United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. and NATIONAL TREASURY EMPLOYEES UNION	Case No. 13 FSIP 20

DECISION AND ORDER

The Department of the Treasury, Internal Revenue Service (IRS), Washington, D.C. (Employer) filed a request for assistance with the Federal Services 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 National Treasury Employees Union (Union).

Following an investigation of the Employer's request for Panel assistance, which involves a dispute over the establishment of a pre-tax parking program (Program), the Panel determined that the case should be resolved through an informal conference with Panel Member Donald S. Wasserman. The parties were informed that, if no settlement were reached, Member Wasserman would notify the Panel of the status of the dispute, including the parties' final offers and his recommendation for resolving the impasse. The Panel then would resolve the dispute by taking appropriate action, which could include the issuance of a binding decision.

In accordance with the Panel's procedural determination, Member Wasserman conducted an informal conference with the parties on April 10, 2013, at the Panel's offices in Washington, D.C. During the course of the meeting, however, the parties were unable to resolve their dispute. In rendering its decision, the Panel has considered the entire record, including Member Wasserman's recommendation and the parties' post-conference submissions.

BACKGROUND

The Employer's mission is to fairly enforce tax laws, respect taxpayers' rights, collect taxes, and help educate taxpayers. The Employer has approximately 100,000 professional and non-professional General Schedule employees who encumber a variety of positions and who are stationed nationwide at IRS headquarters, service centers, regional offices, and numerous field offices. The Union represents approximately 78,000 of these employees. The parties are covered by a National Agreement (NA) that is due to expire on September 30, 2014.

Under Article 29, Section 18 of the NA, the Employer was required to conduct a nationwide survey or, alternatively, create a "data gathering instrument" to gauge its employees' interest in participating in a Program.[1/] Also, pursuant to Section 18, the Employer was required to provide the Union, at the national level, with the results of this survey and a "cost analysis" based on the number of employees who expressed interest in the Program no later than 1 year after the implementation of the NA. Within 90 days of the Union's receipt of both of these items, either party could request to negotiate over the implementation of the Program.

In accordance with Section 18, the Employer conducted the above survey, and 5,015 of the Employer's approximately 100,000 employees responded. Of those employees who responded, 4,476 stated they were interested in participating in the Program whereas 539 expressed no interest. The Employer provided the Union with these results and a cost-analysis briefing. The Union timely requested to negotiate over the establishment of the Program. The Employer, however, declined to negotiate, citing "a low interest in employees' desire to participate" in the Program, general "escalated government funding concerns," and conflicts with the Employer's goal of eliminating its "carbon footprint." Under Article 47, Section 2.G of the NA, either side could contact a neutral designated under Article 15, Section 3 to resolve a negotiation impasse concerning a mid-term bargaining matter. Article 15, Section 3 provides that this neutral will be a designated factfinder who may conduct a

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1/ Under such a Program, an employee could submit a monthly estimate of his/her parking expenses - currently up to $245 - to the Employer. This amount would be subtracted from that employee's pre-tax gross income, and the employee would receive a cash reimbursement, usually $10 to $20 per pay period.

factfinding inquiry and has the authority to help the parties resolve their dispute and/or issue written recommendations. Relying on the foregoing contractual language, the parties contacted the designated Factfinder for assistance.

The Factfinder met with the parties on September 6, 2012, spending about 75 percent of the day mediating the dispute, but no agreement was reached. At the Factfinding hearing, the Union presented data to demonstrate that the Program would actually save the Employer money if enough employees participated. Specifically, the Union asserted that lowering employees' gross income would reduce the amount the Employer would be required to contribute toward the Federal Insurance Contributions Act (FICA) tax. The Employer conceded that it had not considered the effect of the Program on its FICA tax contributions but nevertheless continued to oppose its implementation.

The Factfinder recommended that the Employer adopt the Program nationwide. But he also suggested that the parties "should consider" a pilot program "in a limited geographic area." Additionally, the Factfinder held that the parties should form a joint-committee to implement the Program and "work[] out its details." He stated that this committee "should meet regularly" for 6 months "to carefully examine costs and to put in place a cost structure that makes the program cost neutral" to the Employer. After the Factfinder issued his report, the Union contacted the Employer to implement his recommendations. The Employer declined to implement them or to engage in negotiations over the Program. Article 15, Section 3 of the NA states that any disputes remaining after the issuance of a factfinder's report will be resolved by requesting assistance from the Panel in accordance with § 7119 of the Statute.[2/] Because the Employer rejected the Factfinder's recommendations, it filed a request for assistance with the Panel.

ISSUE

The parties essentially disagree over whether the Employer should establish a Pre-Tax Parking Program.

2/ Article 15, Section 3 also states that the party who requests assistance from the Panel "carries the burden of proof regarding the reasons the Factfinder's report does not resolve the issues at impasse."

POSITIONS OF THE PARTIES

1. The Union's Position

The Union's final offer requires the Employer to establish a Program for bargaining unit employees.[3/] Among other things, the Employer is expected to reimburse employees' parking expenses, up to $245 per month, through a Flexible Spending Account (FSA), if they incur those expenses by parking: (1) "at or near an IRS office (including parking garages and parking meters) . . . as part of a carpool[,] commuter highway vehicle, or from transportation provided by any person in the business of transporting persons for compensation or hire"; or (2) at a location from which they commute "to work, including commuting by carpool, commuter highway vehicle, mass transit facilities (e.g., metro parking)[,] or transportation provided by any person in the business of transporting persons for compensation or hire." In addition, the Employer is required to: (1) allow employees to enroll in the Program no later than 30 days following October 1, 2013, (2) process employees' applications within one pay period of receipt of those applications, and (3) deduct employees' incurred parking expenses during the first pay period following their enrollment in the Program. Among other things, the Employer also would be obligated to provide training to enrolled employees about the Program and to provide the Union with available participation data bi-annually.[4/]

In support of its final offer, the Union argues that it has demonstrated the need for the Program. In this regard, the parties do not dispute that the Program will increase employees' "net take home pay each pay period" they participate. Such savings would be beneficial to employees who have been working under a pay freeze for roughly 3 years and who may be furloughed

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3/ The Union's final offer, which consists of a proposed Memorandum of Understanding (MOU), is attached to this Decision and Order.

4/ In response to Employer concerns raised during the informal conference, the Union made two changes to its final offer. It agreed to make the Program a "green initiative" by not requiring the Employer to deduct parking expenses for employees who park at or near an IRS office but do not commute by carpool or commuter highway vehicle. Also, to acknowledge the impact of sequestration on the Employer, the Union "propose[d] an implementation date within 30 days of the beginning of [Fiscal Year] 2014."

5 to 7 workdays before October 1, 2013. Also, the evidence presented demonstrates that the Program could either be cost neutral, or provide a cost savings, to the Employer. The Employer admits that, based on its calculations, the Program would be cost neutral within 26 months if 3,000, or 3 percent of its unit employees, participate; the Employer's 26-month estimate is high, in part, because its projected start-up costs are very likely inflated. According to the Union, based on statistics from other agencies and the parties' surveys, a 3 percent participation rate is feasible. Similarly, the parties agree that the more employees who enroll in the Program, the larger the Employer's financial benefit; because of this correlation, the Union maintains that the parties should work together not only to extensively advertise, but also to solicit participation in, the Program.

In addition, the Union contends that it has shown that wording included in its final offer is comparable to what is contained in other collective bargaining agreements. The parties have discovered that several other agencies have established such programs. The ones established at Customs and Border Protection (CBP) and the Office of the Comptroller of the Currency are the most analogous to its proposed Program; while no surveyed agency "compares to IRS in terms of size of the bargaining unit or number of offices in metropolitan areas across the country[,] . . . IRS's size works to its advantage in achieving its goal" of cost neutrality. Moreover, the Program combines the most beneficial aspects of other programs by: (1) including a "green initiative," (2) being open to bargaining unit employees nationwide, and (3) utilizing an FSA and a bona-fide reimbursement program administered by a vendor. Since the Employer is not required to implement the Program until Fiscal Year (FY) 2014, it would have sufficient time to accommodate the start-up costs associated with the Program in its $11 billion budget.

Turning to the Employer's final offer, the IRS should be required to establish a Program now rather than waiting until after a joint committee is formed and that committee decides whether to implement a pilot Program. In support of its contention, the Union asserts that the Employer's concerns about the expense of a Program are unfounded. Its estimated start-up and recurring costs are miniscule when compared with the IRS's $11 billion budget, and are speculative in any case. In this regard, the Employer's cost estimates increased by $25,652 between the filing of its request for assistance and the informal conference. While the Employer included in its

calculations "costs for several full-time employees to oversee the [P]rogram, monitor for fraud, answer questions, make W-2 adjustments," and handle grievances, no surveyed agency indicated that it had a full-time employee dedicated to running its program or that related grievances were filed. Also, before creating its cost estimates, the Employer failed to contact various vendors to determine, among other things, whether it could structure the Program to avoid a reprogramming start-up cost. Similarly, the Employer's cost estimates failed to take into account that vendors provided some surveyed agencies with a lower monthly cost, depending on the participant rate, or a flat rate fee. In the Union's view, the Employer's estimate of the time it would take for the Program to be cost neutral would be dramatically reduced if it had taken into account a lower monthly cost per participant. Finally, in calculating employees' average monthly parking expenses, the Employer did not consider that employees may park in private, rather than public transportation, lots and may need to reserve parking spaces in crowded lots.

2. The Employer's Position

The Employer proposes that, "[b]eginning no earlier than calendar year 2014," the parties convene a "joint committee to assess the feasibility of conducting a . . . [P]rogram that would be" cost neutral to the Employer. The joint committee would only meet telephonically. In addition, the Employer defines cost neutral as follows: Within 2 "years of start-up, the [Employer] will recoup all costs associated with the . . . [P]rogram through FICA savings." If the joint committee finds that the Program "would not be cost neutral, no [P]rogram will be implemented." If the joint committee finds that the Program would be cost neutral, the Employer will "implement an Agency-wide pilot [P]rogram." Further, after 2 years, if the Employer does "not recoup all costs associated with the . . . [P]rogram through FICA savings, the . . . [P]rogram will be discontinued."

In support of its final offer, the Employer claims that a joint committee is necessary because it is undisputed that many questions remain unanswered concerning the feasibility of implementing a Program. During the informal conference, both sides admitted that there were some vital questions that should have been included in their surveys, and the Union questioned the accuracy of the surveys' response rates based on the way they were disseminated to employees. Also, because the employees' participation rate and average monthly parking expenses affect management's ability to run a cost neutral

Program, the Employer should not be required to implement a pilot Program without a joint committee first obtaining more detailed information concerning those issues. A joint committee could send employees another survey that would better determine the participation rate and the average monthly parking expenses spent by employees who use mass transportation. Further, because its "budget has been reduced by nearly $1 billion," and sequestration is projected to take place over the next 10 years, it is imperative that a pilot Program be cost neutral within a reasonable amount of time, namely, within 2 years of implementation.

With regard to the Union's final offer, the Employer asserts that the Panel should not order it to establish a Program. In this regard, it is uncertain whether the Program will be cost neutral or generate a cost savings in the future because the Union's cost estimates are speculative. The Union's assumption that participants' average monthly parking expense will be $180 is "not based in reality" because: (1) it is taken from a fictional example created by the Employer to help explain the Program; (2) it is higher than the average monthly parking expenses reported by surveyed agencies; and (3) it is likely, based on the "green initiative," that participants will park at "substantially cheaper parking lots which are adjacent to public transportation locations actually being used by IRS employees in the Public Transportation Subsidy Program." Similarly, the Employer claims that the Union's projected participation rate is speculative because: (1) only roughly 4 percent of all employees are interested in a Program based on the Employer's survey; (2) the Union's survey indicates that only 514 out of 5,011 employees who responded would be eligible to participate under the Union's proposed "green" Program; and (3) CPB, which the parties agreed at the informal conference was the most analogous agency, suffered a 27-percent cancellation rate within the first year of its program. Also, the Employer contends that it should not be ordered "to shoulder the burden of . . . a Program during a period of fiscal austerity" because it would benefit only a small number of employees. While the Union proposes that implementation should occur at the beginning of FY 2014, surveyed agencies indicated that it took at least 6 to 9 months to create and implement a program, and the Employer's resources for FY 2014 and beyond are uncertain because sequestration is projected to take place over the next 10 years. Finally, it should not have to expend time and money, among other things, to provide the Union with detailed data concerning employees' participation in the Program bi-annually, or to provide formal instruction concerning all aspects of the Program to employees

during their normal tours of duty, for a program it does not support and should not be forced to implement.

CONCLUSIONS

Having fully considered the evidence and arguments presented by the parties, we conclude that a modified version of the Union's final offer provides the more reasonable basis for settling their dispute. In this regard, the Employer shall be ordered to establish, within 30 days of the beginning of calendar year 2014, a nationwide Program. If 50 percent of the Employer's start-up costs are not recouped within 12 months of the Program's establishment, it would not continue. If 50 percent of the Employer's start-up costs are recouped, the Program will continue for another 12 months, at which time the remaining 50 percent of such costs must be recouped. If 100 percent of the Employer's start-up costs are recouped within 2 years of the Program's establishment, either party may reopen the MOU within 30 days of that date annually thereafter.

The Employer's latest proposal essentially to embrace the Factfinder's recommendation to form a joint committee, after initially rejecting it, appears to be an attempt to delay indefinitely the implementation of an employee benefit whose time has come. In our view, the approach described above balances the parties' interests by permitting the Employer to discontinue the Program if it is unable completely to recoup its start-up costs within a 2-year period. It also provides a mechanism by which the Union's representation that the Program would likely be cost neutral can be tested. If this does not turn out to be the case, the Employer would have the ability to negotiate over the discontinuation of the Program at the conclusion of the 2-year period. In addition, because of the Employer's legitimate concerns about the current effects of sequestration, and surveyed agencies' responses that it took them at least 6 to 9 months to create and implement a program, we are persuaded that the establishment of the Program should be delayed until the beginning of calendar year 2014. Accordingly, consistent with the foregoing discussion, we shall order the adoption of a modified version of the Union's final offer.

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 Services Impasses Panel, under § 2471.11(a) of its regulations, hereby orders the following:

The parties shall adopt the Union's final offer with the following modifications:

1. Opening Paragraph

This Memorandum of Understanding ("MOU") is entered into between the Internal Revenue Service (hereafter "IRS," "Employer," or "Agency") and the National Treasury Employees Union (hereafter "NTEU") pursuant to the Federal Service Labor-Management Relations Statute. Under 26 U.S.C. § 132, the implementing regulations found in 26 C.F.R. § 1.132-9, and this MOU, the IRS shall establish, within thirty (30) days of the beginning of calendar year 2014, which begins on January 1, 2014, a nationwide pre-tax parking program ("Program"). If fifty (50) percent of the Employer's start-up costs are not recouped within twelve (12) months of the Program's establishment date, it will not continue. If fifty (50) percent of the Employer's start-up costs are recouped, the Program will continue for another twelve (12) months by which time the remaining fifty (50) percent of such costs must be recouped. Under the Program, an eligible employee may elect to have a monthly parking benefit, of up to the maximum amount permitted by law, withheld from the employee's bi-monthly pay on a pre-tax basis. Consistent with this MOU and applicable regulations, a participating employee will be reimbursed the withheld pre-tax funds, on a monthly basis, once the employee has incurred the qualified parking expense(s). Appendix A contains definitions applicable to the Program.

2. Section 4(a)

Enrollment in the Program will begin no later than thirty (30) days after January 1, 2014 and will be processed within one pay period from the receipt of the employee's Program application.

3. Section 10

No later than ten (10) workdays from the beginning of April and October each year, the Employer will electronically provide NTEU National with available participation data, including the following information: Name, grade, series, POD, and monthly reimbursement.

4. Section 14

If one hundred (100) percent of the Employer's start-up costs are recouped within two (2) years of the Program's establishment date, either party may reopen the MOU within thirty (30) days of that date annually thereafter.

5. Section 15

This agreement will become effective upon Agency Head Review or on the thirty-first (31st) day from the date of the Federal Service Impasses Panel's Decision and Order in Case No. 13 FSIP 20, whichever comes first.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

June 12, 2013
Washington, D.C.