United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. and NATIONAL TREASURY EMPLOYEES UNION	Case No. 06 FSIP 66

DECISION AND ORDER

The National Treasury Employees Union (Union or NTEU) 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 the Treasury, Internal Revenue Service (IRS), Washington, D.C. (Employer).

After investigation of the request for assistance, concerning a dispute over the length of time certain letters of reprimand should be retained in employee personnel files, the Panel determined that the matter should be resolved by directing the parties to resume negotiations with the assistance of the Federal Mediation and Conciliation Service (FMCS) during the 45-day period following the parties' receipt of the Panel's procedural determination letter.[1/] Thereafter, if any issues remained unresolved, the parties were to submit their final

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1/ Additional mediation was ordered because the parties had not reached a bargaining impasse over the key issue in dispute. In this regard, during bargaining the Employer claimed that the Union's proposal over retention time in personnel files for letters of reprimand was a nonnegotiable issue because it interfered with management's right to discipline employees. After the Employer was provided with a decision by the Federal Labor Relations Authority (FLRA) finding a substantively similar proposal within the duty to bargain, however, it agreed to negotiate over the issue.

offers to the Panel followed by written supporting statements of position. The parties were informed that the Panel would resolve the dispute by selecting between the parties' final offers on an issue-by-issue basis, to the extent they otherwise appear to be legal.

In accordance with the Panel's procedural determination, the parties convened a bargaining session with a mediator from FMCS on October 24, 2006. While several provisions were resolved, the parties were unable to reach agreement over eight others, several of which involved issues arising for the first time during the course of their mediation session. The parties' final offers on the issues were submitted to the Panel on October 31, 2006, and their written statements of position were submitted on November 20, 2006. In its statement of position, the Employer claimed, for the first time, that several Union proposals were nonnegotiable because they conflicted with various management rights. Shortly after submitting that statement to the Panel, the Employer requested to clarify its position on negotiability and submitted a second statement of position which also included additional argument on the merits of the Employer's proposals. The Union requested and was granted the opportunity to respond in writing to further address its proposals on the merits. During the course of the parties' exchange of their final offers and written statements of position, they were able to resolve two additional issues. The Panel has now considered the entire record.

BACKGROUND

The Employer's mission is to fairly enforce tax laws, respect taxpayer rights, collect taxes and help educate taxpayers on their responsibilities. The Union represents a bargaining unit consisting of approximately 90,000 professional and non-professional employees stationed nationwide at the Employer's Headquarters Office, Service Centers, Regional Offices, and numerous field offices. The parties' National Agreement (NA) expired on June 30, 2006; with the exception of provisions that concern permissive subjects of bargaining or have been declared illegal by the Employer, the parties continue to follow the terms of that agreement.

Currently, letters of reprimand issued to employees for tax-related offenses, such as failure to timely file tax returns or the under-reporting of income, are retained in the employee's personnel file for a period of 2 years. Thereafter, they are removed and destroyed. Once the letter of reprimand is removed,

the Employer cannot make reference to it in any subsequent disciplinary action. The Employer has proposed to extend, beyond 2 years, the period of time that such letters of reprimand would be retained in an employee's file. According to the Employer, this initiative would foster its efforts to use progressive discipline for employees who have more than one tax-related infraction, and is necessary because the organizational component responsible for reviewing employee tax filings, the Tax Compliance Branch, is backlogged and currently reviewing employee tax returns from tax years 2003 and 2004.

ISSUES AT IMPASSE

Among other things, the parties disagree over the length of time that tax-related letters of reprimand should be retained in an employee's personnel file and the procedures for implementing the change in retention time.

POSITIONS OF THE PARTIES

1. Communicating the Change to Employees [2/]

a. The Union's Position

In essence, the Union proposes that meetings to disseminate information to employees about the initiative "generally" would occur within 60 days of the effective date of the parties' Letter of Understanding (LOU). The Employer would provide a hard copy of the LOU and a list of frequently asked questions (FAQs) to employees during group meetings. Also, the Employer would notify seasonal employees of the changes outlined in the LOU upon their return. If requested, the Employer would provide a hard copy of the LOU to employees who do not have computer access as part of their regularly-assigned duties. Its proposal is reasonable because it would require only that the Employer convene meetings with employees about the change in working conditions "generally" during the initial 60-day period. While the time frame is not mandatory, it should not be difficult to meet because, typically, managers hold group meetings with employees more frequently than every 60 days. Hard copies of the LOU and FAQs should be made available to employees because those who usually commit tax-related offenses are lower graded employees who often do not have access to a computer system during work hours where they could read about the change on-

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2/ Only the disputed portions of the parties' proposals are referenced.

line. Seasonal employees should be apprised of the change when they are recalled to duty, and the notice could be part of the documentation seasonal employees receive from the Employer when recalled. Finally, increasing the amount of information employees receive about the policy should help improve employee tax compliance.

b. The Employer’s Position

The Employer basically proposes that the parties jointly develop information to be communicated to employees regarding the change in retention time for a tax-related letter of reprimand as quickly as possible following approval of the agreement. For seasonal employees, management would make every effort to inform them of the provisions of the LOU upon their return. Upon request, the Employer would provide a hard copy of the LOU to employees who do not have intranet access. Its proposal appropriately addresses the need to provide information to employees and meets the communication objectives of both parties. It is more realistic for the Employer to "make every effort" to inform employees of the "initiative" at the next group meeting than for the Employer to commit to doing so within 60 days of the effective date of the LOU, as the Union proposes. Publication costs would be contained because employees would view the LOU on the IRS intranet instead of being issued a hard copy. Those employees who do not have computers at their desks would be able to read the LOU at the kiosks where intranet access is supplied by the Employer. Furthermore, the Employer would be committed to making “every effort” to inform seasonal employees about the LOU upon their return to duty. Finally, having the parties jointly develop information about the initiative for publication in newsletters and other information channels should help ensure that the interests of both parties are satisfied in the publications.

CONCLUSIONS

Having carefully considered the parties’ positions on this issue, we conclude that the Union’s approach would be more effective in ensuring that employees are made aware of an important change in policy which could lead to their removal from employment for recurring tax-related offenses. In our view, the proposal does not appear to impose onerous requirements on management since the time frame for meeting with employees about the change is not mandated. Accordingly, we shall order the parties to adopt the Union’s final offer.

2. **Scope of the Change**

a. The Union's Position

The Union's proposal states: "This LOU only applies to tax related letters of reprimand involving 1203(b)(8) and (b)(9) issues,[3/] consistent with the Employer's stated objective to address willful 1203 violations." Its proposal should be adopted because it addresses the problem that the Employer has identified. Retaining letters of reprimand in personnel files for longer periods of time should pertain only to written reprimands issued when an employee's failure to file a tax return or understatement of a tax liability is not due to willful neglect. Moreover, the Union contends that there are no other tax-related offenses that fall outside § 1203(b)(8) and (9).

b. The Employer's Position

The Employer proposes that "the increased retention time will apply to any tax related letter of reprimand issued after the effective date of this agreement." The Employer states that the broad scope of its proposals would cover all tax-related offenses and not merely those involving untimely filings or understatement of tax liability. Other offenses, such as "where an employee erred in estimating a tax payment and where an employee erred in withholding," also would be covered. It is important for the IRS Review Board that is considering removing an employee from service to have information before it concerning all types of tax-related offenses that the employee may have committed. Limiting the information considered by the Review Board would defeat the Employer's objective in expanding the retention time for letters of reprimand in personnel files. Moreover, the proposal is consistent with the original notice provided to the Union; that is, to extend the retention time for letters of reprimand concerning § 1203 and tax-related matters.

3/ These provisions require an employee to be removed from service if there is a judicial or final administrative determination that the employee engaged in the "willful" failure to timely file a tax return or the "willful" understatement of a Federal tax liability, unless such failure or understatement "is due to reasonable cause and not to willful neglect." See § 1203(b)(8) and (9) of the IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (July 22, 1998).

Finally, the Union’s attempt to limit the scope of the agreement may not be within the Employer's duty to bargain because it is not a negotiable "appropriate arrangement" affecting management’s right to discipline.

CONCLUSIONS

Upon thorough examination of the parties’ evidence and arguments on this issue, we find that the Employer’s proposal better captures the scope of the change as originally announced to the Union and, therefore, we shall order its adoption.

3. Retention Time in Personnel Files for Letters of Reprimand

a. The Union’s Position

The Union proposes that “the Employer [] retain, tax related letters of reprimand for no more than 3 years” in an employee’s personnel file. Its proposal meets the Employer's interest in increasing retention time by adding 1 year to the current practice. A smaller increase, rather than the 3-year increase proposed by the Employer, is justified because very few employees have been issued tax-related letters of reprimand; in fact, since 2000, only 157 out of a bargaining unit of 90,000 employees have received them. This small number demonstrates that the problem does not appear to be critical or pervasive. Furthermore, the proposal is consistent with the time limit for a non-IRS employee taxpayer's liability, which expires 3 years after filing a return; similarly, letters of reprimand issued to employees should expire 3 years after their issuance.

b. The Employer's Position

The Employer proposes that “tax related letters of reprimand [] be retained by the Employer for use in disciplinary and adverse action letters for a period of 5 years." A 5-year retention period is necessary because it would allow the Employer additional time to consider the effect of an existing letter of reprimand in an employee's file when rendering a decision on a second infraction; therefore, it would promote an appropriate progressive disciplinary policy. Under the current 2-year retention period, if an employee had been issued a letter of reprimand in 2003 it would be purged in 2005 and unavailable for consideration by the Employer's Review Board in 2007, while an audit of an employee's 2005 tax return may reveal a tax-related infraction. Infractions committed within two years of each other would not be available for consideration by

the Review Board in an effective time frame because of the current backlog in the Tax Compliance Branch. Having a more comprehensive history of an employee's compliance with tax reporting requirements would help to ensure that the Review Board has a complete and accurate record of the employee's recent history in regard to compliance with tax-related matters. The Union's proposed 3-year retention period is insufficient for this purpose.

CONCLUSIONS

After thoroughly evaluating the parties' positions on this issue, we shall order the adoption of the Employer's final offer. The Union's proposal for a 3-year retention period does not appear to be long enough for retaining letters of reprimand in an employee's file for purposes of progressive discipline. A 5-year retention period also is more consistent with the reality IRS faces in terms of the current backlog in reviewing employees' tax compliance and the built-in lag time concerning completeness of tax filing information.

4. Application of the New Policy

a. The Union's Position

The Union proposes that "the 3-year retention time for tax related letters of reprimand [] only apply to employee returns filed after the effective date of the agreement." Its proposal preserves a fundamental element of fairness; in this regard, a new policy should not apply until employees are made aware of it and the significant impact the change may have should they fail to comply with their tax reporting requirements. Therefore, the change in retention time should apply to letters of reprimand issued after the employee was notified of the change; it should not apply to tax returns that the Tax Compliance Branch has yet to review. In addition, the proposal is consistent with the notice provision in Article 12, § 6A, of the parties' NA which provides, in part, that "(i)n no event will employees be held accountable or responsible for their critical job elements and standards until they are received by the employees." Thus, in the past, the parties have agreed to delay application of a change in working condition until employees are apprised of the change.

b. The Employer's Position

The Employer proposes that "the increased retention time [] apply to any tax related letter of reprimand issued after the

effective date of this agreement." Immediate application of the change would promote the Employer's objective of placing complete and accurate information before the 1203 Review Board regarding an employee's past discipline. Delaying application of the change is unnecessary because employees already are on notice that there are consequences, in the form of disciplinary action, for tax-related offenses. Therefore, implementing the change immediately would not harm employees. The Union's proposal, on the other hand, may delay for a significant period of time the Employer's ability to provide a 1203 Review Board with a complete and accurate record of an employee's conduct.

CONCLUSIONS

Having carefully reviewed the evidence and arguments presented by the parties in support of their positions on this issue, we conclude that the Union's proposal provides the better basis for resolving the dispute.[4/] In our view, fairness dictates that employees should be made aware of the change in policy before they are affected by it, particularly in circumstances where the consequences to their careers is potentially significant. For this reason, we shall order the adoption of the Union's final offer.

5. Information Provided to the Union

a. The Union's Position

The Union proposes that:

> On an annual basis on or before December 31, the Service will provide NTEU National a report on employees with multiple tax offenses containing the following information: . . . permanent/seasonal status . . . and EEO data (race, age—over/under 40 years of age, national origin, gender and disability status). Further, the Employer will provide to NTEU National the raw data as to compliance trends and adverse impact on protected Title VII cases and lower graded employees (grades 9 and below) on an annual basis, on or before December 31.

4/ Consistent with our decision above, the wording of the Union's proposal must be modified to reflect a 5-year retention time for such letters of reprimand.

Its proposal does not require the Employer to analyze the data, but merely to provide it to the Union. Such information is necessary for the Union to monitor whether the Employer's disciplinary actions against employees for tax-related offenses are being applied disparately to certain categories of employees. If the Union's analysis of the data uncovers disparate application of the new policy, it could reopen the agreement to address the matter. In addition, the information is in the Employer's possession and available for submission to the Union. Finally, its proposal is consistent with a previous case involving the parties where the Panel ordered the Employer to provide the Union with data on race, age, national origin, gender, and disability status for RIF-impacted employees.

b. The Employer's Position

The Employer proposes that the agreement not contain any additional requirement to provide information to the Union other than what the parties have already agreed to, that is:

> On an annual basis on or before December 31st, the Service will provide NTEU a report on employees with multiple tax offenses containing the following information: ALERTS case number, case year, employee services, grade, job title division location, case issue code, proposed disciplinary action, and imposed disciplinary action.

In its view, this information is adequate for the Union's purposes. Any additional information should be sought under the provisions of the Statute rather than by establishing a contractual right, particularly where its need is dubious and its collection would be burdensome.

CONCLUSIONS

Upon careful review of the parties' positions on this matter, we shall order the Union to withdraw its proposal. In our view, 5 U.S.C. § 7114(b)(4) of the Statute is sufficient to meet the Union's legitimate interests.

6. **Training Employees on Tax Compliance Matters**

a. The Union's Position

The Union proposes that "the Employer [] make reasonable efforts to ensure that an employee with at least one current tax-related offense since 2002 has completed the annual ethics briefing within a reasonable period of time following implementation of this initiative." This would advance the agency's goal that employees comply with their tax reporting responsibilities. It is neither unreasonable nor burdensome because the proposal would affect only a small number of the 90,000 members of the bargaining unit who currently have a tax-related offense. Nevertheless, it is important, particularly for those employees, that the Employer take steps to ensure that they receive training on their ethical obligations.

b. The Employer's Position

All IRS employees already receive annual ethics training at a predetermined time each year, and additional steps to ensure that employees are in compliance with their tax filing requirements are unnecessary. The ethics briefing "does not provide information about filing taxes or the requirement to file taxes" in any case, so the Union's proposal would do nothing to ensure that the employees would not commit other tax-related offenses.

CONCLUSIONS

Having carefully evaluated the parties' positions on this issue, requiring the Employer to communicate the change, and why it is necessary, consistent with our Order, would be more effective in helping employees avoid tax-related offenses. Accordingly, we shall order the Union to withdraw its proposal.

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 following:

1. **Communicating the Change to Employees**

The parties shall adopt the Union's proposal.

2. **Scope of the Change**

The parties shall adopt the Employer's proposal.

3. **Retention Time in Personnel Files for Letters of Reprimand**

The parties shall adopt the Employer's proposal.

4. **Application of the New Policy**

The parties shall adopt the Union's proposal, modified to include a 5-year retention period, consistent with our decision to adopt the Employer's proposal in Issue 3.

5. **Information Provided to the Union**

The Union shall withdraw its proposal.

6. **Training Employees on Tax Compliance Matters**

The Union shall withdraw its proposal.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

April 4, 2007
Washington, D.C.