

United States of America
BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL LABOR RELATIONS BOARD

and

NATIONAL LABOR RELATIONS BOARD UNION

Case No. 17 FSIP 091

DECISION AND ORDER¹

The National Labor Relations Board (NLRB, Agency or Management) filed a request for assistance with the Federal Services Impasses Panel (Panel) to consider a negotiation impasse over the Agency's proposed "Resident Agent Home Internet Service Reimbursement Policy" (RA Internet Policy or Policy) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119, between it and the National Labor Relations Board Union (NLRBU or Union).

Following an investigation of the Union's request for assistance, the Panel determined that it would assert jurisdiction over the matter. Under 5 C.F.R. §2471.6 (a)(2) of its regulations, the Panel determined that it would resolve the impasse through a Written Submission procedure, with opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which may include issuance of a binding decision. The Panel has now considered the entire record, including the parties' final offers, written submissions, and the rebuttal statements.

¹ Chairman Mark A. Carter did not participate in any portion of these proceedings.

BACKGROUND

The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer and enforce the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.* (1935). Its mission is to protect the rights of private sector employees to organize, or refrain from organizing, to decide whether to have a union represent them, and to bargain with their employers over wages, hours and other working conditions. Among other things, the NLRB supervises representation elections and investigates/remedies unfair labor practices committed by employers and/or unions during representation elections and throughout the collective bargaining relationship. Nationwide, the Agency employs approximately 1,500 bargaining unit employees (BUEs).

The National Labor Relations Board Union represents between 800 and 850 BUEs. About 500 are professional employees who work in the field for the General Counsel in one its 26 Regional Offices.^{2/} Of the 500 professional employees who work in the field, eight are Resident Agents (RAs). A RA is a Field Attorney or Field Agent who is assigned to a regional office but whose duty station is his/her home. Resident Agent positions are established on an ad hoc basis, as a cost savings measure and/or to fulfill a particular need of the Agency. Some RA positions are in remote areas that generate enough work to justify a full-time position but are geographically difficult for an existing regional office to service. The RA in Spokane, WA, for instance, is 4 ½ hours from the Seattle office and 6 hours from its Sub-Regional Office in Portland, OR. Others have been created to ease the workload, reduce travel and per diem expenses, and/or obviate the necessity for hiring additional staff in a high locality pay area. For example, an RA in Newport News, VA, is responsible for an area that extends from Portsmouth to Richmond, VA, thereby bringing relief to the Baltimore, MD, Regional and Washington, DC, Field Offices.

The eight RA positions are scattered throughout the country. The first two positions were created in the mid-90s. Three more were established between 2004 and 2007; a sixth in

^{2/} The rest are Support Staff who work either in the Regional Offices, for the General Counsel or the Board at the Agency's Washington, D.C. Headquarters Office. A second union, the National Labor Relations Board Professional Association represents Board-side professional employees.

2009; seventh between 2014 and 2015 and the final in 2016. Although the first RA positions were filled and managed informally, by 2006, the parties had bargained and reached agreement over a "Resident Agent Program" that was incorporated in their 2006 Collective Bargaining Agreement (CBA). Section 8 of Article 37, "Work Agreement, Reporting and Other Requirements," requires selected employees and their supervisors to co-sign a Resident Agent Work Agreement that, among other things, sets the employee's tour of duty, CWS or flexible work schedule and certifies he/she will be accessible to Regional managers and supervisors during regular work hours; timely submit T&A reports; follow office leave procedures and, otherwise, comply with the parties' CBA. The Agency commits to providing, delivering and installing furniture, supplies and equipment in the RA's home. Of particular importance to this dispute is the Agency's specific commitment to "provide and pay for telecommunications services."

The parties are currently covered by a CBA that was executed on December 6, 2013. Although scheduled to expire on December 6, 2016, pursuant to Article 29, Section 1, the Agreement remains in effect "from year to year" until one of the parties notifies the other of its intent to terminate or modify the Agreement. Article 37 continues as negotiated.

In 1995, Congress determined that beginning in Fiscal Year 1996, an agency may use appropriate funds to install telephone lines and other equipment, and to pay related monthly charges, in an authorized work-at-home employee's residence as long as the agency head "certifies that adequate safeguards against private misuses exist, and that the service is necessary for direct support of the agency's mission." Pub. Law No. 104-52, Title VI, §620, 109 Stat. 468, 501 (Nov. 19, 1995). In 1996, the Agency began to pay for internet services for full-time work-at-home employees. Over the years, internet services were paid for by the Agency, however, the payment practices had been inconsistently applied to the Resident Agents; there were 4 different methods employed among the 8 Resident Agents.

Internet service accounts for Salt Lake City and Knoxville RAs were established directly by the Agency. The accounts were set up in the NLRB's name and invoices were sent to and paid by the Agency. The RAs never saw a bill. A different practice was developed for the three RA positions established between 2004 and 2007: Northampton, Providence and Newport News. The RAs, instead of the Agency, chose the internet service and provider, and opened accounts in their names, rather than that of the

NLRB. And, the payment practice shifted to one that split responsibility for the invoice between the Agency and the RA on the basis of NLRB business versus personal use. The Agency, however, continued to be responsible for directly paying the provider for its portion of the bill. When invoices were received, RAs would send them to the Office of the Chief Information Officer (OCIO) with an estimate of the percentage of time the internet was used for NLRB business versus personal reasons. The NLRB would pay the provider for the work portion and request that the provider bill the RAs for the rest. In 2009, when a sixth RA position was created in Spokane, the Agency instituted a hybrid: the RA chose the internet provider and opened the account in his name, but the Agency paid 100% of the monthly bills. The parties returned to the practice they established for the 2004-2007 RAs when they created positions for Jacksonville and Sacramento in 2014/2015 and 2016, respectively.

In approximately May 2016, the payment practices became a part of an Office of Inspector General (OIG) Review (i.e., Purchase Card Audit). In its report, dated January 27, 2017, the OIG found that the Agency violated the Anti-deficiency Act by making payments for Internet service for work-at-home employees without the Agency head's certification that the Agency had adequate safeguards against employee misuse and certification that the internet services were necessary to support the Agency mission. In its report, the OIG reaffirmed that the payments were appropriate and further found that there was no wrongdoing or misconduct of a single employee. The OIG concluded that the deficiency that the Agency needed to address was the lack of formal internal controls.

Motivated by the OIG finding, on January 19, 2017, the Agency notified the Union by email of its desire to negotiate a policy that addresses reimbursement of Resident Agents for the cost of internet service. The Agency attached its January 11, 2017, initial proposal - "Resident Agent Home Internet Service Reimbursement Policy". The Union responded the same day with a request to bargain. Thereafter, the parties exchanged proposals and engaged in bargaining. The Agency unilaterally implemented its final offer on or about March 1, 2017. The parties engaged in two telephone mediation sessions with a Federal Mediation and Conciliation Service (FMCS) Mediator.

On May 11, 2017, the Union filed a request for FSIP assistance, which was docketed by the Panel as Case No.17 FSIP 071. On August 8, 2017, the Union withdrew its request for FSIP

assistance in order to pursue their concerns over the Agency's unilateral changes to the practice of reimbursing for internet services via an unfair labor practice (ULP) charge before the FLRA. On August 14, 2017, the Agency filed this request for FSIP assistance (Case No. 17 FSIP 091). On November 2, 2017, the Union withdrew its ULP complaint.

ISSUES

The Panel asserted jurisdiction over the following issues:

- (a) Whether the Agency should be responsible for the entire cost of a Resident Agent's monthly internet service or only the "business use portion" thereof.
- (b) Whether the Agency should "directly pay" for the cost of their internet service or require Resident Agents, instead, to pay their invoices up front and seek reimbursement for their expenses from the Agency.

Agency's Final Offer

3.2 REIMBURSEMENT

The Agency will reimburse the employee for the business use portion of the cost of the employee's home internet service.

- (a) Documentation. Employees requesting reimbursement must submit copies of invoices from their service provider and disclose whether the service provider provides "bundled" services, i.e., whether cable television and/or telephone service are provided along with internet service. When services are bundled, only internet cost is reimbursable. The employee must state the amount of the "bundled" services that are allocated to internet service. The employee will provide his or her best estimate of the percentage of time that internet service is used for official NLRB business (e.g., 30 percent).
- (b) Reimbursement Process: A Standard Form (SF) 1164, "Claim for Reimbursement for Expenditures on Official Business,"

must be submitted to OCIO either monthly or quarterly, along with the documents described in paragraph (a). A checklist for the submission is set forth in the Appendix. OCIO will review the submission, and if approved, will forward it to OCFO for payment. It is recommended that the reimbursement be submitted quarterly. A Claim for reimbursement shall be submitted no later than 30 calendar days after the end of each month, or each quarter, as noted in the table below.

Quarte	Service Provider Invoice	OCIO Reimbursement
1s	January 1 through March	April 30th
2n	April 1st through June	July
3r	July 1st through	October 30th
4t	October 1st through	January 30th

(c) Annual Certification. On October 1 of each calendar year, the Resident Agent will electronically sign and date a certification that contains the following language: "I hereby certify that my home internet service is used to conduct official National Labor Relations Board business. In order to be reimbursed, I will timely submit a copy of my internet bill, a signed and dated SF-1164, and my best estimate of the percentage of time that the internet service is used to conduct official NLRB business."

Union's Final Offer

3.2 PAYMENT

The Agency will pay for the cost of internet services.

- a. Documentation. Employees requesting payment must submit copies of invoices from their service provider, provide the period of service and disclose whether the service provider provides "bundled" services, i.e., whether cable television and/or telephone service are provided along with internet service. When services are bundled, only internet cost is payable. The employee must state the

- amount of the "bundled" services that are allocated to internet service.
- b. Payment Process: The employee will submit a copy of the invoice from their service provider showing the cost of internet services to OCIO. After approval, the Agency will directly pay the service provider for internet services.
 - c. Annual Certification. On October 1 of each calendar year, the Resident Agent will electronically sign and date a certification that contains the following language: "I hereby certify that my home internet service is used to conduct official National Labor Relations Board business."

POSITIONS OF THE PARTIES ON ISSUE A

- a. Whether the Agency should be responsible for the entire cost of a Resident Agent's monthly internet service or only the "business use portion" thereof.

Agency's Position

The Agency's proposal is to reimburse the employee for the internet service that is proportional to the services received by the Agency (allowing for 100% reimbursement where the internet service is used fully for Agency business). The plan would require employees to attest to the percentage of internet service used for work purposes, and would permit reimbursement on a use-percentage basis. The Agency's plan also includes an annual certification, in which the employee certifies that the home internet service is being used to conduct official Agency business. The Agency believes these plan provisions would meet the OIG requirement that 1) there be adequate safeguards against employee misuse and 2) certification that the internet services were necessary to support the Agency mission. The Agency's two other justifications for their proposal: 1) consistency with the internet service practices used by the NLRB Administrative Law Judges (ALJ), and 2) sound fiscal policy in light of budget reductions.

Union's Position

The Union's proposal is for the Agency to continue to pay 100% of the internet service bill because of a decades-long standing past practice. The Union argues: 1) the long term Resident Agents have received 100% Agency payment of the internet service in their homes to support the mission work; 2) Article 37, Section 8(b) of the parties master collective bargaining agreement contemplates full payment of internet service - "the General Counsel will provide the resident agent with necessary equipment..."; and 3) Section 11 of the most recent Work Agreements signed by the Resident Agents contemplate full payment - "the Agency will provide and pay for telecommunication services...". The Union concludes that a shift from the past would cause confusion and conflict.

The Union also argues that there should be parity between the Resident Agent employee and the rest of the Agency's employees that are on Agency's property working on the Agency's equipment and systems. Under the Agency's "Acceptable Use of Agency Information Technology Resources" policy, employees are permitted to use Agency IT resources for personal use, provided that such use meets several requirements, including that it involves no more than minimal additional expense to the Agency. The Union argues that the Resident Agent's use of the internet in their home office for non-work purposes during non-work time adds nothing to the overall cost of the service. Finally, the Union notes that the OIG found no wrong doing with regard to the Agency paying 100% of the internet service; the violation was regarding the establishment of adequate safeguards to prevent misuse (noting that no misuse was found to have occurred by the OIG).

Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse over for the entire cost of a Resident Agent's monthly internet service. In this regard, the Panel has determined that the Agency should reimburse the employee for the internet service that is proportional to the services received by the Agency; reimbursement for the business use portion of the internet bill.

POSITIONS OF THE PARTIES ON ISSUE B

(b) Whether the Agency should "directly pay" for the cost of their internet service or require Resident Agents, instead, to pay their invoices up front and seek reimbursement for their expenses from the Agency.

Agency's Position

The Agency proposes to have one consistent practice for paying for internet services for employees working at home. The Agency proposes to implement a claim reimbursement plan, allowing employees to submit for reimbursement either monthly or quarterly (noting that the ALJs³ submit for reimbursement quarterly). In addition to providing a consistent protocol for all work-at-home employees, the plan would be similar to travel reimbursement at the NLRB.

Union's Position

The Union would like to maintain the practice of having the Agency pay the internet bills of the Resident Agents directly. The Union is concerned that employees will not receive (and have not since the unilateral implementation of the Agency's proposed protocol) timely reimbursement of their internet service claim. Under the Prompt Payment Act, 31 USC 39, agencies are required to make payments within 30 days of receipt of a proper invoice. While the delay of reimbursement is concerning, the employees are not without recourse. The employees are free to challenge the delay of payment under the Act; they can file a grievance and seek interest for the delay as a remedy.

Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve whether the Agency should "directly pay" for the cost of the Resident Agent's internet service or require Resident Agents, instead, to

³ The ALJs are not represented by a labor union.

pay their invoices up front and seek reimbursement for their expenses from the Agency. In this regard, the Panel notes that the OIG has determined that the practice of having the Agency pay the Internet service bills of the work-at-home employees, by having the OCIO employee log onto the personal vendor accounts using the Resident Agent's personal email and password, was improper. The OIG further notes that it would be virtually impossible for the Agency to devise an OIG-acceptable system of controls that would mitigate the risk associated with the Agency having access and being responsible for personal internet service accounts. The Union offers no direct-payment plan that may overcome OIG's concern. The Panel has determined that having the Resident Agent seek reimbursement, with proper certification of use, is the best practice. Further, there is recourse for an employee if the Agency is delayed in making the reimbursement.

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 Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the parties to adopt the following to resolve the impasse:

3.2 REIMBURSEMENT

The Agency will reimburse the employee for the business use portion of the cost of the employee's home internet service.

- a. Documentation. Employees requesting reimbursement must submit copies of invoices from their service provider and disclose whether the service provider provides "bundled" services, i.e., whether cable television and/or telephone service are provided along with internet service. When services are bundled, only internet cost is reimbursable. The employee must state the amount of the "bundled" services that are allocated to internet service. The employee will provide his or her best estimate of the percentage of time that internet service is used for official NLRB business (e.g., 30 percent).

b. Reimbursement Process: A Standard Form (SF) 1164, "Claim for Reimbursement for Expenditures on Official Business," must be submitted to OCIO either monthly or quarterly, along with the documents described in paragraph (a). A checklist for the submission is set forth in the Appendix. OCIO will review the submission, and if approved, will forward it to OCFO for payment. It is recommended that the reimbursement be submitted quarterly. A Claim for reimbursement shall be submitted no later than 30 calendar days after the end of each month, or each quarter, as noted in the table below.

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c. Annual Certification. On October 1 of each calendar year, the Resident Agent will electronically sign and date a certification that contains the following language: "I hereby certify that my home internet service is used to conduct official National Labor Relations Board business. In order to be reimbursed, I will timely submit a copy of my internet bill, a signed and dated SF-1164, and my best estimate of the percentage of time that the internet service is used to conduct official NLRB business."

By direction of the Panel.

Andrea F. Newman

Andrea Newman
Acting Chairman

February 1, 2018
Washington, D.C.