

In United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HEALTH AND HUMAN
SERVICES
FOOD AND DRUG ADMINISTRATION
ARKANSAS REGIONAL LABORATORY
JEFFERSON, ARKANSAS

and

CHAPTER 254, NATIONAL TREASURY
EMPLOYEES UNION

Case No. 06 FSIP 128

DECISION AND ORDER

Chapter 254, National Treasury Employees Union (Union or NTEU) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Health and Human Services (DHHS), Food and Drug Administration (FDA), Arkansas Regional Laboratory (ARL), Jefferson, Arkansas (Employer).

After an investigation of the request for assistance, which arose after a private grievance arbitrator ordered the parties to negotiate over a local alternative work schedule (AWS) agreement, the Panel determined that the impasse should be resolved through an informal conference with Panel Member Joseph C. Whitaker. The parties were advised that if no settlement was reached during the informal conference, Member Whitaker would notify the Panel of the status of the dispute, including the parties' final offers and his recommendation for resolving the matter. Thereafter, the Panel would take whatever action it deemed appropriate to resolve the impasse, which could include the issuance of a Decision and Order.

In accordance with the Panel's procedural determination, Member Whitaker conducted an informal conference with the parties on January 5, 2007, at the ARL in Jefferson, Arkansas.

During the course of the meeting, possibilities for settling the dispute were explored, but a voluntary resolution was not reached.^{1/} Member Whitaker has reported to the Panel, which has now considered the entire record, including the parties' post-conference statements of position in support of their final offers.

BACKGROUND

The Food and Drug Administration (FDA) is a public health agency charged with safeguarding the health of Americans; specifically, it researches and approves drugs and medical devices for use, and safeguards a major part of the U.S. food supply. The ARL is one of three laboratories in the FDA's Southwest Region that primarily tests the safety of food, drugs, and cosmetics. The Union represents approximately 652 employees; 65 work at the ARL. The employees are mainly biologists and chemists, GS-11 through -13. The parties are covered by a collective bargaining agreement (CBA) that expired on October 23, 2004, but its terms and conditions continue by operation of law until a successor is effectuated.^{2/}

ISSUES AT IMPASSE

The parties disagree over a variety of AWS-related issues including whether their local AWS agreement should: (1) specify ARL's core hours; (2) require employees to obtain prior supervisory approval to work more than 10 hours per day or after 6 p.m. and on weekends; and (3) contain an expiration date.

1/ Member Whitaker's efforts were undercut by the Union's chief negotiator, who walked out of the informal conference prior to its conclusion. She did so even though the Panel's letter of November 16, 2006, clearly informed the parties that "because meetings under the Panel's auspices may require representatives to stay beyond the normal duty day, they should be prepared to make alternative arrangements." In the Panel's view, the conduct of the Union's chief negotiator was unprofessional.

2/ As the result of a decision by the Federal Labor Relations Authority to consolidate the bargaining units represented by NTEU throughout DHHS into one nationwide unit, the parties are currently negotiating at the national level over an initial CBA.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer's final offer is as follows:

In accordance with the provisions of the Collective Bargaining Agreement (CBA) between the United States Food and Drug Administration (FDA) and the National Treasury Employees Union (NTEU), Chapter 254, the parties agree as indicated below regarding Alternative Work Schedules (AWS):

1. The flexible time band to accomplish the basic work requirement for Any 80 will be 6 a.m. to 10 p.m. Monday through Saturday.
2. During the flexible time band in paragraph 1 above, employees must obtain prior supervisory approval to: a) work more than a 10-hour day; and b) work after 6 p.m. or on weekends.
3. Employees on AWS will provide their estimated daily arrival time and estimated hours per day to their supervisor prior to the start of the pay period. If an employee will arrive at work more than a half hour beyond that estimated for the day, they are to notify their supervisor.
4. The flexible time band to earn credit hours will be 6 a.m. to 10 p.m. Sunday through Saturday. Prior supervisor approval is required to earn or use credit hours.
5. ARL employees may only perform work in the Arkansas Regional Laboratory when there is a second qualified employee present. Employees must follow all laboratory procedures and must be in communication with each other while in the ARL facility. If a second qualified person is not working in the same lab room, the workgroup supervisor may approve the work to be performed by assessing the work requirements and risk, and determining the work conditions, proximity, and communications requirements to be maintained by the two qualified employees.

6. An employee who wishes to perform work, or needs to work to complete his/her required number of hours under the AWS, must ensure that another qualified employee will be available during the hours s/he requests to perform work and provide his or her supervisor the name of the other available qualified employee. If the two-person staffing requirement in paragraph 5 is not met, the employee will not be permitted to perform work.
7. Under no circumstances will an employee, without another qualified employee present in the same analytical lab room or suite, remain or work on their own volition with viable select agents or amounts of toxins as delineated on the CDC website for the Select Agent Program.
8. The ARL may alter or cancel an employees' AWS at any time pursuant to the provisions in the FDA/NTEU CBA, FDA AWS Master Plan, applicable law, rule, regulation, or this agreement.

This agreement will take effect upon signature of the parties and will expire on its one year anniversary date, or the effective date of a successor CBA, whichever occurs first.

Although the parties' bargaining was ordered by an arbitrator, this "neither abrogates nor abridges" the Employer's statutory or contractual rights to negotiate a local AWS agreement, in accordance with the provisions of Article 25 of the parties' CBA, that is "tailored to meet local needs [that do] not interfere with the ability of the organization to effectively meet its workload and programmatic objectives." Its proposed AWS agreement, particularly with respect to the arrival and departure times of employees working flexible work schedules, "reflects these contractually prescribed local factors and managerial issues." In this regard, the ARL is under the jurisdiction of the Office of Regulatory Affairs (ORA), which has a policy that work schedules not be established affording work days beyond 10 hours. In addition, "there is no regularly recurring amount of available work requiring more than a 10-hour day to accomplish." This is confirmed by the fact that there have only been 26 requests to work more than a 10-hour day from a total of 14 unit employees during the past year, and 17 of them were from 13 employees to work 10.5 hours. Thus, incidents

of work availability beyond 10 hours per day are rare, representing "unusual workloads outside the normal planned program work." This demonstrates that "there is no local need to supersede the existing ORA AWS policy maximum of 10 hours/day within the flexible band without supervisory approval."

It is also "rare that any work needs to be done on Saturdays" or Sundays, or after 6 p.m. on weekdays. Supervisory approval to work at these times is required, among other reasons, because of the lack of full security guard support, the lack of co-workers to accomplish the work in an efficient manner, the lack of supervision, and due to difficulty in providing adequate safety at such a remote facility. Moreover, if employees are at work in the building, regardless of when this occurs, the facility operates under "occupied" mode, "using significantly more energy and increasing costs." Thus, management must be permitted to approve after-hours work to ensure consistency with ORA's AWS policy "limitations due to increased operational/facility cost" and "facilities accessible w/o additional cost." Its proposal that employees on AWS provide estimated daily arrival and departure times prior to the start of the pay period is consistent with the CBA and existing ORA/FDA AWS policies by affording "management the methods and means to manage work schedules to allow the organization to meet local workload and programmatic requirements." The need for supervisors to know when employees are on site also "is heightened" because of the ARL's location next to a military arsenal with nerve agents. Furthermore, the portion of its final offer establishing a "date certain expiration date" is in accordance with DHHS policy and acknowledges that once the CBA between DHHS and NTEU becomes effective, AWS provisions would come into play that "may necessarily require the renegotiation of all local AWS agreements then in effect."

The Union's final offer is based on a Memorandum of Understanding in effect at the Southeast Regional Lab in Atlanta, Georgia, where "the locality conditions, staffing levels, workload, and an assigned late supervisor until 6:30 p.m., are all vastly different than at ARL." In addition, it includes core hours that are inconsistent with those currently established in the ORA AWS and Southwest Regional Office (SWRO) policies because they would apply to all days in the flexible band. The Employer questions the implied use of core hours on Saturdays, and contends that "at least one day during a pay period must be without core hours in order to meet the Maxiflex Any 80 requirements." Therefore, to eliminate confusion, the Union's attempt to establish alternate core hours should be

rejected by the Panel. Overall, the Employer's final offer should be adopted because it provides a "balanced AWS program for its employees" that also accommodates the workload and programmatic objectives of the ARL consistent "with the local conditions and realities at the ARL."

2. The Union's Position

The Union proposes the following wording:

A. Core Hours between 10:00 a.m. to 3:00 p.m.

B. Flexible Work Schedule Hours

1. The flexible time band to accomplish the basic work requirement and or to earn credit hours for individuals on alternative work schedules will be 6:00 a.m. to 10:00 p.m. Monday through Saturday.
2. Employees on alternative work schedules may work 12 hours any day, Monday through Saturday, as long as they do so between the 6:00 a.m. and 6:00 p.m. flexible time band. When an employee decides to work 12 hours within the flexible band, he/she will inform his or her supervisor either prior to completing the day or the next day, if their supervisor has already departed for the day.
3. A supervisor must approve all earning/using of credit hours in advance.

C. Staffing Requirements for the Arkansas Regional Laboratory

1. Employees may not enter, remain or work in the laboratory prior to 6:00 a.m.
2. Employees may not remain or work in the laboratory without meeting the minimal staffing requirement of two qualified employees, as specified in this agreement.
3. Work on the Weekend

- a. Employees who have agreed to work together on the weekend, to ensure minimum staffing requirements, are required to sign in and out at the Security Guard's station located at the main entrance of Jefferson campus.
 - b. Employees who wish to work on weekends will provide the name of the other qualified working employee to their supervisor prior to the weekend.
 - c. An employee who wishes to work, or needs to work to complete his/her required number of hours under the AWS, and reports to work, must ensure that the minimum staffing requirements are met.
 - d. Employee will notify their supervisor when they wish to work a Saturday and if the minimum staffing requirement is met, and the Saturday work does not negatively impact work scheduled during the normal work week, permission will be granted.
 - e. If the minimum staffing requirements are not met, the employee may not remain at work.
4. Work after 6:00 p.m.

When an employee wants to work beyond 6:00 p.m., he/she must:

- a. Obtain his/her supervisor's or acting supervisor's approval and must provide the name of the other employee that is to work beyond 6:00 p.m.
- b. Communicate to the supervisor the type of work (i.e. lab or administrative) that he/she plans to perform.
- c. Sign out at the Security Guard's station when exiting the campus.

- d. No employee may work beyond 6:00 p.m. unless they find another qualified employee that is willing to work after 6:00 p.m.
- e. No employee, without another qualified employee present in the same analytical room, may remain or work on their own volition with viable select agents or amounts of toxins as delineated on the CDC Website for Select Agent Program.

Its proposed core hours "are identical with the parties' National Memorandum of Clarification regarding AWS core hours" that were incorporated into the SWRO AWS agreement the arbitrator found applicable to the ARL, and the Employer "has presented no evidence that would warrant changing this provision." The Employer also has produced no evidence that permitting employees to work 12 hours per day, Monday through Saturday, between 6 a.m. and 6 p.m., without prior supervisory approval, would negatively impact productivity, increase costs, or reduce its ability to serve its clients. In addition, the currently applicable AWS agreement "contains no restriction on the number of work hours an employee may work between the time bands." Requiring prior supervisory approval "merely adds an unnecessary bureaucratic layer," and would serve no purpose other than to deprive employees an opportunity to work a 12-hour day "because the supervisor is either unavailable or does not act on the request, resulting in an effective denial."

The Employer's proposal to limit the application of the local AWS agreement to Any 80 maxiflex schedules "contravenes" the arbitration decision that gave rise to the parties' current impasse. Moreover, the Employer has failed to justify the exclusion of Any 8 or Any 40 flexible schedules from the agreement. There also is "no justifiable rationale" for limiting an employee's ability to work beyond 10 hours on any given day without first obtaining supervisory approval. In this regard, if an employee has previously been approved to work AWS, the supervisor already has determined the ARL "will not be negatively affected in performing its assigned work." Employees also do not have daily assigned work requirements but work on assignments for a period of time, further undercutting any need for the Employer's proposed restrictions. With respect to whether employees on AWS should be required to provide estimated daily arrival and departure times prior to the start of the pay

period, the Employer's proposal is "improper" because this matter "was never discussed either in bargaining or before the Panel Member." Thus, "NTEU has been deprived of the opportunity to bargain to impasse over it and, therefore, it is not a valid proposal." Nor has management documented any productivity or cost-related problems that demonstrate a need for this "unnecessary bureaucratic step."

The Employer's proposed requirements in connection with the performance of laboratory work, e.g., the need to have more than one qualified employee present and for communication between employees while in the ARL facility, "are bureaucratically inefficient to the Agency's ability to complete its mission and productivity." In particular, proposal 5 "lacks specificity" and is "overly broad" by, among other things, failing to define which employee has the responsibility of notifying the workgroup supervisor when the situation occurs that only one employee is remaining in the laboratory. Rather, "management should be able to determine in advance based upon the type of work being performed the necessity of having two qualified employees present at all times." Finally, the CBA establishes the specific conditions that must obtain "for altering or temporarily changing" an employee's AWS, and the parties cannot bargain a local agreement that "contravenes" its provisions. Therefore, where the Employer's proposal references "this agreement" as a basis for altering or canceling AWS schedules, "it would [be] unenforceable."

CONCLUSIONS

Having carefully considered the evidence and arguments presented by the parties in support of their positions, we conclude that, on balance, the Employer's final offer provides the better basis for resolving the dispute. Preliminarily, it appears that there is now very little substantive disagreement between the parties on the concerns the arbitrator specifically ordered them to address during bargaining over their local AWS agreement.^{3/} At this point, their dispute is mainly over whether employees should be permitted to work more than 10 hours per day, or after 6 p.m. or on weekends, only if they have received prior supervisory approval. In this regard, we are persuaded on

3/ The arbitration award states that the parties' negotiations should "tak[e] into consideration the concerns of the Union about working before 6 a.m. or after 6 p.m. and the Agency's concern regarding the safety of its employees while working in the laboratory."

the basis of the record that employees at the ARL normally do not need more than 10 hours per day to accomplish their work requirements. In our view, the Employer's expressed interest in limiting employees' work hours outweighs their need for the increased flexibility proposed by the Union. Accordingly, we shall order the adoption of the Employer's final offer, with the exception of provision 3. In agreement with the Union, it appears that the issue of whether employees on AWS should be required to provide estimated daily arrival and departure times prior to the start of the pay period was never the subject of negotiations or mediation prior to the Panel's determination to assert jurisdiction over the dispute.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the parties' failure to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under § 2471.11(a) of its regulations, hereby orders the following:

The parties shall adopt the Employer's final offer, with the exception of provision 3.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

March 26, 2007
Washington, D.C.