In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TEXARCANA, TEXAS

and

LOCAL 2459, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 12 FSIP 5

ARBITRATOR'S OPINION AND DECISION

This request for assistance from the Federal Service Impasses Panel (Panel), filed by the Union on October 11, 2011, under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, concerns a dispute that arose out of negotiations pursuant to an *Opinion and Decision* in *Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Texarkana, Texas and Local 2459, American Federation of Government Employees, AFL-CIO*, Case No. 09 FSIP 99 (February 13, 2010). In that decision, I found that the Employer had failed to meet its burden of proof under the Federal Employees Flexible and Compressed Work Schedules Act (Act), 5 U.S.C. § 6120, *et seq.*, by providing evidence establishing that the Union's proposed 4/10 compressed work schedule (CWS) for employees in the Correctional Services Department (CSD) would cause an adverse agency impact. I therefore issued a decision directing the Employer to bargain over the Union's proposal.

After an investigation of the instant request, the Panel directed the parties to mediation-arbitration by telephone with the undersigned.[1/] Accordingly, on March 27, 2012, a mediation-arbitration proceeding was held by telephone with the parties. During the mediation phase, the parties were unable to resolve the issues in their dispute, thereby causing the need for the undersigned to decide the matter in arbitration. By mutual agreement, the Arbitrator provided the parties until 5 p.m. on April 3, 2011, to submit any additional evidence and final statements of position to the Panel's offices. In reaching this decision, I have considered the entire record in this matter, including the parties' final offers and submissions made at the hearing.

The Employer operates a minimum security institution and a minimum-security camp in Texarkana, Texas. The Union represents a bargaining unit consisting of 190 employees. The parties are covered by a master collective bargaining agreement (MCBA) that was to have expired in 2001, but remains in effect until it is replaced by a successor agreement. The parties do not have a supplemental agreement in effect at the local level.

1/ Panel Member Edward F. Hartfield.

The CSD is responsible for the day-to-day custody and security of over 1,700 inmates. Most of the positions in CSD are subject to a bid rotation process every 3 months where some 110 bargaining unit employees bid on 84 posts of duty that cover all 3 shifts: (1) day watch - 7:30 a.m. to 4 p.m.; (2) evening watch - 4 p.m. to midnight; and (3) morning watch - midnight to 8 a.m. If employees are permitted to work a 4/10 CWS, their work hours would extend into another shift.

BARGAINING HISTORY

The parties bargained on numerous occasions since they were ordered back to the table. From August 23, 2010, through February 10, 2011, they participated in 16 negotiation sessions for a total of approximately 56 hours. On August 18, 2011, they met with an FMCS mediator for about 5 hours. On December 16, 2011, FMCS referred the matter to the Panel.

ISSUE AT IMPASSE

The parties' primary disagreement is over the number of posts in CSD that should be permitted to have a 4/10 CWS.

STATEMENT OF FINAL POSITION OF THE PARTIES

Before closing the record on this matter, I requested the parties to submit final statements of position for the Arbitrator. The Employer's final statement of position on the issue in dispute is as follows:

The Agency asserts that the Panel does not have jurisdiction over this case concerning CWS. It asserts that the MCBA, Article 18, covers and preempts all disputes about particular rosters issued pursuant to, and in compliance with, the procedures in Article 18, Section (d). In this regard, the Agency relies on *Federal Bureau of Prisons v. FLRA,* 654 F.3d 91 D.C. Cir. 2011), where the United States Court of Appeals for the District of Columbia Circuit has stated that "the procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures." Further, the Court states that § 7106(a) of the Statute gives the Agency an exclusive, non-negotiable right to assign work but, under § 7106(b), it may bargain with the representative of its employees over the 'procedures' it will use when it exercises that authority and the 'appropriate arrangements' it will make for employees 'adversely affected' by a particular action. An agreement prescribing such 'arrangements' and 'procedures,' that is, the "impact and implementation of an agency's management right, covers the content of the Agency's decision made under that rubric," 654 F.3d at 95. Therefore, the Agency has no further duty to engage in additional bargaining regarding work schedules of employees in the CSD at FCI Texarkana. Consequently, the Agency asserts that the Panel has no jurisdiction to arbitrate a dispute over CWS or impose a CWS.

The Agency further asserts that the Union's proposal would result in a loss of productivity, an increase in non-productive man hours, the need to hire additional staff, and a significant increase in the amount of overtime payments to cover posts left uncovered by the Union's proposal.

Finally, because the Agency wishes to protect its position in the event that the Panel *does* have the authority to arbitrate this case, the Employer submits the following as its final offer during the March 27 hearing:

The Agency proposes eight (8) 10-hour posts. These posts are as follows: (1) Special Housing Unit #4 Officer, Day Watch; (2) Phone Monitor, Day Watch; (3) Day Relief 5; (4) Day Relief 9; (5) Phone Monitor, Evening Watch; (6) Captain's Secretary; (7) Security Officer #1; and (8) Security Officer #2.

The Union's final statement of position on the issue in dispute is as follows:

In rejecting the Employer's assertion that the Panel lacks jurisdiction to arbitrate this matter because it is "covered by" Article 18, Sections d & g of the MCBA, the Union cites testimony offered by a regional Vice President on the applicability of the Article on the whole. The Union also points out that the current MCBA, Article 18, Section b, indicates "the parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level," and that any agreement reached by the parties will be forwarded to the Office of General Counsel for a legal and technical review.

The Union rejects the Agency's claim that productivity would be reduced under the Union proposal, asserting that more staff will be on duty during key times such as shift changes, serving meals, institution count times, movement in the Special Housing Unit, and open inmate movements. The Union also rejects the Agency's claim that the CWS proposal will result in an increase in 'non-productive man hours' as without merit or supporting evidence, stating that "the mere presence of a correctional officer is a deterrent to illegal, dangerous, and inappropriate inmate activities".

Finally, the Union rejects the Agency's concerns that the CWS proposal will result in significant cost increases in Sunday premium pay, night differential, and overtime usage. The Union's final offer proffered during the March 27 hearing is as follows:

The Union essentially proposes that a 4/10 CWS be implemented in the CSD. The CWS would consist of 28 biddable posts made available to bargaining unit correctional officers at FCI Texarkana. The Union requests that a pilot program be implemented on a 6-month trial period to evaluate the effective for the proposed 28 biddable posts. The Union also requests which posts on the custody roster will be utilized as compressed positions.

DISCUSSION

The analysis of this case must, of necessity, deal with two distinct problems: (1) the Employer's claim that the Panel lacks jurisdiction to arbitrate this matter; and (2) what the finding on the merits should be in the event that the Panel does, in fact, properly have jurisdiction on this case.

The jurisdictional question itself appears to have two distinct prongs: (1) Is the Union proposal for a CWS covered by the MCBA?; and (2) Is the case cited by the Agency as the basis for its position relevant and applicable?

In the first instance, the Agency maintains that Article 18, Sections 18 d & g of the MCBA establish the Employer's unilateral and unimpeded right to make all decisions regarding directing the workforce. An examination of Section d shows that the focus of that section is on "Quarterly Rosters for CSD employees," and a similar examination of Section g indicates that it addresses "Sick and Annual Relief Procedures" for CSD employees. Since neither of those two issues is in dispute here, I fail to see the relevance of the Agency's analysis.

More importantly, in Article 18, Section b, one does note the language that states: "The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 U.S.C." The section goes on to state that "any agreement reached at the local level will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review." And in Section b.2. the language continues: "if the review at the national level reveals that the agreement is insufficient from a technical and/or legal point of view, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule would have upon the Agency."

It appears, therefore, that the Agency is hoping that one would ignore the language in Article 18, Section b and proceed directly to the more ambiguous language of Article 18, Sections d & g, which this Arbitrator finds irrelevant.

Secondly, the Agency relies on the case of *Federal Bureau of Prisons v. FLRA,* 654 F.3d 91 (D.C. Cir. 2011) as the basis for challenging the jurisdiction of the Panel to arbitrate this matter. As noted above, the Court found that "the procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures." Since the Court concluded that "an agreement prescribing such 'arrangements' and 'procedures,' that is, the 'impact and implementation of an agency's management right, therefore covers the content of the agency's decision made under that rubric" (654 F.3d at 95), the Agency has no further duty to engage in additional bargaining regarding work schedules of employees in the CSD Department at FCI Texarkana.

While it may be easy to understand why the Court's decision appeals to the Employer, in the view of this Arbitrator, the case is substantially off point. The case revolves around the question of whether or not there was an obligation to bargain over the impact and implementation of the Federal Bureau of Prison's decision on "mission critical" positions. In overruling the decision of the FLRA in favor of the union, the Court found that Article 18 covered all roster positions. The case in question that the Employer is relying upon does not mention CWS. I believe, therefore, that the Employer's reliance on this case is flawed and overreaching.

With respect to the merits of this case, one might first turn to the question of whether comparable institutions have instituted CWSs and with what level of success. I might point out that I requested this information from the parties in both the 2009 and the 2012 cases, before the

hearings at the pre-hearing calls, during the hearings, and before the record was closed in both hearings. Finally, in the instant case, the Union has complied with my request in its post-hearing submission. In reviewing the document titled "Compressed Work Schedule Report," a quick scan of the more than 50 pages and even more institutions indicates more than 70 CWSs in place. One would suppose that the Employer would respond that many of the institutions are not similar in size and composition, that many of the work areas involved (largely Facilities, Unit Management, and Nursing) do not have the safety and security responsibilities of a CSD, nor might they have the same more senior bargaining unit composition that Texarkana FCI has. But one cannot give weight to those assumptions because the Employer chose not to respond, nor even to comment, on the document supplied on April 10 by the Union.

As to the Employer's claims of lost productivity and redundant man-hours, I cannot help but be suspicious about the Employer's annualizing the aggregate hours. In accepting the Employer's arguments, it wants us to believe that it will be paralyzed with the inability to make adjustments to a new and somewhat different staffing pattern. Nowhere does the Employer make a bona fide attempt to respond to the Union's assertion that there are no redundant, non-productive hours in a correctional institution, and when overlaps in shifts might arise, those overlaps can be deployed to provide additional security at critical times such as shift changes, serving meals, laundry service, etc.

There is a close parallel to the arguments raised by the parties relative to the impact of the CWS on overtime. The Union asserts that by its calculations, Sunday overtime actually diminishes, resulting in a savings to the Employer. The Employer relies on projecting some assumed increases in overtime costs at the same rate for an entire year. Again, does the Employer expect us to view them as unable to manage the amount of overtime hours in a more efficient fashion? Perhaps what is most disturbing is that the Employer's calculations are largely the same as what they were in 2009. The parties have spent more than 2 years negotiating in an attempt to resolve this one issue. Rather than agree to institute a pilot and collect some actual data on overtime, productivity, lost man-hours, and increased costs as well as improved morale, impact of the CWS on attendance, unscheduled absence and leave usage, the core of the reasons raised in 2009 to unsuccessfully support the Employer's attempt to prove an adverse agency impact remains largely unchanged.

This last point warrants further discussion. The very purpose of compressed and/or alternate work schedules is to improve morale, reduce unscheduled absences by creating greater balance between work and home life, provide for longer periods of time off on a regular basis, and in so doing, reduce the likelihood that employees would call in sick on an unscheduled basis. The basic theory would appear to be even more applicable in a federal correctional institution in which the employees are regularly exposed to stressful working conditions. I am hard pressed to find any reflection of the cost benefits of a CWS by the Employer.

Finally, the use of a pilot project approach to evaluate the implementation of a CWS is part of the parties' agreement, and has been part of the Union's proposal since my original involvement starting in 2009. I am again at a loss to find a logical basis for not being willing to pilot a CWS proposal given the ability to sit down after a specific period of time to evaluate the positive and negative effects of the schedule.

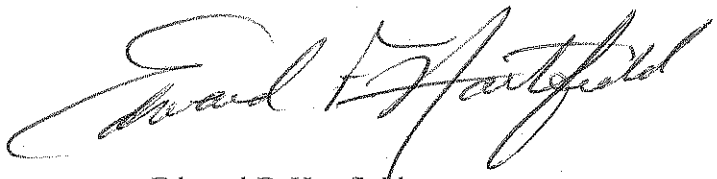
DECISION

Having carefully considered the evidence and arguments presented by the parties, I conclude that the Union's position provides the more compelling basis for resolving this dispute. Therefore, I order the Employer to undertake the following actions to resolve this impasse:

First, at the earliest possible convenience, but in no case later than August 1, 2012, unless otherwise mutually agreed by the Union, the Employer shall implement the Union's proposed CWS schedule for a total of 18 CSD positions. The 18 positions shall be comprised of the 8 positions previously offered by the Employer plus an additional 10 positions to be selected by the Union. The positions shall be rotated and posted on a 3-month basis as proposed by the Union. The Employer shall determine the regular days off for the 8 positions it has proposed and the Union shall determine the regular days off for the 10 positions it selects.

Second, the parties shall utilize the proposed CWS schedule for a period of 1 full year following the implementation date. At that time, and upon serving of written notice to each other, the parties shall jointly evaluate the impact of the CWS both positive and negative to determine whether or not it should be continued and if so, at what level of positions.

Third, the parties shall form a Joint CWS Committee for the purpose of setting up the criteria for evaluating the project, meeting on at least a quarterly basis to jointly review the data, and for making improvements to the process on a continuous basis.



Edward F. Hartfield
Arbitrator

June 1, 2012
St. Clair Shores, Michigan