

In the Matter of

DEPARTMENT OF EDUCATION
REGION 7
KANSAS CITY OFFICE
KANSAS CITY, MISSOURI

and

LOCAL 3892, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 40

ARBITRATOR'S OPINION AND DECISION

Local 3892, American Federation of Government Employees, AFL-CIO (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 Education, Region 7, Kansas City Office, Kansas City, Missouri (Employer).

Following investigation of the request for assistance, arising from negotiations over the Employer's decision to relocate the Kansas City Office, the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned, Panel Member Martin H. Malin. The parties were informed that if a complete settlement of the issues at impasse were not reached during mediation, I would issue a binding decision to resolve them.

Consistent with the Panel's procedural determination, on March 20, 2013, I conducted a mediation-arbitration proceeding with representatives of the parties at the current location of the Kansas City Office.^{1/} During the mediation phase, the parties reached voluntary settlements on some issues but were unable to

^{1/} The Kansas City Office's current suburban location is in a Federal building approximately 15 miles from its new location, which is being leased from a private landlord in the downtown Kansas City, Missouri area. The Kansas City Office will occupy the 3rd and 4th floors of the leased building.

resolve their dispute over a number of others, including the kind of workstations to be provided to attorneys and investigators in the Office for Civil Rights (OCR) and the number of break rooms on the 3rd Floor of the new location.^{2/} Thus, I am required to take final action by imposing terms in accordance with the Statute and 5 C.F.R. §2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including the parties' pre- and post-hearing documentary evidence and submissions.^{3/}

BACKGROUND

The Employer's mission is to ensure equal access to education and to promote educational excellence throughout the Nation. Primarily, it establishes policies on Federal financial aid for education, and distributes and monitors those funds; collects data on America's schools and disseminates research results; focuses national attention on key educational issues;

2/ During mediation, the parties' reached a tentative agreement on OCR workspace, subject to the approval of the OCR. The OCR's rejection of the tentative agreement was the subject of a subsequent conference call, at which time it was agreed that: (1) the parties' final offers on all remaining issues would be submitted on April 4; (2) any additional documentary evidence would be submitted on April 9; and (3) post-hearing briefs would be submitted on April 16, 2013.

3/ On April 11, 2013, after the Union received the Employer's additional post-hearing documentary evidence, which included unsigned statements from two management witnesses, it filed a "Motion to Strike the Agency's Unsigned Witness Statements" from the record on the basis that "the absence of signatures on the Agency's documents for this arbitration means that no one would bear responsibility to be accountable for any discrepancies that may be within the contents of these statements." On April 12, the Employer submitted the same witness statements, this time with signatures. On that same date, the Union objected "to any consideration from the Arbitrator to be given to Agency documents submitted after the agreed-upon deadline." Additionally, the Union requested that, "should this Agency activity be allowed by the Arbitrator . . . the Union be provided the same advantage next week" to submit additional documents. The Union's "Motion to Strike" and request to submit additional documents are hereby denied.

and prohibits discrimination and ensures equal access to education. More than half of its employees work at its headquarters in Washington, D.C. but it also has 10 offices in other parts of the country. The Union, which represents 53 employees in the Kansas City Office,^{4/} is part of AFGE Council 252, which represents a nationwide consolidated bargaining unit of approximately 3,700 professional employees, GS-5 through -15. Employees work in such major job titles as management program analyst, equal opportunity specialist, education specialist and attorney. The parties' collective bargaining agreement (CBA) was slated to expire in 1998 but continues in effect until its successor is effectuated.

ISSUES AT IMPASSE

The Union's final offer addresses break rooms/amenities, vending machines, OCR bargaining unit employee workspace, workstation storage and counter surface, and a pink noise system, while the Employer's final offer addresses only break rooms/amenities and non-FSA bargaining unit employee workspace.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union's final offer is as follows:

Memorandum of Understanding Between
AFGE Local 3892 and the U.S. Department of Education
Concerning the Relocation of the Kansas City Office

This document comprises the Agreement between AFGE Local 3892 (Union) and the United States Department of Education (Agency) for the physical move from 8930 Ward Parkway to 1010 Walnut Street (1 Petticoat Lane), Kansas City, Missouri 64106.

^{4/} In addition to the OCR, unit employees in Kansas City work in two other principle operating components (POC), Federal Student Aid (FSA) and the Office of Communications and Outreach (OCO). There are 26 unit employees in the FSA, 24 in the OCR and 3 in the OCO. Most of the unit employees will be located on the 3rd floor in the new building.

A. Break Rooms and Vending Machines

1. The Agency shall remove the wall between the OCR break room and the FSA break room located on the third floor to create one large break room for use by all employees. The break room will include two new refrigerators with ice makers, two new microwave ovens, ventilation, sink, hot and cold running water, seating for at least twenty-five persons, cabinets and counter space, hand soap, anti-bacterial dispenser, paper hand towels, trash and recycling receptacles.

2. The Agency shall ensure that vending machines containing soda, fruit juices, water, healthy snacks, and other food items are provided in the third floor break room.

B. OCR - Bargaining-Unit Employee Workspace

3. The Agency will maintain the 18 private offices for OCR bargaining-unit employees at the 1010 Walnut location that it currently has at the 8930 Ward Parkway location. The square footage requirements for all bargaining unit employee cubicles and offices will be no smaller than 100 square feet (10 ft. x 10 ft.).

4. The Agency will provide cubicles for OCR bargaining unit employees with 80-inch walls or partitions with sliding doors with locks. The top panel of the 80-inch walls or partitions will be made of glass to allow natural light to flow into the cubicle space.

C. Workstation Storage and Counter Surface

5. The Agency will ensure that the amount of counter surface in each cubicle is not less than 22.5 linear feet, the amount of file storage is not less than 13 linear feet and the amount of overhead storage space is not less than 11 linear feet.

D. Pink Noise System

6. The Agency will install a pink noise system in all work areas of bargaining unit employees.

The individual(s) signing for each party represents that she is authorized to bind the parties to this Agreement.

In the current location, each of the three POCs has its own individual break room, and employees also have access to a large break room, with a skylight, that can accommodate up to 50 employees, and vending machines containing a variety of items. The Union realizes that, because there is less space in the new location, "the same break rooms are not possible for each POC." Removing the wall between the FSA and OCR break rooms would create a larger space that is available to all employees. The adoption of its wording on break room amenities and vending machines merely ensures that employees would continue to enjoy the same treatment as they currently do at the new location. Overall, its proposals on this issue would merely ensure that employees have an adequate break room.

The Employer supports its proposal for separate 3rd floor break rooms by asserting that FSA intends to use its break room as workspace for scheduled and impromptu meetings where FSA employees would bring personally identifiable information (PII). Consequently, it asserts that "the FSA break room would be off limits to any other non-FSA employee." This particular reason for maintaining separate break rooms was disclosed to the Union for the first time in the Employer's post-hearing submission over a year after such information was required by the Union and the floor plans for the new location were disseminated to the Union and POC managers. Allowing documents containing PII to be exposed to others in non-secure areas is inconsistent with Information Technology and Security Awareness requirements and current training and "Rules of Behavior." Moreover, FSA has a conference room on the 4th floor "large enough to accommodate bi-weekly meetings and other FSA requirements." If the Employer's proposal is adopted, "a working condition will be changed that will cause significant impact without requiring the Agency to establish a compelling and reasonable need for the change."

As to the issue of OCR workspace, OCR unit "employees currently assigned to cubicles have complained that the cubicle environment is extremely challenging with respect to confidentiality, privacy, noise and other distractions on a daily basis." Under the Employer's proposal, all OCR attorneys and investigators would be assigned to cubicles. They also would be required to use an inadequate number of conference and team rooms to conduct interviews, negotiate agreements and speak with complainants and recipients which would "not be sufficient to

accommodate the needs of employees in carrying out the mission of OCR." In this regard, the Employer's plan is inconsistent with the statement of the OCR Deputy Assistant Secretary, quoted in a previous Panel decision, where the Agency supported "private offices for attorneys and senior investigators [EOS] because of the complex nature of their work and the amount of time they spend negotiating with recipients and other customers."^{5/}

The Employer argues that the adoption of the Union's proposals to maintain the 18 private offices for OCR unit employees that exist in the current location, to create semi-private offices for the remaining OCR employees, and to require that all OCR unit employee cubicles be no smaller than 100 square feet (10' x 10'), are "cost prohibitive." According to management's estimates, purchasing and installing a cubicle costs approximately \$5,243, while constructing and furnishing a private office costs a total of \$11,482. The Union, however, collaborated with a registered architect who estimated that the cost of constructing a 10' x 10' private office, including a door and hardware, is \$3,000. If the Employer re-uses the existing furniture at the new location, as the Union suggested but the Employer claimed "would not work" for reasons it never articulated, the overall savings to taxpayers for 18 private offices would be "approximately \$44,374 less moving expenses." Thus, contrary to the Employer's position, the Union's proposal is not cost prohibitive. Moreover, it has the added advantages of boosting the morale of OCR employees and creating "a work environment conducive to carrying out the mission of OCR."

The Employer also cites two Office of Management and Budget (OMB) Memoranda, issued on May 4, 2011 ("Realignment of Federal Real Estate") and in May 2012, respectively, and Executive Order 13589 ("Promoting Efficient Spending"), issued by President Obama on November 9, 2011, to support its position that the private offices of OCR employees must be taken away from them. None of these documents appear to be relevant "to the issue at hand, namely, the relocation of Federal employees from a Federal building to leased space." Its reliance on the two OMB Memoranda as the reason for reducing the Agency's "footprint" is particularly unpersuasive given the fact that its floor plan for OCR already decreases the square footage of the workspace

5/ The Union cites U.S. Department of Education, Office for Civil Rights, Kansas City, Missouri and Local 3892, AFGE, AFL-CIO, Case No. 01 FSIP 203 (December 17, 2001).

available for OCR employees from about 14,000 to 10,000 square feet, or 29 percent. Finally, the Employer also references a space management plan "that it is compelled to abide by" that requires placing all OCR employees in cubicles. Previous moves of Agency offices in San Francisco, Denver, Chicago, Cleveland and Atlanta, however, have "maintained private offices of bargaining unit employees." As the Agency has failed to consistently apply the space management plan, "it cannot hold the plan out as standard policy."

2. The Employer's Position

The following is the Employer's final offer:

Memorandum of Understanding Between AFGE Local 3892 and the U.S. Department of Education Concerning the Relocation of the Kansas City Office

This document comprises the Agreement between AFGE Local 3892 (Union) and the U.S. Department of Education (Agency) for the physical move to 1010 Walnut Street (1 Petticoat Lane), Kansas City, Missouri 64106.

A. Break Rooms

The Agency will provide two break rooms, one for FSA and one for other employees, as provided in floor plan documents discussed on March 20, 2013. Each break room will include a refrigerator, a microwave oven, ventilation, sink, hot and cold running water, seating for employees, cabinets and counter space, hand soap, anti-bacterial dispenser, paper hand towels, trash and recycling receptacles.

B. Bargaining-Unit Employee Workspace

Permanent cubicles for non-FSA space will be 10 feet x 10 feet. Cubicles will have walls of approximately 64 inches in height and comport with the document titled 'Attachment A.'

Given the Federal government's current economic situation, "all parties have a responsibility for good stewardship of taxpayer dollars." The adoption of the Union's proposal, however, "would result in a gross misuse of Federal funds." Moreover, there have been significant changes in the way that government operates

since the move to the current Kansas City Office location that have a direct bearing on the issues in dispute in this case, among them, an increase in the use of telework and the issuance of OMB Memorandum M-1212 in May 2012 "requiring Federal agencies to dispose of unneeded real estate, streamline existing space, and cease acquisition of new space without offsetting savings." For these reasons, the Department of Education "has had to reevaluate its use of space and to plan for future use," not only in Kansas City, but across the country.

With respect to workspace, a workstation costs slightly over \$5,000, and an office "costs approximately \$6,200 more." The cost of the Union's proposal to construct 18 offices, therefore, is an additional \$112,000, "a dramatic expense in an era of furloughs, when funding is nearly non-existent." While the Union contends that offices can be built for much less, its "estimate is flawed" because its author has never been to the new location and did not base his cost figures on the specifics that pertain there. The estimate also overstates the original cost of open workstations as \$7,000 and does not consider the additional cost of office furniture, which is greater than workstation furniture, or the cost of changing air conditioning and heating to accommodate additional walls. In any event, "the estimate of an independent contractor is irrelevant since the construction contract has been awarded and the Department is contractually obligated to the rates established in the contract." In addition, the construction of floor-to-ceiling offices would require the installation of sprinklers in each office, which are not needed with open workstations, and changes to the electrical system and wiring. Offices also would have an impact on air flow and lighting for the entire space, as well as the heating and cooling systems, which "would likely consume more energy to operate." Furthermore, "these changes might require [the Agency] to secure new permits, which could result in delays and additional cost."

The Union asserts that if fewer cubicles are built this would offset the cost of offices. Unfortunately, "to offset 18 offices, the Department would be required to build 22 fewer workstations," and this reduction "would not accommodate the current number of employees or allow for any growth." The impact of the additional expense under the Union's proposal also would affect more than just the employees in OCR. Due to "the nature of OCR's funding stream" there can be no reallocation of funds between OCR and the rest of the Agency. As OCR already "faces up to 12 furlough days in order to save the necessary amount to make up its budget shortfall," every OCR employee in the country

would have to be furloughed 3 hours to offset the cost of building 18 offices for OCR's Kansas City attorneys. This is "a great deal to ask . . . for something that is merely a convenience to a few people."

The Union's contention that open workspaces would automatically result in interruptions and have a negative impact on performance should be rejected because it "is not supported by the practice or data" at the Agency generally or in Kansas City in particular. Although offices are "a convenience," many of the attorneys in headquarters and the regions work in open workstations, including those in the Office of General Counsel, and "are able to perform successfully (even superbly)." Other Agency employees who routinely handle and discuss confidential matters, such as employees in Human Resources, also are in open workstations. While the Union's concerns regarding privacy and confidentiality of information are legitimate, the Agency has taken several steps to limit risk, including controlling access to OCR space "so no one (even employees from other POCs) will be able to enter without permission" and providing OCR attorneys with locking drawers and storage. Employees' concerns that confidential conversations may be overheard and that increased noise levels will be distracting also have been addressed at the Kansas City Office. In this connection, on those occasions when confidentiality is required, the new location was designed to include more team rooms and conference space than at the current location. In addition, the workstations in Kansas City will be made of different materials than those in the Atlanta Office, which the Union claimed had high noise levels, and employees will be provided headsets that "greatly increase the privacy of participants in the conversation, and reduce the need to use speakerphones." To address potential distractions, the Agency also has agreed "to install pink noise to further mask the sound."

If offices are awarded to certain Kansas City employees issues would be created that impact the Agency "across the Nation." For one thing, there could be a ripple effect whereby other employees request them in moves that are currently in process and in future relocations, increasing overall costs contrary "to the directions of the President in Memorandum 12-12." For another, "internal equity among employees" also would be negatively affected. Currently, "there are 9 or 11 bargaining unit employees with offices"^{6/} so the Union's proposal

^{6/} According to the Employer, the number is unclear because the Union is proposing an office for one attorney who is

for 18 offices "overcompensates for the current conditions." But even providing offices only to those who currently have them would create an inequity among employees because "OCR would have staff members with more seniority in open workstations while more junior employees have offices." Given the "many steps" that have been taken to address the Union's concerns and the expense of additional offices, "it is more appropriate to implement the Department's proposals."

The Union's proposal for the creation of a single break room should also be rejected, primarily because it ignores "management's analysis, design and intended use of the space." In this regard, space at the Agency is allocated and paid for by each individual POC on the basis of an evaluation of what is needed "to best accomplish the mission of each POC and the Department." During the planning stages of the current relocation, OCR determined that it did not want a large break room and, instead, it decided to invest in more team space and larger workstations. FSA's plans for new space were developed "through employee and management engagement" and, as discussed by the FSA Director of Facilities, "sacrifices were made by FSA employees in order to design the proposed break room." FSA employees understood that their desire for a larger break room "came at the expense of [the] size of other workstations and rooms."^{7/} Further, the Regional Director for FSA explained that the break room was designed to be a multi-purpose room to meet a number of FSA's needs. Combining the break rooms and permitting access by all employees would be problematic for a number of reasons, including the fact that all FSA paperwork and work products contain PII and, therefore, "FSA staff would not be able to leave work products in the break room if [it] was shared with non-FSA staff." In conclusion, OCR employees are not negatively impacted since they would continue to have a break room. Although a large break room "might be a convenience, the intended use of the space and the negative impact to FSA and its employees outweigh the 'convenience' to OCR staff."

currently located in an open workstation but has more seniority than at least one employee currently in an office.

^{7/} FSA permanent workstations are 8' x 8'.

CONCLUSION

After carefully reviewing the arguments and evidence presented during the mediation-arbitration proceeding, I shall not order the adoption of either party's final offer with respect to workstations for OCR employees but shall order the Employer's final offer with respect to break rooms with one modification regarding vending machines. I shall address each issue in turn.

With respect to OCR employees' workstations, currently 11 OCR bargaining unit employees have 10' x 10' private offices and the other bargaining unit employees work in cubicles. The Employer's final offer places all employees in cubicles while the Union's final offer provides for private offices for 18 employees. Both final offers propose significant changes from the *status quo*. I find that neither party has offered sufficient justification to depart from the current work station arrangement of 11 employees in private offices and the remainder in cubicles.

The Employer's objection to private offices is cost. The Employer calculates the cost of each private office at \$11,482, with \$6,879 representing the cost of construction and \$4,603 representing the cost of furniture. The Employer calculates the cost of a 64" high 10' x 10' workstation at \$5,243. Although on its face, the difference in costs is significant, the persuasiveness of the Employer's cost justification for moving employees currently in private offices into cubicles is considerably diminished by the following factors.

First, although the Employer proposes to move bargaining unit OCR employees currently in private offices into cubicles, it plans to continue to provide supervisors and managers with private offices. Of course, I have no authority over the Employer's decision concerning workspace for its supervisors and managers but its decision does undercut the credibility of its claim that it cannot afford to provide private offices for the high level professional employees in the bargaining unit who currently work out of private offices. This case is substantially different from my prior award on the private office versus cubicle issue, *Environmental Protection Agency Region 7 Kansas City, Kansas and Local 907, American Federation of Government Employees*, 12 FSIP 79 & 81 (June 6, 2012) (*EPA*). In *EPA*, the union proposed to retain private offices for all bargaining unit attorneys while the employer proposed cubicles. I rejected the union's proposal because the record established

that no other employees in the facility, including supervisors, managers and a presidential appointee, were to receive a private office. The employer's rationale, which included avoiding the higher costs of private offices, was particularly persuasive because it applied to all personnel, not just to members of the bargaining unit.

Second, of the \$6,239 difference in cost between a private office and a 64" high cubicle, \$4,603 comes from the cost of furnishing the private office. However, during the mediation-arbitration proceeding, the Union represented that the existing office furniture is in excellent condition and can be reused. The Employer did not dispute the representation about the condition of the existing furniture. Rather, the Employer rejected the option of reusing current furniture because it has not worked in the past and usually does not fit the new office. Yet, the new offices would be the same size as the current offices, 10' x 10'. There is no evidence that the Employer actually examined the existing furniture or made a specific analysis as to whether it can be moved to and used at the new location. It is not my place to tell the Employer to reuse existing furniture or to buy new furniture but the absence of Employer attention to the option of using the existing furniture further undermines the Employer's claim that it cannot afford to provide private offices to employees who currently have them.

Third, the Employer's plan calls for providing many more cubicle workstations in OCR than are needed to meet the workstation needs of current employees. There is no evidence of any reasonable expectation of such workforce expansion that would create a need for all of these additional workstations in the near future. It is not my place to tell the Employer how many workstations to purchase and install in anticipation of future growth but the fact that the Employer is willing to spend a considerable amount of funds on workstations which it has not shown a reasonable likelihood of needing in the near term further undermines its claim that it cannot afford to provide private offices for those employees who currently have them.

Accordingly, I shall order that the Employer provide 10' x 10' private offices for the 11 bargaining unit employees in OCR who currently have them.

The Union proposes that 18 OCR employees be provided with private offices. The Union justifies this change to the *status quo* on the ground that having attorneys and investigators working from cubicles endangers confidentiality and reduces

productivity because of noise and distractions. However, the only evidence offered in support of the Union's claim that the *status quo* is not working for employees currently in cubicles is a statement from the Local Union President based not on her personal knowledge but based instead on conversations she has had with OCR employees currently assigned to cubicles. The statement speaks in generalities and provides no specific examples of instances where working from a cubicle significantly impaired an employee's ability to accomplish his or her job responsibilities. Furthermore, the noise and distractions in the new location will be mitigated by two changes. Employees will have headsets which should eliminate their need to conduct telephone conversations by speakerphone so that they can write or type during the conversation. Second, although the Employer's formal final offer does not expressly include installation of a pink noise sound masking system in OCR, the Employer alludes to such a system in its submission and the parties have agreed to installation of such a system in FSA space. To ensure that such a system is included in OCR space, I shall order it in this Award. For these reasons, I also reject the Union's proposal that the cubicles have 80" rather than 64" walls.

The Union's final offer also specifies the number of linear feet of counter space, file storage space and overhead storage space. This subject received minimal attention, at best, during the mediation-arbitration and is not addressed specifically in the Union's brief. Accordingly, I will not include specific dimensions for counter, file and overhead storage space in my Award.

Turning to the issue of break rooms, I find persuasive the Employer's representations that during the planning of the move, FSA employees expressed the desire to have a large break room understanding that it would come at the expense of FSA workspace and team space. I note that as agreed to between the parties the FSA workstations will be 8' x 8' cubicles, *i.e.*, 36 square feet smaller than the OCR workstations. Under these circumstances, to deprive FSA of its exclusive break room would be inequitable and I will not order it.

The Employer's final offer does not address the issue of vending machines. During the mediation-arbitration, the Employer advised that it is not opposed to vending machines but that the availability of vending machines depends on finding a vendor willing to install and service such machines which may be problematic because of the small population of potential

customers. The parties appeared amenable to providing for vending machines if a vendor can be attracted to install and service them. I shall include such a provision in my Award.

DECISION

The parties shall adopt the following Memorandum of Understanding to resolve their impasse, incorporating within it the additional provisions agreed upon during mediation:

Memorandum of Understanding Between
AFGE Local 3892 and the U.S. Department of Education
Concerning the Relocation of the Kansas City Office

This document comprises the Agreement between AFGE Local 3892 (Union) and the U.S. Department of Education (Agency) for the physical move to 1010 Walnut Street (1 Petticoat Lane), Kansas City, Missouri 64106.

A. Break Rooms and Vending Machines

The Agency will provide two break rooms, one for FSA and one for other employees, as provided in floor plan documents discussed on March 20, 2013. Each break room will include a refrigerator, a microwave oven, ventilation, sink, hot and cold running water, seating for employees, cabinets and counter space, hand soap, anti-bacterial dispenser, paper hand towels, trash and recycling receptacles. Vending machines will be provided if a vendor is willing to install and service such machines.

B. OCR Bargaining-Unit Employee Workspace and Pink Noise Masking System

The Agency will provide the 11 employees currently in private offices in the Office for Civil Rights with private offices that are 10' x 10'. All other employees in OCR will receive 10' x 10' four-sided cubicles with partition walls no less than 64" in height that comport with the document titled 'Attachment A.'

The Employer will install an effective pink noise masking system as soon as practicable.

A handwritten signature in black ink, appearing to read "Martin H. Malin". The signature is fluid and cursive, with a large initial "M" and "H".

Martin H. Malin
Arbitrator

May 1, 2013
Chicago, Illinois