

In the Matter of

DEPARTMENT OF THE NAVY  
NAVAL UNDERSEA WARFARE CENTER  
DIVISION NEWPORT  
NEWPORT, RHODE ISLAND

and

FEDERAL UNION OF SCIENTISTS AND  
ENGINEERS, LOCAL R1-144, NATIONAL  
ASSOCIATION OF GOVERNMENT  
EMPLOYEES, SEIU

Case No. 16 FSIP 31

#### ARBITRATOR'S OPINION AND DECISION

The Federal Union of Scientists and Engineers, Local R1-144, National Association of Government Employees, SEIU (FUSE or 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, 5 U.S.C. § 7119, between it and the Department of the Navy, Naval Undersea Warfare Center Division Newport, Newport, Rhode Island (Employer).

After an investigation of the request for assistance, which arises from negotiations over changes in a local Instruction (NUWC DIVNPTINST 12451.2B) on awards and provisions in a Memorandum of Understanding (MOU) concerning the implementation of the Instruction, the Panel directed the parties to mediation-arbitration with the undersigned. Accordingly, on April 12, 2016, a mediation-arbitration proceeding was convened at the Employer's facility in Newport, Rhode Island. During the mediation phase, the parties reached agreement on several provisions but they could not achieve a voluntary resolution on two others.<sup>1/</sup> Consequently, I am required to impose terms to

---

1/ In this regard, agreement was reached on provisions concerning: (1) information to be provided to the Union concerning awards granted to non-bargaining unit employees, including managers, and members of another bargaining unit; (2) the extent to which the Employer must comply with its bargaining obligations before changes are made to the

settle the impasse. In reaching my decision, I have considered the entire record.

### BACKGROUND

The Employer's mission is to conduct research and development on underwater weapons systems. The Union represents approximately 1,800 professional employees who primarily hold positions such as engineer and scientist. The parties do not have a collective bargaining agreement but, rather, have negotiated a series of MOUs on various topics. Since 1999, employees represented by the Union have been part of the Navy's Personnel Demonstration Project (Demo Project), an alternative pay-for-performance and personnel system which eliminates the pay structure under the General Schedule system and authorizes pay bands for determining salaries along with provisions for funding "continuing pay" (the equivalent of within-grade increases) and bonus pay (incentive pay for performance). Regulations governing Demonstration Projects were first issued in 1997 by the Office of Personnel Management (OPM) and published in the Federal Register.

### ISSUES AT IMPASSE

The parties disagree over whether: (1) the FUSE bargaining unit should receive a pro rata share of awards by the end of a Fiscal Year (FY) if the Commander sets aside a fixed amount of money for awards at the beginning of the FY; and (2) unit employees should have the option of receiving time off instead of a cash award.<sup>2/</sup>

---

awards program and the MOU; and (3) a duration clause for the MOU and Instruction.

2/ Since FY 2012 the sorts of awards covered by the Instruction (e.g., Special Act, Beneficial Suggestion, Division Annual, Publication and Presentation Awards) have been severely curtailed or eliminated entirely due to lack of funding, and there is no money in the budget for cash awards in FY 2016. Moreover, in accordance with annual directives issued by the Office of Management and Budget limiting the percentage of employees' basic pay that agencies may grant as awards, the Employer has used any such amounts to provide bonus pay under the parties' negotiated Demo Project. It also should be noted that, once the parties' Awards Program MOU is effectuated, unit

1. Mandatory Distribution of a Pro Rata Share of Awards

a. The Union's Position

The Union proposes that the following wording be included in the MOU:

3. Each Fiscal Year (FY) the Commander will set the budget for awards. The Agency shall distribute a pro-rata share of Awards to the FUSE bargaining unit, or negotiate a lesser amount with the Union if necessary. Negotiations will be completed before a lesser amount can be distributed.

The pro-rata share will be based on the total amount of the awards listed in para. 2.a, 2.c, 2.e, and 2.f above and will be the same percentage (i.e., 55%, 60%, etc.) as the size of the FUSE bargaining unit in relation to the total population of the Agency workforce at the start of the FY.

Its proposal is consistent with the Demo Project agreements the parties have negotiated since 1999 whereby, by the end of an FY, the Employer is required to give the FUSE bargaining unit a pro rata share of bonus and continuing pay in relation to the total population of the Agency workforce at the start of an FY, unless the parties mutually agree otherwise. Unlike the parties' practice under the Demo Project, under its awards proposal there is no requirement that the Commander budget any money for awards at the start of an FY. If funding is available, however, the practice ensures that the Union's bargaining unit is treated fairly in relation to the Agency's entire workforce. In the Union's view, the Employer has not provided any legitimate reasons for changing this practice when it comes to awards covered by the Instruction.

To accommodate the Employer's concern that it needs flexibility if limitations on funding arise during the course of an FY, as happened in FY 2013 when Sequestration went into effect, the Union's proposal would permit the Employer to negotiate a lesser amount of awards funding than was originally budgeted by the Commander. This is also consistent with what has successfully occurred in recent years under the Demo Project

---

employees will for the first time be eligible to receive time off awards.

where the parties reached agreements after reductions in continuing pay were mandated at a higher level. It is superior to the Employer's proposal which would only require management to *consider* apportioning a pro rata share of the awards to the FUSE bargaining unit, and then merely provide rationale to the Union if a pro rata share is not apportioned. In effect, the Union's approach is already reflected in a different section of the MOU where the Employer has agreed to meet its bargaining obligations before any changes are made to the Awards Program or the MOU.

b. The Employer's Position

The following wording is proposed by the Employer:

3. Each Fiscal Year (FY), the Commander will set the budget for awards. The Agency shall apportion a pro-rata share of Awards to the FUSE bargaining unit for consideration. The apportioned amount will be based on the total amount of awards listed in paragraph two, 2(a), (c), (e), and (f) and will be the same percentage (i.e., 55%, 56%, etc.) as the size of the bargaining unit in relation to the total population of the Agency workforce at the start of the FY. Should the pro-rata share (percentage), apportioned to FUSE not be awarded, the Agency shall meet and provide rationale to the Union.

Preliminarily, there is a "failsafe" already built into some of the awards covered by the Instruction that guarantee they will be distributed because they are subject to committee oversight and specified criteria. Where there is some level of discretion in granting awards, it is management's intent to give FUSE bargaining unit employees their pro rata share. A review of awards data going back to FY 2010 confirms, for example, that its members received at least 60 percent of all Special Act awards that were paid by the Agency. What the Employer's proposal ensures is that, if there is a change in funding halfway through an FY, as occurred in 2013 under Sequestration, it would not be required to distribute non-existent award money. This would permit management to avoid what has recently occurred under the parties' Demo Project agreement where grievance arbitrators have mandated that FUSE unit employees receive approximately \$1.5 million in bonus pay for previous years. The Union's proposal, which would require management to distribute a pro rata share of all awards to the FUSE bargaining unit

budgeted at the start of an FY, or negotiate a lesser amount with the Union if necessary, is unacceptable. It would eliminate the Employer's discretion to respond unilaterally to unexpected shortfalls in funding and could lead to an impasse requiring resolution by a third party.

#### OPINION

Having carefully considered the evidence and arguments presented by the parties, I shall order the adoption of the Employer's proposal to resolve this issue. While the Union contends that its Demo Project agreements substantiate its position that the Employer's proposal constitutes an unwarranted change in a past practice, the parties' dispute arises because of a change in a local Instruction on awards. As established during the mediation portion of the proceeding, the Union acquiesced in the elimination of a separate awards program covered by the previous Instruction when it agreed to participate in the Demo Project in 1999. The awards program was reinstated by the Employer in 2003 after it found additional funding. Since then the Employer has been under no contractual obligation to provide the FUSE bargaining unit with a pro rata share when it distributes awards. Therefore, I conclude that it is the Union that is attempting to change the *status quo* by proposing that the FUSE bargaining unit receive a pro rata share of awards whenever the Commander establishes a budget for them at the start of an FY.

In my view, the Union has failed to demonstrate the need for its proposal. Based on the data the Employer provided from FY 2010 until FY 2012, when award funding was severely curtailed, the FUSE bargaining unit received a pro rata share of Special Act awards, among others, even though there was no contractual requirement that the Employer do so. This fact establishes management's credibility when it states that, if its proposal is adopted, it still intends to give the FUSE bargaining unit a pro rata share of awards. Because there is no funding set aside for awards in FY 2016, it may be some time before the Employer's intentions in this regard can be confirmed through its actions. I note that the parties have agreed that either side may reopen the MOU after 1 year. If it subsequently turns out that the FUSE bargaining unit does not receive a pro rata share of awards in future years the Union can address that matter by reopening the MOU for negotiations.

2. Option of Receiving Time Off Instead of a Cash Award

a. The Union's Position

The Union proposes the following wording:

6. Management will approve employee requests for paid time off from duty (time off awards) in lieu of a cash award unless work requirements necessitate disapproval. Employees receiving time off awards should use the award in a timely manner; but no later than one year after receipt or the award will be forfeited. Supervisors will approve time off award requests in a timely manner unless work requirements necessitate disapproval, in which case, management will explain the reason for disapproval. If the request is disapproved, management will work with the employee and make all reasonable efforts to reschedule the time off award request to preclude forfeiture. [Only the highlighted wording is in dispute.]

The primary reason given by the Employer for not agreeing to allow employees to request time off in lieu of a cash award is that mission requirements may not permit an employee to be spared. To meet this interest, the Union modified its proposal to make it clear that such a request would be approved unless work requirements necessitate disapproval. According to the Union, disapprovals on that basis would be rare because most employees would receive less than the maximum 40-hour time off award authorized by regulations, and such time could be scheduled for use within the required 1-year period without compromising the Employer's mission. Contrary to the Employer's "management knows best" approach, it is reasonable to give employees a choice based on what they believe is best for them. In particular, younger employees who have not accumulated much annual leave may prefer time off over cash. Any adverse impact on management if employees are given the option would be minimal and are outweighed by the benefits to employees.

b. The Employer's Position

The following wording is proposed by the Employer:

6. Management will give consideration to employee requests for paid time off from duty in lieu of a

**cash award.** Employees receiving time off awards should use the award in a timely manner; but no later than one year after receipt or the award will be forfeited. Supervisors will approve time off award requests in a timely manner unless work requirements necessitate disapproval, in which case, management will explain the reason for disapproval. If the request is disapproved, management will work with the employee and make all reasonable efforts to reschedule the time off award request to preclude forfeiture. [Only the highlighted wording is in dispute.]

While the ability to meet mission requirements is a major concern if employees are permitted to select time off in lieu of a cash award, it is not the Employer's only concern. Management must also consider the "apportionment" of cash awards and time off between employees. In most cases, supervisors know about an employee's leave situation and would take that into account when considering whether to approve an employee's time off request. In addition, management would have to develop a method of converting cash to time off. In this regard, OPM prohibits converting time off to cash based on hourly rates of pay because, among other things, lower-graded employees may find such salary-based conversions unfair. For these reasons, the Employer prefers to retain complete discretion when determining whether an employee should receive time off instead of a cash award.

#### OPINION

On this issue I conclude that, on balance, the Union has made the better case. The decision to grant a particular employee a cash award is within management's discretion. Once that decision is made, the maximum number of hours an employee could elect to receive as a time off award is 40, but only if the cash award is equivalent to that number of hours. Lesser amounts of cash awards would result in correspondingly lower numbers of hours off. The parties agree that a supervisor can deny an employee's request to use such hours because of work requirements and, if that happens, management will make all reasonable efforts to reschedule the time off request within 1 year after the award has been granted to preclude forfeiture. In this regard, managing the use of time off is no different than managing the use of annual leave. Given that the granting of individual awards is at the discretion of management and the maximum number of time off hours that can be awarded is only 40

per year, I am not persuaded that the Union's proposal would have an adverse impact on the Employer's ability to accomplish its mission.

As to OPM's guidance, it only speaks about the conversion of *time off to cash* based on hourly rates of pay. The Union's proposal, however, involves the conversion of *cash to time off*, the reverse of what OPM's guidance addresses. Consequently, the Union's proposal does not appear to conflict with OPM's guidance. Presumably, after deciding to grant an employee a cash award, management would have the discretion to determine how many hours of time off the cash award is worth based on hourly rates of pay or some other method. If the conversion method management uses is perceived as unfair the employee always has the right to take the cash instead. Because the MOU can be reopened by either party 1 year after its implementation, if it subsequently turns out that implementation of the Union's proposal leads to practical problems not contemplated here, the Employer can address the matter through negotiations. Accordingly, I shall order the adoption of the Union's proposal to resolve this issue.

#### DECISION

The parties shall take the following actions to resolve their dispute:

1. Mandatory Distribution of a Pro Rata Share of Awards

The parties shall adopt the Employer's proposal.

2. Option of Receiving Time Off Instead of a Cash Award

The parties shall adopt the Union's proposal.



H. Joseph Schimansky  
Arbitrator

April 28, 2016  
Bethesda, Maryland