

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL INSTITUTION  
SCHUYLKILL  
MINERSVILLE, PENNSYLVANIA

and

LOCAL 3020, AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 06 FSIP 111

**DECISION AND ORDER**

Local 3020, 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 decision by the Department of Justice, Federal Bureau of Prisons (FBOP), Federal Correctional Institution (FCI) Schuylkill, Minersville, Pennsylvania (Employer), not to establish a 5-4/9 compressed work schedule (CWS) in the Education Department as proposed by the 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 Mark A. Carter. The parties were advised that if no settlement were reached during the informal teleconference, Member Carter would notify the Panel of the status of the dispute, including the parties' final positions. 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.

In accordance with the Panel's procedural determination, Member Carter conducted an informal conference by telephone with the parties on December 6, 2006, but a voluntary resolution was not reached. Member Carter has reported to the Panel, which has

now considered the entire record, including the parties' pre-conference submissions.

### 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 secure. The FCI is a medium security facility that houses approximately 1,600 inmates; the site also includes a Federal Prison Camp. The Education Department offers various classes and programs, including high-school equivalency diplomas (GED), designed to enable inmates to complete their prescribed or desired educational objectives. Overall, the Union represents about 200 employees, at grades GS-5 through -11, WG-5 through -9, and WS-7 through -11, who are part of a consolidated nationwide unit of about 23,000. There are 10 bargaining unit employees in the Education Department, eight of whom already are on a 4/10 CWS; the Union proposes that the GED Instructor, who teaches at the Prison Camp, be permitted to work on a 5-4/9 CWS. The parties are covered by a master collective bargaining agreement (MCBA) that expired on March 8, 2001; its provisions will remain in effect until a successor agreement is effectuated.

### ISSUE AT IMPASSE

In accordance with § 6131(c)(2)(B) of the Act, the issue in dispute is whether the findings on which the Employer bases its determination not to establish the 5-4/9 CWS proposed by the Union is supported by evidence that the schedule is likely to cause an adverse agency impact.<sup>1/</sup>

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1/ 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 (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);

**POSITIONS OF THE PARTIES**

1. The Employer's Position

The Panel should find that the evidence on which the Employer bases its determination not to implement the proposed CWS establishes that the schedule is likely to cause an adverse agency impact as defined under the Act. In this regard, implementation of the 5-4/9 CWS for the GED Instructor would reduce the productivity of the agency and diminish the level of services furnished by the Education Department in four areas: (1) loss of instruction hours; (2) increase in the amount of idle man hours; (3) cost to the agency; and (4) failure to meet policy requirements. The employee's regular day off (RDO) would result in a loss of 1 day per pay period in instructional hours. Using the average of 52 inmates/students per day, each attending class for 1.5 hours, there would be a loss of 2,028 hours of instructional time for inmates per year. In turn, the reduction in instructional hours would "increase the amount of time an inmate/student would need to remain in class by 9.4 weeks," exacerbating a decline in GED enrollment numbers and instructional hours that has been occurring since FY 2003. Instead of spending additional time to complete GED classes, inmates "could be enrolled in other classes or training" to prepare them for release.

In addition to lost instructional time, the proposed 5-4/9 CWS would increase by 11 percent the GED Instructor's non-instruction time and non-inmate contact time. Thus, "a full 42 percent of her year would be spent in activities other than direct classroom instruction." According to the FBOP's policy requirements<sup>2/</sup> for full-time teachers and education specialists, however, "at least 75 percent of their 40-hour work week" must be spent in instruction or in work related to instruction, "with a minimum of 50 percent of their work spent in direct classroom instruction." Assuming the GED Instructor works on Sunday during the first week of each pay period, or a holiday or in-lieu-of holiday day off falls during the week, this requirement will not be met, *i.e.*, "at most" 15 to 18 hours per week would be spent in direct classroom instruction. Once annual leave and mandatory training are taken into account, her "classroom instruction time would be reduced to 45 percent, below the stated policy

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and 128 CONG. REC. S7641 (daily ed. June 30, 1982) (statement of Sen. Stevens).

<sup>2/</sup> Program Statement 5300.21, "Education, Training and Leisure Time Program Standards."

requirement." In summary, the cost of losing an additional day of staff coverage each pay period "far outweighs any potential benefit to adding 1 hour of non-instruction time each day." Management "should not have to reduce services in order to provide a [CWS]."

## 2. The Union's Position

The Union proposes that the GED Instructor be permitted to work a 5-4/9 CWS, Monday through Friday, with weekends off. On 7 of the 10 workdays per pay period, her hours would be from 7:30 a.m. to 4:30 p.m. She would work 2 nights per pay period, from 12:30 to 9 p.m. and from noon to 9 p.m., respectively. Her RDO would be the first Friday per pay period.

The Panel should find that the Employer has not met its burden under the Act of demonstrating that the proposed CWS is likely to cause an adverse agency impact. Since the 4/10 CWS went into effect for all other teaching staff several years ago, the Education Department has been "running successfully" and "passing program reviews," despite the Employer's contention that it is causing adverse agency impact. Similarly, its claim that the proposed 5-4/9 CWS for the GED Instructor would increase the amount of time an inmate/student would need to remain in class "is pure conjecture without any evidence to support it." In this regard, any such increase is more likely to be attributable to the fact that "less educated inmates" are arriving at the facility. Moreover, the Employer's contention that the schedule would cause a delay in furthering educational opportunities for inmates is based on an "informal fallacy." Any such delay would be a result of "inmate attitude, lack of ambition on the inmate's part, and lack of incentive for the inmate to obtain his GED." If anything, the proposed CWS would correct for losses in instruction time that occur under the GED Instructor's current non-compressed schedule.

The Union does not understand the Employer's allegation that its proposed schedule would increase non-instruction time and non-inmate contact time. In fact, a 9-hour day would increase the amount of direct instruction and inmate contact time by 4 percent per day. In addition, regardless of work schedule, "there is always the potential for loss of instructional hours" due to institutional procedures or because of the assignment of collateral duties by the supervisor of the Education Department. The Employer's assertion that the GED Instructor would fall short of policy requirements for direct classroom instruction under the proposed schedule is also without merit. By the Union's

calculations, she would exceed the minimum requirement by 10 percent during week one of the schedule, and by 14 percent during week two. Finally, the issue of whether the employee should receive days off in lieu of holidays would be revisited when the parties return to the bargaining table if the Panel determines that the Employer has not established that the proposed CWS would cause an adverse agency impact.

### CONCLUSION

Under § 6131(c)(2)(B) of the Act, the Panel is required to take final action in favor of the agency head's (or delegatee'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."<sup>3/</sup>

Having carefully examined the totality of the evidence presented in this case, we find that the Employer has not met its burden of establishing that an adverse agency impact is likely to occur under the Union's proposal. In addition to work schedules, there are a number of other factors that determine such matters as the amount of instructional time provided to inmates and how long they remain in class to complete their GED requirements. In the absence of actual experience under the proposed CWS, it appears that the consequences predicted by the Employer are speculative. Its claim that the schedule would not permit the GED Instructor to meet the FBOP requirement that teachers spend a

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

minimum of 50 percent of their work time in the direct instruction of inmates is particularly unpersuasive. Accordingly, we shall order the parties to negotiate over the Union's proposal.<sup>4/</sup>

**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(b) of its regulations hereby orders the parties to negotiate over the Union's proposal.

By direction of the Panel.

H. Joseph Schimansky  
Executive Director

December 22, 2006  
Washington, D.C.

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<sup>4/</sup> 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 (128 Cong. Rec. H3999, daily ed. July 12, 1982) (statement of Rep. Ferraro). See also S. Rep. No. 97-365, 97<sup>th</sup> Cong., 2d Sess. 15-16 (1982).