

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
BEAUMONT, TEXAS

and

LOCAL 1010, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,
AFL-CIO

Case No. 07 FSIP 33

DECISION AND ORDER

The Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Beaumont, Texas, filed a request for assistance with the Federal Service Impasses Panel (Panel) pursuant to 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 decision to terminate a 4/10 compressed work schedule (CWS) for employees in the Unicor (Federal Prison Industries, Inc.) factory who are represented by Local 1010, American Federation of Government Employees, AFL-CIO (Union).

After investigation of the request for assistance, the Panel determined that the dispute should be resolved through an informal conference by telephone with Panel Member Richard B. Ainsworth. The parties were advised that if no settlement were reached during the informal teleconference, Member Ainsworth would report to the Panel on the status of the dispute, including the parties' final positions and his recommendations for resolving the impasse. After considering this information, the Panel would take final action in accordance with 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of its regulations.

Pursuant to the procedural determination, Member Ainsworth conducted an informal conference by telephone with the parties on March 28, 2007. Efforts were made during the teleconference to resolve the dispute voluntarily, but no settlement was

reached. The Panel has now considered the entire record, including the parties' pre-conference submissions, and Member Ainsworth's recommendation for resolving the dispute.

BACKGROUND

The Employer's mission is to protect society by confining criminal offenders in the controlled environments of prisons and community-based facilities that are safe, humane, and appropriately secure. The U.S. Penitentiary is one of four facilities that make up the Federal Correctional Complex at Beaumont, Texas, which together house approximately 5,000 inmates. Overall, the Union represents about 672 employees, including correctional officers, counselors, case managers, secretaries, and food service employees, at grades GS-5 through -11, WG-5 through -9, and WS (wage supervisor) -7 through -11. 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.

The Unicor factory produces army combat uniform trousers for the Defense Supply Center in Philadelphia, Pennsylvania. There are five bargaining-unit employees currently working at the factory--a Sewing Machine Repairer Supervisor and four Fabric Worker Supervisors, but as of January 1, 2007, only two of them are on the CWS. Unit employees supervise approximately 160 inmates, down from the 324 that worked at the factory as late as May 2006. The factory is normally in production from Monday through Friday. Employees on CWS work from 6 a.m. to 4 p.m. without a duty-free lunch period; the other employees in the Unicor factory work from 7:15 a.m. to 3:45 p.m. with a 30-minute duty-free lunch period.

ISSUE AT IMPASSE

In accordance with section 6131(c)(3)(B) of the Act, the issue in dispute is whether the findings on which the Employer bases its determination to terminate the 4/10 CWS in the Unicor factory are supported by evidence that the schedule is causing an adverse agency impact.^{1/}

1/ 5 U.S.C. § 6131(b) defines adverse agency impact as:

(1) a reduction in the productivity of the agency;

POSITIONS OF THE PARTIES

1. The Employer's Position

The Panel should find that the 4/10 CWS in the Unicor factory is causing an adverse agency impact and order its termination. According to the Employer, the evidence demonstrates that the schedule is increasing costs and diminishing the level of service the agency is furnishing to the public. In this regard, to ensure that employees perform their primary function of supervising inmates in the production of trousers, the parties' 2002 CWS Memorandum of Understanding (MOU) for Unicor established a 6:30 a.m. inmate starting time. This was done to accommodate the 6 a.m. starting times of employees on the CWS. As a result, inmates routinely receive overtime for performing work that is "unnecessary to meet the factory's production requirements." For example, overtime payments amounted to \$5,716.15 in August 2006, \$3,092.57 in September 2006, and \$2,883.50 in October 2006. While events outside the parties' control recently have pushed inmate starting times closer to 7 or 7:15 a.m., any starting time before 7:30 a.m. to accommodate CWS requires the unnecessary payment of overtime to inmates.

The current CWS also results in somewhere between 14 percent (or 85 minutes) and 24 percent (or 145 minutes) of employees' workdays "being spent in non-supervision of inmates," depending on when inmates report to the factory. This includes most of the time that employees are at the factory prior to inmates' arrival and after their departure, and during the inmates' 45-minute lunch period. While the Union argues that employees are performing other duties when they are not

(2) a diminished level of the services furnished to the public by the agency; or

(3) an increase in the cost of 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 CWS has caused 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).

supervising inmates, all of the work that management wants employees to do can be done within a normal 8-hour day. Thus, the 14 to 24 percent of the CWS workday spent in non-supervision of inmates represents time when the level of service the agency is furnishing to the public is diminished. In addition, given current staffing levels, "on numerous occasions, [the Employer is] down to three staff to run the factory" when CWS employees are on their regular days off. If annual leave is granted to an employee on such days, there are only two employees to "provide direct supervision to approximately 160 inmate workers," and to perform all of the other necessary activities at the factory. This already "has forced management to cancel [and/or reschedule] deliveries of raw materials from the warehouse, due to security and safety concerns, which caused delays in production for the entire factory." Finally, the possibility that production operations will have to be suspended if CWS continues, at a cost of approximately \$15,402 per day, will only be exacerbated when the total number of bargaining unit staff is reduced to four, as is expected in the near future.

2. The Union's Position

The Panel should find that the Employer has not met its burden under the Act of demonstrating that the existing 4/10 CWS has caused an adverse agency impact. Among other things, the data the Employer relies on to make its case are flawed. Bargaining unit staff maintained a log book until April 2006 that showed the average time employees spent without inmates averaged 20 minutes a day, and not the 85 minutes a day that management claims. Moreover, employees' non-supervisory correctional responsibilities are "regular and recurring," consistent with the parties' 2002 CWS MOU and the fabric worker supervisor's position description, which states that the staff's correctional responsibilities precede all others required by the position. Contrary to the Employer's contentions, the time without inmates is used to perform a variety of duties, including area searches for contraband, and completing inmate door check sheets and administrative paperwork, among others. Confirmation of this can be found in employees' annual performance appraisals, which rate them on job elements beyond just the supervision of inmates. Although it may be true that such duties are completed in 8 hours in factories not on a CWS, "performing these duties while inmates are not in the factory allows staff to have closer supervision while they **are** in the factory."

Close scrutiny of the data provided by the Employer also reveals that management has been paying inmates overtime rates when they are not present in the Unicolor factory, in violation of an agency-wide instruction. In this regard, Program Statement 8570.01 indicates that "inmates are to be paid overtime pay at twice the hourly rate for hourly, individual, and group piece work when the total hours worked exceed the industrial operation's regularly scheduled workday." Management, however, has "continuously paid overtime rates to inmates that have not exceeded their regularly scheduled workday." In addition, the Employer has repeatedly failed to follow its own procedural memoranda by granting employees annual leave in an attempt "to cause an adverse agency impact." As to the Employer's scenarios concerning the cancellation of deliveries of raw materials from the warehouse and the suspension of production operations if CWS continues, management's contentions are simply "opinion compiled by the use of speculation and assumption."

CONCLUSIONS

Under section 6131(c)(3)(C) of the Act, the Panel is required to take final action in favor of the agency head's (or delegatee's) determination to terminate a CWS if the finding on which the determination is based is supported by evidence that the schedule has caused an "adverse agency impact." As its legislative history makes clear, Panel determinations under the Act are concerned solely with whether an employer has met its statutory burden on the basis of "the totality of the evidence presented."^{2/}

Having carefully considered the evidence presented by the Employer in this case, we conclude that the 4/10 CWS is causing an increase in inmate overtime costs beyond what is necessary to

^{2/} See the Senate report, which states:

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).

accomplish the Unicor factory's mission. In this regard, the parties' 2002 CWS MOU establishes inmate work hours from 6:30 a.m. to 3:30 p.m. For reasons unrelated to the parties' dispute, inmates currently normally arrive for work at the factory between 7 and 7:15 a.m. In our view, however, this does not alter the following facts: (1) any work performed before 7:30 a.m. to accommodate the CWS starting time of 6 a.m. requires the Employer to pay inmates at the applicable overtime rate, and (2) the factory's current production requirements can be met without incurring such payments. While acknowledging that the monthly cost figures provided by the Employer are imprecise because they contain an unspecified number of unauthorized overtime payments that exceed the amount directly attributable to CWS, we are nevertheless persuaded by the totality of the evidence that it has met its burden of demonstrating that the CWS is causing an adverse agency impact by increasing the cost of agency operations. Accordingly, we shall order that the 4/10 CWS at the Unicor factory be terminated.

ORDER

Pursuant to the authority vested in it by the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6131(c), the Federal Service Impasses Panel under § 2472.11(a)(2) of its regulations hereby orders the termination of the 4/10 CWS in the Unicor factory.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

April 9, 2007
Washington, D.C.