

In the Matter of

DEPARTMENT OF HEALTH AND HUMAN
SERVICES
NATIONAL INSTITUTES OF HEALTH
NATIONAL INSTITUTE OF ENVIRONMENTAL
HEALTH SCIENCES
RESEARCH TRIANGLE PARK, NORTH
CAROLINA

and

LOCAL 2923, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 179

ARBITRATOR'S OPINION AND DECISION

Local 2923, 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 Health and Human Services, National Institutes of Health, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina (Employer/Agency).

After an investigation of the request for assistance, which arises from bargaining over the continuation of a membership subsidy payment for employees who join private fitness centers, the Panel directed the parties to mediation-arbitration with the undersigned. Accordingly, on February 11, 2014, a mediation-arbitration proceeding was convened by videoconference with representatives of the parties. During the mediation phase, the parties were able to resolve some aspects of their dispute, but they were unable to reach agreement on other matters. 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's mission is to conduct, foster, and coordinate research and research training on the biological effects of chemical, physical, and biological substances in the environment to improve human health conditions. The Union represents a bargaining unit consisting of approximately 180 non-professional employees. The parties are covered by a collective-bargaining agreement (CBA) that went into effect in 1990. Recently, they negotiated a successor CBA, which is pending implementation. The current CBA does not address fitness center subsidies.

The dispute arose when the Employer notified the Union, on May 20, 2013, of its intent to discontinue paying a \$13 monthly subsidy for employees who are members of private health clubs. The Employer has not implemented the change, as yet.

ISSUES AT IMPASSE

The parties have been unable to reach agreement over a Memorandum of Understanding concerning the extent to which subsidies for membership in private fitness centers would continue. The Union also has taken the opportunity during these negotiations to advance proposals concerning the impact and implementation of the expansion of the Employer's fitness center in the Rall Building, and for access by all bargaining-unit employees to the Keystone Fitness Center which has been, heretofore, limited to those who are stationed in the Keystone Building.

POSITIONS OF THE PARTIES

1. The Union's Position

The following wording is proposed by the Union:

Section 1 - Fitness Subsidy

A. The Agency agrees to continue to subsidize fitness activities of BUEs through the use of gymnasiums, fitness centers, fitness clubs, etc. The subsidy shall be in the amount of \$18 per month per participant. The parties agree that they will meet and renegotiate this provision in 3 years.

B. The Agency shall provide a subsidy for a minimum of

15 BUEs. When there are not enough participants, or BUEs, the Agency will pay only for those who have applied and met the below requirements. Whenever this occurs the Agency shall notify the Union that there are less than 15 participants.

- C. The Agency shall continue this subsidy involving the current fitness clubs: Fitness Connection, Millennium Fitness and O2 Fitness. The Agency is free to expand the subsidy but they agree to notify the Union prior to such expansion. In addition, if the Agency determines that there is an easier or better way to pay for such subsidies it also is free to implement as long as they notify the Union prior to such implementation.
- D. Memberships will be issued on a first come, first served basis. When all memberships are filled, a waiting list will be maintained for employees who are interested in joining one of the health clubs. As memberships become available, employees will be notified by E-mail or telephone.
- E. To participate in this program, the employee must agree to abide by the conditions set forth below:
 - 1. To participate at one of the sponsored health club facilities at least 24 times per 3-month period.
 - 2. To pay the employee's portion of the fee according to the fitness club's arranged terms (monthly, quarterly, etc.).
 - 3. To complete the required paperwork, if any, provided by the health facility before staffing an exercise program.
 - 4. To contact the designated Agency staff upon termination of participation.

Section 2 - Rall Fitness Center

- A. Hours will be Monday - Friday 7 a.m. to 7 p.m. but closed during any Federal holiday.
- B. Classes and facility access are free to NIEHS employees.

- C. Equipment shall consist of, at a minimum: two recumbent bikes, four treadmills, two elliptical trainers, one cross-training step machine, medicine balls, jump ropes, hand weights, weight bench, free-weights, mats and exercise bands, TV/VCR/DVD with a news station and a collection of exercise videos. Expansions to this list will be considered on a regular basis. All exercise equipment will be bought in new condition and renewed whenever it becomes worn-out, met its life cycle, or is a potential danger to employee health.
- D. A variety of free exercise classes will be provided that last approximately 30 to 60 minutes. The parties agree to assess classes and provide those types that appeal most to employees and that will permit the greatest number of participants.
- E. Classes will usually be offered throughout the day, including before 9 a.m. and after 5 p.m. Many of the classes will be offered around the typical lunch hour.

Section 3 - Keystone Fitness Center

NIEHS BUEs shall be permitted to use the Fitness Center located at 560 Keystone. Employees will need to sign the application and an application for a card key to use this Center. The Agency agrees to approve such requests in an expedient fashion, not to exceed 10 work days.

Section 4 - General

Any rules for such exercise facilities will be limited to health and safety issues, proper attire, theft, and/or use of equipment. BUEs who violate any such rules will be permitted to re-apply for use of the facilities within 30 days with the exception of theft or other egregious violations. Such BUEs will be notified of their right to Union representation.

Nothing in this document changes or waives either party's rights.

The Union advances a number of arguments in support of its proposal. With respect to the subsidy, it contends that, for at

least 20 years, the Employer has granted a \$13 monthly subsidy for BUEs who elect to join private fitness centers. Not only should the Employer continue to subsidize membership in private fitness centers, but it should also increase the subsidy to \$18 per month in recognition that, over the years, membership costs have risen. The Employer can well afford an \$18-per-month subsidy since its budget has steadily increased since 2011 and the office which "manages" the subsidy "gave back" approximately \$100,000 in 2013. Currently, there are 13 BUEs receiving a subsidy. If, for example, the number increased to 15, an \$18-per-month subsidy would cost the Employer \$3,240 annually, a "pittance" of the Employer's overall budget.

The Employer has failed to establish that the cost of the Union's proposal is significant and not offset by compensating benefits to employees, which are the criteria used by the FLRA when it examines a claim that a proposal interferes with management's right to determine its budget. Retaining the subsidy, with a modest increase in the monthly amount, would benefit employees who are unable to use the Employer's on site fitness centers during the day due to job constraints and family matters that impede their ability to use those centers before or after their work day. Furthermore, it would allow employees to retain a modest economic benefit during a time when there are few financial incentives for employees and help them to defer the cost of private fitness centers that offer greater amenities than those offered at the Employer's centers, extended hours of operation, and operate at night and weekends, unlike the Employer's facilities.

The Union's proposals concerning the renovated Rall Fitness Center, which is operated by the Employer and available to all employees, merely represents "what the parties' informally acknowledge are current practice and offerings." The Union, however, believes it prudent to reduce those matters to a written agreement, to ward against memories that "may fade." Its proposals are consistent with the terms of a previously negotiated MOU which provides that "(t)he Union will be permitted to bargain any changes to any negotiable aspects of the new fitness center."

The Union also proposes that access to the fitness center in the Keystone Building should be expanded to allow all BUEs to use it, and not merely those who currently work in that building. Expanding access would give employees another fitness center option that particularly would be convenient when BUEs not stationed at Keystone need to work in that building for day-

long periods. The Employer has the ability to require the lessor of the Keystone Building to grant building access to all BUEs and not just those who are permanently stationed there.

Finally, the Union maintains that it is important to include in an MOU a provision that gives employees notice of the rules for access and use of the Rall and Keystone Fitness Centers. Similar to its proposals concerning the Rall Fitness Center, the Union maintains that its proposal "(p)reserves current and past practice" and implementation would not burden the Employer.

2. The Employer's Position

The Employer proposes the following:

Offsite Fitness Programs:

1. The Agency agrees to continue to subsidize the fitness activities of currently enrolled BUEs at existing gymnasiums, fitness centers, fitness clubs, etc. in the amount of \$13 per month per participant. This will continue through September 30, 2015.
2. If an enrolled participant leaves the program they will not be entitled to re-enroll.
3. If an existing fitness facility ceases to operate, enrolled BUEs affected by this closure will have the option to change to one of the facilities remaining open.

The Employer belatedly argues that it has no duty to bargain over the Union's proposal to retain and increase monthly private fitness center subsidies because the proposal interferes with its right, under 5 U.S.C. § 7106, to determine its budget and, furthermore, the proposal does not constitute an "appropriate arrangement," under 5 U.S.C. § 7106(b)(3), for employees adversely affected by the exercise of a management right. In 2013, when the agency was under sequestration, a determination was made to eliminate the subsidy program for all employees in an effort to conserve economic resources. Nevertheless, rather than terminating the funding immediately, the Employer is willing to continue authorizing the current subsidy, until September 30, 2015, for those few now receiving it which it maintains is a reasonable approach that would allow employees to retain the subsidy for another 1½ year.

Essentially, the Union's proposals concerning the on-site Rall Fitness Center reflect the *status quo*, as provided in the Employer's policy concerning "Fitness and Wellness," in terms of the hours of operation, type and maintenance of equipment, and class times. There is no need to commit those terms to a written agreement with the Union because the proposals do not address any changes in practice or working conditions. Furthermore, the Union's proposal concerning equipment replacement, already has been addressed in a prior agreement between the parties, dated January 18, 2013, which provides that "any additional equipment will be new, commercial-grade, from an authorized dealer, easy-to-use, and durable." The Union's proposal to expand access to the fitness center in the Keystone Building to all BUEs would violate the lease agreement with the building landlord, which, for security reasons, limits building access to those who work in the Keystone Building.

CONCLUSIONS

In reaching a decision on this case, the arbitrator must address the differences in both substantive positions and on jurisdictional matters. Since the jurisdictional issue is the most troubling - the Employer's last minute claim that the Union's proposals are nonnegotiable - I will address it first.

As noted above, the Employer belatedly argues that it has no obligation to bargain further over the Union's proposal concerning fitness center membership subsidies because the proposal interferes with management's right, under 5 U.S.C. § 7106, to determine its budget and the proposal does not constitute an appropriate arrangement, under 5 U.S.C. § 7106(b)(3), for employees adversely affected by the exercise of a management right. The Employer raises these arguments for the first time in its Statement of Position submitted to the arbitrator at the close of the mediation-arbitration proceeding. While I recognize that such claims technically are within the right of the Employer, a review of the record leads me to conclude that they are both insincere and ill timed, and give the appearance of the Employer attempting to hedge its bets.

To begin with, the Employer became aware of the request for Panel assistance in August of 2013 without raising possible negotiability issues; it did not oppose the Panel asserting jurisdiction. Moreover, once the Panel asserted jurisdiction, the Employer voluntarily collaborated in the mediation-arbitration proceeding which involved an all-day procedure during which, no mention was made of a possible negotiability

dispute until the final moments. Other than its bare assertion, no evidence was ever provided by the Employer to substantiate a claim that the Union's proposal would interfere with its right to determine its budget and, I note that the Employer submits its negotiability argument while still proposing adoption of its proposal on the merits. This strategy has the effect of undermining the merit of the arguments raised by the Employer during the mediation-arbitration procedure. While I consider the Employer's willingness to continue providing, for the next 18 months, the current subsidy for the 13 bargaining-unit employees who receive it, as having some merit, I find the Employer's arguments about the budgetary impact of the Union's proposal to be disingenuous in view of the *de minimis* cost of maintaining the existing fitness center membership subsidies for a relatively small percentage of the bargaining unit. Moreover, the Employer presents no relevant data or case law to support its argument.^{1/}

Inconsistency of argument is by no means limited to the Employer. The Union, for its part, acknowledges that the \$13 subsidy has been in place for close to 20 years. It seeks to increase the number of employees who will be eligible to receive the subsidy without presenting any evidence of need. The Union also seeks to increase the amount of the subsidy from \$13 to \$18 to reflect the increasing costs of private health club memberships. While it is not difficult to imagine that those membership costs have indeed increased over the past 20 years, the Union presents no data about such increases, nor does it

^{1/} By contrast, the Union relies on *American Federation of Government Employees and Air Force Logistics Command, Wright Patterson Air Force Base*, 2 FLRA 604, 608 (1980) which established the FLRA's balancing test in determining management's right to determine its budget in connection with a proposal to establish a day care center. The FLRA held that:

Only where an agency makes a *substantial demonstration* that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106 (a) of the Statute. [Emphasis added.]

As previously stated, the Employer provides no evidence or any elaboration on its budget claims in the instant case.

attempt to explain why so few of its bargaining-unit members are concerned with receiving or using such memberships. While this Arbitrator recognizes the subsidy for memberships as a unique economic benefit which any labor organization would attempt to preserve, the Union does not succeed in making a compelling case for raising the fees or expanding the number of employees who can receive such a benefit.

Finally, the Employer dismisses the Union's desire to memorialize the key aspects of the current understanding about the operation and practices of the Employer's Rall Fitness Center as unnecessary since, for the most part, the Union's proposals reflect the *status quo*. The Union did not effectively rebut that claim or support the need to make changes to some aspects of the *status quo*.^{2/} Therefore, I find it unnecessary to include in the MOU reference to the operating procedures at the Rall Fitness Center. With respect to the Union's desire to allow all bargaining-unit employees access to the fitness room in the Keystone Building, I am not persuaded that the Union has demonstrated a need for such a change, nor would it be consistent with the lease agreement for that space which limits access to the fitness room to those who work in the Keystone Building.

DECISION

Having carefully considered the arguments and evidence presented, I conclude that the impasse shall be resolved on the basis of the following compromise solution:^{3/}

2/ For example, currently, there is a fee for a yoga class offered at the Rall Fitness Center. The Union's proposal would require it to be offered free of charge which, if adopted, could mean that should the Employer refuse to absorb the cost of the class, it may have to be discontinued. Also, the Union's proposal would require the fitness center to have a "TV/VCR/DVD with a news station and a collection of exercise videos." No evidence was provided whether the Rall center already has that equipment and the Union merely desires to memorialize it in a written agreement or, whether it is proposing a new amenity for the center but does not justify a need for it.

3/ The MOU incorporates those provisions which the parties voluntarily agreed to, on February 11, 2014, during the mediation-arbitration proceeding.

MEMORANDUM OF AGREEMENT

The parties agree that fitness is a key part of good health, and healthy employees are generally more productive, use less leave, and have enhanced morale, among many other benefits to themselves and their workplace.

The parties enter into this Agreement in an effort to afford employees the ability to seek alternative arrangements, if desire, in order to fulfill their personal fitness objectives. The parties also encourage employees to utilize the opportunities and facilities provided by the Institute.

Section 1: Fitness Subsidy

A. For bargaining-unit employees currently receiving a \$13 monthly subsidy for their memberships in private fitness centers, the Agency shall continue the practice until September 30, 2016. Thereafter, either party may initiate bargaining to extend, modify or cancel this provision. The monthly subsidy of \$13 per month for currently enrolled bargaining-unit employees shall continue until the parties implement changes.

B. The Agency shall continue this subsidy involving the current fitness clubs: Fitness Connection, Millennium Fitness, and O2 Fitness. If an existing fitness facility ceases to operate, enrolled bargaining-unit employees affected by the closure will have the option to change to one of the facilities remaining open. In addition, if the Agency determines that there is an easier or better way for such subsidies to be paid, it is free to implement the method as long as the Union is notified prior to such implementation.

C. To participate in this program, the employee must agree to abide by the conditions set forth below:

1) To participate at one of the sponsored health club facilities at least 24 times per three month period.

2) To pay the employee's portion of the fee according to the terms arranged by the fitness clubs (monthly, quarterly, etc.)

3) To complete the required paperwork, if any, provided by the health facility, before starting an exercise program.

4) To contact the designated Agency staff upon termination of participation.

Section 2-Keystone Fitness Center

A. Use of the Keystone Fitness Center at 560 Keystone shall be limited to bargaining-unit employees who are permanently assigned to work in the Keystone Building. The parties recognize that this is a condition of the lease of that building.

B. The Agency shall work with the lessor of the Keystone facility to provide fitness equipment, space, and amenities that are optimal for employees.

Section 3-General

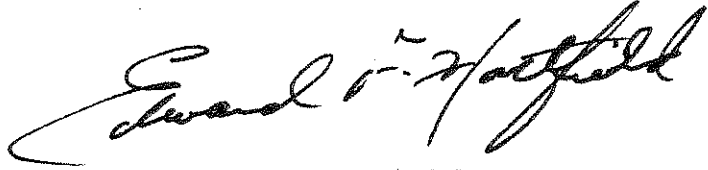
Applications for any exercise facility managed, operated, maintained, or overseen by NIEHS shall include only necessary information regarding legal liability issues. The Agency agrees that information about health status will only be collected on a strictly voluntary basis and only related to a participant's health goals. Applications shall be reviewed and approved on a timely basis, not to exceed 10 workdays. Any applications that are not approved shall contain an explicit reason in writing to the employee.

The parties agree that fitness is a key part of good health and that healthy employees are better employees. Healthy employees are generally more productive, use less leave, and have enhanced morale among other benefits to them and their workplace. With this understanding, the Agency agrees to strongly encourage supervisors to work with employees to provide flexibility that supports participation in fitness programs.

Any rules for such exercise facilities will be limited to health and safety issues, proper attire, theft, and/or use of equipment. Bargaining-unit employees who violate any such rules will be permitted to re-

apply for use of the facilities within 30 days with the exception of theft or other egregious violations. Such bargaining-unit employees will be notified of their right to Union representation.

Nothing in this document changes or waives either party's rights.

A handwritten signature in black ink, reading "Edward F. Hartfield". The signature is written in a cursive style with a large, sweeping initial "E".

Edward F. Hartfield
Arbitrator

March 28, 2014
St. Clair Shores, Michigan