

In the Matter of

DEPARTMENT OF THE ARMY
DESERET CHEMICAL DEPOT
STOCKTON, UTAH

and

LOCAL 2185, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 10 FSIP 54

ARBITRATOR'S OPINION AND DECISION

The Department of the Army, Deseret Chemical Depot, Stockton, Utah (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 (Act); 5 U.S.C. § 6120, *et seq.*, to resolve an impasse arising from its determination to terminate the 4/10 compressed work schedule (CWS) for approximately 120 security guards represented by Local 2185, American Federation of Government Employees, AFL-CIO (Union), because it is causing 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 Deseret Chemical Depot with the undersigned, Panel Member Martin H. Malin. 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 March 5, 2010, I conducted a mediation-arbitration proceeding in Utah with representatives of the parties. During the mediation phase, the parties agreed to explore the feasibility of implementing an alternative CWS to resolve the matter. Consequently, the med-arb proceeding was scheduled to continue by telephone on March 18 to give the parties sufficient time to study the practicality of implementing the alternative CWS. When the proceeding reconvened on that date, the Employer reported that it had conducted a thorough analysis of the compromise solution but had come to the conclusion that it could not entertain the alternative further. 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

The mission of the Deseret Chemical Depot is to dispose of 13,616 tons of stockpiled chemical weapons.^{1/} The Union represents approximately 296 employees who work mainly as toxic material handlers and security guards. The parties' collective bargaining agreement (CBA) went into effect on August 28, 2003, and has no termination date. The parties' also negotiated a Memorandum of Agreement (MOA) that went into effect on June 18, 2007, that established the security guards' current 4/10 CWS.

The chemicals are stored on 1,700 acres that must be patrolled 7 days a week, 24 hours per day. The Employer currently accomplishes its security mission in two shifts with a minimum of 30 security guards per shift. Each shift consists of 12 hours plus a 3/4 hour overlap at shift change. Because of its remote location and for other reasons, the Depot consistently suffers from a shortage of guard personnel and both parties expect the situation to continue. Consequently, it is necessary to cover for the shortage, as well as to cover for guards who are absent or otherwise unavailable on any given day, with employee overtime. The 4/10 CWS includes 2¾ hours of mandatory overtime per shift with varying regular days off (RDOs). Coverage needs frequently result in guards working a second 12-hour shift, followed by their regular shift the following day, resulting in 36 hours of consecutive duty time. When this occurs, the Employer provides them with 4 hours of paid "down time" so they can remain alert, in accordance with the requirements of 5 C.F.R. §§ 551.432 and 550.112(m). During this period, guards may sleep but are available to respond to incidents as called upon. They also participate in monthly unannounced emergency response training exercises.

^{1/} In 2005, President Bush and Congress accepted the recommendation of the Base Realignment and Closure (BRAC) Commission that the Deseret Chemical Depot be closed. Closure is scheduled to occur in 2015.

ISSUE AT IMPASSE

The sole issue before me is whether the finding on which the Employer has based its determination to terminate the 4/10 CWS is supported by evidence that the schedule is causing an adverse agency impact.^{2/}

PARTIES' POSITIONS

1. The Employer's Position

The Arbitrator should find that the 4/10 CWS is causing an adverse impact upon Agency operations essentially because it is diminishing the level of services furnished to the public. In this regard, the Employer defines the public as the surrounding community and those that work at the Depot. As a preliminary matter, the importance of the Employer's mission is exemplified by the fact that it has a shoot-to-kill policy designed to thwart postulated threats to its facility. While no breaches in security have occurred to date, military installations are experiencing increased threat levels, particularly in light of recent incidents of violence and terrorism around the Nation and the world. The Depot's Commander is concerned about the capacity of security guards working what amounts to 36-hour shifts to respond to threats to the Depot's security. As a consequence, management has examined the merits of the current 4/10 CWS, as well as other alternatives that arose during

^{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).

mediation, and has concluded that the best option for meeting its security concerns is a standard 5/8 work schedule.

The validity of the Employer's concern is supported by evidence that, from August 30, 2008, to August 1, 2009, it recorded and paid for 9,892 hours of "non-productive" down time between the security guards' consecutive 12-hour shifts. This equates to \$278,460 in salary and benefits. Although it concedes that it still would pay that amount if employees are required to work 8-hour shifts, and that "base annual cost" is higher for a 5/8 schedule than the 4/10 CWS, the guards would be performing their security functions rather than being paid while resting. The primary benefit of a 5/8 schedule, however, is the elimination of the 36-hour shifts that significantly reduce the security guards' capacity to react to threats to the facility. In the Employer's view, while the Depot has been fortunate up to this point, it should not be required to suffer a serious security incident in order to terminate the current 4/10 CWS. Finally, it acknowledges that the termination of the current schedule may disrupt the lives of a number of the security guards. Nevertheless, the effect of the termination of a CWS on employees' "quality of life" is not a factor that should be considered when determining whether an employer has met its burden of proof under the Act. Moreover, if the Arbitrator orders the termination of the 4/10 CWS, the Employer will work with the Union to ameliorate the impact of the change on affected employees.

2. The Union's Position

The Arbitrator should find that the Employer has not met its statutory burden of demonstrating that the 4/10 CWS is causing an adverse agency impact. By way of background, although the current 4/10 CWS went into effect in June 2007, the guard force has been on a CWS since September 2001 when management changed the 8-hour schedule to a 10-hour schedule with 2¾ hours of forced overtime. In addition, "the guard force worked 7-12's each week for many weeks after 9/11." Contrary to the Employer's contentions, the down time it labels "non-productive" is "actually standby time used to refresh guards working overtime because management has not adequately staffed the guard force shifts," and is authorized in accordance with federal regulations. While guards are on standby, they still must respond to actual incidents within required time frames and remain in armed status even though they are not performing

duties at their assigned posts. Furthermore, without hiring additional personnel, under a 5/8 schedule guards would be "required to work substantially more 16¼-hour shifts each two-week pay period." In addition to the disruption to their personal lives, the change would substantially increase costs by requiring employees to drive their own vehicles to and from the Depot, which is located more than 25 miles from most of their homes. This is likely to result in a reduction in guard force staffing as they look for employment closer to home, perhaps at the Tooele Army Depot or at Dugway Proving Grounds, where wages are higher or their 12-hour shifts could continue.

More importantly, the switch to a 5/8 schedule would not address the Employer's primary concern that the 36-hour shifts often worked by the guards under the current 4/10 CWS is reducing their ability to respond to security threats. In this regard, the Union has analyzed the effect of the two schedules consistent with the Employer's need to provide 24/7 coverage at the Depot. Its comparison reveals that employees working back-to-back shifts under a 5/8 schedule (a total of 16¼ hours) will have 33 percent less rest than those on the 4/10 CWS (a total of 36 hours, including 4 hours of paid down time) over the same 96-hour period. This is due to the fact that employees on a 5/8 schedule working 16¼ hours in a row would have only 7¼ hours to return home, perform necessary activities prior to sleeping, and return to work to start their next regularly scheduled shift. The Union notes that the average guard has a one hour commute each way and arrives 30 minutes before the start of the shift to change into uniform, arm up and otherwise prepare to report for duty. In conclusion, the Union contends that "management's determination to change the guard force tour of duty by termination of the CWS causes many more problems and raises more issues that it resolves." Thus, the Arbitrator should find that termination of the CWS "neither reduces cost" nor increases service to the public.

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 employer has met its statutory burden on the basis of "the totality of the evidence presented."^{3/}

Having carefully considered the totality of the evidence presented in this case, I find that the Employer has not met its statutory burden. In this regard, its concern that employees working 36-hour tours of duty often suffer from fatigue that diminishes their response times is heartfelt and understandable given the times we live in. The Employer, however, has provided no evidence to support its finding that the 4/10 CWS is diminishing the level of services furnished to the public.

The primary way in which the Employer contends that the 4/10 CWS is providing diminished service to the public comes from the fatigue resulting from guards working 36 consecutive hours with four hours of down time. This fatigue, the Employer contends, results in guards that are not as ready to respond to incidents than they will be under the 5/8 schedule where double shifts will be limited to 16 ¾ hours duration, leaving 7 ¼ hours of rest time. The Employer, however, has failed to prove that guards will be better rested under the 5/8 schedule.

The average guard has a one hour commute each way. Thus, for the typical guard, the 7 ¼ hours of rest time must be reduced by two hours of commuting time. The average guard also arrives ½ hour before the start of the shift to prepare to report for duty, thus reducing the rest time available to a 5 ¼ hours. That rest time will likely be reduced further by activities such as bathing and eating. Consequently, the increase in rest time when a guard works a double shift under the 5/8 schedule over the current 4/10 schedule is marginal at best. Furthermore, the Employer's own analysis shows that in a

^{3/} 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).

typical 14 day pay period, the current schedule results in 126 overtime shifts, but the 5/8 schedule will result in 367 overtime shifts. This almost tripling of the number of overtime shifts cannot be ignored in determining whether the Employer has proven that the 5/8 schedule will produce a significantly less fatigued workforce. The Employer has failed to show that the 5/8 schedule will result in a more effective response to incidents.

Furthermore, the Employer has failed to produce evidence that the current schedule has, in fact, resulted in diminished readiness to respond to incidents. Such evidence could come in the form of breaches in security, the misplacement or misfiring of weapons, etc. Instead, the Employer concedes that its record regarding safety and security at the Depot is unblemished. Hence, the Employer's concern is speculative and, given the clear requirements established in the Act, I must conclude that it has not met its statutory burden. Accordingly, I shall order that the Employer rescind its determination to terminate the 4/10 CWS at the Deseret Chemical Depot.

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 rescind its determination to terminate the 4/10 CWS at the Deseret Chemical Depot.



Martin H. Malin
Arbitrator

March 22, 2010
Ann Arbor, Michigan