

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE NAVY
NORFOLK NAVAL SHIPYARD
PORTSMOUTH, VIRGINIA

AND

LOCAL 4015, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 92 FSIP 109

DECISION AND ORDER

Local 4015, American Federation of Government Employees, AFL-CIO (Union), filed a request for assistance with the Federal Service Impasses 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 the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia (Employer).

After investigation of the request for assistance, the Panel directed the parties to meet informally with Staff Associate Gladys M. Hernandez for the purpose of resolving the impasse concerning overtime pay for three journeymen inspectors who were denied assignment to "tiger teams"^{1/} in favor of apprentice inspectors. The parties were advised that if no settlement were reached, Ms. Hernandez would report to the Panel on the status of the dispute, including the parties' final offers, and her recommendations for resolving the impasse. After considering this information, the Panel would take whatever action it deemed appropriate to resolve the impasse, including the issuance of a binding decision.

Ms. Hernandez met with the parties on September 30, 1992, at the Employer's offices in Portsmouth, Virginia, but the parties were unable to reach a settlement. Thereafter, the parties submitted their final proposals and position statements in writing. She has reported to the Panel based on the record developed by the parties, and the Panel now has considered the entire record.

^{1/} These teams are made up of inspectors selected for travel to perform off-base jobs and can involve lucrative overtime assignments.

BACKGROUND

The Employer's mission is to repair, overhaul, and maintain naval vessels. The Union represents approximately 350 WG-11 through -15 inspectors who inspect the work of mechanics on the ships. The parties' collective-bargaining agreement (CBA) was due to expire on April 27, 1991; however, it remains in effect until a successor is implemented.

The disputed issue first was addressed during negotiations which ensued after the Union filed an unfair labor practice (ULP) charge to protest the Employer's selection of an apprentice rather than a journeyman inspector for a "tiger team" assignment in violation of the longstanding Nondestructive Test Division's (Code 135) "tiger team" selection practice. Under that practice, only journeymen inspectors (those with more than 4 years of on-the-job and academic training) are eligible for "tiger team" assignments. Those assignments are made from among (1) journeymen with the requisite qualifications whose names are on the volunteer travel list or (2) other qualified journeymen on an involuntary basis if, for example, (a) those on the volunteer list choose not to take the assignments or (b) management determines that workload requirements or their specific qualifications or training dictate that they remain at the Shipyard. A new "tiger team" selection procedure was agreed upon by the parties on November 8, 1991. Thereafter, the Union withdrew the ULP. Also, it again requested that the Employer compensate the journeymen inspectors on the volunteer list, who had been denied "tiger team" assignments in favor of apprentices, for the overtime wages they would have earned had they been selected. The dispute herein stems from resumed negotiations over that matter.

In its request for assistance, the Union contended that two such assignments were given to apprentices rather than journeymen while negotiations over a new selection procedure were in progress. Documents released to the Union by the Employer pursuant to an order of the Panel, however, reveal that there were three. Moreover, a second review of the volunteer travel list conducted by the Union after release of such documents shows that different employees, from those it originally identified, wrongfully were denied voluntary assignment to the first two "tiger team" jobs in question.

ISSUE

Whether the three journeymen inspectors identified by the Union as having been improperly denied voluntary assignment to "tiger teams" for which they were qualified should be compensated for overtime wages they lost as a result.

POSITIONS OF THE PARTIES1. The Union's Position

The Union proposes that three specific journeymen inspectors be compensated for their lost overtime wages. The amount would be calculated by subtracting the Code 135 overtime hours which they worked from the "tiger team" overtime hours worked by the apprentices. It is "just, fair, and equitable" to compensate these employees for monies they would have earned had the Employer not departed from the practice of giving "tiger team" assignments exclusively to journeymen, without first negotiating with the Union.

As to the Employer's alternative proposal to give priority consideration for future such assignments to the two journeymen originally identified by the Union as having lost previous assignments to apprentices, it should not be adopted by the Panel. Doing so only would create resentment among Code 135 inspectors, all of whom are satisfied with the new negotiated selection procedure.

2. The Employer's Position

The Employer proposes that the Panel relinquish jurisdiction over this case because there is no impasse as defined under the Panel's regulations, 5 C.F.R. § 2470.2(e). In this regard, the parties have not negotiated over the merits of the Union's proposal because the Employer has maintained throughout bargaining that: (1) The November 1991, MOU memorializes the parties' complete agreement on all matters related to the change in selection procedure for "tiger team" assignments; this would include the question of overtime pay for the journeymen who previously lost such assignments to apprentices, which was discussed during the course of negotiations over that MOU; and (2) The issue is more appropriate for resolution through grievance arbitration as a violation of the overtime article in the CBA. If the Union believes that the Employer's bargaining position on this matter is inappropriate, it should have filed a ULP rather than a request for Panel assistance.

Notwithstanding its no-duty-to-bargain position as outlined above, the Employer would agree to give the next "tiger team" assignments to the two Code 135 journeymen inspectors originally identified by the Union, "in order to facilitate a positive labor relations atmosphere." Since there has not been a finding from the Federal Labor Relations Authority (Authority) that the Employer committed a prohibited personnel practice when it assigned apprentices rather than journeymen to "tiger teams," for those journeymen to receive overtime wages, they must work for it.

The Panel lacks the authority to compensate the identified journeymen inspectors for lost "tiger team" overtime wages or, in other words, to issue a back pay award, because "[p]ay in and of itself is not a negotiable issue." Moreover, these employees would be entitled to back pay only if the three requirements under the Back Pay Act, 5 U.S.C. § 5596,^{2/} are met. Such is not the case here. First, as mentioned earlier, the Employer has not admitted, nor has the Authority found through a ULP proceeding, that it committed "an unjustified or unwarranted personnel action." Second, the Employer's willingness to negotiate a new selection procedure should not be viewed as an admission of wrongdoing. Last, the identified journeymen would not have received any of the assignments in question "but for" the assignment of the apprentices. In this regard, the Code 135 manager responsible for making such assignments has attested under penalty of perjury that, pursuant to his discretion under the selection practice at the time, he would not have given those assignments to the identified journeymen "because of critical assignments at th[e] [S]hipyard requiring their qualifications and experience." Furthermore, he attested that he is unable to determine which other journeymen he would have assigned involuntarily, given the great number who had the requisite qualifications.

CONCLUSIONS

After evaluating the arguments and evidence presented, we shall order the parties to withdraw their proposals.^{3/} Although we are persuaded that the Employer acted contrary to existing practice when it assigned apprentices rather than journeymen to the "tiger teams," we are unable to fashion a different solution because the record in the case does not reveal conclusively which journeymen would have been selected for the assignments in question but for the Employer's inappropriate actions. In this regard: (1) There is persuasive evidence that the journeymen identified by the

2/ A back pay award under the Act requires a determination that:

- (1) an employee was affected by an unjustified or unwarranted personnel action;
- (2) the unjustified personnel action resulted in a withdrawal or reduction in pay, allowances, or differentials of the employees; and
- (3) the withdrawal or reduction would not have occurred but for the unjustified action.

3/ In view of this decision, we will not address the Employer's jurisdictional argument.

Union as being next on the volunteer travel list for those assignments would not have received them; and (2) The record is inconclusive as to which other journeymen would have been assigned on an involuntary basis. As to the Employer's alternative proposal, we find it unacceptable as it may undermine the new "tiger team" selection procedure negotiated by the parties which is satisfactory to all inspectors.

ORDER

Pursuant to the authority vested in it under 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 the proceeding 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 withdraw their proposals.

By direction of the Panel.



Linda A. Lafferty
Executive Director

November 6, 1992
Washington, D.C.