

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
LEWISBURG, PENNSYLVANIA

and

LOCAL 148, AMERICAN
FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-
CIO

Case No. 05 FSIP 89

DECISION AND ORDER

The Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania (the Employer), filed a request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the Act), 5 U.S.C. § 6120 *et seq.*, to resolve an impasse between it and Local 148, American Federation of Government Employees, AFL-CIO (the Union), arising from its decision to terminate the 4/10 compressed work schedule (CWS) in Units 1, 3, and the Prison Camp of the Unit Management Department (UMD).

After investigation of the request for assistance, the Panel determined that the dispute should be resolved through an informal conference, by telephone, with Panel Member Richard B. Ainsworth. The parties were also directed to submit pre-conference written statements in support of their respective positions. The parties were advised that if no settlement were reached during the teleconference, Member Ainsworth would report to the Panel on the status of the dispute, including the parties' final positions and his recommendation for resolving the impasse. After considering this information, the Panel would take final action in accordance with 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of its regulations.

Pursuant to the procedural determination, Member Ainsworth conducted an informal conference, by telephone, with the parties on July 11, 2005. During the course of the teleconference, the parties were unable to voluntarily resolve their dispute. The Panel has now considered the entire record, including the pre-conference written statements, and Member Ainsworth's recommendation for resolving the dispute.

BACKGROUND

The Employer's mission is to protect society by confining criminal offenders in the controlled environments of prisons and community-based facilities that are safe, humane, and appropriately secure. The U.S. Penitentiary in Lewisburg is a high security facility that also includes a Prison Camp. The Union represents approximately 443 employees who typically work as correctional officers, counselors, case managers, physician assistants, accountants, plumbers, food service workers, and in various support staff positions, at grades GS-5 through -11 and WS-3 to -11. The master collective bargaining agreement (MCBA) covering these employees expired on March 8, 2001; its terms and conditions will remain in effect until a new agreement is negotiated.

ISSUE AT IMPASSE

In accordance with 5 U.S.C. § 6131(c)(2)(B) of the Act, the sole issue in dispute is whether the finding on which the Employer bases its determination to terminate the 4/10 CWS in the UMD^{1/} is supported by evidence that the schedule has caused an adverse agency impact.^{2/}

POSITIONS OF THE PARTIES

1. The Employer's Position

The Panel should find that the 4/10 CWS is causing an adverse impact on the Agency. Among other things, it diminishes the accessibility of case managers and counselors to inmates at the institution. In this regard, each employee on the 4/10 CWS is away from the institution "an additional 52 days per year." There are 14 employees participating in the CWS, which equals "728 days total staff assigned to CWS are not available to provide services to the inmate population." When added to staff absences due

to annual leave, sick leave, and training, "staff coverage is depleted to a greater extent." Furthermore, in 2004 there were "40 weekdays that there was only one case manager or counselor working at the Camp," including six weekends when there were no case managers or counselors working. In Unit 1, there were four Fridays when there was no case manager or counselor, and four weekdays when there was only one case manager working. In addition, Camp staff whose regular day off (RDO) fell on a Federal holiday took an "in lieu of" day (a total of five), which further diminished coverage. When case managers or counselors are on their RDO, on annual or sick leave, or in training, other staff or the unit manager must perform the absent employee's work. These duties include, but are not limited to: (1) rounds in the Special Housing Unit; (2) issuing legal mail to the inmate population; (3) holding open house for the inmate population; (4) unit disciplinary meetings; and (5) "standing mainline" (*i.e.*, standing in the dining hall during meals).

A 2004 comparison of sick leave usage of employees in Units 1, 2, 3, and the Camp also supports the termination of the CWS. The data show that employees assigned to Unit 1 (who participate in a CWS) used more sick leave than employees in Unit 2, who are not on the CWS. Implementation of the CWS also increased costs. In 2004, the institution paid \$13,228.40 in holiday pay to employees who participate in the CWS because their RDOs fell on holidays. Moreover, staff on the CWS were paid an additional 2 hours of holiday pay on each holiday, which totaled \$1,919.22 for that year. The CWS also causes an adverse impact by inhibiting the ability to provide coverage to the Correctional Services Department on Mondays, Tuesdays, Thursdays, and Fridays when employees are on their RDO, and by interfering with the rotation of employees between units since not all units are covered by the CWS agreement.

Finally, CWS has caused a diminished level of services to the public. In this regard, an Operational Review was conducted in April 2004, which identified several program areas that were not in compliance with the Program Review Guidelines. For example, staff were not: (1) developing plans for inmates with special needs; (2) consistently developing inmate goals in measurable terms, as defined by policy; or (3) conducting initial classifications and program reviews within the required timeframes. An analysis of the Review shows that a "majority of the deficiencies

can be attributed to staff who are assigned to the CWS." For all the reasons identified above, therefore, the 4/10 CWS should be terminated.

2. The Union's Position

The Panel should find that the Employer has not met its burden under the Act of demonstrating the 4/10 CWS has had an adverse agency impact. In this regard, the Employer claims that the CWS diminishes the presence of case managers and supervisors, which increases the workload of unit managers and staff not participating in a CWS. It is "quite clear," however, that whether employees are participating in the CWS or on a traditional schedule, everyone is working the same amount of hours. Thus, they are at the institution the same amount of time, even if those times differ, a fact that the Employer does not dispute.

The Employer states that when employees are absent, other unit staff or the unit manager must complete their duties. The only data the Employer provided to support this allegation is taken from a 1-month period between February and March 2005 where one unit manager worked as a counselor or case manager for 40 hours. This occurred during the same timeframe that the Employer instituted an "augmentation" policy of pulling non-custody staff away from their normal work assignments to perform custody duties for 1-week intervals to backfill custody vacancies. The Employer has assigned UMD staff to custody posts 31 times, resulting in 1,240 hours where staff were removed from their duties to fill custody posts. Rather than attributing the unit manager's need to work as a counselor or case manager to the CWS, it is "probably the result of the Agency's augmentation policy."

In addition, the Employer alleges that there has been a decrease in the number of UMD staff available to stand mainline. Prior to the implementation of the CWS, however, UMD staff only were able to perform this function during the noon meal. After the CWS went into effect in 2000 there was an "immediate increase" of employees available at the noon and supper meals. This is supported by a 6-month Supervisory Assessment of the CWS in Unit 1, which noted that service to the public was increased by 5 percent. In essence, the Employer's own documents support the Union's

view that CWS enables the institution to provide better service to the inmate population.

While the Employer interprets its data to show that "staff assigned to the Camp and Unit 1 utilized more sick leave than staff assigned to Unit 2 which is not on the CWS," the data actually reveal that Unit 3 employees (some of whom are on the CWS) used "almost a third less full days sick leave" than those not on the CWS. Moreover, employees could have been using sick leave under the Family and Medical Leave Act of 1993, which "may have been associated with a number of unforeseen and tragic events." The Union's attempt to determine if this was the case was rebuffed when the Employer denied its request for a sanitized roster of staff assigned to each unit within UMD, which would have included the ages of each staff member.

The Employer's assertion that the CWS increased costs by an additional \$15,527.62 in holiday pay in 2004 is exaggerated. In response to a Union data request, the Employer stated that the \$13,338.40 spent on employees whose RDOs fell on holidays "would have been paid out regardless if staff were on a CWS or not." Therefore, the direct cost of the CWS is \$1919.12, which is a reasonable administrative cost relating to the process of establishing the CWS and "not more than would be expected by the Agency by implementing a CWS." Management's statement that the CWS inhibits its ability to use case managers and counselors to provide coverage to other departments "is another false statement." Its own data reflect that employees who are assigned to the augmentation roster are assigned to those duties for 1-week intervals, during which time employees revert back to a traditional 5/8 schedule.

Finally, on the issue of diminished services, the Repeat Deficiencies and Deficiencies Reports the Employer provides do little to support its argument that the CWS has caused an adverse agency impact. In a more recent program review, conducted from March 21 through March 24, 2005, the UMD was rated as good, and all of the deficiencies and repeat deficiencies the Employer mentions in its position statement "seem to be absent from the Program Review of March 2005." The UMD's improvement in providing program services occurred while employees were on the CWS.

CONCLUSION

Under 5 U.S.C. § 6131(c)(2) of the Act, the Panel is required to take final action in favor of the agency head's (or delegatee's) determination to terminate a CWS if the finding on which the determination is based is supported by evidence that the schedule has caused an "adverse agency impact." 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."^{3/}

Having considered the totality of the evidence before us, we find that the Employer has not met its statutory burden. In our view, the evidence submitted is insufficient to demonstrate that the CWS has increased costs or diminished the level of services provided to the public. In this regard, most of the data presented by the Employer was accumulated in 2004 and does not show a direct relationship between the CWS and the adverse impact the Employer alleges. With respect to the 728 days in 2004 that UMD staff on the CWS were not at the institution, for example, there is nothing in the record that indicates specifically how this diminished the level of services counselors and case managers provided to inmates. In addition, the cost of the CWS appears to be negligible after the amount spent on employees whose RDOs fell on holidays is deducted from the total, and should have been anticipated before the CWS was implemented. Overall, we are persuaded that the Union has effectively used the Employer's own records to undercut the conclusions management reached when comparing the units that participate in the CWS to the one that does not. Accordingly, we shall order the Employer to rescind its decision to terminate the 4/10 CWS in the UMD.

ORDER

Pursuant to the authority vested in it by the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6131(c), the Federal Service Impasses Panel under § 2472.11(b) of its regulations hereby orders the Employer to rescind its determination to terminate the 4-10 CWS in Units 1, 3, and the Prison Camp of the Unit Management Department.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

July 25, 2005
Washington, D.C.

[1/] All six employees in Unit 1 are on the CWS; of the eight employees who work in Unit 3, four are on the CWS; and the Prison Camp's four UMD employees all are on the CWS. None of the five employees in Unit 2 is on a CWS, and there appears to be a dispute between the parties, irrelevant to the issue in this case, as to whether a CWS agreement applies to the employees in Unit 2. Employees not on a CWS work a 5/8 schedule.

[2/] 5 U.S.C. § 6131(b) defines adverse agency impact as:

(1) a reduction in 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 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 CWS has caused 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).

[3/] 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).