

In the Matter of

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT
REGION IX
SAN FRANCISCO, CALIFORNIA

and

Case No. 13 FSIP 80

LOCAL 1450, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, FEDERAL
DISTRICT 1, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

ARBITRATOR'S OPINION AND DECISION

The Department of Housing and Urban Development, Region IX, San Francisco, California (Employer or HUD) and Local 1450, National Federation of Federal Employees, Federal District 1, International Association of Machinists and Aerospace Workers, AFL-CIO (Union), filed a joint 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.

After an investigation of the request for assistance, which arises from bargaining over the Employer's decision to terminate the practice of paying for parking as a reasonable accommodation for employees with disabilities, the Panel directed the parties to mediation-arbitration with the undersigned. Accordingly, on July 1 and 2, 2013, a mediation-arbitration proceeding was convened by telephone with representatives of the parties. During the mediation phase, the parties addressed their interests and positions, but they were unable to resolve the issues. Consequently, the issues have been submitted for arbitration. In reaching my decision, I have considered the entire record, including the parties' final offers, documentary evidence, and post-hearing briefs.

BACKGROUND

The Employer is one of 10 Regions responsible for programs that address America's housing needs, including improvement and development of the Nation's communities, and enforcement of fair housing laws. The Union represents approximately 550 professional and non-professional bargaining-unit employees stationed in 11 offices in four states within Region IX. Employees hold positions such as appraiser, architect, fair housing specialist, housing project manager, single family housing specialist, and program assistant. The parties' current collective-bargaining agreement has a term ending in September 2014.

Since 1983 Region IX has paid for parking provided as a reasonable accommodation to certain disabled employees after determining that, because of their disabilities, they are unable to use public transportation and must drive to work, and free parking is not available at the work site. The cost to the Employer is either: (1) embedded in the occupancy agreement for the field office which the General Services Administration (GSA) enters into with the building owner; (2) set forth as a separate line-item for parking in the occupancy agreement if the building owner is also the parking vendor; or (3) if the parking vendor is other than the building owner, the parking fee is paid through a purchase order issued to the parking vendor on behalf of the employee receiving the benefit.

This policy has not been agency-wide. At HUD headquarters, the policy has always been that, should parking be granted as a reasonable accommodation to a disabled employee, any implicated cost is borne by the employee (no free or subsidized parking is available to any HUD headquarters employees). Until the Employer's recent actions, reasonable accommodation parking was paid for in other HUD regions, but reportedly this has ended.^{1/}

Based on information offered during the mediation-arbitration, the facts are that, currently, thirteen employees receive paid parking not covered by an occupancy agreement for an annual cost of \$14,268. The Employer has announced its intention to terminate paying for their parking in the near future. For others receiving paid parking through an occupancy agreement, the Employer' intention is to maintain the *status quo*

^{1/} Unions representing employees in those regions reportedly did not request bargaining over this change that has now been implemented.

until the end of each current occupancy agreement.^{2/} Future occupancy agreements would not include reasonable accommodation spaces paid for by the Employer. At this point in time there are about 13 employees who would lose paid parking in these circumstances.

ISSUES AT IMPASSE

The parties disagree over: (1) the extent to which the practice of paying for parking granted as a reasonable accommodation for employees with a disability should continue; and (2) whether a parking subsidy program should be implemented that would require the Employer to pay employees who currently receive "disabled parking" a monthly parking subsidy, up to the current statutory authorization (\$245 as of January 1, 2013), but not greater than the actual cost of monthly parking for the employee.

POSITIONS OF THE PARTIES

1. The Employer

The following wording is proposed by the Employer:

(1) The Agency will discontinue paying for parking for disabled employees in accordance with the terms of this Agreement, and will update HUD Handbook 2201.1, HUD Handbook 2216.1, Chapter 10, Section 10-1(b), and any other applicable provisions to reflect this change; however, because the Agency has been paying for Region IX parking for disabled employees, the Agency will agree to delay implementation of the change for NFFE 1450 bargaining unit employees for 6 months.

The Employer's position is that its voluntary practice of paying for parking for certain disabled employees should be discontinued immediately, but it is willing to defer that action for 6 months. Under law, the Employer's only obligation is to provide "accessible" parking for employees with disabilities and it would continue to do so. The practice of providing Employer-paid parking for certain disabled employees currently exists

^{2/} The termination dates of these agreements are spread out with the San Francisco office being the most imminent (September 2014) and Sacramento being the furthest out (October 2022.)

only in Region IX, as three other labor organizations that represent HUD employees in other Regions have not requested to bargain over the termination. Thus, the termination already has been implemented in other Regions. Furthermore, employees stationed at the HUD Headquarters offices in Washington, D.C. have never been offered this benefit. The Employer wants to eliminate what it believes is an inconsistent practice by discontinuing paid parking for bargaining-unit employees in Region IX. There is no mandatory requirement under the Rehabilitation Act or the Americans with Disabilities Act to provide paid parking as a reasonable accommodation, other than for one or two employees who have received paid parking as a result of litigation. Essentially, the Employer is concerned that it has exposure to claims of disparate treatment from employees in the Headquarters office and other Regions unless it has a consistent nationwide approach concerning this parking issue; as a result, it maintains that the practice should be eliminated to avoid litigation involving allegations that employees with disabilities outside Region IX were unfairly denied the benefit currently available only to those in Region IX.

Additionally, the Employer maintains that the current adverse financial climate for Federal agencies is forcing HUD to examine all expenditures that are not mandatory, such as parking benefits for disabled employees, as a "cost avoidance" measure. Other cost savings implemented by the Employer include freezing hiring, other than for mission-critical positions; reducing discretionary training; placing a moratorium on overtime and compensatory time; implementing furloughs; and closing 16 smaller offices throughout the country. Continuing the parking benefit as the Union proposes would adversely affect management's right, under 5 U.S.C. § 7106 of the Statute, to determine its budget.

The Employer also opposes the Union's proposal that all employees in Region IX, who qualify for parking as a reasonable accommodation for a disability, should receive a statutorily authorized parking subsidy that would supplant other forms of payment for parking currently authorized by the Employer for those individuals. Management views the proposal as not only regressive, but also as a new issue raised by the Union that was not discussed at the table or during mediation and, therefore, is not properly before the undersigned as the parties have not reached a bargaining impasse over it. Moreover, on the merits, the proposal fails to meet the Employer's objective of not having to pay for any employee parking and it is likely to

increase costs rather than reduce them. If the Employer has to pay for parking through a parking subsidy program it likely would have to reduce the maximum subsidy amount, currently up to \$245 paid to employees who participate in the transit subsidy. There is only a finite source of funding available for employee transportation purposes and the budget for it is shrinking, not expanding. Furthermore, providing a parking subsidy would create a new agency program and, as such, it could be seen as an opportunity for other HUD labor organizations to bargain over the same benefit.

Finally the Union's alternative proposal, to resolve the issue during term bargaining that is likely to commence in 2014, is merely "kicking the can down the road," and deprives the Employer of an opportunity to resolve the matter now. Taxpayer money already has been spent in bringing this matter to impasse and the dispute is ripe for resolution now, rather than revisiting the matter once again next year.

2. The Union

The Union proposes the following:

(1) The Agency will discontinue paying for parking for disabled employees in accordance with the terms of this Agreement, and will update HUD Handbook 2216.1, Chapter 10, section 10-1(b) to reflect this change, but because the Agency has been paying for Region IX occupancy-funded parking as a Reasonable Accommodation for disabled employees since at least 1983, the Agency will agree to: (1) delay implementation of the change for NFFE 1450 bargaining unit employees until the completion of the next labor Management Agreement (LMA) negotiation, and (2) put in place a 1-year disabled parking transportation subsidy pilot program within 60-days from the signing of this agreement. The parking subsidy will not exceed the actual parking cost. After the 1-year pilot program, the parties will review the budgetary impact on the Agency and either party may request to re-open negotiations. If neither party re-opens negotiations, the pilot will be implemented as a formal program within NFFE 1450 offices.

(8) The Agency shall provide all affected employees with a monthly amount equal to the full amount of the monthly transit subsidy which may be used by the

affected employees to offset the cost of disabled (RA) parking. The monthly amount paid to each affected employee shall not be greater than the monthly cost of parking for that employee.

The Union opposes termination of management's 30-year practice of providing free-of-charge parking to employees who, as a result of a certified disability, have been authorized a parking space as a reasonable accommodation. This long-term practice has allowed many employees the ability to have productive professional lives and, without the accommodation, they may not have been able to work. The Union proposes that the Employer continue the past practice and that the issue be addressed during successor term bargaining in 2014. Retaining the benefit for at least another year would give the 13 employees, who otherwise would be adversely affected by the change, time to consider their options should Employer-paid parking ultimately cease. Several field offices in Region IX have lease agreements that include parking for some or all employees, so the Employer does not incur any additional monthly cost for parking. For other employees, who work in offices where the cost of parking is not imbedded in the building lease or occupancy agreement, the Employer uses a purchase order to pay the building parking vendors for the spaces authorized for disabled employees. This annual cost to the Employer is relatively small, \$14,268, according to the documentation produced by the Employer, and it should be easily absorbed by management, whereas the impact on employees, should they have to pay for parking spaces themselves, could pose a significant and unexpected financial hardship. Some employees have stated that they may have to consider retirement if they lose their parking benefit as they would not be able to pay a monthly parking fee themselves.

The Union would agree to terminate the practice of paying for parking as a reasonable accommodation for a disability if the Employer would implement a parking subsidy for disabled employees who must drive to work. A 1-year pilot program would give the parties an opportunity to assess the budgetary impact of a parking subsidy and negotiate any needed modifications with the goal that the program would become permanent. The law permits agencies to offer not only transit subsidies to employees, but also a parking benefit. The Union is proposing that the Employer implement this parking benefit program in Region IX for disabled employees only. Doing so, essentially, would continue a "reasonable accommodation" for employees and give the Employer a vehicle to legally fund the parking benefit.

Only minimal funding would be needed to provide parking subsidies for employees who need to be accommodated with a parking space and that money could be allocated from the funds authorized for transit subsidies. In FY 2013, the Agency received \$6 million to fund transit subsidies for employees, according to an Employer witness, so there is funding available to implement the proposal. Disabled employees currently are excluded from participating in the transit subsidy program because their disability does not allow them to use public transportation. Creating a parking subsidy program for disabled employees would allow them to receive some of the \$6 million in transportation benefit funds allocated by the Employer which they previously have been excluded from using.

CONCLUSIONS

Having carefully considered the arguments and evidence presented in this case, I conclude that the impasse should be resolved by ordering that disabled employees currently receiving payment for parking (made by any method) granted as a reasonable accommodation for a disability retain this benefit.^{3/}

Paying for reasonable accommodation parking has been in effect since 1983 and constitutes a past practice, placing the burden on the Employer of justifying its termination. I am not persuaded that the case has been made for now requiring employees to pay parking costs assumed by the Employer under longstanding, published local policy upon which employees have relied as a condition of employment. The Employer's justification for change is based on the opinion of HUD headquarters attorneys that these payments are not actually required by the Americans with Disabilities Act (ADA) and that Region IX's policy has gone beyond what the law requires, inconsistent with HUD headquarters policy. But that opinion does not create a legal bar to the payments continuing. This order to continue paying for parking for employees currently receiving paid parking does not reflect or constitute any view

^{3/} This order does not cover employees whose reasonable accommodation requests are determined after the date of this decision. With respect to employees whose parking is currently paid under leases or occupancy agreements, upon the expiration of those agreements the Employer will continue to pay for their parking by whatever method it determines (new lease/occupancy agreement, purchase order) for as long as they are provided parking as a reasonable accommodation.

on the requirements of the ADA but rather a conclusion that this policy has become a condition of employment by virtue of a longstanding past practice and that a change with respect to these employees has not been justified. The Employer's concerns about the impact of inconsistent interpretations of the ADA are therefore exaggerated.

The cost data simply do not support the Employer's other contention that budgetary implications are significant. At present the identifiable costs (not embedded in lease agreements) are under \$15,000 a year. A total of less than 30 employees are involved, and the Employer is already prepared to continue to subsidize reasonable accommodation parking for half these employees for as long as 9 years.

With respect to the Union's novel proposal for creating a special parking subsidy program for disabled employees paid for by transit subsidy funds, I believe this requires more thorough examination and more focused discussion between the parties than has occurred to date. This makes it more appropriate for consideration during term bargaining should either party choose to raise the issue of paying for reasonable accommodation parking and the Union puts forward this proposal.

DECISION

Disabled employees currently receiving payment for parking, made by any method, granted as a reasonable accommodation for a disability shall retain this benefit.



Mary E. Jacksteit
Arbitrator

August 9, 2013
Takoma Park, Maryland