

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
CITY VIEW PLAZA POST OF DUTY  
GUAYNABO, PUERTO RICO

and

CHAPTER 193, NATIONAL TREASURY  
EMPLOYEES UNION

Case No. 10 FSIP 52

DECISION AND ORDER

The Department of the Treasury, Internal Revenue Service, City View Plaza Post of Duty (POD), Guaynabo, Puerto Rico (Employer or IRS), 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 Chapter 193, National Treasury Employees Union (Union or NTEU).

Following an investigation of the request for assistance, which arose after the Employer decided to relocate its POD from privately-owned space at Mercantil Plaza to privately-owned space at City View Plaza, the Panel directed the parties to show cause why it should not adopt the recommendations of a private factfinder to resolve their impasse.<sup>1/</sup> In accordance with the

---

1/ The parties voluntarily engaged the services of the factfinder pursuant to a national level settlement agreement which essentially adopted Article 15 of their 2006 National Agreement (NA) as the interim procedure to be followed at the local level for negotiations involving reassignment/realignment of employees or changes to space, furniture and leases. Article 15, Section 3, of the 2006 NA states that any dispute related to relocation will be submitted to a factfinder who will then recommend a

(Cont.)

Panel's instructions, the parties submitted initial responses to the Panel's *Order to Show Cause*, and the Union submitted a rebuttal statement. The Panel has now considered the entire record.

### BACKGROUND

The Employer's mission is to fairly enforce tax laws, respect taxpayer rights, collect taxes and help educate the taxpayer. The Union represents approximately 90,000 professional and nonprofessional employees nationwide at the IRS headquarters, service centers, regional offices and numerous field offices. Approximately 97 unit employees were affected by the relocation to City View Plaza.<sup>2/</sup> The IRS/NTEU NA covering these employees is due to expire on September 30, 2014.

In paragraph 1 of his recommendation, the factfinder adopted a modified version of the Union's final offer, which contained four proposals, to resolve their dispute. At this point, only the factfinder's recommendation with respect to Union Proposal 1 appears to be in dispute.<sup>3/</sup> With respect to

---

resolution to the parties. Any disputes remaining after submission to the factfinder will be resolved by the Panel.

2/ Although it is unclear from the record exactly when employees were relocated, a 10-year lease for space at City View Plaza was signed on July 17, 2007, that set employee parking rates at \$90 per month for years 1-5 and \$105 per month for years 6-10. On November 19, 2008, the Union filed a "mass grievance" against the Employer for failing "to comply with the applicable contract provisions when procuring space for the purpose of relocating employees who are currently stationed at the Mercantil Plaza site." A second 10-year lease was signed on February 17, 2010, that set employee parking rates at \$90 per month for years 1-5 and \$110 per month for years 6-10.

3/ In paragraphs 2-4 of his recommendation, the factfinder did not adopt Union Proposal 2 that free employee parking be determined to be "mission critical"; he recommended that the Employer provide certain parking-related information and bulletin board space on Union Proposal 3, but declined to recommend that the parties' agreement be reopened based on the increased availability of public parking; and on Proposal 4, he recommended that the Employer provide

(Cont.)

Union Proposal 1, in addition to requiring the Employer to contact the General Services Administration (GSA) to renegotiate the lease with the private landlord at City View Plaza to set the parking rate for unit employees at no more than \$50 per month, the factfinder amended the proposal to require that the rate not increase in year 6 of the lease when the IRS's rental rate goes down. The factfinder also recommended that "the adjustment in rates shall be accomplished by an addendum to the lease or by other means chosen by the [IRS], without using appropriated funds to pay for employee parking."

### ISSUES AT IMPASSE

The parties disagree over whether the factfinder's recommendations should be imposed to resolve the parties' impasse, particularly those portions that would require the Employer to: (1) request GSA to renegotiate the lease with the private landlord to set the parking rate for all employees assigned to City View Plaza at no more than \$50 per month per employee over the entire 10-year period of the lease; and (2) accomplish the adjustment in parking rates by an addendum to the lease or by other means without using appropriated funds to pay for employee parking.

### POSITIONS OF THE PARTIES

#### 1. The Union's Position

The Union urges the Panel to impose the factfinder's recommendations on the parties. Among other things, the factfinder concluded that there was little or no mass transit available at City View Plaza. Contrary to the Employer's position before the factfinder and the Panel, transportation is not readily available at City View Plaza. This is confirmed by the Union's recent survey of unit employees where only 1 of the 70 respondents acknowledged using or being able to use public transportation. Even the recent evidence the Employer provided to the Panel states: "The inner-city public bus transportation system . . . that operates in the Greater San Juan Metro Area is considered unreliable by most people, and it does not have a

---

information to the Union, and request information from GSA, only pertaining to the relocation of employees from Mercantil Plaza to City View Plaza to the extent not precluded by law, and not "all information pertaining to any other office relocation," as requested by the Union.

regular schedule." The factfinder also found that \$50 per month was the appropriate market rate based on anecdotal evidence provided by the Union. Although it had ample opportunity to refute that figure before the factfinder, the Employer "failed to establish the lowest parking rate paid by tenants of City View Plaza," so his findings in this regard also should not be disturbed.

The factfinder further concluded that "the parking rate increase beginning in the 6<sup>th</sup> year of the lease was a *quid pro quo* for a decrease in the rental rate because the [IRS] failed to give an alternate explanation." Management asserts for the first time in its response to the Panel's *Order to Show Cause* that the rental rate decrease is due to "Tenant Improvements" not being included in years 6-10 of the lease. Because this explanation was not presented to the factfinder "the Panel should reject it as untimely." In addition, the Employer erroneously believes that, because GSA requested to renegotiate the lease with the landlord after the lease had been finalized, it has done what the factfinder recommended, but it "conveniently ignores" the rest of his recommendation. One of the main reasons for the factfinder's recommendation was his conclusion that IRS violated the NA and failed to comply with its own Parking Policy when it engineered the relocation. Given this fact, the Panel "must ensure" that the Employer is held accountable for its actions and failures. In summary, because the parties specifically authorized the factfinder to make findings of fact and issue recommendations resolving the impasse, they "should be given considerable deference and should not be disturbed unless unlawful."

## 2. The Employer's Position

The Employer "requests that the Panel determine that the factfinder's recommendation with regard to [P]roposal 1 should not be adopted." GSA already approached the landlord on behalf of IRS during mediation and requested to renegotiate the parking rates but the landlord refused, indicating that the rates would go up rather than down. Therefore, imposing that portion of his recommendation would be pointless. In addition, other than acknowledging that appropriated funds could not be used to lower the cost of employee parking, the factfinder provides no further guidance as to how the \$50 monthly rate should be effectuated if the landlord refuses to renegotiate the lease. In this connection, he specifically rejected the Union's proposal that

parking be found to be "mission critical" in that event.<sup>4/</sup> While the Union at one point alleged that non-appropriated funds could be used for this purpose, after the Employer explained that such funds are subject to the same limitations and controls as appropriated funds, it "apparently agreed, stating that '. . . it appears that non-appropriated funds may not be used'."

In reaching his conclusion that free employee parking in this instance is not "mission critical," however, the factfinder stated that he was not convinced that public transportation was "easily available." In fact, bus, trolley and train service are all available to and from City View Plaza. Nor is there evidence supporting the factfinder's conclusion that the appropriate market rate for parking at City View Plaza is \$50 per month. Instead, GSA confirmed that some tenants pay as much as \$140 per month and those without special rates pay \$210 per month, so the Union's assertion, based on anecdotal evidence, that \$50 is the appropriate market rate "is completely without merit." Finally, the factfinder also erroneously concluded that IRS "may" have negotiated high parking rates in order to achieve lower rental rates during the last 5 years of the lease. The two events are "completely unrelated." The Employer's expenses for years 1-5 of the lease include Tenant Improvements, i.e., non-structural alterations to an existing space made to accommodate the specific needs of a lessee that the landlord pays for at the start of the lease, which are reimbursed by the IRS during those first 5 years. Since there are no more Tenant Improvements to be made by year 6 the rent decreases.

#### CONCLUSIONS

Having carefully considered the parties' responses to our *Order to Show Cause*, we are constrained to adopt a modified version of the factfinder's recommendation to resolve their impasse. Generally, the Panel is deferential to factfinders' recommendations, particularly where extensive efforts are made to develop the record, the recommendations are supported by clear rationale, and they otherwise appear to be legal. In this case, the portion of the factfinder's recommendation requiring the Employer to adjust the parking rate to \$50 per month, even if the landlord is unwilling to renegotiate the lease, appears to be illegal since there are no funds that can properly be used

---

<sup>4/</sup> Under IRS's Parking Policy, if it is found to be "mission critical," the Employer is permitted to provide employees with free parking.

to subsidize employee parking in the absence of a finding that parking is mission critical.<sup>5/</sup> Accordingly, we shall order the Employer essentially to comply with the other portions of paragraph 1 of the factfinder's recommendation. While the Employer may have unilaterally preempted part of that recommendation, there is insufficient evidence in the record concerning the parking rates of the other tenants in the building, including the parking rates paid by other Federal tenants which should already be in GSA's possession. Although it appears unlikely, requiring that the Employer take these steps may result in a different outcome if undertaken as part of a decision imposed by the Panel. At the very least, however, ascertaining the facts as to what other tenants actually pay for parking, including what other Federal employees pay, could assuage employees' concerns that they are being treated unfairly or provide additional evidence for an arbitrator to consider if the Union decides to pursue its "mass grievance" to arbitration.

#### 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 failure of the parties 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 paragraphs 2 through 4 of the factfinder's recommendation as written, and paragraph 1, as modified below:

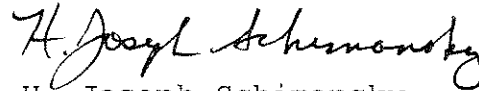
The Employer will contact GSA and request that GSA renegotiate on behalf of all unit employees assigned to City View Plaza a reduced parking rate commensurate with the rate other tenants in the building, including

---

<sup>5/</sup> In its pre-jurisdictional submission to the Panel, the Employer cites Office of Management and Budget (OMB) Circular No. A-25 and Comptroller General decisions stating that the use of user fee revenue and reimbursable resources (i.e., non-appropriated funds) "are subject to the same statutory controls and restrictions applicable to appropriated funds." In its response to the Employer's submission, the Union concedes that "it appears that non-appropriated funds may not be used."

other Federal tenants, pay for parking. The Employer also will request GSA to provide that information to the Union, along with the parking rates paid by other Federal tenants already in GSA's possession.

By direction of the Panel.



H. Joseph Schimansky  
Executive Director

July 2, 2010  
Washington, D.C.