In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
LEAVENWORTH, KANSAS

and

LOCAL 919, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 09 FSIP 62

ARBITRATOR'S OPINION AND DECISION

Local 919, 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), U.S. Penitentiary, Leavenworth, Kansas (Employer or USP Leavenworth), that implementation of the Union's proposed 5-4/9 compressed work schedule (CWS) for bargaining-unit employees in the Facilities Department (FD) would cause an adverse agency impact.[1/]

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through mediation-arbitration by telephone with the undersigned. The parties were informed that if a settlement were not reached during mediation, a binding decision would issue to resolve the dispute. On January 15, 2010, a telephonic mediation-arbitration

1/ The Union's request for assistance was filed after a grievance arbitrator found that the Employer had violated Article 18, section (b)(1) of the parties' master collective bargaining agreement (MCBA) "by failing to agree to the Union's request for a proposed [CWS] for the [FD]." As a remedy for the violation, the arbitrator ordered the Employer either to accept the Union's proposed CWS within 14 days of his decision or "the request will be deemed denied and the Union may appeal the Employer's decision to the [Panel]."

proceeding was conducted. During the mediation phase, the parties scheduled additional meetings among themselves to continue their efforts to resolve the matter voluntarily. The med-arb proceeding was reconvened by telephone on February 26. The parties reported that, although the Union had modified its proposal and the Employer had made a counter-offer, the Employer alleged that the implementation of the Union's revised proposal also would cause an adverse agency impact. 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

USP Leavenworth is a medium security facility housing male inmates. An adjacent satellite prison camp houses minimum security male offenders. Its mission is to protect society by confining criminal offenders in the controlled environments of prisons and community-based facilities that are safe, humane, and secure. The Union represents approximately 260 bargaining-unit employees, who work, among other things, as secretaries, accountants, educators, counselors and corrections officers, and in food service and facilities maintenance. The parties' MCBA was to have expired on March 8, 2001; however, its provisions remain in effect until a successor agreement is implemented.

ISSUE AT IMPASSE

The sole issue before me is whether the finding on which the Employer has based its determination not to implement the 5-4/9 CWS in the FD is supported by evidence that the schedule is likely to cause an adverse agency impact.[2/] Essentially, under

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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 Union's revised proposal, 13 of the FD's 21 bargaining-unit employees would be on a 5-4/9 CWS; 4 employees would have the first Monday in the pay period as their regular day off (RDO), 3 would have the first Friday in the pay period as their RDO, 3 would have the second Monday in the pay period as their RDO, and 3 would have the second Friday in the pay period as their RDO.[3/]

PARTIES' POSITIONS

1. The Employer's Position

The Arbitrator should find that the Union's proposed 5-4/9 CWS would result in an adverse impact upon Agency operations because it would reduce productivity, increase costs and diminish the level of services provided to its customers. Productivity would be reduced because CWS shifts would start at 6:30 a.m. and end at 4 p.m.[4/] even though the inmates that the employees' supervise work from 7:30 a.m. until 2:55 p.m. Therefore, the Union's proposal would add an hour per day of unproductive time to employees' schedules that is unnecessary for the completion of their primary job responsibility, *i.e.*, the supervision of inmates. Costs would increase because 1 hour of reduced productivity per 13 employees 8 days per pay period equates to 2,704 hours of staff idleness annually. Since the average salary of FD employees is $36.50 per hour, this amounts to a loss of $98,696 annually in production.

The proposed CWS also would diminish the level of services provided to the inmates and the facility. In this regard, part of the FBOP's mission is to lower the rate of recidivism by making inmates more employable. The Union's proposal, however,

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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).

3/ The Union's initial proposal had 2 employees off on the first Monday in the pay period, 6 employees off on the first Friday in the pay period, 0 employees off on the second Monday in the pay period, and 5 employees off on the second Friday in the pay period.

4/ Under the current 5/8 schedule, employees work from 7 a.m. until 3:30 p.m.

would "create staff shortages" in the FD on Mondays and Fridays, in addition to the employee absences that already occur due to training and various types of leave, because the affected employees would have 13 RDOs per pay period. This amounts to about 26 days per month during which the 125 inmates the 13 employees normally supervise would remain in their housing units, or approximately 1,500 hours per month of inmate idleness. When inmates are "laid in" in their housing units, they are not being given on-the-job training (OJT) to make them productive members of society upon their release from prison. Laying-in inmates for 1,500 hours per month also would add security risks for the correctional officers that work in the housing units. Service to the public would be diminished because USP Leavenworth is the oldest institution in the Federal prison system and requires a higher than normal number of repairs. Without staff available to supervise the inmates, "fewer repairs will be completed." It is also possible that "more staff may opt to participate, thereby causing even more staff to be absent on Mondays and Fridays."

While the Union claims that its proposal is comparable to the schedules available to employees at 99 of the 114 institutions within the FBOP, in reality only the USPs in Atlanta and Lewisburg are as old as USP Leavenworth, so they are the appropriate institutions for comparison. Moreover, there is no way to determine from the available data regarding CWSs in facilities departments whether employees at other institutions are permitted to have RDOs that fall only on Mondays or Fridays, as the Union is proposing. In this connection, the Employer expressed its willingness to implement a 5-4/9 CWS where all staff would rotate RDOs throughout the week, thereby lessening the impact on FD operations and eliminating the need to lay-in inmates, but its offer was rejected.

2. The Union's Position

The Arbitrator should find that the Employer has not met its statutory burden of demonstrating that the proposed 5-4/9 CWS is likely to cause an adverse agency impact. Contrary to the Employer's contentions, productivity would increase under its proposals, as management could extend the work hours of certain inmates until 3:25 p.m. In addition, management has initiated new OJTs for inmates without the employees' consent, which has added "considerable man hours of paperwork and tracking inmates' productivity." The additional work would be performed during the 9-hour workday. As to inmate idleness, the Union has modified its initial CWS proposal to distribute RDOs

on Mondays and Fridays more evenly. This would result in full coverage and little or no inmate idleness. It is also an exaggeration to contend that most inmates are productive during their time in the FD. Management uses the FD "as a dumping ground for inmates that are unproductive or a threat to security." Moreover, the alleged threat to security posed by the proposed CWS is a "bogus issue." In fact, "laying-in" inmates would result in a few additional inmates per housing unit during employees' RDOs. By comparison, on weekends, when there are no inmates on FD details, the number of inmates in housing doubles to about 200 per unit. Although the ratio of inmates to housing unit correctional officers increases markedly more on weekends than would be the case if the Union's CWS is implemented, management raises no security concerns when that happens.

The real reason management will not adopt a CWS in the FD is because the Warden believes that "this place is like a ghost town on Fridays." The answer is not to deny the employees a CWS but to restore custody staff to their previous levels. Furthermore, the Union has not crafted "any strange or bizarre schedule," but is only asking to be treated "as fairly and equitably as other [FBOP] employees," consistent with Article 6, Section b.2., of the parties' MCBA. Currently, there are 8,200 FBOP employees on CWS at 99 institutions. Eighty two institutions provide CWS to employees in their FDs. None of them rotate RDOs every 2 weeks, as the Employer is proposing. As to its assertions regarding increased cost, under the Union's proposal, the Employer could plan longer daily projects and reduce overtime costs when emergency work is needed, which undercuts its claim that it would lose $98,696 annually to staff idleness. At the same time that it is claiming that the Union's proposal would increase costs, however, management has proposed to implement a 5-4/9 CWS with rotating RDOs. If the Employer's cost estimates were valid the same alleged amount of lost productivity would result whether or not RDOs are rotated, demonstrating that its concerns about cost are "a made up issue." For these reasons, the Union urges the Arbitrator to reach a conclusion that supports Congress's finding in § 6120 of the Act that "the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater 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

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."[5/]

Having carefully considered the totality of the evidence presented in this case, I find that the Employer has not met its statutory burden. Its concerns with respect to a reduction in productivity and diminishment in the level of service to inmates are speculative and should not be permitted to stand in the way of genuine negotiations between the parties where these concerns can be addressed with specificity.[6/] This conclusion is consistent with an examination of the comparability data provided by the parties which indicate that successful negotiations implementing CWS at FDs have occurred at dozens of medium security institutions within the FBOP. In particular, the Employer's claim that the only institutions comparable to

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5/ 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).

6/ Such is the limit of the Panel's statutory authority under the Act, where the legislative history confirms that, if an employer fails to meet its statutory burden:

> 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).

USP Leavenworth are the USPs in Atlanta and Lewisburg is unsupported by evidence confirming that their repair rates are higher than the rest of the institutions within the Federal prison system.[7/] Further, there is a dearth of information to show any nexus exists between the asserted repair needs and CWS. Accordingly, I shall order the Employer to return to the bargaining table to continue negotiations over the Union's proposed 5-4/9 CWS.

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 proposed 5-4/9 CWS for unit employees in the Facilities Department.

Thomas Angelo
Arbitrator

March 26, 2010
Mill Valley, California

7/ Moreover, the contention is undercut by data showing that USP Atlanta implemented a 4/10 CWS in October 2002 covering 17 FD employees.