

In the Matter of

DEPARTMENT OF HOMELAND SECURITY  
FEDERAL LAW ENFORCEMENT TRAINING  
CENTERS  
CHELTENHAM, MD

and

NATIONAL TREASURY EMPLOYEES  
UNION, CHAPTER 338

Case No. 22 FSIP 023

### **ARBITRATOR'S OPINION AND DECISION**

The Department of Homeland Security, Federal Law Enforcement Training Centers, the Office of Cheltenham Operations (Agency) 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 compressed work schedules (CWS) for approximately twenty-three of the thirty-four Training Instructors at the Cheltenham Training Delivery Point, represented by National Treasury Employees Union, Chapter 338 (Union) because it is causing an adverse agency impact.

Following the investigation of the request for assistance, the Panel determined that the dispute should be resolved through a virtual mediation-arbitration proceeding with the undersigned. The parties were informed that if a settlement was not reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, on February 10, 2022, I conducted a virtual mediation-arbitration proceeding 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. 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 principal mission of the Agency is to provide training at its facility in Cheltenham, Maryland, on firearms, driving, tactics, and investigations to law enforcement professionals to help them safely and proficiently fulfill their responsibilities. The Union is the exclusive representative of a bargaining unit consisting of approximately 746 non-professional employees located at FLETC facilities in Glynco, Georgia; Artesia, New Mexico; Cheltenham, Maryland; and Charleston, South Carolina. The parties' collective bargaining agreement (CBA) went into effect on July 27, 2021.

Prior to July 27, 2021, the parties operated under a 2014 CBA between the Agency and the American Federation of Government Employees (AFGE). However, in 2017, the FLRA certified the Union as the new exclusive representative. The 2014 CBA was in place at the time the Agency proposed to terminate the CWS in this case. That CBA permitted the parties to establish a CWS in accordance with applicable laws and regulations. The parties previously agreed to allow Training Instructors to work a CWS of either a "5/4/9" (an employee works eight 9-hour days and one 8-hour day in a two-week pay period) or "4/10" (an employee works eight 10-hour days in a two week pay period). Training Instructors not on a CWS work a traditional "5/8" (an employee works five eight-hour days each week).

Under the CWS, Training Instructors complete their biweekly 80-hour work requirement in less than ten workdays and receive regular days off (RDOs) during the traditional Monday through Friday workweek on a weekly or biweekly basis. Regardless of the schedule, Training Instructors have the choice of taking either a 30- or 60-minute lunch break. According to the Agency, many Training Instructors elect to take a 30-minute lunch break to shorten their overall day. The parties agree that most of the Training Instructors at the Cheltenham Training Delivery Point have been working a CWS for approximately the last seventeen years.

## **ISSUE AT IMPASSE**

The sole issue before me is whether the finding on which the Agency has based its determination to terminate the CWS is supported by evidence that the schedule is causing an adverse agency impact.<sup>1/</sup>

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<sup>1/</sup> 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

## **PARTIES' POSITIONS**

### 1. The Agency's Position

The Agency takes the position that the CWS for Training Instructors at the Cheltenham Training Delivery Point is having an adverse agency impact as defined by 5 U.S.C. § 6131(b). Specifically, the Agency argues that the CWS has caused a reduction in productivity and an increase in the cost of agency operations in accordance with 5 U.S.C. §§ 6131 (b)(1) and (3). In support of these arguments, the Agency has provided evidence involving its use of While Actually Employed employees (WAEs) and "Contact Hours."

First, the Agency explained it established the WAE program in 2014, and WAEs are not regular full or part-time employees of the Agency. Rather, the WAEs serve in a substitute role in place of unavailable Training Instructors, providing the same class instruction that Training Instructors provide. The Agency uses WAEs when they need class coverage while Training Instructors are out due to sick leave, annual leave, temporary duty orders, and RDOs. The Agency funds the WAEs' costs through the Agency's annual personnel compensation and benefits budgetary allotments. Currently, the Agency is authorized WAE expenditures equivalent to two full-time employee (FTE) positions (4,160 hours).

Next, the Agency asserts that it has a policy to calculate instructors needed for a given year based on projected annual requests for training from Partner Organizations (POs). Although the Agency did not provide this policy, it explains that it derives the number of authorized FTE positions from the number of instructional hours that POs request and how many instructional hours the Agency delivers in a given year. The Agency classified these instructional hours as "Contact Hours," which it limits to the time Training Instructors spend actively delivering training. The Agency does not count the time Training Instructors spend planning or setting up as Contact Hours. Rather, the Agency explains that it provides ample time for lesson planning and set-up by assigning free periods and assigning multiple Training Instructors to the same class, with only one instructor

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(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).

required to be “on the podium” at a time. The Agency explained that the time WAEs spend providing the same instruction as Training Instructors is not counted as Contact Hours.

Given this context, the Agency argues that the CWS is causing a reduction in productivity. The Agency reasons that any hours in a Training Instructor’s tour of duty outside of the “Core Training Hours” (the fixed schedule for class offerings of 7:00 a.m. to 4:00 p.m. with a one-hour lunch) cannot count as Contact Hours. Specifically, the Agency points to Training Instructors working a CWS of 4/10 as working 16 hours each pay period when no class is in session. Additionally, the Agency asserts that because they cannot count WAEs’ instructional time as Contact Hours, the continued use of WAEs to cover classes for Training Instructors on RDOs has led to a decrease in Contact Hours. As the Agency derives the number of FTEs to staff, using in part the number of Contact Hours it delivers, the Agency argues that the use of WAEs to cover RDOs hurts operational statistics and could lead to a decrease in budget or FTE staffing in the future.

The Agency also argues that the CWS is causing an increase in the cost of agency operations as it has had to use WAEs to staff voids created by Training Instructors on RDOs. The Agency reasons that this WAE cost for RDO coverage is an increased cost over what the Agency would pay if Training Instructors worked a schedule that followed the Core Training Hours. The Agency provided schedules and accounting showing the number of hours the Agency used WAEs to cover class instruction for a Training Instructor on an RDO. The Agency explained that its scheduling policy attempts to cover a class with other available Training Instructors before scheduling a WAE. The Agency calculated its WAE expenditures for just the purpose of covering RDOs to be 2,025 hours in FY19, 1,367 hours in FY20, and 722 hours for FY21 plus the first quarter of FY22. Using the set WAE pay rate, the Agency calculated the cost of WAE coverage of RDOs to be \$101,533 in FY19, \$68,582 in FY20, and \$36,201 for FY21 plus the first quarter of FY22. The Agency noted for FY20 that due to COVID-19, there was a temporary closure of the training programs from March until June that year. The Agency did not use any WAEs from March 2020 until the beginning of FY21.

## 2. The Union’s Position

The Union takes the position that the CWS has not had an adverse impact on the Agency. In the alternative, the Union takes the position that the Agency has failed to demonstrate an adverse impact that meets its burden under the Act. Specifically, the Union claims the Agency has not offered evidence showing the budget for WAEs or that WAE expenditures have had an adverse impact relative to the Agency’s allocated budget. The Union also pointed out that after the Agency implemented changes recommended by the Union to utilize the full capabilities of its internal scheduling system, the Agency’s evidence shows a discernable decrease

in WAE expenditures.

The Union also asserts that the Agency's mismanagement resulted in the unnecessary use of WAEs and any associated costs. Reviewing the Agency's evidence, the Union claims that it does not show whether other Training Instructors were available to work when WAEs were used to cover RDOs. Without such evidence, the Union argues the Agency's claim that it had to resort to using WAEs to cover RDOS is unsupported. To refute the Agency's evidence, the Union provided evidence of its own relating to scheduling Training Instructors to monitor classes. The Union claims that this evidence proves the Agency's evidence of WAE use is incomplete and misleading. Moreover, the Union claims that the Agency failed to provide any evidence supporting its claim that the CWS resulted in a loss of productivity.

## **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 agency has met its statutory burden based on "the totality of the evidence presented."<sup>2/</sup>

Having carefully considered the totality of the evidence presented in this case, I find that the Agency has not met its statutory burden. In this regard, the Agency has gone to great lengths to detail the coverage required to maintain Agency operations during the Core Training Hours due to Training Instructors' RDOs. The Agency, however, has failed to support its finding that the CWS has caused either a reduction in productivity or an increase in the cost of Agency operations.

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<sup>2/</sup> 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, 97<sup>th</sup> Cong., 2d Sess. at 15-16 (1982).

First, the Agency's contention that the CWS is causing an increase in the cost of Agency operations is solely based on an evaluation of the amount of time the Agency has used WAEs to cover Training Instructors' RDOs. In presenting its argument, the Agency has established its need for coverage for the Core Training Hours. The Agency's evidence also shows that many Training Instructors use a 30-minute lunch break to shorten their overall workday. If Training Instructors do not work a CWS, they will work a traditional schedule of 5/8. Those Training Instructors who elect to take a 30-minute lunch break would have a tour of duty of 7:00 am to 3:30 pm, or 7:30 am to 4:00 pm. The Agency has not provided evidence of how it would have managed staffing to remain fully operational between the Core Training Hours of 7:00 am to 4:00 pm, with most Training Instructors either arriving after 7:00 am or leaving prior to 4:00 pm.

The Agency suspended CWS in April 2021, reverting all Training Instructors to the 5/8 schedule. It is unclear why the Agency provided no data concerning scheduling, costs, or Contact Hours during this time. In fact, the Agency provided no data from February 2021 to July 2021. While it is logical that there would be no need for WAEs to cover RDOs if there are no more RDOs, it is just as logical to reason that Training Instructors working a 5/8 schedule and electing to take a 30-minute lunch break cannot cover a 9-hour instructional day. In addition, in the absence of CWS, the cost of WAEs for reasons other than RDOs could be expected to increase, as Training Instructors are required to use leave rather than an RDO for personal business or health-related purposes. Without establishing what Agency operations would have cost without CWS, it is impossible to determine if CWS has caused an increase in that cost.

Second, the Agency asserts the CWS is causing a reduction in productivity. Specifically, the Agency identifies an overall decrease in Contact Hours due to Training Instructors on a CWS of 4/10 working hours outside of the Core Training Hours. Again, the Agency's claims are based on a comparison with only one side. That is, the Agency fails to provide a projected productivity baseline which, in the absence of CWS, it purports would be greater.

Additionally, the Agency has failed to provide any evidence outlining Contact Hours as an appropriate measure of productivity. The Agency did not provide a context for the administration of Contact Hours, including, most importantly, why WAE instruction does not qualify. Without a basis for relying on Contact Hours as the appropriate measure of productivity, Contact Hours are nothing more than a bookkeeping tool for purposes of this determination. Further, Contact Hours, by the Agency's own admission, are primarily at the Agency's discretion given its right to assign work and its practice of filling free periods by assigning multiple Training Instructors to the same class with only one instructor "on the podium."

The Agency has also failed to produce evidence that the CWS has resulted in reduced productivity regarding Training Instructors working outside of the Core Training Hours. To claim that an employee has no work to do outside of those hours of instruction is based on the unreasonable assumption that Training Instructors arrive to work alongside participants and immediately begin instruction without set-up, briefing, or other administrative matters. It is noted that the Agency did not include Training Instructors on a CWS of 5/4/9 in this claim, suggesting the Agency found Training Instructors working 9 hours a day to be productive. Without evidence that Training Instructors have been less productive, the Agency's concern is speculative at best.

Ultimately, without the necessary evidence, the Agency's claims are unsupported. Given the clear requirements established in the Act, I must conclude that it has not met its statutory burden. I shall therefore order that the Agency rescind its determination to terminate the CWS for Training Instructors at the Cheltenham Training Delivery Point.

### **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 determination to terminate the CWS for Training Instructors at the Cheltenham Training Delivery Point.

*/Pamela Schwartz/*  
Pamela R. Schwartz  
Arbitrator

February 24, 2022  
Arlington, Virginia