

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 216

Case No. 20 FSIP 087

DECISION AND ORDER

BACKGROUND

This case, filed under the Federal Service Labor Management Relations Statute (the Statute) by the Equal Employment Opportunity Commission (Agency or Management) on September 24, 2020, concerns one article in the parties' successor collective bargaining agreement between it and the American Federation of Government Employees, Local No. 216 (Union). This article covers the topic of "maxiflex."¹ The Agency is a Federal agency that administers and enforces Federal civil rights laws against workplace discrimination. The American Federation of Government Employees, Local 216 (Union) represents over 1,300 employees in a variety of positions throughout the country. The parties are governed by a collective bargaining agreement that expired on November 01, 2019, but is in a year-to-year rollover status.

¹ OPM defines "maxiflex" as a "type of flexible work schedule that contains core hours on fewer than 10 workdays 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." Federal unions have the authority to bargain over these types of flexible work schedules pursuant to the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. 6120, et seq (the Act).

BARGAINING HISTORY

In August 2020 in 20 FSIP 067, the Panel asserted jurisdiction over 6 articles in the parties' successor CBA but declined jurisdiction on their maxiflex article because the parties had not bargained over it. The parties contacted the Panel on September 1st and stated that they had settled their dispute over the aforementioned 6 articles. Accordingly, the Panel closed the dispute in 20 FSIP 067.

After the Panel closed the foregoing case, the parties began negotiations over their maxiflex article. The parties had 1 day of bilateral negotiations on September 16, 2020. They then had 1 day of mediation with the assistance of the Federal Mediation and Conciliation Services (FMCS) on September 23rd. The Mediator could not resolve the dispute, so he released the parties on the same day in Case No. 202012340037 and the Agency filed this request for assistance. On November 10, 2020, the Panel asserted jurisdiction over this matter and ordered it to be resolved through Written Submissions with an opportunity for rebuttal statements. The parties submitted their initial arguments on November 30th. Their rebuttal positions were submitted December 7th.

ISSUE

There is only one article on maxiflex that remains in dispute. It is the last article in the parties' successor CBA that requires resolution. The parties' *current* agreement, executed in 2013, has language on alternative works schedules and language that allowed the parties to meet to bargain a pilot program for maxiflex.² Consistent with the latter, the parties executed a memorandum of understanding (the 2015 MOU) for such a program in 2015. The 2015 MOU was limited to a certain number of positions and continued until 2017 for most of those positions. However, a small number of them continued to work maxiflex schedules until 2018. The Agency conducted some surveys of employees who worked under this pilot, but after 2018 the parties took no further action for several years.

In March 2020, as a result of the Covid-19 pandemic, the Agency elected to expand telework and maxiflex options. Accordingly, the parties executed another maxiflex MOU (2020 MOU) that opened maxiflex to all employees. As the pandemic continued, the parties continued to agree to extend the 2020 MOU

² See Agency Initial Position at 2.

several times. Finally, the parties agreed that this agreement would expire December 31, 2020. Around 150 employees worked a maxiflex schedule under the 2020 MOU. With the foregoing background established, the Panel now turns to setting forth the parties' positions.

I. Agency Position

The Agency proposes that the parties reconvene after the execution of the successor CBA to discuss the "advisability" of a maxiflex program. As a result of the ongoing pandemic, the Agency instituted a maxiflex program for a limited amount of time. Before expanding this program on a permanent basis, however, the Agency believes it is appropriate for the parties to analyze the data gathered during the past several months in order to gauge the strengths and weaknesses of maxiflex. The Agency has never enacted an Agency-wide maxiflex program in the parties' CBA as the Union now requests. The Agency believes that doing so now, without analyzing supporting evidence, could lead to potential hardships.

Management acknowledges that under the Act it has a legal obligation to bargain over alternative work schedules if requested to do so. However, Management contends that there is no law, rule, or regulation that requires the Agency to *establish* a maxiflex program. As such, the Agency believes it is within its rights to offer its proffered language instead of accepting the imposition of a maxiflex program at this juncture.

II. Union Position

As an initial matter, the Union claims that the Panel should decline jurisdiction over this dispute because the Agency never truly bargained over a maxiflex article. Instead, the Agency has offered only a proposal that would call for the parties to reconvene to discuss data at a later date. The Union argues that this proposal demonstrates that the Agency never actually negotiated the topic of maxiflex and, as such, the parties are not at impasse.

On the merits, the Union argues for the adoption of a proposal that establishes maxiflex throughout the Agency. The Union argues this proposal is appropriate because Management has not demonstrated that such a proposal would "adversely impact"

the Agency.³ Alluding to the criteria for assessing adverse impact under the Act,⁴ the Union argues:

- There was no reduction in productivity. To the contrary, employees were more productive.⁵
- No diminished level of services occurred. Indeed, the Union notes that more employee flexibility meant employees expanded their hours of availability to the public.⁶
- Finally, there were no increased costs because employees had more flexibility to work tours of duty that allowed them to complete their duties without a need for overtime.⁷

According to the Union, all of the above demonstrates a lack of adverse impact. Indeed, the Union contends that the Panel has declined to find the existence of adverse impact in similar circumstances.

In addition to adverse-impact arguments, the Union contends that its proposal is appropriate because even the Agency itself has publicly touted the success of the 2020 MOU. And, the Union asserts that its proposal is comparable to the prior pilot program that ran until 2018, which was also successful. Thus, according to the Union, there is no need for further analysis or discussion on the topic of maxiflex: the parties have more than enough data.

III. Conclusion

The Panel imposes Management's language to resolve this dispute. The Union's jurisdictional claim concerning a lack of

³ Union Initial Argument at 5. The term "adverse impact" is a legal term of art that arises under the Act and, in certain circumstances, is a standard agencies may rely upon to avoid bargaining over the establishment of a flexible work schedule or to seek the termination of such a schedule. See 5 U.S.C. §6131(a).

⁴ Under the Act, "adverse impact" is established if an agency can demonstrate that a proposed or existing flexible schedule would reduce productivity, diminish the level of services offered to the public, or would increase operational costs. See 5 U.S.C. §6131(b).

⁵ See Union Initial Position at 6-7.

⁶ See *id.* at 7.

⁷ See *id.*

impasse is misplaced. The parties had negotiations and were released from FMCS mediation. Moreover, that the Agency has placed a proposal on the table calling for further discussion is not an indication that the parties are not at impasse. Instead, it indicates only that the Agency has an interest in examining more data once it becomes available. The parties are properly at impasse.

Turning to the merits of this dispute, the Agency has offered a common-sense explanation that, before it can comfortably commit to permanently expanding maxiflex on a large scale, it needs an opportunity to explore and discuss data with the Union. The 2020 MOU remains in effect until the end of December 2020; so, the period for capturing data is not yet even complete. The Union claims that the existence of maxiflex data during the past several months, and the first pilot period, demonstrates that further analysis is not necessary. Yet, it is undisputed that the parties have never had CBA language that establishes a permanent Agency-wide maxiflex program. Adopting Management's position will allow the parties an opportunity to parse data and determine its applicability to the entirety of the Agency. The examination of this data will be critically important given that the current pilot program has operated under the auspices of the ongoing Covid 19 pandemic. It is a testament to the Agency and its workforce that they were able to successfully continue the Agency's mission in the midst of a global pandemic, undoubtedly due in part to maxiflex availability. But, the unique character of these circumstances is also what makes further scrutiny necessary.

The Union's adverse impact argument is rejected. Under the Act, an agency may cite adverse impact as a basis for declining to negotiate the establishment of a flexible work schedule or to seek the termination of an existing schedule. The Agency has not raised any claim of adverse impact. Moreover, the parties agreed to a pilot program only rather than an indefinite maxiflex program.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated in the above Panel majority opinion.



Mark A. Carter
FSIP Chairman

December 20, 2020
Washington, D.C.