United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ENGLEWOOD LITTLETON, COLORADO and LOCAL 709, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 06 FSIP 119

DECISION AND ORDER

Local 709, 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, Federal Correctional Institution Englewood, Littleton, Colorado (Employer), not to establish a 5-4/9 compressed work schedule (CWS) for an employee who works in the Product Support Center (Federal Prison Industries or UNICOR).

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 Andrea Fischer Newman, to be preceded by written submissions from the parties. The parties were advised that if no settlement were reached during the informal conference, Member Newman would notify the Panel of the status of the dispute, including the parties' final positions and her recommendation for resolving the matter. After considering this information, the Panel would take final action pursuant to 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of its regulations.

In accordance with the Panel's procedural determination, Member Newman conducted an informal conference by telephone with

the parties on December 7, 2006, following receipt of their written submissions. During the course of the teleconference, the parties discussed various alternatives, including an Employer proposal for a 5-4/9 CWS with a duty-free 30 minute lunch period and a mid-week regular day off (RDO); however, a voluntary resolution was not reached. Member Newman 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 facilities that are safe, humane, and secure. The Employer operates a medium-security institution for male inmates that includes a Product Support Center for a UNICOR facility where items such as furniture and electronics are produced by inmates for public sale. The Union represents a bargaining unit consisting of 285 employees; of those, approximately 25 work in the Employer's UNICOR operation. The parties' master collective-bargaining agreement (MCBA), which was to have expired in 2001, remains in effect until succeeded. There is a local supplemental agreement, which runs concurrently with the MCBA; however, the local agreement does not address compressed schedules.

The dispute arose during negotiations over the Union's proposal for a 5-4/9 CWS for an employee in the Tool and Die Shop of the Product Support Center, who holds the position of Industrial Specialist (metal products), GS-1150-12. The employee primarily supervises the work of inmates in the Tool and Die Shop.

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.[1/]

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

POSITIONS OF THE PARTIES

1. The Union's Position

The Union proposes to establish a 5-4/9 CWS for the Industrial Specialist consisting of work hours from 7 a.m. to 4 p.m., without a duty-free lunch break on 9-hour days, and 7 a.m. to 3:30 p.m. on the 8-hour day, which would include a 30-minute duty-free lunch break; the employee's RDO would fall on a Monday. The Employer has failed to demonstrate that the proposed schedule is likely to cause an adverse agency impact. Since the Employer also proposed a 5-4/9 CWS during bargaining, it cannot maintain, with any credibility, that a 5-4/9 CWS is likely to cause an adverse agency impact. In fact, prior to the Union's request for a 5-4/9 CWS for the employee, the Employer did not always require double coverage of the inmate work crew in the Tool and Die Shop, as it now contends is needed. Furthermore, during a recent overtime project that required the Tool and Die supervisor and the inmate crew to work into the evenings and on weekends, the Employer did not require double coverage.

When inmates are at lunch, and after 3:20 p.m. when they return to their Housing Units, the Industrial Specialist has plenty of work to do. Among other things, he has to research materials, equipment, and machinery; make calls to West coast factories; assist in the preparation of billing statements; monitor factory flow; provide factory support; and contact vendors. The proposed schedule would allow time for the employee to perform these duties without interruption. On those days when the employee is on an RDO, the second staff member in the shop, the Toolmaker supervisor, could adequately supervise inmate work in the shop; another employee, the Costing

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

Industrial Specialist, who has a window overlooking the Tool and Die Shop, also could observe inmates to detect illicit behavior.

2. The Employer's Position

The Panel should order the Union to withdraw its proposal because the Employer has met its burden under the Act by providing evidence that the proposed schedule is likely to result in an adverse impact upon agency operations. In this regard, it is difficult to find coverage for work performed by an employee who has a recurring absence every other Monday because other employees tend to request that day off for annual and sick leave. Employees providing such coverage would be taken away from their jobs, thereby reducing their productivity and diminishing the level of services they provide. In addition, the Tool and Die Shop requires two staff members to supervise inmate work crews because of the nature of the work performed by inmates in the shop. Finally, when inmates are on their lunch break and after they leave the Tool and Die Shop at 3:20 p.m., there is little work for the employee to perform to justify a 30-minute working lunch and a schedule that requires the employee to work until 4 p.m. on 9-hour days.

CONCLUSION

Under § 6131(c)(2) 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."[2/]

2/ 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

Having carefully examined the arguments and evidence presented, we conclude that the Employer has failed to meet its burden of establishing that the compressed schedule proposed by the Union is likely to result in an adverse agency impact. In this regard, its contention that a Monday RDO would create coverage problems resulting in a reduction in the productivity of other employees appears speculative. In addition, the Employer's claim that two employees are required to supervise inmates is undercut by its offer to implement, for a 6-month trial period, a 5-4/9 CWS that included an unpaid lunch and a mid-week RDO, and by the fact that for several months in 2006 a Tool and Die supervisor worked alone with an inmate work crew during an overtime assignment. For these reasons, we shall order the parties to bargain over the Union's proposal.[3/]

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

By direction of the Panel.

H. Joseph Schimansky
Executive Director

January 11, 2007
Washington, D.C.

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evidence presented. S. REP. NO. 97-365, 97th Cong., 2d Sess. at 15-16 (1982).

3/ The Senate Report also contains the following:

> If the Panel finds that there is not sufficient evidence to support a conclusion that an adverse impact will occur, it is expected that the Panel will direct the parties to fully negotiate out the particular schedule and not [] simply impose it on the agency. S. REP. NO. 97-365, 97th Cong., 2d Sess. 15-16 (1982).