be working 8 hours of overtime, but the CWS officer's relief of the covering officer substitutes two hours of straight time for 2 hours of overtime.

The Union further argues that the 4-10 CWS saves money when an officer is away on leave. In the Union's view, a 4-10 CWS officer away on leave for a full week is replaced for only 8 hours for each of the 4 days of that week, thereby saving 8 hours of overtime that would have been spent on coverage. In contrast, an officer working five 8-hour days who is on leave for a week would be covered for 40 hours rather than 32 hours.

CONCLUSION

Under § 6131(c)(2)(B) of the Act, the Panel is required to take final action in favor of the agency head's determination to terminate a CWS if the finding on which the determination is based is supported by evidence that the schedule is causing an "adverse agency impact." As its legislative history makes clear, Panel determinations under the Act are concerned solely with whether an agency has met its statutory burden based on "the totality of the evidence presented."⁴

Having carefully considered the totality of the evidence presented in this case, I find that the Agency has not met its statutory burden. Although the Agency's evidence claims that the 4-10 CWS causes an additional 15 unassigned posts and 104 hours of associated overtime, the record convinces me that this analysis is not sufficiently reliable to meet the Agency's statutory burden. At the hearing the Agency advised me that in compiling its calculation of overtime, the Agency treated situations where a post was unassigned under the current schedule and under the proposed schedules as identical, i.e., each required 8 hours of overtime for coverage. But the evidence shows that under the current 4-10 CWS, officers often spend the first two hours of their tour of duty relieving officers covering unassigned posts on overtime. Under this relief arrangement, the Agency can cover an 8-hour unassigned post with 6 hours of overtime and 2 hours of regular duty time from the 4-10 CWS officer, rather than using a full 8 hours of overtime.

The Agency also clarified that adjusting for this miscalculation could be accomplished by identifying the instances within the Agency's Tab 8 when a post is unassigned under both the current and proposed schedules. The Agency's overtime calculation for the current schedule would then be reduced up to 2 hours for each instance where overtime relief was provided by the 4-10 CWS officer. Reviewing the Agency's Tab 8, I identified a total of 53 occurrences (i.e., 17 within Morning Watch, 14 within AM/Day Watch, and 22 within Evening Watch) when a post was unassigned under both schedules. To the extent, as is often the case, under the current schedule that a 4-10 CWS officer relieves an officer covering an unassigned post on overtime, the Agency's exhibit inflates the amount of overtime under the current schedule for two hours. Therefore, the Agency's total overtime under the current schedule has a potential inflation of up to 106 hours (i.e., 2-hours for 53

⁴ 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).

occurrences). As the Agency bases its declaration of adverse agency impact on the 4-10 CWS's increased cost of an additional 104 hours of overtime, the possible inflation of up to 106 hours calls into doubt the severity or existence of any cost increase.⁵

The Union raised an additional missing consideration within the Agency's evidence involving leave coverage. Specifically, the Union presented evidence that when a 4-10 CWS officer takes leave (e.g., annual leave, sick leave, or training) for the 40-hour workweek, the Agency only arranges for 32 hours of coverage, i.e., 8 hours for each of the 4 days that the officer is on leave.⁶ The Union argues that there is no accounting for this 8-hour savings within the Agency's analysis. However, the Union's analysis does not take into account that many, if not all of those 8 hours would have been used to relieve other officers covering unassigned posts on overtime. In other words, the purported savings will often be offset by the loss of overtime relief. Accordingly, the Union's argument does not significantly aggravate the unreliability of the Agency's analysis.

Nevertheless, the Agency's failure to account for the instances where a 4-10 CWS officer relieves an officer who was covering an unassigned post on overtime, is a flaw that renders its analysis insufficiently unreliable to carry its burden of establishing that the 4-10 CWS is having an adverse agency impact. Given the clear requirements established in the Act, I must conclude that the Agency has not met its statutory burden. I shall therefore order that the Agency rescind its determination to terminate the 21 4-10 compressed work schedules within the Correctional Services Department.

⁵ At the Agency's suggestion, I have examined the Daily Roster Reports for each day of the week covered by Tab 8. My examination found numerous instances where a 4-10 CWS officer relieved an officer covering an unassigned post on overtime. I also found a few instances where coverage of an unassigned post was performed using 8 hours of overtime and numerous instances where it is not possible to tell whether overtime was used to cover an unassigned post and, if so, for how many hours. It is apparent that the overtime inflation is less than 106 hours but it is sufficiently significant to undermine the reliability of the Agency's calculation.

⁶ As an example of the prevalence of this practice, using the Daily Roster Report and Quarter 1 Roster (Union Evidence #5 and #21) for March 4th, the Union identified five instances in a single day where the Agency covered leave for a 4-10 CWS officer with only 8 hours of coverage.

DECISION

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6131(c), and § 2472.11(b) of its regulations, I hereby order the Agency to rescind its determination to terminate the 21 4-10 compressed work schedules within the Correctional Services Department.

A handwritten signature in dark ink, appearing to read "Martin H. Malin", is written over a faint, circular official seal.

Martin H. Malin
Arbitrator

May 12, 2023
Chicago, Illinois