In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TEXARKANA, TEXAS

and

LOCAL 2459, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 09 FSIP 99

ARBITRATOR'S OPINION AND DECISION

Local 2459, American Federation of Government Employees, AFL-CIO (Union), filed a request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Act), 5 U.S.C. § 6120, *et seq.*, to resolve an impasse arising from a determination by the Department of Justice, Federal Bureau of Prisons (FBOP), Federal Correctional Institution (FCI), Texarkana, Texas (Employer), that implementation of the Union's proposed 4/10 compressed work schedule (CWS) for employees in the Correctional Services Department (CSD) would cause an adverse agency impact.

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through mediation-arbitration at the Texarkana FCI with the undersigned, Panel Member Edward F. Hartfield. The parties were informed that if a settlement were not reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, on December 18, 2009, I conducted a mediation-arbitration proceeding with representatives of the parties in Texarkana, Texas. During the mediation phase, the parties were unable to settle the matter voluntarily. Thus, 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, including the parties' pre- and post-hearing submissions.

BACKGROUND

The FCI in Texarkana is a low security facility housing male inmates. An adjacent satellite prison camp houses minimum security male offenders. The Union represents a bargaining unit consisting of approximately 186 correctional officers in a variety of disciplines. The current CSD roster includes a total of 110 positions. The parties' are covered by a master collective-bargaining agreement (MCBA) that was to have expired in 2001, but remains in effect until it is replaced by a successor agreement.

ISSUE AT IMPASSE

The sole issue before me is whether the finding on which the Employer has based its determination not to implement the 4/10 CWS in the CSD is supported by evidence that the schedule is likely to cause an adverse agency impact.[1/] Essentially, the Union proposes to allow 30 of the 84 posts in the CSD the option of working a 4/10 CWS - 13 on the day watch, 10 on the evening watch, and 7 on the morning watch (or graveyard shift).[2/] The parties would evaluate the effectiveness of the CWS within 6 months of its implementation, and any time thereafter if the

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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).

2/ The Union initially proposed that all 84 posts be eligible to participate in the 4/10 CWS. According to the Union, its current proposal is based on the Employer's concerns regarding cost and productivity.

Employer documents concerns with the CWS that identify an adverse agency impact.

PARTIES' POSITIONS

1. The Employer's Position

The Arbitrator should find that the Union's proposed 4/10 CWS would result in an adverse impact upon Agency operations primarily because it would reduce productivity and substantially increase costs. Preliminarily, "although [its] concerns are speculative," they are nevertheless valid. Among other things, the current 3 to 5 hours during a 24-hour period that the Lieutenants spend making changes to the CSD roster because of unanticipated staff absences would increase to 6 to 8 hours due to the number of overlaps in the Union's proposed 4/10 CWS. They would thus spend less time guiding and training employees, making daily inspections to ensure that security and sanitation procedures are being followed, conducting internal audits, and meeting with inmates to address their concerns.

Productivity also would be reduced because the proposed 4/10 CWS would result in 174 non-productive staff hours per week. In this regard, the Employer "ran the Union's proposal through its computerized roster program for the week of July 12, 2009," and discovered that it would create 187.50 hours of overlapping staff per week. Even after taking into account the additional hours of monitoring of inmate telephone calls that would be beneficial under the Union's proposal, 174 hours of non-productive time equates to a cost of over $224,000 (174 hours x $24.82 per week x 52 weeks) annually. The average staffs' Sunday premium pay also would increase to 19 hours per week, totaling $30,657.64 per year.[3/] In addition, the Union's proposal would require management to add five posts to operate the Union's proposed CWS, thereby increasing the "complement analysis to 115" and "costing approximately $256,399 in salaries to cover the additional posts." But to maintain its current 24/7 coverage, management really would need an additional 14 posts "which are D, F Unit and SHU [Special Housing Unit] 3

3/ This estimate of the cost of Sunday premium pay under the Union's proposal is contained in the Employer's August 12, 2009, pre-hearing submission. In another document submitted by the Employer, it projects an increase of 41 hours of Sunday premium pay and "an increase resulting in a projected annual cost of $13,229.06."

"vacating these posts on a regular basis." Finally, the other institutions the Employer cites in support of the comparability of its position "are no reflection on the [CWS]" the Union is proposing, and "the Agency has no proof that the CWS will not work at FCI Texarkana."

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 not to establish a CWS if the findings on which it is based are supported by evidence that the schedule is likely to cause an "adverse agency impact." Panel determinations under the Act are concerned solely with whether an employer has met its statutory burden. The Panel is not to apply "an overly rigorous evidentiary standard," but must determine whether an employer has met its statutory burden on the basis of "the totality of the evidence presented."[4/]

Having carefully considered the totality of the evidence presented in this case, I find that the Employer has not met its burden of establishing that an adverse agency impact is likely to occur if the Union's proposed CWS is implemented. Turning first to comparability, the Employer was asked during the pre-hearing conference call on November 18, 2009, to provide information concerning CWS practices in the CSDs at all FCIs within the FBOP.[5/] Instead of providing that information before or at the mediation portion of the process, it waited until it was reminded to provide the information in its post-hearing submission, and then it provided the CWS practices at only nine

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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).

5/ A brief search of the FBOP website reveals at least 55 FCIs within the FBOP.

FCIs that it alleges are comparable to FCI Texarkana in mission, staffing, and security levels. The rationale it provided for focusing on only the nine FCIs it selected is unconvincing. In this regard, it is difficult to see how comparing FCI Texarkana with only those FCIs favorable to the Employer's position provides a realistic picture of the current practices within the FBOP.

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. Its calculation of additional costs that would result from implementation of the Union's proposed CWS schedule is derived from doing a test run of the proposed schedule for the week of July 12, 2009. First, use of that week itself is troubling since it is, admittedly, a high leave period. Second, the idea that management would continue to sustain those costs week after week and not intervene to take the fiscally responsible steps to correct the problem is hardly defendable. Similarly, the assertion that management would endure an increase of 174 non-productive hours each week without taking steps to solve the problem is not credible.

Finally, its claim that the schedule would lead to a substantial increase in Lieutenants' scheduling duties, including the scheduling of overlapping shifts, is also unpersuasive. 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 and any discussion about the possible realignment of staff responsibilities when conditions warrant it, 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.[6/]

6/ If an employer fails to meet its statutory burden under the Act:

> The Panel will direct the parties to return to the bargaining table and to continue negotiations on an alternative work schedule (128 Cong. Rec. H3999, daily ed. July 12, 1982) (statement of Rep. Ferraro). See also S. Rep. No. 97-365, 97th Cong., 2d Sess. 15-16 (1982).

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 Employer to negotiate over the Union's 4/10 CWS proposal for unit employees in the Correctional Services Department.

Edward F. Hartfield
Arbitrator

February 13, 2010
Troy, Michigan