

In the Matter of

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
EMERGENCY MANAGEMENT DISPATCH
CENTER
PORTSMOUTH, NEW HAMPSHIRE

and

LOCAL 2024, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 12 FSIP 36

ARBITRATOR'S OPINION AND DECISION

The Department of the Navy, Portsmouth Naval Shipyard, Emergency Management Dispatch Center (EMDC), Portsmouth, New Hampshire (Employer), 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 with Local 2024, American Federation of Government Employees, AFL-CIO (Union) arising from its determination that the 12½-hour daily work schedule of the 10 EMDC dispatchers is causing an adverse agency impact, and that the implementation of the Union's proposed 4/10 compressed work schedule (CWS) for the dispatchers would create an adverse agency impact.^{1/}

^{1/} The Employer's request for assistance included a November 16, 2011, finding by the Commander, Navy Region, Mid-Atlantic's Public Safety Regional Program Director (RPD), Captain John Fristachi, that the current 12½-hour schedule is causing an adverse agency impact, and that the Union's proposed 4/10 CWS would cause an adverse agency impact. On December 30, 2012, the Employer submitted COMNAVREG MIDLANT INSTRUCTION 5233.1 to the Panel, which delegates authority from the Commander, Navy Region, Mid-Atlantic to RPDs to, among other things, "allocate program resources while seeking the best possible service delivery and ensuring standardization and economy of operations throughout [their] area of responsibility" which, in the case of Captain Fristachi, includes Portsmouth Naval Shipyard's EMDC. Accordingly, the Employer has met the statutory and

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through mediation-arbitration by telephone with the undersigned, Panel Member Donald S. Wasserman. The parties were informed that if a settlement were not reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, on February 21, 2012, I conducted a mediation-arbitration proceeding by telephone with representatives of the parties. During the mediation phase, the parties were unable to settle the matter voluntarily. Thus, in accordance with 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of the Panel's regulations, I am required to issue a final decision resolving the parties' dispute. In reaching this decision, I have considered the entire record, including the Employer's pre-hearing submissions and the additional information provided by the parties during the hearing.

BACKGROUND

The mission at the Portsmouth Naval Shipyard is to overhaul, repair and modernize the U.S. Navy nuclear powered submarine fleet. The Union represents a bargaining unit consisting of approximately 216 professional General Schedule accountants and non-professional employees, including police officers, dispatchers, computer clerks and computer assistants. The 10 dispatchers affected by the Employer's determination in this case must provide 24/7 coverage monitoring alarms, receiving calls, and sending units to respond to incidents and emergencies. The parties' most recent collective-bargaining agreement (CBA) expired on January 13, 2009, but the parties follow its terms as past practice.

During the parties' negotiations, as well as the Panel's initial investigation and the mediation-arbitration proceeding, the Union stated that it was not "wedded" to the current 12½-hour daily work schedule of the 10 EMDC dispatchers, which was implemented following the events of September 11, 2001. As an alternative, however, it proposes that the dispatchers' current schedule be replaced by the 4/10 CWS in Article 11, Hours of Work, of the parties' CBA.^{2/}

regulatory requirements for presenting this case to the Panel under the Act.

2/ In pertinent part, Article 11B specifies that: (1) normally, the basic workday shall consist of 10 hour days and the basic workweek shall consist of 40 hours; (2) the

ISSUE AT IMPASSE

The issue before me is whether the November 16, 2011, finding by the Public Safety RPD, upon which the Employer bases its determinations: (1) to terminate the 12½-hour daily workday schedule of the EMDC dispatchers, and (2) not to implement the Union's proposed 4/10 CWS for the dispatchers, is supported by evidence of adverse agency impact as defined under the Act.^{3/}

THE PARTIES' POSITIONS

1. The Employer's Position

The Arbitrator should find that the current 12½-hour schedule is causing an adverse agency impact because it has significantly increased the cost of Agency operations and has resulted in a reduction of the Agency's productivity. With respect to cost, each of the 10 dispatchers on the schedule works a total of 87½ hours per pay period, 7½ hours of which "constitute[s] regularly scheduled overtime," for a total of 75 hours of regularly scheduled overtime per pay period and 1,950

regular hours of work for the three shifts shall normally be 0530 hours to 1530 hours with no lunch period, 1430 hours to 0030 hours with no lunch period, and 2200 hours to 0800 hours with no lunch period; and (3) the three non-workdays shall be consecutive, whenever practicable.

3/ 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 an existing CWS is causing an adverse agency impact, and 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).

hours of regularly scheduled overtime per year. Multiplied by the average EMDC dispatcher overtime rate of \$29.65 per hour, this amounts to \$57,817.50 in regularly scheduled overtime per year. After adjusting for periods when dispatchers were taking sick leave, annual leave, etc., and overtime was not earned, for the 6-month period from June 5 to December 3, 2011, the total overtime costs for the dispatchers was \$24,673.58. In contrast, if the 5/8 schedule proposed by management had been in effect during that 6-month period EMDC's mission would have been accomplished "without the need for any regularly scheduled overtime."

The current 12½-hour daily work schedule also reduces productivity because it results in an overlap between shifts "that places more employees on duty during the overlap than the Agency needs." In this regard, the first shift under the current schedule starts at 0530 and ends at 1800, while the second shift starts at 1730 and ends at 0600. Thus, there is ½ hour of overlap between each of the two shifts, for a total of 1 hour of overlap between the shifts per day where two shifts of dispatchers are working at the same time. Since the minimum staffing requirement is two dispatchers per shift, the current schedule results in 1 hour per day where there are "at least two additional dispatchers on duty beyond what is needed for the EMDC to perform its mission." In total, the overlap period amounts to 728 nonproductive man-hours per year. The 5/8 schedule proposed by management, on the other hand, would perform EMDC's mission "without any overlap between shifts," thereby preventing any nonproductive man-hours from occurring.

The Arbitrator also should find that the 4/10 CWS proposed by the Union would cause an adverse agency impact by resulting in a significant increase in the cost of operations and a reduction in the productivity of the Agency. As to the cost of its operations, under the proposed 4/10 CWS there would be three shifts. Because there are 10 dispatchers, each would work four 10-hour shifts per week, and EMDC management would have a total of 40 dispatcher shifts at its disposal to meet mission requirements "without the assignment of overtime." To cover the EMDC's 24/7 operation with a minimum of two dispatchers per shift, however, management would have to staff 42 dispatcher shifts per week. Consequently, "the EMDC would need to staff this two dispatcher-shift deficit per week via the assignment of regularly scheduled [overtime]." This would amount to a minimum of 40 hours of regularly scheduled dispatcher overtime per pay period, and 1,040 hours per year. Multiplied by the average EMDC dispatcher overtime rate of \$29.65 per hour, this would

cost the Agency \$30,836 in regularly scheduled overtime per year. In contrast, the Employer's proposed 5/8 schedule would enable the EMDC "to complete its mission without any regularly scheduled [overtime] incorporated into the schedule." In fact, the 5/8 schedule would result in a surplus of eight dispatcher shifts per week to which management could regularly assign its dispatchers to work.

In addition to the unnecessary cost in regularly scheduled overtime, the Union's 4/10 CWS proposal would result in overtime expenses due to dispatcher absences from duty. Under the proposed schedule, there would be no shifts at the EMDC with more than the required minimum of two dispatchers. Therefore, whenever a dispatcher was on scheduled or unscheduled sick or annual leave, management would have "to fill the absent dispatcher's shift through the assignment of overtime." When all of the dispatchers' earned annual and sick leave is combined, it amounts to approximately 2,652 hours per year; if they were to expend all of the leave that they accrue, the additional overtime expense would be \$78,631.80 per year. For the 6-month period from June 5 to December 3, 2011, the actual combined total of annual and sick leave used by the dispatchers at the EMDC was 801.50 hours, so the cost in overtime if the Union's 4/10 CWS were in place during this time would have been \$23,764.48. A 5/8 schedule would have avoided most of these overtime costs because it results in a surplus whereby approximately 38 percent of the shifts at the EMDC would have additional dispatchers regularly assigned to them beyond the minimum staffing requirement of two dispatchers per shift. The Employer estimates that the cost in additional overtime under the 4/10 CWS for dispatcher absences during the 6-month period from June 5 to December 3, 2011, would have been over \$14,500.

Finally, the 4/10 CWS would result in a reduction of the productivity of the Agency. If implemented, the three shifts under the Union's proposal would result in a total of 6 hours of daily overlap at the EMDC. Because there would be two shifts of dispatchers working at the same time during the 6 hours of overlap each day, there would be four dispatchers on duty during the overlap periods, or two more than are necessary to perform EMDC's mission. Thus, the 6-hour daily overlap between shifts "would result in 12 nonproductive man-hours per day," and 4,368 nonproductive man-hours per year. Under the 5/8 schedule, however, "the EMDC would perform its mission without any scheduled overlap between any of its shifts." As the proposed 4/10 CWS would result in 4,368 nonproductive man-hours per year that would not occur under the 5/8 schedule proposed by

management, it would result in an adverse agency impact by reducing the productivity of the Agency.

2. The Union's Position

The Arbitrator should find that the Employer has not met its burden under the Act of demonstrating that the proposed 4/10 CWS is likely to cause an adverse agency impact. Preliminarily, when the parties officially memorialized the current 12½-hour shift CWS for dispatchers at the EMDC in 2007, they specifically agreed at least quarterly to "meet and discuss the viability of bringing the workforce to the 4/10 workshift, which remains contract language and a high priority for both parties." Therefore, the Union's 4/10 CWS proposal merely reflects the intent of the parties in 2007 to permit the EMDC dispatchers to have the same work schedule options as the rest of the employees the Union represents. Unlike the 5/8 schedule proposed by the Employer, where there would be no overlap between dispatcher shifts, the overlap under the 4/10 CWS would more effectively accomplish the EMDC's mission by allowing dispatchers to brief one another on the events of the day and any potential situations that may arise. In addition, contrary to the Employer's position, the overlap periods would permit dispatchers to complete vital training, the possibility of which is eliminated under the Employer's proposal. Thus, contrary to the Employer's position, the Union's proposed 4/10 CWS would not result in a reduction of the productivity of the Agency.

CONCLUSION

Under § 6131(c)(3)(C) of the Act, the Panel is required to take final action "not later than 60 days after the date the Panel is presented the impasse" in favor of the agency head's determination to terminate a CWS if the finding on which it is based is supported by evidence that the schedule has caused an "adverse agency impact." 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 finding on which it is based is 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."^{4/}

^{4/} See the Senate report, which states:

Having carefully considered the totality of the evidence presented, I conclude that the Employer has met its statutory burden by providing evidence, under § 6131(b)(3) of the Act,^{5/} both that the current 12½-hour daily work schedule is causing an adverse agency impact, and that the Union's proposed 4/10 CWS would cause an adverse agency impact. With respect to the former, the current schedule has included 7½ hours of built-in overtime per pay period since its inception in 2001, something which apparently was in the parties' mutual interest until the EMDC was severed from the Police Department and placed under a different command. The record amply demonstrates that the Employer has documented the substantial costs of such overtime, a point the Union tacitly concedes. As for the 4/10 CWS proposed by the Union, the record is also clear that it would substantially increase the costs of the Agency's operations because it would result in regularly scheduled overtime and additional overtime expenses due to dispatcher absences from duty, both of which would be avoided under the 5/8 schedule.^{6/}

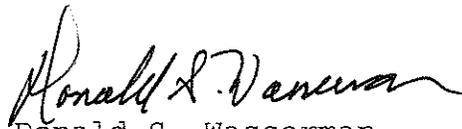
The agency will bear the burden in showing that such a schedule is likely to have an adverse impact. This burden is not to be construed to require the application of an overly rigorous evidentiary standard since the issues will often involve imprecise matters of productivity and the level of service 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).

5/ Contrary to the Employer's contention, in my view the evidence does not support a conclusion that the current schedule is causing, or that the 4/10 CWS would cause, a reduction in the productivity of the Agency, under § 6131(b)(1) of the Act. EMDC dispatchers essentially "produce" services, such as the monitoring of alarms, the receipt of calls, and the sending of units to respond to incidents and emergencies. There is no evidence in the record that dispatchers have failed to provide these services in the past under the current schedule or that more of these services would be provided under a 5/8 schedule.

6/ While I am constrained by the requirements of the Act to reach these conclusions, I nevertheless hope that the

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(a)(1) and (2) of its regulations, I hereby order that: (1) the 12½-hour daily work schedule of the EMDC dispatchers be terminated; and (2) the Union withdraw its proposed 4/10 CWS for the dispatchers.


Donald S. Wasserman
Arbitrator

February 28, 2012
Washington, D.C.

parties will reach an agreement on some form of CWS when they discuss this matter in the near future, as they promised to do during the mediation phase of the proceeding. In this regard, during mediation the data were insufficient to determine whether schedules other than the 5/8 would meet the Employer's interest in preventing built-in overtime, nor did the parties discuss creative solutions, such as staggered shifts. They are urged to consider all options when their discussions resume.