ARBITRATOR'S OPINION AND DECISION

In the Matter of DEPARTMENT OF HOMELAND SECURITY BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES SAN JOSE FIELD OFFICE SAN JOSE, CALIFORNIA and LOCAL 1616, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 10 FSIP 113

For the Employer:	**Robert L. Hemphill** **Labor Employee Relations Specialist** **DHS, USCIS Western Region** **Laguna Nigel, California**
For the Union:	**Melvin D. Smith** **National Representative** **AFGE** **Sacramento, California**
Arbitrator:	**Thomas Angelo** **Member, FSIP**

January 18, 2011

SUMMARY

This matter comes before the Panel by a somewhat circuitous route. After several years of use the Agency announced it intended to change its Alternate Work Schedule (AWS). It initially bargained the proposed change, but then unilaterally implemented it in May 2009. The Union filed an unfair labor practice charge, and the matter was settled through the San Francisco Regional Office of the FLRA by an agreement to put the dispute before the Panel. The Panel determined to assert jurisdiction under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Act), 5 U.S.C. § 6120, *et seq*., and that the impasse should be addressed through med-arb procedures conducted by the Undersigned. Proceedings took place on November 18, 2010, in San Jose, California.

ISSUES PRESENTED

As stipulated by the parties, the issue is:

> Whether the finding upon which the C.I.S. Acting District Director has based his determination not to establish a 4-5/9 compressed work schedule with a 6 a.m. starting time in the San Jose Field Office because it would cause an adverse agency impact is supported by evidence as defined under the Act?

STATEMENT OF FACTS

The Agency maintains a Field Office in San Jose, California, which is a part of San Francisco Region 21. The Office administers immigration and naturalization adjudicatory functions and related policies. This work includes conducting interviews of applicants seeking benefits, many of whom are represented by attorneys. The work of an Immigration Services Officer (ISO) requires certain pre-interview review activity to

prepare for scheduled 25-30 minute interviews as well as post-interview administrative functions.

By way of history, the parties had negotiated CWSs for both the San Francisco and San Jose offices. In January 2009 the Agency notified the Union that it wanted to consolidate the CWS Agreements into one District-wide Agreement. One feature of the proposed Agreement was to change the 6 a.m. start time in San Jose to a 7 a.m. start time. Bargaining took place, but the Agency unilaterally implemented its proposal in May 2009. A ULP charge was filed by the Union, and the FLRA Regional Office found merit to the charge. In order to resolve the matter, the parties agreed they were at impasse and would submit the matter to the Panel.

Following the unilateral change, the parties had three bargaining sessions and one mediation session with the FMCS. The Union sought to implement a 5-4/9 schedule with a 6 a.m. start time. The Panel received a request for assistance from both parties, but it initially was unclear whether they wished to process the case under the Statute or the Act.[1/]

After the Panel accepted jurisdiction, a mediation-arbitration hearing was conducted by the Undersigned on November 18, 2010, at the Agency's Field Office in San Jose, California, at which time the parties were afforded a full opportunity to present evidence and examine witnesses. The parties each timely submitted written closing argument.

The practical difference between the parties is a 45 minute block of time. The Agency asserts employees should report no earlier than 6:45 a.m. The Union argues for

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1/ After discussion with the Panel it was determined the matter would proceed under the Act.

what would essentially be a *status quo ante* result and contends employees should continue to use the 5-4/9 schedule they had enjoyed for 10 years, with a 6 a.m. start time.

DISCUSSION

As in every case where the Panel asserts jurisdiction under the Act, the Agency carries the burden in this matter. In accordance with the Act's Legislative History, 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."[2/] In broad terms, this means the Agency prevails if its allegations are likely to be correct. As discussed below, the Agency has failed to carry its burden.

In seeking Impasse assistance the Agency argued "adverse agency impact" on all recognized grounds: productivity, diminished services, and increase in cost if the 6 a.m. start time was maintained as requested by the Union. This cost would relate to having security guards present at the early report time.

The Agency looks to the decade-long history of the early start time in the San Jose office as reflecting that employees are not productive without supervisors being present. This argument rests on two contentions: that production statistics show it to be true, and that discipline had to be taken when certain employees were found to have engaged in non-work activity. The Union points out the statistical results were skewed

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2/ 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).

due to a recordation error, a claim not addressed by the Agency. I do not find the Agency's claim that production will be irreparably harmed by the 6 a.m. start to be persuasive.

Similarly, the Agency places far too much weight on relatively recent disciplinary history of certain office employees. Over the decade that the 6 a.m. start time was in place there is no evidence showing on-going disciplinary actions so as to warrant the Agency's wholesale rejection of the Union's proposal. Most importantly, there is no evidence to believe the curative effects of the recent discipline will not take effect. I do not, in any event, find the meager evidence of prior discipline helpful in concluding there will be adverse Agency impact due to the proposed shift times.

The Agency also relies on a host of speculative consequences if the early shift is continued. According to the Agency, observation of employee performance would be hindered and "coaching, training and mentoring opportunities" would be limited because there would be an absence of supervision for 45 minutes. The Agency cites Elmendorf AFB 3 FSIP 93 for the proposition that an "unsupervised environment" equates to an adverse agency impact. This reads too much into the decision. Unlike the situation in Elmendorf the Agency here has failed to show any tasks employees perform that require the presence of a supervisor to initiate or complete. As for "coaching, training and mentoring," there is nothing in the record to show these activities can't effectively take place during the remaining seven hours of the employee's workday. Nor is there any evidence that there were recurring problems during the many years the early shift was in place. These arguments do not show adverse impact has or will occur.

The Agency also argues the Union's proposal will adversely affect its customers because it will require them to appear for early morning interviews. This hearsay information represents the view of attorneys who represent those clients since it was the immigration bar that provided the information. The problem is this hearsay information conflicts with the hearsay information provided by the Union (that clients prefer the earlier start time to avoid conflicts with work or school).

In my view, conflicting hearsay information does not provide a basis for an affirmative finding. Since the Agency carries the burden of proof, I do not find the Union's proposal creates adverse impact on the Agency based on this hearsay information.

As for the various workload and scheduling problems cited by the Agency, I credit the responsive testimony of Ms. Cortez, who explained how effective time-management made the earlier start time an advantage in timely completing her work. There was no persuasive reason presented why this approach could not be used by the work unit as a whole.

Finally, the Agency argues it will incur significant security costs if it has to arrange for security during the early morning shift. If it were necessary to have guards present, there might well be a significant additional cost. However, the level of security sought by the Agency appears to be based on its view that the San Jose Office is in a crime-ridden area and Agency management did not wish to voluntarily be responsible for not having security present.[3/]

3/ The Agency presented no data to support its claim but instead relied on general anecdotal evidence. For example, that marijuana-related activity took place in the

The Agency's concerns are clearly overblown. For the decade prior to the Agency's unilateral change guards were not present, nor are they present when other employees report before 6:45 a.m. Moreover, the Employer's last offer in mediation would have allowed early reporting for some employees, without any persuasive explanation of how or why that arrangement was any safer.[4/] For these and other reasons I find the Agency has no legitimate reason to increase security costs in light of the Union's proposal.

As a final overarching consideration, in October 2010, President Obama addressed the issue of balancing work and family matters. He stated, in part, that:

> There are steps we can all take to help – implementing practices like telework, paid leave, and alternative work schedules – and my Administration is committed to doing its part to help advance these practices across the country. And within the federal government, we have followed the lead of many private sector companies when it comes to increasing workplace flexibility. Because at the end of the day, attracting and retaining employees who are more productive and engaged through flexible workplace policies is not just good for business or for our economy – it's good for our families and our future.

In my view the parties and the Panel all bear an obligation to "lean toward" the adoption of workplace policies that recognize family needs. In this record there is ample evidence employees were harmed in terms of their domestic life by virtue of the elimination of the 6 a.m. shift start. Where there is insufficient evidence of adverse agency impact and where it is evident operational concerns can be addressed by reasonable, traditional managerial efforts, such harm should be avoided.

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general urban area where the office exists is neither indicative of a crime-ridden area nor of any clear or present danger.

4/ All the Agency explains is that employees could park in a gated area in the morning so long as they subsequently moved to the "public" lot later in their shift.

CONCLUSION

For the foregoing reasons the Agency has not carried its burden of demonstrating adverse impact if the Union's proposal were adopted. Because the Panel took jurisdiction of this case under the Act, if a Panel-designated arbitrator finds an agency has not met its statutory burden the established practice is to order the parties to bargain over the union's CWS proposal. Having fully heard the matter under the circumstances presented, where the Agency has previously shown little inclination to bargain and the case arose as the result of a ULP settlement agreement, this Arbitrator would order that the Union's proposal be imposed on the parties. Since this approach is unavailable given the Panel's jurisdictional determination, the parties will be given a limited time to negotiate, as they are very familiar with the issues. Should they reach an impasse under the Federal Service Labor-Management Relations Statute, including mediation assistance, either party can return to the Panel for assistance which hopefully can be an expedited process that will bring final resolution to this matter.

The situation presented here illustrates the wisdom of the Panel in the future reconsidering the available options in AWS cases that come to the Panel in a stance like the instant case.

Accordingly, the following Award is warranted:

1. The Agency shall return to the bargaining table to negotiate over the Union's CWS proposal.

2. The parties' negotiations, including mediation assistance, shall conclude no later than 30 days from the date of this Award unless the parties mutually agree to do

otherwise. If a voluntary settlement is not reached, either party shall have the right to request further assistance from the Panel.

Thomas Angelo
Member, FSIP