

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of)

DEPARTMENT OF HEALTH AND)
HUMAN SERVICES)
PUBLIC HEALTH SERVICE)
CENTERS FOR DISEASE CONTROL)
ATLANTA, GEORGIA)

and)

LOCAL 2883, AMERICAN FEDERATION)
OF GOVERNMENT EMPLOYEES, AFL-CIO)

Case No. 91 FSIP 91

DECISION AND ORDER

Local 2883, 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 section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between it and the Department of Health and Human Services, Public Health Service, Centers for Disease Control, Atlanta, Georgia (Employer or CDC).

The Panel determined that the impasse should be resolved through written submissions from the parties, with the Panel to take whatever action it deemed appropriate to resolve the impasse. Written submissions were made pursuant to this procedure, and the Panel has now considered the entire record.

BACKGROUND

The Employer's mission is to safeguard the public health by providing information, primarily to state health departments, on methods of disease control. To that end, it operates a conglomerate of technical centers including, among others, the Center for Chronic Disease Prevention and Health Promotion. That center is the parent organization of the Office on Smoking and Health, whose primary mission is to compile and disseminate information on the health risks associated with smoking. The

bargaining unit consists of approximately 1,500 employees who work in a wide variety of administrative and technical occupations in approximately 20 separate buildings throughout the Atlanta metropolitan area. The instant impasse arose as a result of negotiations for a successor collective-bargaining agreement. The prior contract was to expire in April 1990, but remains in effect until a new agreement is implemented.

ISSUES AT IMPASSE

The parties are at impasse over two issues: (1) smoking policy and (2) merit promotion.

1. Smoking Policy

a. The Employer's Position

The Employer had originally maintained that it had no duty to bargain over smoking because its proposed ban "was essential to the performance of its mission to educate the public about the dangers of smoking." It argued that the proposed policy fell within the "compelling need" exception to the duty to bargain, found at section 7117(a)(2) of the Statute, and it urged the Panel to decline to assert jurisdiction over the issue. On the merits, the Employer has proposed continuation of its Smoke-Free Workplace Policy, which it has already implemented.^{1/} Under that policy, indoor smoking has been prohibited at all locations under the Employer's control, with smokers continuing to have access to existing designated

^{1/} In a memorandum dated October 25, 1990, the head of the agency advised all Atlanta area CDC employees that "effective 15 days from the date of this memorandum, all areas currently designated as smoking areas will become smoke free areas." In response to the Employer's implementation of its proposal, the Union filed an Unfair Labor Practice charge with the Federal Labor Relations Authority (FLRA) alleging that the Employer had failed to negotiate over a change in working conditions. The FLRA's General Counsel has advised the parties that it has deferred action on this charge, as well as one filed by the Employer, pending the outcome of the instant Panel proceedings. It has, however, begun investigation of a related charge filed by the Union which alleges that the Employer violated the Statute by conducting a smoking survey without first negotiating over the matter.

outside smoking areas. Continuation of smoking cessation programs and the creation of a Smoking Cessation Advisory Group are other elements of the Employer's plan.

According to the Employer, a complete ban on smoking is necessary in order to protect the health of nonsmokers. It maintains that continuation of existing outdoor smoking areas should accommodate those employees who continue to smoke. Such a ban is also necessary to maintain consistency with the Employer's mission of disease prevention. In its view, the existing smoking agreement, which provides for indoor designated smoking areas, does not protect adequately the health of nonsmokers and fails to consider the agency's overall mission.

b. The Union's Position

With respect to the negotiability question, the Union asserts that the Employer is required to negotiate over the issue; it urges the Panel to exercise its mandate as set forth in Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988) (Carswell), and decide the duty-to-bargain question in its favor. The Union relies on the holdings of Department of Health and Human Services, Family Support Administration, Washington, D.C., Department of Health and Human Services Headquarters Office, Washington, D.C. and Department of Health and Human Services Region VII, Kansas City, Missouri v. Federal Labor Relations Authority, 920 F.2d 45 (D.C. Cir. 1990) (Family Support Administration) and National Treasury Employees Union, Chapter 250 and Department of Health and Human Services Family Support Administration, Washington, D.C.; National Treasury Employees Union, Chapter 229 and Department of Health and Human Services Headquarters Office, Washington, D.C.; National Treasury Employees Union, Chapter 217 and Department of Health and Human Services, Region VII, Kansas City, Missouri, 33 FLRA 61 (1988), (NTEU) in which both the U.S. Court of Appeals for the District of Columbia Circuit and the FLRA, respectively, rejected the "compelling need" argument, which had been raised by the Department of Health and Human Services under circumstances similar to those in the instant case, and ordered it to negotiate over union proposals on smoking.

On the merits, the Union proposes that the Panel maintain the existing smoking agreement which was negotiated in 1986. Under that agreement, smoking was banned in all indoor areas except those specifically designated for smoking. The Employer was required to provide smoking cessation programs, and smokers were allowed a reasonable number of smoke breaks. Smoking was

prohibited in Government vehicles when occupied by two or more passengers, and the sale of tobacco products on CDC-controlled premises was forbidden. The agreement also provided for progressive discipline for violations of the policy with complaints to be addressed through the parties' negotiated grievance procedure.

In the Union's view, the Employer has not demonstrated any need to change the existing agreed-to policy. It believes that the existing agreement has effectively balanced the competing interests of smokers and nonsmokers and, therefore, ought to be maintained.

CONCLUSIONS

In deciding this issue, we shall, pursuant to the FLRA's decision in Carswell, first address the nonnegotiability allegations which were raised by the Employer. In that case, the FLRA concluded that the Panel may apply existing case law to resolve a duty-to-bargain question which arises during impasse proceedings. In this regard, both the FLRA and the U.S. Court of Appeals for the District of Columbia Circuit have, in similar smoking cases, rejected the "compelling need" argument raised by the Employer.^{2/} Accordingly, we find that the Employer does have a duty to bargain over the Union's proposals on smoking and conclude that the matter is properly before the Panel for resolution on the merits.

Having examined the evidence and arguments on this issue, we conclude that neither party's proposal would provide an adequate resolution to the impasse. On the one hand, we believe that the Union's proposal pays too much deference to the interests of smokers. In this regard, allowing indoor smoking in designated areas, as well as in Government vehicles, would appear to be too casual an approach given the mounting scientific evidence of the adverse effects on the health of nonsmokers. We also believe that allowing smokers "a reasonable number of smoking breaks" would undoubtedly have a negative effect on productivity and also could lead to unnecessary difficulties between supervisors and smokers, as well as to resentment on the part of nonsmokers. The Employer's proposed policy, on the other hand, would not provide smokers at all CDC locations with a measure of protection from the elements. Moreover, while the Employer agrees to provide smoking cessation programs, the precise terms of that portion of its proposal are unclear.

^{2/} See Family Support Administration and NTEU, supra.

In accordance with the above discussion, we shall order the adoption of compromise wording which, in our opinion, strikes a better balance between the competing interests in this case. In this vein, smoking shall be prohibited in all indoor areas which are under the Employer's control; this ban extends to Government vehicles, regardless of the number of occupants. Because we are persuaded that there should be some accommodation for those who choose to continue to smoke, however, our Order shall also specify that the Employer designate outdoor smoking areas at all locations covered by the policy which (1) are reasonably accessible to employees, and (2) provide a measure of protection from the elements. In reaching this determination, we are mindful of the Employer's concerns about its public image and, therefore, emphasize that outdoor smoking shall be permitted only in those areas designated by the Employer as smoking areas.

With respect to other aspects of the smoking policy, we shall retain those elements of the existing agreement which, in our view, are consistent with the agency's mission of disease prevention. In this regard, the ban on sales of tobacco products on premises controlled by the Employer shall be continued. We also shall order the Employer to sponsor free smoking cessation programs during working hours which employees may attend while on administrative leave. To further assist those smokers who wish to break the habit, the Smoking Cessation Advisory Group, initially created by the Employer and consisting of smokers, nonsmokers, and Union representatives, shall be continued. Finally, we believe that the negotiated grievance procedure provides an appropriate mechanism for resolving disputes arising in connection with smoking policy; therefore, we shall retain those portions of the policy which provide for its use.

2. Merit Promotion

a. The Employer's Position

The Employer proposes that the existing Merit Promotion Plan remain in effect for up to 1 year; during that period, the Employer would revise the Plan and submit it to the Union for impact-and-implementation bargaining. The Union would be permitted to submit proposals which the Employer would consider in completing its revisions, and once the new Plan was implemented, the Employer would agree to an expedited grievance procedure to address disputes over eligibility and ranking.

In the Employer's view, a 1-year period is a reasonable amount of time to revise the existing Plan, as it contains a

complex set of procedures which are used in filling vacancies. Its proposal would allow the Union to have input into the revision process and would recognize the Union's right to bargain over the impact and implementation of the revised Plan. Finally, the expedited grievance procedure which it proposes would be fair and equitable and should help resolve disputes in a timely fashion.

The Union's proposal, on the other hand, could be administratively cumbersome and, in the Employer's view, "would have a negative impact on E[qual] E[m]ployment] O[pp]ortunity], the Merit Promotion Program, and [the] . . . morale [of] nonbargaining-unit employees."

b. The Union's Position

The Union proposes the following:

1. All vacancies shall be announced and posted on all employee bulletin boards.
2. The CDC Merit Promotion Plan shall be followed when filling bargaining-unit positions, in addition to the requirements in this Article.
3. Bargaining-unit employees shall receive first consideration for bargaining-unit positions.
4. The Union shall be provided with a copy of all vacancy announcements that are within the bargaining unit.
5. The Union waives its right to negotiate changes to the CDC Merit Promotion Plan, provided that any future changes fully comply with 1, 2, 3, and 4, above.

According to the Union, adoption of its proposal would ensure that all bargaining-unit employees are aware of vacancies. In this regard, since unit employees work at numerous locations throughout the Atlanta metropolitan area, announcing and posting of vacancies at all locations should provide an equal opportunity for all employees to compete for open positions. The provision requiring that bargaining-unit employees receive first consideration for bargaining-unit vacancies is consistent with a widely-accepted principle of labor-management relations whereby internal candidates are given priority consideration for promotional opportunities.

Moreover, that portion of its proposal which would require the Employer to adhere to the Merit Promotion Plan should provide for fair and equitable treatment of all employees. Similarly, the section of its proposal which would require the Employer to provide the Union with copies of announcements for bargaining-unit vacancies would assist the Union in monitoring merit promotion practices and, therefore, should have a positive impact on labor-management relations. Finally, the provision which waives the Union's right to further negotiations should provide closure to the issue and help create stability in the workplace.

In contrast, adoption of the Employer's proposal would fail to provide a final resolution to the issue. Moreover, since the Union is entitled to bargain over the substance of the Merit Promotion Plan, the Employer's proposal that the Union be allowed to bargain over only its impact and implementation is overly restrictive.

CONCLUSIONS

Having examined the evidence and arguments on this issue, we conclude that the dispute should be resolved by the adoption of a modified version of the Union's proposal. In this regard, we agree with that portion of the Union's proposal which requires that the Employer adhere to the Merit Promotion Plan. In our view, this is a reasonable approach, and should result in the equitable treatment of all bargaining-unit employees. Likewise, we agree that bargaining-unit employees should receive first consideration for bargaining-unit vacancies.^{3/} This is consistent with a widely-accepted principle of labor-management relations under which internal candidates are given priority consideration for promotional opportunities. Accordingly, we shall order its adoption.

With respect to Provisions 1 and 4 of the Union's proposal, we believe that those portions, as written, could be

3/ Proposals which would require an employer to give priority consideration to bargaining-unit candidates, but which would not prevent the concurrent solicitation of other candidates, have been found to be negotiable by the FLRA. See American Federation of Government Employees, Local 2298 and U.S. Department of the Navy, Navy Resale Activity/Navy Exchange, Naval Weapons Station, Charleston, South Carolina, 35 FLRA 1128 (1990) and National Association of Government Employees, Local R5-165 and Tennessee Air National Guard, 35 FLRA 886 (1990).

unnecessarily cumbersome to the Employer. Thus, we will order that Provision 1 be modified to require that vacancies be announced and posted on at least one bulletin board at each location where bargaining-unit employees perform work. This should ensure that all bargaining-unit employees are made aware of job openings, while minimizing any administrative burden. Similarly, we shall order that Provision 4 be modified to require that the Employer provide copies of all vacancy announcements to the Union, as we see no reason to limit such to those within the bargaining unit. Not only will this allow the Union to monitor merit promotion practices, but it will relieve the Employer of the responsibility of sorting the announcements. Finally, since the Union's offer to waive its right to further negotiations over merit promotion was conditioned on adoption of its entire proposal, we believe that ordering such a waiver where the Panel has made modifications would be inherently unfair; accordingly, that portion of the Union's proposal shall be dropped.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of the proceedings instituted under section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

1. Smoking Policy

The parties shall adopt the following wording:

Smoking Policy Agreement between AFGE Local 2883
and the Department of Health and Human Services,
Centers for Disease Control, Atlanta, Georgia

1. There shall be no indoor smoking in any area controlled by CDC. Smoking shall also be prohibited in Government vehicles, regardless of the number of occupants. At each location covered by this policy, the Employer shall designate outdoor smoking areas which (a) are reasonably accessible to employees, and (b) provide a measure of protection from the elements. Outdoor smoking shall be permitted only in those locations designated by the Employer as smoking areas. Disputes over the adequacy or accessibility of a designated smoking area shall be resolved through the parties' negotiated grievance procedure.

2. The Employer shall sponsor free smoking cessation programs during working hours. Employees shall be allowed administrative leave to attend such programs.

3. The Smoking Cessation Advisory Group shall continue for the purpose of developing additional methods for assisting employees who wish to stop smoking. This group shall consist of smokers, nonsmokers, and Union representatives.

4. The sale of smoking or tobacco products shall be prohibited on CDC-controlled premises.

5. Disputes arising over disciplinary actions involving smoking shall be processed in accordance with the parties' negotiated grievance procedure.

6. Complaints about any aspect of the smoking policy shall first be discussed with the employee's immediate supervisor in an attempt to resolve the complaint informally. If the complaint is not resolved, a grievance may then be filed in accordance with the parties' negotiated grievance procedure.

2. Merit Promotion

The parties shall adopt the following wording:

1. All vacancies shall be announced and posted on at least one bulletin board in each building where bargaining-unit employees perform work.

2. The CDC Merit Promotion Plan shall be followed when filling bargaining-unit positions, in addition to the requirements in this Article.

3. Bargaining-unit employees shall receive first consideration for bargaining-unit positions.

4. The Union shall be provided with a copy of all vacancy announcements.

By direction of the Panel.



Linda A. Lafferty
Executive Director

July 24, 1991
Washington, D.C.