

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
VAN NUYS POST OF DUTY
VAN NUYS, CALIFORNIA

and

CHAPTER 233, NATIONAL TREASURY
EMPLOYEES UNION

Case No. 12 FSIP 61

DECISION AND ORDER

The Department of the Treasury, Internal Revenue Service (IRS), Van Nuys Post of Duty (POD), Van Nuys, California (Employer or Agency) 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 233, National Treasury Employees Union (Union or NTEU).

Following an investigation of the request, which concerns the recommendation of Factfinder Robert M. Hirsch regarding an increase in rates charged to employees for parking at the Corman Federal Building in Van Nuys, California, the Panel determined that the matter should be resolved through an *Order to Show Cause (OSC)*. Under this procedure, the parties were directed to show cause why the December 21, 2011, recommendation of the Factfinder should not be imposed to resolve the parties' dispute, to the extent it otherwise appears to be legal. The parties were advised further that after considering the entire record the Panel would take whatever action it deems appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*. Responses to the OSC were submitted in accordance with the procedural determination, and the Panel now has 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. Chapter 233 currently represents approximately 93 unit employees at the Van Nuys POD. The IRS/NTEU National Agreement (NA) covering these employees is due to expire on September 30, 2014.

In June 2007 the Employer passed along to affected employees an increase in the cost of parking established by the General Services Administration (GSA). The rate was raised to \$36 per month for surface parking and \$51 per month for structure (underground) parking; prior to the increase, the rates were \$5 and \$15, respectively. The Union filed a grievance over the change that was sustained by an arbitrator on March 19, 2010. The arbitrator found that the Employer violated the Union's right to negotiate over the subsidization of employee parking rates, and ordered the Employer to: (1) return the rates to their previous level; (2) refund each current employee who paid the higher rates the difference between the pre- and post-June 2007 parking rate within 4 months; and (3) provide the Union with the opportunity to negotiate over subsidies before changing the parking rate at the Van Nuys POD. The Employer subsequently filed exceptions to the arbitrator's award. In *U.S. Department of the Treasury, Internal Revenue Service and NTEU, Chapter 233*, 66 FLRA No. 25 (September 19, 2011) (*IRS and Chapter 233*), the Federal Labor Relations Authority (FLRA) set aside the parking reimbursement remedy, finding that personal commuting expenses, including parking costs, are not reimbursable under the Back Pay Act (BPA), 5 U.S.C. § 5596, but sustained the remaining portions of the arbitrator's award.

The parties sought the services of the Factfinder after failing to reach agreement following the FLRA's decision to sustain the portion of the grievance-arbitrator's remedy requiring the Employer to provide the Union with the opportunity to negotiate over parking subsidies before changing the parking rate at the Van Nuys POD.^{1/} The Factfinder's recommendation is as

^{1/} The parties voluntarily engaged the services of a factfinder pursuant to Article 15, Section 3(a)(4) of their NA. By mutual agreement, the factfinder is required to recommend a resolution of the bargaining impasse to the

follows:

The Agency should be allowed to pass the cost of parking, established by the GSA at the Van Nuys POD, along to the Agency employees. The rate is currently \$36 per month for surface parking and \$51 per month for structure parking. Because the Agency charged those increased rates when it should have maintained the *status quo* and bargained with the Union over the subsidy issue, the Agency should give a credit to each affected employee who continues to park at the facility. The credit should be based upon the difference between the original rates from the date the increase was passed along to the employees until it was stopped.^{2/}

In support of the portion of his recommendation permitting the Employer to pass the cost of parking established by GSA along to employees, the Factfinder stated that "the Agency never agreed to anything more than to provide parking to its employees at the Van Nuys POD at cost" and that past practice "suggests that the GSA parking assessment was passed along by the Agency to the employees who parked at the GSA parking facility."

ISSUES AT IMPASSE

The parties disagree over which parts of the Factfinder's recommendation the Panel should impose to resolve their dispute over the Employer's 2007 decision to pass along the cost of parking established by the GSA to employees at the Van Nuys POD.

POSITIONS OF THE PARTIES

1. The Union's Position

The Panel should not impose the first part of the Factfinder's recommendation, i.e., instead of charging employees \$36 per month for surface parking and \$51 per month for

parties. Any disputes remaining after submission to the factfinder are to be resolved by the Panel. If the parties accept the factfinder's recommendation, they split the costs of the factfinding. If a party objects to the recommendation, it pays the full cost of the factfinding.

^{2/} The higher rates were charged from June 2007 until November 19, 2011.

structure parking, the Union proposes that employees be charged \$5 per month for parking on the surface lot and \$15 per month in the underground parking garage at the Corman Federal Building. In addition, the Panel should impose the second part of the recommendation granting affected employees who continue to work at the facility a credit based upon the difference between the original rates from the date the increase was passed along to the employees until it was stopped.

As to what employees should pay to park at the Van Nuys POD, requiring the Employer to charge the pre-June 2007 rates is justified for safety reasons. In this regard, the POD is in a relatively high crime area and charging low monthly rates would encourage employees to park within the secure confines of the Corman Federal Building rather than in commercial lots located more than one block away.^{3/} The adoption of lower rates also is consistent with the IRS's own policies permitting it to provide free parking if necessary to ensure that employees have a safe work environment. Moreover, the lower parking rates are "reasonable as a matter of cost," i.e., they are a "reasonable compromise" because at least three other federal agencies provide their employees with free parking at the Corman Federal Building and the IRS offers, or will soon offer, free parking for employees at several other PODs in the Los Angeles and Orange County area. The cost of its proposal is "mitigated" by the fact that only 25 bargaining unit employees, not all of whom park at the Corman Federal Building, will remain there by the end of the fiscal year when IRS opens the new Santa Clarita POD.

The second part of the Factfinder's recommendation should be imposed because "the Agency has not cited, and the Union was unable to find, any case law indicating that accepting this proposal would be contrary to law." On its merits, the Factfinder's recommendation to provide a credit to each affected IRS employee is "reasonable and just" because the Employer unilaterally raised the parking rates without negotiating with the Union and has had "the use of those excess fees for as many as 6 years now." Finally, the cost of adopting the recommendation would be minimal because the credit does not apply to employees who already have left the Agency or to those

^{3/} In support of its contention, the Union submitted a June 3, 2009, article from the dailynews.com website reporting on a decision by a Los Angeles Superior Court judge granting an injunction against one of the San Fernando Valley's largest street gangs, creating a special safety zone that includes the Corman Federal Building.

who will soon be reassigned to the Santa Clarita POD.

2. The Employer's Position

The first part of the Factfinder's recommendation should be imposed on the parties, *i.e.*, "employees should be required to continue to pay the cost of parking their personal vehicles." The second part of his recommendation, on the other hand, "is illegal, contrary to existing regulation and cannot be adopted." As to the first part of the recommendation, permitting the Employer to pass the cost of parking established by GSA along to its employees "is consistent with past practice, consistent with applicable case law and consistent with the FLRA decision rendered in the present matter." In this connection, it is well settled that employees engaged in commuting between their residences and official duty stations are performing personal business and that employing agencies are prohibited from paying such costs under the Travel Expense Act, 5 U.S.C. § 5701, and the Federal Travel Regulations, 41 C.F.R. part 300-1e.^{4/} At the Van Nuys POD, "the parking expenses at issue are and have always been for parking employees' personal vehicles used for commuting between their residences and their official duty stations." Thus, the Panel must adopt the first part of the Factfinder's recommendation to resolve this portion of the parties' dispute.

The second part of the Factfinder's recommendation requiring the Agency to give a credit to each affected employee who continues to park at the facility is "similar" to the reimbursement remedy the FLRA set aside in *IRS and Chapter 233* because it was contrary to the BPA. Its "practical effect" is "to subsidize the cost of employees' personal commuting expenses far into the future." Because both remedies require the Agency to reimburse employees' personal commuting expenses they are contrary to the Travel Expense Act and the Federal Travel Regulations. In addition, "the only discernible difference" between the second part of the Factfinder's recommendation and the arbitrator's reimbursement remedy "is when the Agency is required to pay the subsidy, now or in future installments."

^{4/} The Employer cites, among other things, *National Council of Field Labor Locals, Local 2513, AFGE and U.S. Department of Labor, Employment Standards Administration, Region 2*, 29 FLRA 451 (1987), *NTEU and Family Support Administration, DHHS*, 30 FLRA 677 (1987), *AFGE, AFL-CIO, Council 236 and GSA*, 9 FLRA 825 (1982), and *In the Matter of Frank A. Conforti*, CBCA 828-TRAV (2007), to support its legal claims.

Regardless of when such payments are made, based on *IRS and Chapter 233* and the supporting case law and regulations, "the Agency is precluded by regulation from reimbursing employees' for personal commuting expenses." Finally, because only 12 to 15 of the affected employees are likely to remain at the Van Nuys POD after July 2012, "providing reimbursement as a credit over an extended period into the future is no longer practicable." Parking at the Santa Clarita POD will be free and, therefore, "even if such a remedy was legal, future credit would not reimburse those employees."

CONCLUSIONS

Having carefully considered their responses to the OSC, we conclude that neither party has shown cause as to why the recommendation of the Factfinder should not be imposed to resolve the parties' dispute. As a general matter, where parties have selected a private factfinder to assist in the resolution of a bargaining impasse, the Panel will normally defer to the factfinder's recommendation, particularly if it is supported by clear and convincing rationale and appears to be legal. To do otherwise would undercut the effectiveness of the procedure the parties have mutually agreed to adopt by encouraging them to view the factfinding process merely as a stepping stone on their way to the Panel.

Turning to the first part of his recommendation, the Union contends for a variety of reasons that the Panel should impose the pre-2007 parking rates instead of the most recent ones established by the GSA at the Van Nuys POD. In our view, the Factfinder supported this part of the recommendation with clear and convincing rationale and the Union has failed to show cause why it should not be imposed. With respect to the second part of the Factfinder's recommendation, the Employer's primary argument to the Panel is that its adoption would be inconsistent with the FLRA's decision in *IRS and Chapter 233* because it would require the Agency to reimburse employees' personal commuting expenses, contrary to the requirements of the BPA, the Travel Expense Act and the Federal Travel Regulations. In *IRS and Chapter 233*, however, the FLRA rejected the Employer's claim that it had no duty to bargain over the parking increase because it lacked discretion to determine what GSA would charge the Agency for parking spaces, stating that "there is no basis for finding that the Agency lacks discretion to determine what it will charge employees for those spaces."^{5/} The FLRA also

^{5/} *IRS and Chapter 233* at 123.

reaffirmed its previous holdings that where, as here, "an agency has leased parking spaces through the GSA, proposals requiring management to subsidize employee parking costs are within the duty to bargain."^{6/} For these reasons, we do not see the second part of the Factfinder's recommendation as inconsistent with law or the FLRA's decision and conclude that the Employer has not shown cause as to why it should not be imposed. Accordingly, we shall order the adoption of the Factfinder's recommendation, in its entirety, to resolve 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 failure of the parties to resolve their impasse during the course of proceedings instituted pursuant to 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 Factfinder's recommendation in its entirety.

By direction of the Panel.



H. Joseph Schimansky
Executive Director

June 21, 2012
Washington, D.C.

^{6/} *IRS and Chapter 233*, footnote 5 at 123. The Employer also appears to have overlooked the fact that the FLRA sustained the portion of the arbitrator's remedy requiring the IRS to return the parking rates to their pre-violation levels while the parties negotiated over future changes to the parking rates. This means that the IRS effectively has been subsidizing the affected employees' parking expenses since November 19, 2011. Thus, application of its logic in the instant case would lead to the contradictory conclusion that the FLRA's decision in *IRS and Chapter 233* is itself contrary to the requirements of the BPA, the Travel Expense Act and the Federal Travel Regulations.