United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of	
DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE ARLINGTON, VIRGINIA	
and	Case No. 91 FSIP 212
PATENT OFFICE PROFESSIONAL ASSOCIATION	

DECISION AND ORDER

The Patent Office Professional Association (Union), 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 Commerce, Patent and Trademark Office, Arlington, Virginia (Employer).

After investigation of the request for assistance, the Panel decided to assert jurisdiction over the issue of continued-service agreements[1/] and directed the parties to meet informally with Staff Associate Harry E. Jones for the purpose of assisting them in resolving that issue. If no settlement were reached, he was to notify the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the issues. Following consideration of this information, the Panel would take whatever action it deemed appropriate to resolve the dispute.

Mr. Jones met with the parties on December 11, 1991, in Washington, D.C., but no agreement was reached. He has reported to the Panel, and it has now considered the entire record.

1/ The Panel declined to assert jurisdiction over the issue of part-time employment because of duty-to-bargain questions which were raised by the Employer.

BACKGROUND

The Employer's mission is to issue patents and register trademarks. The bargaining unit consists of approximately 2,000 professional employees, 90 percent of whom are patent examiners. Although there is some question as to the status of the parties' collective-bargaining agreement, both sides agree that they continue to abide by its terms and that the contract has been rolled over for a 1-year period each year since 1989.

Since the 1950's, the Patent and Trademark Office has provided a Law School Tuition Assistance Program for its employees. Under the terms of the program, the Employer pays for tuition and books for those employees enrolled in evening classes at local law schools. In exchange for these payments, an employee must sign, each semester, an agreement which requires him or her to continue in the service of the agency for a specific length of time. These agreements are required by statute[2/] and are more fully described in Office of Personnel Management (OPM) regulations.[3/]

For many years, the policy at the Patent and Trademark Office has been to require 1 month of continued service for each semester credit hour paid for by the Government. Since each semester during which an employee takes classes is considered a separate training period, continued-service obligations are calculated on a semester-by-semester basis. Prior to 1985, under this scheme, concurrent payback was permitted. In 1985, however, concurrent payback was unilaterally discontinued by the Employer and consecutive periods of continued service were required for multiple law school semesters. In response to this unilateral change, the Union filed an unfair labor practice charge with the Federal Labor Relations Authority (FLRA or Authority). In a subsequent decision, the Authority, after finding that the Employer had violated the Statute by refusing to negotiate over the impact and implementation of the change in the computation method, issued a bargaining order.[4/]

2/ 5 U.S.C. § 4108(a) (1988) et seq.

3/ 5 C.F.R. § 410.508 (1991) et seq.

4/ In reviewing this matter, the Authority found that the Employer was not required to bargain over its decision to change the method of computing the time period for continuation-in-service agreements. The Authority held, however, that "the discretion to make exceptions to the continuation-in-service period computed under 5 U.S.C. § 4108(a) is a subject for bargaining over the impact and implementation of the change in the computation method." U.S. Patent and Trademark Office and Patent Office Professional Association, 31 FLRA 952, 955 (1988). This portion of the Authority's decision was upheld on appeal. Patent Office

Following unsuccessful negotiations, the Union filed the instant request for Panel assistance.

ISSUE

The issue at impasse is how the Employer should be required to exercise its discretion under the continued-service requirement regulations.

1. The Union's Position

The Union's proposals, which draw their essence from the above-referenced OPM regulations, would require the Employer to exercise the discretion allowed it under the regulations in connection with the Law School Tuition Assistance Program[5/] such that: (1) an employee's continued-service obligation, for each law school semester, be limited to 1 month or to a period equal to the number of hours spent in class (or with the instructor), whichever is greater;[6/] (2) all courses taken during a single semester or quarter be considered as a single training program; (3) employees who spend 80 hours or less in class during a semester not be required to enter into a written continued-service agreement;[7/] (4) all continued-service agreements signed after July 1, 1985, be retroactively modified to conform to the above provisions; and (5) requests for waiver of repayment due to an employee's failure to fulfill the terms of a continued-service agreement be granted, if the reason for such failure is set forth in 5 C.F.R. § 410.509(b)

Professional Association v. Federal Labor Relations Authority, 872 F.2d 451, 455 (D.C. Cir. 1989).

5/ At the close of the informal conference, the parties disagreed over the scope of the Union's proposals. The Union maintains that they relate to all non-Government training for which the agency approves training costs prior to the start of the training period. The Employer, on the other hand, asserts that the Union's proposals relate only to the Law School Tuition Assistance Program. The Employer points out that for non-law-school training, it already utilizes OPM Standard Form 182, which incorporates the requirements set forth in the Union's proposals. Thus, because the parties appear to be in agreement on this issue as it relates to non-law-school training, we will limit our discussion to continued-service requirements as they relate to the Law School Tuition Assistance Program.

6/ This proposal is drawn from 5 C.F.R. § 410.508(d).

7/ This proposal is drawn from 5 C.F.R. § 410.508(c)(2).

and there is no compelling reason to the contrary.[8/]

The Union maintains that its proposals would provide a more generous fringe benefit to employees, thereby achieving parity with private sector employees involved in "the patent business." It avers that its proposals are consistent with the policies of other Federal agencies (such as the Internal Revenue Service) which have only minimum continued-service requirements, as well as the OPM regulations governing this subject.[9/] Moreover, adoption of its proposals is necessary to bring the policy regarding continued-service requirements into line with promises made to employees at the time they were recruited. With respect to the Employer's proposal, the Union argues that the portion which requires consecutive payback appears to be inconsistent with OPM regulations found at 5 C.F.R. § 410.508(a)(3) (1991).[10/] The Employer's

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8/ This proposal is drawn from 5 C.F.R. § 410.509(b). That section provides as follows:

> (b) The head of an agency, or a representative especially designated by him or her for this purpose, must provide procedures for an employee's response to an agency request for repayment of the additional expenses and for an employee's appeal for a waiver of the agency's right of recovery under section 4108(c) of title 5, United States Code, before the agency can recover the appropriate payment and may waive, in whole or in part, the right of the agency to recover when he or she finds that:
>
> (1) The employee has completed most, but not all of the required period of service;
>
> (2) The employee resigned because of his or her own illness or the serious illness of a member of his or her immediate family; or
>
> (3) The employee is unable to make payment because of severe financial hardship.

9/ See supra note 3.

10/ That section of the Code of Federal Regulations provides as follows:

> (3) The period of time an employee is required to agree to continue in the service of the agency begins on the first workday after the end of the training covered by the agreement and does not include any service in nonpay status except for

proposal would also be burdensome since it would increase already onerous continued-service requirements. In this regard, if the requirements are made too severe, most employees in the program will simply default on their obligation and look for other employment, thereby defeating the purpose of continued service. Overall, the Union believes that its proposal is preferable as both the affected employees and the agency would benefit from its adoption.

2. The Employer's Position

The Employer proposes implementation of its version of the Law School Tuition Assistance Program as set forth in a memorandum dated June 24, 1985, from the Assistant Commissioner for Patents. In essence, it would maintain the status quo, including the change from concurrent to consecutive payback. Under this scheme, the Employer would retain the discretion, in accordance with the above-referenced OPM regulations, to (1) reduce or eliminate an individual employee's continued-service requirement, and (2) waive a repayment obligation arising from a failure to fulfill the terms of a continued-service agreement.

In the Employer's view, the Law School Tuition Assistance Program is a generous perquisite, and, therefore, its proposal is necessary to retain employees who take advantage of this benefit. In this regard, it notes that patent attorneys are highly marketable in the private sector and emphasizes that the vast majority of program participants leave the Patent and Trademark Office following completion of their legal studies. In its view, therefore, a longer payback requirement is necessary so that the Employer can reap the benefits of more highly skilled employees for a longer period of time.

The Union's proposal is extreme as its adoption would result in the elimination of continued-service requirements for most employees participating in the tuition assistance program. Since there have been no complaints from employees about the existing requirements, there is no demonstrated need for the Union's proposal. The Employer denies making any promises to employees at the time of hire regarding the Law School Tuition Assistance Program. Moreover, retroactive application of the Union's proposal could be financially burdensome, as it may require payments to individuals no longer employed at the agency who bought out their continued-service requirements. Since the Employer plans to eliminate the program by mid-1992 as part of an overall cost-cutting plan, it believes that changing the requirements, at this point, is unnecessary.

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service in nonpay status which is at the agency's convenience.

CONCLUSIONS

Having considered the evidence and arguments in this case, we conclude that the Employer's proposal provides a more acceptable resolution to the impasse. In this regard, we believe that the Union's proposal is extreme as it would result in the elimination of continued-service requirements for most Law School Tuition Assistance Program participants, thereby limiting, to a great extent, the benefit to the Employer of the program.[11/] We agree with the Employer that retroactive application of the Union's standards would be overly burdensome, as it would require the review of records dating back to 1985. The Union's proposal also could be costly, as it might require that former employees be reimbursed for payments made to the agency when they failed to fulfill the terms of their continued-service agreements. Moreover, there is no evidence that maintaining the status quo would cause most employees in the program to default on their obligation and look for other employment. The Employer's proposal, on the other hand, strikes an appropriate balance between the educational subsidies provided to employees under the Law School Tuition Assistance Program, and the benefit received by the Employer through employees' continued service to the Agency. Since the Employer's proposal allows for modification of the continued-service requirements on a case-by-case basis, it also recognizes that circumstances may arise which necessitate a more flexible approach to the subject. For these reasons, we shall order its adoption.

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:

11/ Although the Union's proposal, as crafted, appears to be within the bargaining obligation as set forth by the Authority in U.S. Patent and Trademark Office and Patent Office Professional Association, 31 FLRA 952 (1988), we are convinced, nevertheless, that it essentially is a back-door attempt to change the method of computing continued-service requirements.

The parties shall adopt the Employer's proposal.

By direction of the Panel.

Linda A. Lafferty
Executive Director

July 1, 1992
Washington, D.C.