

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
PHOENIX
PHOENIX, ARIZONA

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 3954

Case No. 24 FSIP 079

ARBITRATOR'S OPINION AND DECISION

The American Federation of Government Employees, Local 3954 (Union), filed a request for assistance with the Federal Service Impasses Panel (Panel or FSIP) 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, Phoenix in Phoenix, Arizona (FCI Phoenix, Management, or Agency). The issue in controversy concerns whether the Act obligates the Agency to negotiate over a compressed work schedule (CWS) proposed by the Union.

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through a mediation-arbitration proceeding with the undersigned arbitrator. Due to scheduling conflicts, I concluded that it would be appropriate to resolve this matter entirely through a written submissions procedure instead. Accordingly, the undersigned conducted a virtual meeting with the parties on November 18, 2024, to establish deadlines and to address any questions the parties had about the process and my decision. Initial arguments were due December 10, 2024, and rebuttal statements were due January 3, 2025. The parties timely submitted their position papers and the record is hereby closed. Accordingly, I must 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

The Agency is a medium-security United States federal prison for male and female inmates in Arizona. It is operated by the Federal Bureau of Prisons, a division of the United States Department of Justice. The facility houses female offenders in an adjacent minimum

security satellite prison camp. The campus houses approximately 1,150 total inmates. The parties are covered by a master CBA that expired on July 1, 2024. Article 18, Hours of Work, Section B provides for local bargaining over changes to scheduling.

In 2013, the parties executed a memorandum of understanding (MOU) that permitted the position of Drug Treatment Specialists (DTS or Specialist) the opportunity to work a CWS. The MOU permits the Agency to suspend the CWS for an undefined period as long as certain conditions are satisfied. Subsequently, the DTS unit began working a 4/10 CWS. Claiming that the DTS unit was experiencing a prolonged staffing shortage, in April 2022, the Agency informed the Union that it was suspending CWS for the DTS unit. The Union disagreed with the Agency's interpretation of the MOU, so it filed an unfair labor practice charge with the Federal Labor Relations Authority. As a settlement, the parties agreed to enter into negotiations over re-establishing CWS for the DTS unit.

Between November 2022 and May 2023, the parties had three bilateral negotiation sessions over the Union's proposal to re-establish CWS for the DTS unit. And, from October 2023 thru April 2024 the parties had five sessions with the assistance of the Federal Mediation and Conciliation Services. During the tail end of these negotiations, the Agency announced it intended to declare that the Union's proposed CWS schedule would create an adverse agency impact within the meaning of the Act; however, it did not provide a timeframe for providing the actual written statement. After several months of back and forth, the Union filed this dispute with the Panel on August 28, 2024. On September 18, the Agency provided an adverse impact statement (which it later revised) that was executed in accordance with the Act via signature of the Warden. Subsequently, the Panel asserted jurisdiction over this matter under the Act as set forth above.

ISSUE AT IMPASSE

The sole issue before me is whether the finding on which the Agency has based its determination to not negotiate over the Union's proposed CWS for the DTS unit is supported by evidence that CWS would cause an adverse agency impact.¹ The Union has proposed a schedule

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).

in which a DTS employee would be permitted to select either a 4/10 CWS or a 5/4/9 CWS option.²

PARTIES' POSITIONS

1. The Agency's Position

The Agency takes the position that the CWS proposed by the Union would have an adverse agency impact as defined by 5 U.S.C. § 6131(b) if it were adopted. DTS's play a significant role in providing drug rehabilitation services to federal prisoners, who are labeled as adults in custody (AIC). In accordance with Bureau of Prisons guidance titled "Psychology Treatment Programs," PS 5330.11 (Program or the Program), the facility employs a community based treatment model for drug rehabilitation that emphasizes face to face contact with AIC's and specialists as part of an overall Residential Drug Abuse Program (RDAP). Under RDAP standards, DTS's and AIC's should have at least 500 hours of face to face treatment in the span of 9 months.³ Treatment includes, among other things, interactive journaling groups. Ideally, treatment groups should not exceed 12 AIC's. In 2022, the facility clarified that groups should be no larger than 1 DTS to 48 AIC's. The facility's RDAP program for AIC's has a goal of 41 weeks and 17.5 hours of treatment per week, or about 3.5 hours of treatment per day, Monday thru Friday.⁴

CWS was implemented for DTS in 2013 when the Agency had 8 individuals in this position; however, due to vacancies, that number shrank to 7 individuals. Due to these shortages, the Agency suspended CWS in 2022. The Agency believes the CWS, mixed with the vacancy, led to improper coding for RDAP treatments, inaccurate intake screenings, incomplete documents, and increased overtime as a necessity for completion of DTS duties.⁵ Additionally, because DTS's on CWS would have a rotational day off (RDO), it became necessary for on duty DTS's to combine their work loads, which led to treatment groups of about 72 individuals. Moreover, the Agency found itself having to utilize other facility positions to provide assistance to DTS service areas.

The foregoing problems, the Agency contends, were attributable to CWS in the past. Moving forward, Management argues, other issues would arise were CWS once again established. To wit, two of seven DTS positions remain vacant, and RDAP programing has five different programming days with face to face AIC meetings.⁶ If granted a weekly, or bi-weekly,

2 Under a 4/10 CWS option, an employee would work four 10 hour shifts per week and then have one rotational day off (RDO) per week. Pursuant to a 5/4/9 option, an employee would work four 9 hour shifts one week with an RDO that week as well, and then four 9 hour shifts and a single 8 hour shift the other week.

3 Agency Initial Argument at 2.

4 *Id.* at 4-5; *see also* Agency Ex. H.

5 *See* Agency Initial Argument at 6.

6 *Id.* at 7.

RDO, then DTS's could miss one session a week. This results in 2.5 less hours of treatment per week, or over 102 missed hours in a 41 week period.⁷ As things stand, roughly 80% of current treatment programming is impacted by non CWS absences: RDO's under a CWS would only exacerbate this problem.⁸ Finally, with 385 AIC's on a treatment wait list at the Agency's facility, the Agency cannot agree to a program that would likely lengthen wait time.

In its rebuttal statement, the Agency emphasizes many of the points discussed above. To wit, the Agency reiterates that DTS's would be missing one day of duty time per week due to their RDO's. Additionally, DTS's who work extra hours would not be providing treatment duties to AIC's during those hours because the hours arise when the AIC's are in their cells and, therefore, are unavailable. Additionally, the Agency rejects a Union argument that more CWS means that DTS's would be available to provide inmate assistance that is unrelated to drug treatment. In this regard, the Agency contends that DTS's have attended solely to RDAP duties for the past two years.⁹

2. The Union's Position

The Union takes the position that the 4-10 CWS would not have an adverse impact on the Agency within the meaning of 5 U.S.C. §6131(b). To that end, the Union rebuts the three identified categories of "adverse agency impact" as defined by the Act.

First, the Union maintains its proposed CWS – specifically a 4/10 – would not reduce the Agency's productivity. In this regard, the Union argues a 4/10 CWS increases the number of hours per day DTS's have to observe AIC behavior. Most AIC treatment programs are administered from 7.30 a.m. to 11 a.m., whereas DTS's on 4/10 schedules arrive at 6 a.m. Thus, such DTS employees can work before 7.30 a.m. to focus on administrative tasks before turning to substantive AIC tasks later on in the work day.¹⁰

Second, the Union argues CWS actually increases efficiency because it "enhance[s] the level of vigilance, attention, caution, and prudence, thereby ensuring that . . . participants receive the requisite quality of clinical care."¹¹ To that end, DTS's would have more duty time to craft individualized treatment plans and identify roots of concerns for individual AIC's. The change to 5/8 schedules has seen a focus on meeting the annual 500 RDAP hours rather than quality care, the Union avers. And, reduction in the foregoing RDAP hours are often attributed to issues created by Management, such as facility lockdowns.

Third, the Union contends its proposed schedule would not increase costs. It argues the schedule would not lead to holiday or night differential pay. Additionally, the Union believes its schedule would not alter staffing levels.

7 *Id.*

8 *Id.* at 8.

9 See Agency Rebuttal at 2-3.

10 Union Initial Argument at 1-2.

11 *Id.* at 4.

In its rebuttal statement, the Union elects to address all of the Agency's exhibits submitted as part of its initial argument. It is unnecessary to address every rebuttal, but the pertinent ones will be summarized briefly:

- In Agency's Attachment A, "Community Standards," the Agency cites American Society of Addiction Medicine standards for limiting patient group sizes to 10-12 patients. Yet, the Union notes this is not BOP policy and, in any event, internal records show larger groups.¹² And, other healthcare guidance shows larger treatment groups can be successful.
- Agency Attachment B is a BOP "Integrity" checklist and discusses staffing shortage issues. Yet, the Union maintains this document does not show such issues that lead to significant treatment disruptions. Moreover, the Union notes there is a weekly internal DTS staff meeting on Tuesdays for several hours that does not disrupt treatment.¹³
- Attachment C is the Program and, according to current data, treatment groups are meeting their treatment goals well within established timeframes. The Union maintains that a 4/10 CWS would still permit these goals to be met because AIC's would receive treatment on all days, even if DTS's are off duty on one day.¹⁴
- Agency Attachment F is an RDAP scheduling document, that the Union never had a chance to negotiate, which also states there should be a ratio of 1 DTS to 48 AIC's. However, there is no medical consensus on this figure and in any event, BOP policy is inconsistent with it.¹⁵
- Attachment H is the current RDAP schedule and shows the various treatment and group meetings for AIC's that are held on every day of the week; Attachment I is a 2013 CWS schedule for AIC's. The latter Attachment shows multiple days of the week where treatment is not provided. According to the Union, BOP policy requires 3 hours of treatment for AIC's per day and, currently, they receive 3.5 hours. When DTS's have days off, AIC's are in mixed group treatment, which Attachment H demonstrates, so they are not actually missing treatment.¹⁶ And, ultimately, the Agency decides how many AIC's have to be served by a certain number of DTS's. That is, treatment needs are largely an Agency invention.
- Agency Attachment K is a chart that compares normal schedules with 4/10 CWS's and, according to the Agency, shows that 150 minutes of treatment would be lost on days where DTS's are not present. But, the Union argues this is incorrect because as

12 See Union Rebuttal at 1.

13 *Id.* at 2.

14 See *id.* at 2.

15 See *id.* at 3.

16 See *id.* at 3-4.

Attachment H shows, discussed above, there are still group treatments that occur during days off.

- Agency Attachment L purports to demonstrate that one treatment group of AIC's lost 103.25 hours in a year of RDAP treatment due to DTS leave (which, therefore, would only increase if CWS became implemented). However, the Union performed its own analysis of data and concluded that lost hours arose to events such as COVID quarantine, lockdown, and mandatory staff training.¹⁷ That is, the foregoing figure could not be attributed to staff leave/scheduling issues.

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 decline to negotiate over a proposed 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."¹⁸

Having carefully considered the totality of the evidence presented in this case, I find that the Agency has not met its statutory burden of establishing that an adverse agency impact is likely to occur if the Union's proposed CWS is implemented. While it appears that the Union's proposal would result in some additional administrative burden, it is unclear, in the absence of a trial period, whether this would rise to the level of adverse agency impact. In any case, such Employer concerns can be addressed by the parties during the negotiations that will occur as a result of this decision. In addition, the Employer's assertions that implementation of the proposed CWS would result in substantial increases in costs are undercut, in some cases, by its own contradictory estimates and statements, and are not adequately supported on the basis of the evidence provided.

The analysis of the data provided by the Agency focuses on problems which occurred in the past, not in the present. The Agency believes that similar problems will occur if it re-establishes the CWS, but this relies purely on speculation.

This arbitrator is struck by what appears to be an apparent contradiction between the

¹⁷ See *id.* at 5.

¹⁸ 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).

attitudes and practices of the Agency. On the one hand, the Agency emphasizes that the various component parts of the RDAP are very structured and require a specific number of hours for successful implementation of the program and achievement of the results required. In fact, the Agency notes that other correctional facilities in the area are sending inmates to FCI Phoenix for enrollment in the drug treatment program, implying successful outcomes associated with the Phoenix RDAP Program. But if the program requires a specific number of hours for success, and the Program's success is attracting inmates from other correctional facilities, why have open positions remained unfilled? Where does the Agency directly address the impact of its having open, unstaffed DTS positions for more than two years?

The Agency obviously has something good going with its RDAP Program. This Arbitrator believes that most, if not all, of the Agency concerns about the impact of a CWS will be addressed by filling the DTS position to its appropriate level, and the rest will be addressed in negotiations with the Union.

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 declaration of adverse impact and negotiate over compressed work schedules within the DTS unit at issue in this dispute.



Edward Hartfield
Arbitrator

January 15, 2025
Washington, DC