In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
PEKIN, ILLINOIS

and

LOCAL 701, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 11 FSIP 40

ARBITRATOR'S OPINION AND DECISION

Local 701, American Federation of Government Employees, AFL-CIO, 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, Federal Correctional Institution (FCI), Pekin, Illinois (Employer) not to implement the Union's proposed variable week schedule for an employee who works in the UNICOR factory.

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned, Panel Member Martin H. Malin. The parties were informed that if a settlement were not reached during mediation, a binding decision would be issued to resolve the dispute. On April 14, 2011, I conducted a mediation-arbitration proceeding at the Employer's facility in Pekin, Illinois. Settlement efforts during the mediation phase were unsuccessful. 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-hearing submissions, documents submitted during the hearing, and the testimony of witnesses.

BACKGROUND

The Employer operates a UNICOR facility that includes a warehouse at a camp location and a sheet metal factory at its low-security institution. The Union represents a bargaining

unit consisting of 260 professional and non-professional employees, including 9 who work as foremen at the UNICOR factory operation where they supervise 155 inmates assigned to work details at the factory. The parties are covered by a master collective bargaining agreement (MCBA) that was due to expire in 2001, but remains in effect until it is replaced by a successor agreement. At the local level, a supplemental agreement is in effect that runs concurrently with the master.

The dispute arose when the Union proposed that an employee, who works as a contract specialist at the UNICOR factory and currently maintains a fixed 6:30 a.m. to 3 p.m. schedule, be permitted to work a variable week schedule. Under the proposed schedule, within an 80-hour biweekly pay period, the employee may work a maximum of 45 hours and a minimum of 35 hours per week during the hours from 6 a.m. to 6 p.m.; requests to change the work schedule would be provided in writing by the employee to her supervisor normally 4 days in advance of the requested change. By letter dated February 11, 2011, in accordance with the requirements of the Act, the FCI's Warden submitted a finding that implementation of the Union's proposed schedule is likely to have an adverse impact on operations. The Union submitted a written response denying the allegations of adverse agency impact.

ISSUE AT IMPASSE

The issue in dispute is whether the Employer has met its burden of establishing that implementation of the proposed variable week schedule[1/] for the position of contract specialist

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1/ The definition of a variable week schedule is not found in the Act, 5 C.F.R. § 610 (Subpart D) "Flexible and Compressed Work Schedules," or the parties' MCBA. According to the Handbook on Alternative Work Schedules, issued by the Office of Personnel Management:

> [A] variable week schedule means a type of flexible work schedule containing core hours on each workday in the biweekly pay period and in which a full-time employee has a basic work requirement of 80 hours for the biweekly pay period, but in which an employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization.

in the Business Office of the UNICOR factory is likely to cause an adverse agency impact.[2/]

POSITIONS OF THE PARTIES

1. The Employer's Position

The Arbitrator should find that the evidence upon which the Employer bases its determination not to implement the proposed variable week schedule establishes that the schedule is likely to cause adverse agency impact under two of the Act's criteria. With respect to reduced productivity, the Union's proposal would allow the employee to leave work at 2:30 p.m., and presumably depart from the Business Office at 2:20 p.m. to begin exiting the facility, the stated objective of the proposed schedule. This means that the employee would leave before the completion of the afternoon inmate shakedown which begins at approximately 2:20 p.m., when inmates line up to exit the factory, and lasts until 2:45 p.m. If the employee were to leave at 2:30 p.m., a supervisor would have to cover for her and participate in the shakedown. Supervisors have other administrative duties to perform, including attending institutional meetings outside the factory, completing their assigned duties in conjunction with corporate objectives and timelines, seeking additional customers and sales volume, and carrying out a variety of other tasks and

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2/ Under 5 U.S.C. § 6131(b), "adverse agency impact" is defined as:

> (1) a reduction of the productivity of the agency;
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> (2) a diminished level of the services furnished to the public by the agency; or
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> (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).

assignments to keep the factory active and in business. The loss of this productivity for supervisory employees, should they have to participate in shakedowns, has a direct impact on the factory's performance and success. Thus, the employee is needed to maintain work hours that would require her to stay through the completion of the inmate shakedown period. Furthermore, should the employee leave the Business Office at 2:20 p.m., if no supervisors are available in the Business Office, the work crew she supervises would have to go to the factory floor, where they would be idle, while under the supervision of factory foremen who also are directing their own crew of inmates in the factory.

The proposed work schedule also is likely to result in a diminished level of services. According to the Employer, a shakedown of the 155 inmates who work at the UNICOR factory requires seven staff members: one for tool room clearance, one to scan inmate work areas in the factory, one to operate the metal detector, three to pat search or strip search inmates, and one to work as the compound door controller. There already are several days when the employee attendance rate is 50 percent (or less) of the complement due to the compressed work schedule implemented in 2001, multiple employees on scheduled or unscheduled annual leave, multiple employees on sick leave, and employees away from the FCI or UNICOR factory for training. The UNICOR factory cannot afford a further reduction in staffing levels for the afternoon shakedown that invariably would be created if the employee were to leave work at 2:30 p.m., or earlier, each workday under the Union's proposal. In this regard, the Employer has an obligation to provide a safe and secure operation for the community, staff and prisoners housed within the FCI. Reducing the number of staff available during the afternoon shakedown would diminish its ability to provide those services, particularly in an industrial setting where inmates have access to tools and sheet metal.

Furthermore, under the proposed schedule, the contract specialist could work until 6 p.m., meaning that she would be working several hours with no inmates to supervise, again resulting in a diminished level of service and reduction in productivity.

2. The Union's Position

The Union states that while it has proposed a variable week schedule, it is "likely" that the employee would request, on a consistent basis, work hours from 6 a.m. to 2:30 p.m., 5 days a

week, including a 30-minute duty free lunch period. In April 2010, the employee's immediate supervisor had approved the request to allow the employee to permanently change her hours to a fixed 6 a.m. to 2:30 p.m. schedule; however, when the Superintendent of Industries who oversees UNICOR learned of it, he objected and, ultimately, the Warden intervened to allow the employee to work the fixed schedule temporarily to give her time to "sort out daycare issues." From May 4 through July 19, 2010, the employee maintained a 6 a.m. to 2:30 p.m. schedule and, thereafter, reverted to her current schedule of 6:30 a.m. to 3 p.m., which she had worked for 6 years. During that 6-year period, the employee was not routinely required to be present during afternoon shakedowns. The employee's duties as a contract specialist require her to work in the Business Office where she purchases raw materials for the factory, enters into contracts and directly supervises only one inmate. The Union contends that the Employer is fabricating reasons to deny the change in work hours by claiming that the proposed schedule would allow the employee to leave before the afternoon shakedown of inmates is complete, and that the employee could avoid being on duty during a significant part of the day when inmates are present in the factory. According to the Union, the employee did not have afternoon shakedown duties until she requested a flexible work schedule. In support, a witness testifying on behalf of the Union stated that he was told not to ask the employee to participate in the afternoon shakedown because she had other matters to attend to in the Business Office. Contrary to the Employer's position, the Union asserts that only three staff members are needed to conduct afternoon shakedown of inmates and they are available without including the contract specialist.

The Arbitrator, therefore, should find that the Employer has not met its burden under the Act of demonstrating that the proposed variable week schedule is likely to cause an adverse agency impact. Its claims that the schedule would reduce productivity and diminish the level of services are baseless and unsupported by actual evidence of an adverse agency impact. Although the employee maintained work hours of 6 a.m. to 2:30 p.m. for 2½ months last year, the Employer failed to produce evidence of adverse agency impact during that time period. If the schedule were going to have the impact claimed, the Employer should have produced evidence from the 2½-month period when the employee worked a schedule that allowed her to leave before the shakedown was completed. No such evidence, however, was produced.

CONCLUSION

Under § 6131(c)(2)(B) of the Act, the Panel is required to rule in favor of an agency head's determination not to establish a flexible schedule 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."[3/] Therefore, the sole issue before me is whether the totality of the evidence presented by the Employer is sufficient to establish that implementation of the Union's variable week proposal is likely to result in adverse agency impact. Having carefully examined the arguments and evidence presented by the parties, I conclude that the Employer has not met its statutory burden.

The employee directs the work of one inmate, the procurement clerk, but also supervises the other inmates who work in the Business Office on the second floor of the UNICOR factory. The accountant, who is the employee's direct supervisor, directs the work of a second inmate in the Business Office. The Industrial Specialist directs the work of the remaining inmates in the Business Office.

The Employer's claim of adverse agency impact focuses predominantly on the probable absence of the employee from the afternoon shakedown if the proposed schedule is adopted. I find it noteworthy that, having allowed the employee to work a 6 a.m.

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).

to 2:30 p.m. schedule for 2½ months that permitted her to leave work before the afternoon shakedown, the Employer did not produce actual evidence derived during that period to demonstrate that the schedule was causing an adverse agency impact. Rather, the Employer has based its case largely on speculation of what may occur should the employee be permitted to maintain a variable week schedule.

The accountant accrues an average of 4 hours of compensatory time per month, largely during periods when she is working on critical time reports. She testified that if she were responsible for supervising the Business Office work crew in the employee's absence, she might accrue an additional 1.5 hours of compensatory time per month. But notably, she could not say whether her monthly compensatory time increased during the period that the employee worked 6 a.m. - 2:30 p.m., and the Employer offered no evidence to that effect.

Of course, inmates may not be left unsupervised and the Employer contends that if the employee leaves the Business Office at 2:30 p.m. and the accountant and industrial specialist are not available the Business Office work crew will have to be sent to the factory floor where they will be idle. However, the Employer offered no evidence that this ever occurred during the 2½ months the employee worked the 6 a.m. - 2:30 p.m. schedule.

I also find compelling that the employee, for the better part of her 6-year tenure as a contract specialist in the Business Office, has not been required routinely to work the afternoon shakedown of inmates even though her 6:30 a.m. to 3 p.m. schedule would have allowed her to be available to perform that duty. In this regard, the sheet metal supervisor testified that he and the other shop floor foremen were instructed that the employee was to stay upstairs during end-of-day shakedowns so she could complete her procurement work. This unrebutted testimony is significant in that it shows that the Employer specifically decided not to take the employee away from her work in the Business Office to participate in the afternoon shakedown.

Thus, the Employer's claim that the unavailability of the employee for the afternoon shakedown will have an adverse agency impact is based on conjecture rather than evidence. Similarly, its claim that the proposed schedule will result in the employee scheduling herself for several hours each day when no inmates are present is also speculative. There is no evidence that the employee would select such a schedule. Rather, all of the

evidence shows that the employee will select a schedule that allows her to leave by 2:30 p.m. to pick her children up at school at 2:45 p.m. Furthermore, under the Union's proposal, the employee must submit proposed schedule changes in advance for approval.

Inasmuch as the Employer has not met its burden, the Act requires that the parties return to the bargaining table and negotiate over the Union's proposed schedule.[4/] During subsequent bargaining, the parties may negotiate to place parameters on the variable week schedule, including limitations on work hours,[5/] a test period, and the establishment of a minimum notice period for requesting changes in the work schedule, to name a few. While it is not my position to advocate for any particular outcome, I mention the possibilities solely to instruct the parties that they have options and the ability to devise an agreement that meets their mutual needs.

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 parties to return to the bargaining table and negotiate over the Union's proposed variable week schedule for the contract specialist. The parties' negotiations, including mediation assistance as necessary, shall conclude no later than 45 days from the date of this decision 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

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4/ As the legislative history reflects, 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.

See 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).

5/ For example, the parties could agree that the employee maintain work hours of 6 a.m. to 2:30 p.m., for 2 or 3 days a week, and 6:30 a.m. to 3 p.m. on other days.

under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.*

Martin H. Malin
Arbitrator

May 24, 2011
Chicago, Illinois