United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
SAN DIEGO PORT OF ENTRY
SAN DIEGO, CALIFORNIA

And

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 105

Case No. 18 FSIP 038

ARBITRATOR'S OPINION AND DECISION

This request for assistance concerning the termination of existing 4/10 compressed work schedules (CWS) was filed by the United States Department of Homeland Security, U.S. Customs and Border Protection, San Diego Port of Entry, San Diego, California (Agency or Management) on March 5, 2018, 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 face-to-face mediation-arbitration at the Agency's facility in San Diego, California with the undersigned, FSIP Member Jonathan Riches. The parties were advised that if no settlement were 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 April 23, 2018, 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 involving 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 carefully considered the entire record, including post-

hearing briefing and documents submitted by the parties by May 1, 2018.[1]

BACKGROUND

The Agency is a component of the United States Department of Homeland Security (DHS). It is charged with the interdiction of drugs and other contraband and the prevention of illegal entry of individuals at a Port of Entry that services both the San Diego Airport and Seaport and the Palomar Airport. The National Treasury Employees Union, Chapter 105 (Union) is a component of the National Treasury Employees Union (NTEU), which represents approximately 25,000 Customs and Border Protection (CBP) Officers who are primarily responsible, on a 24/7 basis, for screening passengers and cargo at 300+ Ports of Entry. The Union represents nearly 1,500 employees at four of those Ports: the San Ysidro Port of Entry, the Otay Mesa Port of Entry, the Tecate Port of Entry, and the San Diego Port of Entry. The Union also represents employees at CBP's San Diego Field Office and other miscellaneous locations.

The Agency and the Union are governed by a National Collective Bargaining Agreement (NCBA) that was enacted in October 2017. Article 14 of the NCBA authorizes local negotiations over the establishment of CWS. A similar provision existed under the predecessor agreement. Relying upon this provision, the parties entered into two local memorandums of understanding (MOU) in 2014 and 2017 authorizing CWS for certain bargaining-unit employees. Specifically, the following work units have bargaining-unit employees who currently work on a 4/10 CWS:

- Passenger Analysis Unit;
- Training and Badging division;
- Core Passenger/Passenger Processing;
- Mission Support;
- Vessel Entry Clearance Specialist;

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[1] At the conclusion of the hearing, the undersigned provided the parties with an opportunity to submit post-hearing submissions on the issues of adverse-impact for five work units (discussed below) and overtime for bargaining-unit employees on CWS.

- CBP Technicians;
- Deferred Inspections; and
- Agriculture Specialists.

Of the above units, the majority of relevant bargaining-unit employees are in the Core Passenger unit. Core Passenger is responsible for processing and inspecting international travelers at, among other areas, the San Diego International Airport.

On August 25, 2017, a local Management representative informed the Union that Management had decided to terminate CWS.[2] The representative stated that the schedule "diminished enforcement operations and services" and had increased "operating costs and overtime expenditures." The parties exchanged several email communications and also had five face-to-face meetings/negotiation sessions between September and November of 2017. Initially, Management informed the Union that termination was being proposed as a result of "future Agency needs not current needs." However, the Agency subsequently clarified that it was examining current effects of CWS.

At the parties' session on November 30, 2017, the Agency informed the Union that it intended to terminate the CWS effective January 8, 2018. As a result, the Union filed a request for Panel assistance (18 FSIP 022). Management thus postponed termination of the CWS. On January 31, 2018, and while 18 FSIP 022 was pending, the Agency submitted its statement of adverse-impact to the Panel and the Union. This submission was the first time that the Agency provided a written allegation of adverse impact. Feeling that the statement contained new information, the Union asked Management to reconvene for additional bargaining and discussions. Because of the foregoing, the Union withdrew its request for assistance in 18 FSIP 022 on February 26, 2018.

The parties met again on February 27, and, after the meeting, the Union submitted a proposed 5/4/9 CWS by email on March 1. The parties met on March 5 to discuss this proposal

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[2] The Agency's statement proclaimed that Management was seeking to terminate CWS for 6 of the 8 work units set forth above. The statement did not reference the Deferred Inspection or CBP Technician units. At the April 23 hearing, the Agency's Port Director conceded these units were not specifically identified.

and 2 other 5/4/9 CWS's that the Union drafted, but the Agency rejected all of them. Accordingly, on this same day, the Agency filed this request for assistance and provided all necessary CWS-termination documentation to the Panel on March 9. The Union argued to the Panel that it should decline jurisdiction over this dispute because the parties had not bargained to impasse. The Panel considered this argument and rejected it. Accordingly, it asserted jurisdiction over the Agency's request for assistance on April 3, 2018, and ordered the parties to resolve this dispute through a mediation-arbitration with the undersigned.

ISSUE AT IMPASSE

In accordance with §§ 6131(c)(3)(B) and (C) of the Act, the sole issue before me is whether the finding on which the Agency has based its determination to terminate the 4/10 CWS for all bargaining-unit employees is supported by evidence that the schedule is causing an adverse agency impact.[3/]

POSITIONS OF THE PARTIES

1. The Agency's Position

a. Pre-Hearing and Hearing Arguments

The Agency argues that CWS has created a strain on its resources, particularly the functions of the Passenger Processing unit. The Officers who work and support this unit handle passengers who traverse through the San Diego International Airport. In 2014, the same year CWS was enacted, the airport expanded hours for the majority of flights covered by the Agency from 12 hours to 14 (9 a.m. to 11 p.m.). To

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3/ Under § 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).

accommodate this change, Management created two different shifts: 9 a.m. to 7 p.m. and 1 p.m. to 11 p.m. Soon thereafter, Management discovered an overlap period in shifts between 1 p.m. and 6 p.m., leading to overstaffing at some points in the day and understaffing at other points.

In 2016, Management began to notice an increase in overtime spending. Additionally, there were "numerous" complaints from customers of the Agency's Trade unit (which has no CWS) that they were not being attended to in a timely fashion. Exacerbating issues were a Mexico-based flight added on November 6, 2017, and a Lufthansa-based flight added on March 22, 2018. Based on the foregoing, and other information discussed below, Management arrived at the conclusion that CWS was and is increasing overtime and also reducing productivity/diminishing the level of Agency services.

As to overtime increases, Management maintains that they are caused by scheduling gaps created by the 4/10 schedule. In this regard, certain Passenger Processing schedules require a set number of Officers for staffing purposes. However, because of CWS, these Officers do not work certain hours or are not even available on some days altogether. Whenever one of these gaps arises, Management must "pull" Officers from the non-CWS Trade unit (although it will occasionally pull other employees too). Doing so can increase duty time for Trade Officers by 1.5 to 3 hours per day as they are required to leave their post, drive to the San Diego airport, perform services, and sometimes drive back to their post. Fiscal Years 2015 and 2017 saw overtime costs average under $1.3 million compared to around $950,000 for the pre-CWS period of FY 2012 to FY 2014. Moreover, FY 2017 saw a reduction in the number of overall passengers processed by Agency employees, but overtime nevertheless increased from FY 2016. This disparity is another indicator that CWS is increasing the Agency's operating costs.

With respect to diminished services and decreased productivity, the Agency emphasizes the effects of "pulls" on its operations. As discussed above, Trade Officers and other employees are forced to cover for Passenger Processing Officers who are not available. Comparing a hypothetical "traditional" schedule to the current CWS, Management created an illustrative "snapshot" scheduling comparison of a 5-week period. Analyzing this snapshot, Management concluded that eliminating CWS would see the current monthly average of 26 pulls reduced to about 8 pulls per month under a traditional schedule. This number is significant because the Officers who work Trade perform

specialized duties that cannot be performed by other Agency employees. Thus, when a Trade Officer is unavailable, Trade customers must wait for their needs to be addressed. This leads to reduced productivity, diminished level of service, and customer dissatisfaction. Agency witnesses testified that, within the past 6 months of the hearing, Management received verbal complaints from several customers concerning diminished services caused by absent Trade officers.

b. Post-Hearing Arguments

At the conclusion of the hearing on April 23, 2018, the undersigned requested that the Agency provide supplemental briefing clarifying its evidence on overtime for CWS positions and its claim of adverse impact for the units of Deferred Inspections, CBP Technicians, Vessel Entry Clearance Specialists, Mission Support, and Agriculture Specialists. The Agency responded as follows.

On the topic of overtime, the Agency's Port Director isolated three work units that are on CWS (Passenger Processing, Agriculture Specialists, and Passenger Analysis Unit[4]) and analyzed their overtime costs for the next 6 months of Fiscal Year 2018 in comparison to a traditional schedule.[5] Management also eliminated the factors of pulls and the Mexico flight because this flight will end in May 2018 (although it will be replaced with a different flight). According to Management, its figures demonstrate that Officer overtime would be reduced by 29% following the elimination of CWS. Additionally, Agriculture Specialists would see a reduction of overtime totaling 17%.

Focusing on Agriculture Specialists, the Agency maintains that 10 such Officers are on CWS and, as a result, have 1 day off each week. Before CWS, these Officers worked in passenger processing and cargo work; post-CWS, the latter function has been eliminated due to unavailability. This elimination has

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[4] The Agency's analysis of the Passenger Analysis Unit merged analysis of a Terrorism Tactical Response work unit. Management did not make clear whether the latter unit is part of the former or a standalone unit.

[5] In his sworn statement, the Port Director stated he did not include the Training and Badging or Deferred Inspection units in his analysis because they "fall outside of passenger operations."

increased agriculture inspections by roughly half-a-day. The Agency has had to utilize CBP Technicians to fill in some of these gaps, but these employees do not have the same training or skill level as Agriculture Specialists. Accordingly, several Agency functions have ceased or diminished since Fiscal Year 2016. Finally, because of CWS, overtime for Agriculture Specialists has increased.

Lastly, concerning the Vessel Entry Clearance Specialist, the Agency argues that there is only 1 employee in this unit, and he performs specialized duties concerning "the full range of activities associated with the clearance of American and foreign vessels." Because of CWS, however, he has 1 day off each week. Consequently, "every Friday," the Agency must pull an Officer from its trade unit to cover for this position. This action reduces productivity in the trade unit.

2. The Union's Position

a. Pre-Hearing and Hearing Arguments

The Union disagrees that CWS is causing an increase in overtime costs. The figures provided by Management do not differentiate between bargaining-unit employees on CWS and non-bargaining unit employees who do not have such schedules. Moreover, managers on non-CWS schedules accrue significantly more overtime. Additionally, some groups of bargaining-unit employees - namely the Mission Support and the Vessel Entry Clearance Specialist - did not actually incur *any* such costs during the most recent fiscal year. The Union also claims Management has caused some of these issues by, for example, creating at least one gap in coverage between 8:00 a.m. and 9:00 a.m. After creating this gap, Management took it upon itself to fill it through the use of overtime shifts.

The Union additionally argues that the Agency's overtime data is faulty. For example, this data shows that overtime costs *decreased* after CWS was implemented. Additionally, under traditional 5/8 schedules that Management drafted to demonstrate the disparity with CWS, non-CWS employees are scheduled to work on days off *without* receiving overtime. The Union claims this was done to give the impression that "traditional" schedules can be fully staffed without the need for overtime. Further, the Union maintains that, in some instances, the Agency left certain shifts unstaffed under the traditional schedule but insisted those shifts require staffing under a CWS. According to the Union, this was done to create a "fictitious" staffing need.

The Union also rejects the Agency's claims that Officer pulls have reduce productivity or led to diminished service. As an initial matter, the Union claims that during bargaining in the fall of 2017 the Agency never claimed that it was relying upon increased pulls as a justification to terminate CWS. Relatedly, the Agency has not provided evidence to demonstrate that productivity is suffering because of these pulls. Indeed, when a pull takes place, an Officer is still servicing a different part of the Agency. The Union also believes that the Agency is exaggerating the effects of pulls. The Union maintains they last only about 1 hour, as opposed to nearly 3 as the Agency suggests. And, until several weeks ago, the Union asserts that pulls only occurred about once or twice per week. It was only recently that Management began increasing the frequency of pulls (which coincided with this matter).

The Union also contests the notion that the Agency has supported its claims concerning pulls. In 2015, the Agency maintained CWS for some employees were creating similar pull issues, so it provided email complaints to the Union. As a result, the Union agreed to terminate those schedules. The Agency recently provided the written complaints it is relying upon to terminate CWS in this matter and they are the *same complaints* used previously. Moreover, according to the Union, the scheduling data that Management provided shows that pulls occurred under pre-CWS and would continue post-CWS.

b. Post-Hearing Arguments

The Union was provided with an opportunity to respond to the Agency's supplemental post-hearing briefing. As an initial matter, it maintains that the Agency offered no arguments supporting termination of CWS for the Mission Support, CBP Technicians, or Deferred Inspection units.

On the topic of overtime, the Union questions the veracity of the figures the Agency submitted with its post-hearing brief. The Union emphasizes that Management stated that costs were not a factor for termination during initial bargaining. Moreover, relying upon a sworn statement from the Union President, the Union asserts that the Agency's figures contain numerous inaccuracies. In this regard, the Agency provided several staffing numbers that are inconsistent with pre-hearing exhibits that also discuss staffing numbers. These inconsistencies create inflated overtime numbers, and once "corrected," Management's figures actually demonstrate that overtime is *greater* under a non-CWS schedule. The Agency's figures also

include overtime for the Terrorism Tactical Response Team; although this unit does have CWS, it does *not* have any bargaining-unit employees and Management is not seeking to terminate CWS for the unit.

The Union further disputes Management's claim that it has established that CWS for the Vessel Entry Clearance Specialist creates adverse impact. According to the Union, the Agency did not explain why this unit's CWS is "now a problem." Indeed, Management waited until its post-hearing submission to actually offer any arguments regarding this unit.

Finally, the Union contests Management's assertion that CWS for Agriculture Specialists is problematic. The Agency offered no arguments pre-hearing or during the hearing, and in its post-hearing submission, the Agency provided only "conclusory, histrionic statements." Nothing Management submitted demonstrated a nexus between CWS for this unit and adverse impact.

CONCLUSIONS

Under § 6131(c) (3) (C) of the Act, the Panel (or its designee) 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 statute, 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."[6/]

6/ 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, 97th Cong., 2d Sess. At 15-16 (1982).

This case involves 4/10 compressed work schedules for employees of multiple work units. *See*, supra, at 2-3. Although the Agency is seeking to terminate CWS for all bargaining unit employees at the Port of San Diego, the plain language of 5 U.S. Code § 6131,[7] and prior decisions of the Panel,[8] leads the undersigned to conclude that the Agency must present evidence that "particular" or specific work schedules of each unit, as opposed to the work schedules for the entire bargaining unit, have caused an adverse impact. The competency of evidence the Agency presented, if any, varied among the different work units.

Having examined the documentary evidence presented, met with and interviewed witnesses from both the Agency and the Union, and reviewed all briefing in this matter, I am persuaded that the Agency has met its statutory burden by presenting evidence of adverse agency impact for some work units, but failed to meet its burden for other work units.

The Agency has presented evidence that CWS has caused an adverse agency impact for the employees in the following work units: (1) the Core Passenger/Passenger Processing Unit, (2) the Passenger Analysis Unit, (3) the Training and Badging Division, (4) the Vessel Entry Clearance Specialist, and (5) the Agriculture Specialists. Specifically, the Agency has shown the 4/10 CWS for employees within these work units has created scheduling gaps causing an increase in overtime costs because the Agency must "pull" employees from other work units and from other duties to cover these gaps. These additional overtime costs have "increase[d] the cost of agency operations."[9] Additionally, the Agency presented both documentary evidence and witness testimony that employee "pulls," have diminished Agency productivity because employees must abandon their primary duties

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[7] *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 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).

[8] *See, e.g., Department of the Air Force 412th Test Wing and American Federation of Government Employees, Local 1406*, Case No. 17 FSIP 077 (2017).

[9] 5 U.S. Code § 6131(b)(3).

to attend to passenger screening or to cover the duties of other employees who are absent because of CWS. This has created disruption in daily Agency operations and "a reduction of the productivity of the agency."[10]

Thus, the undersigned is satisfied that the Agency has met its statutory burden of showing that its determination to terminate CWS for the employees in the Core Passenger/Passenger Processing Unit, the Passenger Analysis Unit, the Training and Badging Division, the Vessel Entry Clearance Specialist, and the Agriculture Specialists work units has caused an adverse agency impact by increasing costs to Agency operations and a reducing the productivity of the Agency.[11]

On the other hand, the Agency presented insufficient evidence that CWS has caused an adverse agency impact for the following work units: (1) Mission Support, (2) Deferred Inspections, and (3) CBP Technicians. The Agency's own witness admitted that there was little to no evidence that CWS for employees in these work units caused an adverse agency impact. Indeed, the undersigned afforded both parties the opportunity to present supplemental briefing and evidence on whether CWS for employees in these work units has caused an adverse agency impact. The Agency neither argued nor presented evidence that employees in these work units caused adverse agency impact.

Accordingly, the Agency's determination to terminate CWS for employees in the Mission Support, Deferred Inspections, and CBP Technician work units is not supported by evidence.

ORDER

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), I hereby order the termination of the compressed work schedules for

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[10] *Id.* at § 6131(b)(1).

[11] The Agency also argued that CWS has resulted in "a diminished level of service to the public by the agency." In support of this argument, the Agency presented testimony regarding alleged customer complaints, contending that customer services were delayed or unavailable as a result of employee "pulls" to cover scheduling gaps. This testimony was unpersuasive and the alleged complaints, if they existed at all, were stale.

personnel in the following work units: (1) the Core Passenger/Passenger Processing Unit, (2) the Passenger Analysis Unit, (3) the Training and Badging Division, (4) the Vessel Entry Clearance Specialist, and (5) the Agriculture Specialists. I further order the Agency to rescind its determination to terminate the compressed work schedule for the following work units: (1) Mission Support, (2) Deferred Inspections, and (3) CBP Technicians.

Jonathan Riches
FSIP Member

May 7, 2018
Washington, D.C.