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. 07 FSIP 35

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, Washington, D.C. (Employer, Agency or IRS).

After an investigation of the request for assistance, which concerns the implementation of retention incentives, recruitment incentives, and student loan repayments, the Panel determined that the impasse should be resolved through single written submissions from the parties followed by the issuance of a *Decision and Order*. The parties also were informed that, in resolving the disputed issues, the Panel would select between the parties' final offers on a package basis regarding each program, to the extent they otherwise appear to be legal. Final offers and written supporting statements were submitted by the parties consistent with the Panel's determination, and 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 the taxpayer. The Union represents a bargaining unit of approximately 90,000 professional and non-professional employees stationed nationwide at IRS headquarters, service centers, regional offices and numerous field offices. The national

agreement (NA) covering these employees expired on June 30, 2006; however, with the exception of permissive subjects of bargaining and provisions the Employer believes are illegal, its terms will remain in effect until a successor agreement is negotiated.

ISSUES

The parties disagree over numerous issues regarding how retention incentive, recruitment incentive, and student loan repayment programs should be implemented for bargaining-unit employees, including: (1) whether the Employer should have "sole and exclusive" discretion to determine who should receive payments under the programs; (2) the titles of the programs; (3) whether the programs should be established as 1-year "pilots"; and (4) the type of information the Union should receive in annual electronic reports provided by the Employer.

1. Retention Incentives

a. The Union's Position

The Union proposes that: (1) the retention incentive program be implemented as a 1-year pilot whose continuation would be at the sole discretion of the Agency; (2) the Agency be able to withdraw from the parties' agreement at any time "upon a showing of adverse agency impact" to the Union, using the criteria established under the Federal Employees Flexible and Compressed Work Schedules Act (the Act), 5 U.S.C. § 6120 *et seq.*, and that resolution of disputes occur using the "expedited procedures" under 5 U.S.C. § 6131(c); (3) the program be called "The IRS-NTEU Retention Allowance Program"; (4) retention allowances be granted to employees who are eligible for retirement, work in an occupation where more than 20 percent of the employees are eligible for retirement at that time, the Agency does not have a program in place to reduce the number of employees in that occupation, and the employee's most recent annual appraisal is a 4.0 or higher; the Employer could avoid payments when it can demonstrate "just cause" to the Union or an arbitrator; (5) the Agency be permitted to pay retention allowances in other circumstances if it notifies the Union in advance and it "treats all similarly situated employees alike"; (6) the incentive normally be 10 percent of an employee's annual salary, but could be more if the Agency notifies the Union in advance and it "treats all similarly situated employees alike"; (7) termination or reduction of the allowance require 30 days' advance notice to the Union and the employee, including

documentation supporting the termination or reduction; the employee would then become eligible for immediate retirement; and (8) the Employer provide the Union with an electronic report by October 31 annually regarding all of the previous fiscal year's disbursements, to include, at a minimum, name, occupation, series, grade, division and function, bargaining unit status, Union membership status, race, national origin, gender, post of duty, entrance on duty date or hire date, total amount of retention incentive, date of submission of initial recommendation, date of initial disbursement, age, disability status, and the Employer's rationale for granting the retention allowance.

Overall, its final offer "effectuates the goal of retaining highly qualified employees" and "treat[s] all similarly-situated employees alike." Its implementation is particularly important in the current circumstances where over 11 percent of the Agency's employees are eligible to retire. Establishing the program as a 1-year pilot would permit the parties to assess whether the program is successful in keeping "excellent employees in critical positions that are facing staffing shortages due to the large number of retirement eligible Federal employees." The Employer could withdraw from the agreement if it demonstrates that the program is having an "adverse impact," using the standards found in the Act, including the requirement that any disputes between the parties would be resolved by the Panel within 60 days. The Union's proposed title would make it clear that it was involved in negotiations over the program, alleviating employee concerns the Agency is "merely rewarding favored employees on non-merit bases."

Focusing on occupations in which more than 20 percent of employees are eligible to retire is "the simplest and fairest method by which to target retention incentives to those groups of employees most likely to leave." Moreover, such occupations face a severe risk of shortages, previously described by the Office of Personnel Management (OPM) as critical, so "the Agency should use all tools at its discretion to meet the need." By providing a "floor" incentive amount of 10 percent of an employee's salary, and giving the Employer the flexibility to increase the amount if necessary, its proposal "simply tracks regulation." Further, a 30-day notice period for reducing or terminating incentives establishes "an important procedural safeguard" for employees expecting certain income, and is modeled after the requirements of the Debt Collection Act, which provides for notice to employees where they have been overpaid due to no fault of their own. Its proposal also requires the

Agency to provide the Union with an annual report that includes information on a variety of different factors. The Union intends to use the report to "track the effectiveness of the program," and to ensure compliance with the agreement and that the program is being administered in a non-discriminatory manner.

In contrast, the Employer's final offer does not define when and how employees will be eligible for retention incentives, and is contrary to regulation because it does not establish a "plan," including criteria for authorizing allowances and determining the size of allowances, before implementing the program. Thus, its adoption would require additional bargaining over whatever plan the Employer seeks to implement, resulting in unnecessary delay. The Employer's approach also reserves to management complete discretion as to "when, whether, and in what manner" to provide retention incentives to employees. As such, it has the effect of removing the Union "from all aspects of the decision or of the procedures for making the determination," which runs counter to case law finding that a party "cannot impose its last best offer where that offer is tantamount to waiver of statutory rights."[1/] Therefore, "the Panel is compelled not to enforce the Agency's last best offer." Finally, the annual report the Employer proposes to give to the Union does not include information regarding the race, age, gender, or national origin of recipients, so it would "not provide the needed check against potential discrimination – be it malignant or unintentional."

b. The Employer's Position

Essentially, the Employer proposes, consistent with Government-wide regulations authorizing such programs, 5 C.F.R. §§ 575.301 – 575.314, to: (1) pay a retention incentive to a current employee when it determines the employee possesses "unusually high or unique qualifications" or the Agency has a special need for the employee's services that makes it essential to retain the employee, and that the employee would be likely to leave Federal Service in the absence of the incentive; (2) establish the criteria for determining the amount of the retention incentive and the length of the service period; and (3) notify the employee in writing, including the termination

1/ The Union cites a decision by the Court of Appeals for the District of Columbia Circuit, *McClatchy Newspapers v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997), to support this contention.

date, when it decides to end the retention incentive. It also would provide the Union with an electronic report annually regarding the previous fiscal year's disbursements to bargaining-unit employees including information concerning occupation, series, grade, division or function, post of duty, entrance on duty date or hire date, and the total dollar amount of the retention incentive. Finally, the parties' Letter of Understanding (LOU) would become effective upon agency head review or on the 31st day after execution, whichever occurs first, and terminate when the Agency serves notice on the Union.

The Government-wide regulations implementing retention incentive programs expressly state that agencies retain "sole and exclusive discretion" to determine, among other things, whether an employee possesses unusually high or unique qualifications, or the Agency has a special need for an employee's services, such that it is essential to retain the employee and the employee would be likely to leave Federal Service in the absence of the incentive. Its final offer is consistent with the regulations because it preserves the Agency's "flexibility to use the incentive when it determines that the incentive would assist in its mission." The Union's final offer, on the other hand, would require the Agency to provide the incentive to any employee: (1) who is eligible for retirement; (2) who works in an occupation where more than 20 percent of the employees are eligible for retirement; (3) who works in an occupation where IRS does not have an early out or buy out program in place to reduce the number of employees in that occupation; and (4) whose annual appraisal score is 4.0 or higher. Because the "mandatory nature of the Union's proposal" is inconsistent with the "sole and exclusive discretion" the regulations give the Agency to determine when and to whom to grant a retention incentive, it is nonnegotiable.[2/]

Turning to the merits of the Union's final offer, it has not shown that employees who would receive a retention

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2/ In support of this assertion, the Employer cites 5 C.F.R. § 575.306(a), and *Illinois National Guard v. Federal Labor Relations Authority*, 854 F.2d 1396 (D.C. Cir. 1988); *Department of Veterans Affairs, Veterans Administration Medical Center and National Association of Government Employees*, 44 FLRA 162, 163 (1992); and *Association of Civilian Technicians Mile High Chapter and Department of Defense, Colorado Air National Guard*, 53 FLRA 1408, 1412 (1998).

allowance, primarily on the basis of their retirement eligibility in an occupation, possess unique competencies essential to the Agency's mission, or that they would leave Federal Service if they were not given the retention incentive. Nor does the Union's approach require the Agency to consider such factors as availability and quality of candidates in the labor market possessing the required competencies, or efforts to use non-pay authorities to help retain the employees instead, when making this determination. Further, although the Employer could avoid paying the incentive to retirement eligible employees if it can demonstrate "just cause," such determinations would be placed in the hands of the Union or arbitrators, completely eliminating the "sole and exclusive discretion" and flexibility granted to agencies by OPM, which would lead to endless litigation. It also makes no "business sense" to provide an incentive under the criteria the Union sets forth because the payments would be automatic regardless of whether others could be hired and trained more cheaply to perform the full range of responsibilities of a position.

The Union's final offer also would require the Employer to conduct an extensive study to determine who would get the incentive, which is "antithetical" to its purpose, and to provide appeal rights to employees when management decides to terminate or reduce payments. The latter is inconsistent with 5 C.F.R. § 575.311(g)(5), which states that "termination or reduction of a retention incentive is not grievable or appealable under any law or regulation." With respect to the Union's "last minute proposal" to implement the program as a 1-year pilot, the Employer does not see how this "benefits anyone," and it "only engenders additional bargaining." Given the 6 years that the parties already have spent negotiating the program, they "have had more than ample time to discuss their positions and refine and present their proposals." If the program needs adjusting, the Union can take this matter up during term negotiations. Permitting the Agency to discontinue the program if it shows "adverse impact," as defined under the Act, is "unconstructive." In this regard, the standards created for alternative work schedules "are not readily transferable to a retention incentive program." Finally, the annual report the Union would require management to provide regarding the recipients under the program include matters for which it has not articulated a "particularized need"; such information is more appropriately sought under section 7114 of the Statute.

CONCLUSIONS

Having carefully considered the arguments and evidence presented by the parties in support of their respective positions regarding the implementation of retention incentives for bargaining-unit employees, consistent with the Panel's procedural determination in this case, we shall order the adoption of the Employer's final offer to resolve their impasse.[3/] In our view, its final offer comports more fully than the Union's with the intent of the applicable Government-wide regulations authorizing agencies to establish such programs.

2. Recruitment Incentives

a. The Union's Position

The Union proposes, among other things, that: (1) the recruitment incentive program be implemented as a 1-year pilot whose continuation would be at the sole discretion of the Agency; (2) the Agency be able to withdraw from the agreement at any time "upon a showing of adverse agency impact" to the Union, using the criteria established under the Act, and that resolution of disputes occur using the "expedited procedures" under 5 U.S.C. § 6131(c); (3) the program be called "The IRS-NTEU Recruitment Bonus Program"; (4) recruitment bonuses be granted to any employee not receiving payment for a student loan and who was hired through an appointment process designed to overcome recruitment problems which modify the normal merit recruitment process or indicate that candidates in that occupation are hard to recruit; they also would be granted to any employee who was hired under qualification requirements that exceed the OPM standards for that job family; the Employer could avoid payments if it can demonstrate "just cause" to the Union or an arbitrator; (5) to be eligible to receive a recruitment bonus, a candidate agree to complete a minimum of 6 months continuous service with the IRS; this could be waived by Division Commissioners in "critical situations"; (6) the bonus be equal to or no less than 25 percent of an employee's first year's salary; (7) the Employer notify the appropriate Union Chapter President of any decision to pay this bonus within 10 calendar

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3/ Given that our decision is based on an assessment of the merits of their respective proposals, it is unnecessary for the Panel to address the Employer's contention that it has no duty to bargain over significant portions of the Union's final offer.

days; (8) an employee sign a Service Agreement prior to receiving such payments specifying, among other things, a certain period of employment with the IRS; (9) if the candidate breaches the Service Agreement, he or she be required to refund a prorated portion of the bonus, and that the candidate be permitted to have the refunded portion collected like any other Federal debt; and (10) the Employer provide the Union with an electronic report by October 31 annually regarding all of the previous fiscal year's disbursements, to include, at a minimum, name, occupation, series, grade, division and function, bargaining-unit status, race, national origin, gender, post of duty, entrance on duty date or hire date, the total dollar amount of the recruitment bonus, date of submission of initial recommendation, date of initial disbursement, age, disability status, and the Employer's rationale for granting the recruitment bonus.

Its final offer would ensure that the program is administered in a manner that "effectuates the goal of recruiting for difficult to fill positions" and "treats all similarly-situated employees alike." Establishing the program as a 1-year pilot would permit the parties to assess whether it is successful and should be continued or altered. The Union's proposed title would make it clear that it was involved in negotiations over the program, alleviating employee concerns the Agency is "merely rewarding favored employees on non-merit bases." Requiring recruitment bonuses for employees hired through an appointment process designed to overcome recruiting problems, or when the employee was hired under qualification requirements that exceed the OPM standard for that job family, would establish "an objective basis" for determining when bonuses get paid, thereby eliminating the potential for abuse of the program. Moreover, where the Agency has instituted a specific program to overcome recruiting problems, it has "established an *a priori* basis for concluding that the job is difficult to fill." In addition, requiring notification to the Union prior to the payment of bonuses would help it ensure that all employees are treated equally, and should not be onerous "since payments are intended to be relatively rare." The Employer's annual report would contain information on the race, gender, national origin, etc., of the recipients, permitting the Union to track the effectiveness of the program, and ensure it is being administered in a non-discriminatory manner.

Under the Employer's final offer, among other things, management would "consider" a variety of factors in determining when and whether to provide a recruitment bonus to an employee.

Since this does not require the use of an "objective determination based upon prior Agency actions," it would result in "inconsistency and confusion for employees"; those in the same group, but hired at different times, may receive different bonuses, or some may not receive a bonus while others do. Further, because the factors appear to be the same ones already listed in the regulations, the Employer's proposal does not satisfy the requirements of 5 C.F.R. § 575.104(a)(2). Therefore, it faces the same problem as its retention incentive program proposal, *i.e.*, it would require additional "wasteful and unnecessary" bargaining over the impact and implementation of the Employer's plan. Finally, the annual report management proposes to give to the Union would not include data regarding the race, age, gender, national origin, etc., of the recipients, making it difficult to monitor whether the Employer's program is being administered in a discriminatory or non-discriminatory manner.

b. The Employer's Position

The Employer basically proposes, consistent with Government-wide regulations authorizing such programs, 5 C.F.R. §§ 575.101 – 575.114, to: (1) determine when a position (or group of positions) is likely to be difficult to fill in the absence of a recruitment incentive by considering the factors contained in § 575.106(b) of the regulations; (2) require an employee to sign a Service Agreement prior to receiving such payments; and (3) require an employee to repay any amounts received in excess of the amount that would be attributable to the completed portion of the service period when the Agency terminates a Service Agreement because the employee is demoted or separated for cause, receives a less than fully successful rating of record or otherwise fails to fulfill the terms of the Service Agreement. It also would provide the Union with an electronic report annually disclosing the previous fiscal year's disbursements to unit employees including information concerning occupation, series, grade, division or function, post of duty, entrance on duty date or hire date, and the total dollar amount of the recruitment incentive. Finally, the parties' LOU would become effective upon agency head review or on the 31st day after execution, whichever occurs first, and terminate when the Agency serves notice on the Union.

The purpose of such incentives is "to provide agencies with 'additional flexibility' to help recruit employees and better meet agency strategic human capital needs." The regulations expressly state that agencies retain "sole and exclusive

discretion" to, among other things, determine when a position is likely to be difficult to fill, approve a recruitment incentive, establish criteria for determining the amount of a recruitment incentive and the length of the service period, request a waiver from OPM of the limitation on the maximum amount of the incentive, and establish the criteria for terminating a service agreement. The Employer's final offer is consistent with the regulations, as it gives management "the flexibility to use the incentive when it determines that the incentive would assist it in meeting its mission needs." However, since the "mandatory nature of the Union's proposal" is inconsistent with the "sole and exclusive discretion" the regulations give the Agency to determine when and to whom to grant a retention incentive, it is nonnegotiable.[4/]

In addition to being outside the Employer's bargaining obligation, the Union's final offer should be rejected on its merits. It would require management to provide the incentive in certain situations where the Agency uses its various other authorities to recruit candidates in the face of shortages or critical hiring needs. For example, the proposal would mandate that the Agency pay a recruitment incentive to any employee hired using special salary rates. Since the special salary rate already provides a sufficient incentive for the employee to work for the Agency, "adding a mandatory recruitment incentive on top of that special salary rate is nothing more than an unnecessary salary augmentation." The proposal also requires payments in circumstances where OPM has granted IRS direct hire authority, and to employees hired under qualification requirements that "exceed the OPM standard for that job family," which may not involve positions that are difficult to fill. Furthermore, determinations as to whether the Agency could avoid payments under the proposal's listed mandatory situations would be placed in the hands of the Union or private arbitrators, using a "just cause" standard, which would undoubtedly lead to extensive litigation before third parties.

Providing appeal rights to employees where the regulation grants the Employer sole and exclusive discretion to terminate recruitment bonuses is inconsistent with 5 C.F.R. § 575.111(c), which states that "termination of a service agreement is not grievable or appealable." The Union's requirement that the

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4/ The Employer cites the same legal authorities for this contention as it did in connection with the Union's final offer on retention incentives. See footnote 2.

bonus be equal to or no less than 25 percent of an employee's first year's salary is also inconsistent with the Employer's authority to offer lesser amounts if it would have provided a sufficient incentive for the employee to accept the difficult to fill position, and represents an expenditure of money that is wasteful and unnecessary. Moreover, the regulations do not provide the authority for Division Commissioners to waive the requirement for a minimum service period of 6 months in "critical conditions," so this portion of the Union's final offer also is inconsistent with the regulations. Implementation of the program as a 1-year pilot would only lead to more negotiations; this is unnecessary in the current circumstances where the parties already have been bargaining for 6 years. The Union's proposal to permit the Agency to discontinue the program if it shows "adverse impact," as defined under the Act, should not be adopted, among other reasons, because "work schedules and recruitment incentives are not sufficiently similar such that the same standards for discontinuing them can apply." Nor has the Union articulated a "particularized need" for much of the information the Employer would be required to provide regarding the recipients under the program; such information is more appropriately sought under § 7114 of the Statute. Finally, the Union's proposal to include itself in the title of the program is "brash and irksome" because the Union is not contributing toward its funding, and it has other ways to communicate to the bargaining unit that it negotiated the program on behalf of the employees.

CONCLUSIONS

Consistent with the Panel's procedural determination in this case, we shall order the adoption of the Employer's final offer to resolve the parties' impasse.[5/] We are persuaded that its final offer comports more fully than the Union's with the intent of the applicable Government-wide regulations authorizing agencies to establish recruitment incentive programs.

5/ As in the previous issue, because our decision is based on an assessment of the merits of the parties' proposals, it is unnecessary for the Panel to address the Employer's contention that it has no duty to bargain over significant portions of the Union's final offer.

3. Student Loan Repayment

a. The Union's Position

Under the Union's final offer: (1) the student loan repayment initiative would be implemented as a 1-year pilot whose continuation would be at the sole discretion of the Agency; (2) the Agency would be able to withdraw from the agreement at any time "upon a showing of adverse agency impact" to the Union, using the criteria established under the Act, and resolution of disputes would occur using the "expedited procedures" under 5 U.S.C. § 6131(c); (3) the initiative would be known as "The IRS-NTEU Student Loan Repayment Program"; (4) student loan repayments would be granted to any employee who was hired through an appointment process designed to overcome recruiting problems which modify the normal merit recruitment process or indicate that candidates in that occupation are hard to recruit; they also would be granted to any employee who was hired under qualification requirements that exceed the OPM standards for that job family; the Employer could avoid payments if it can demonstrate "just cause" to the Union or an arbitrator; (5) to be eligible to receive a loan repayment, a candidate must agree to complete a term of at least 3 years of continuous service with IRS; this could be waived by Division Commissioners in "critical situations"; (6) certain types of loans specified under the Higher Education Act of 1965 or the Public Health Service Act would be eligible for repayment; (7) IRS would repay more than one student loan as long as the aggregate amount of the repayments do not exceed $10,000 per individual per calendar year or $60,000 per individual in total; (8) the Employer would have to notify the appropriate Union Chapter President of any decision to repay loans within 10 calendar days of finalizing the repayment agreement, and the notification would have to be provided prior to the Agency's offer of any loan repayment to the candidate or employee; (9) an employee would have to sign a Service Agreement prior to receiving such payments specifying, among other matters, a certain period of employment with the IRS; (10) loan repayments would be applied only to the indebtedness outstanding at the time the Agency and the employee enter into the Service Agreement; (11) the Employer would recognize that there are situations where an employee's loan repayment may be terminated or reduced; this could occur only if a lesser amount would be sufficient to retain the employee; (12) before a loan repayment is reduced or terminated, the Union and the employee would receive at least 30 calendar days advanced notice with rationale supporting the decision; (13) if the employee breaches the

Service Agreement through voluntary separation prior to the completion of the employment term, the loan would be repaid to the extent required by law; the Employer could waive the requirement on a *pro rata* basis based upon the employee's length of service; (14) the Employer would provide the Union with an electronic report by October 31 annually regarding all of the previous fiscal year's disbursements, to include, at a minimum, name, occupation, series, grade, division and function, bargaining-unit status, Union membership status, race, national origin, gender, post of duty, entrance on duty date or hire date, total dollar amount of student loan repayment, date of submission of initial recommendation, date of initial disbursement, age, disability status, and the rationale for granting the student loan repayment; (15) the Employer would exercise fair and equitable discretion in recommending and granting student loan repayments and amounts, and all similarly qualified employees that are considered shall receive like repayment amounts; (16) ultimate responsibility for the loan would remain with the employee or candidate; and (17) the terms of the parties' agreement would replace or supersede any other similar, previous or current policies governing student loan repayments.

Its proposal: (1) is comparable to student loan repayment programs established at other agencies; (2) would "effectuate the goal of retaining and recruiting highly qualified employees" for difficult to fill positions; and (3) "treat[s] all similarly-situated employees alike." At the same time, the Employer would retain its "discretion and flexibility" in implementation, "particularly with its potential concerns relating to cost." Establishing the program initially as a 1-year pilot would permit the parties to assess whether the program is successful and should be continued or altered. The title the Union proposes would make it clear that it was involved in negotiations over the program, alleviating employee concerns that the Agency is "merely rewarding favored employees on non-merit bases." Additionally, granting student loan repayments to any employee who was hired through an appointment process designed to overcome recruiting problems which modify the normal merit recruitment process, or indicate that candidates in that occupation are hard to recruit, and to any employee who was hired under qualification requirements that exceed the OPM standards for that job family, is the simplest and fairest way to establish uniformity within the IRS. A 30-day notice period for reducing or terminating repayments provides an important procedural safeguard for employees expecting the Employer to repay their student loans, and

ensuring that payments are made by the due date of the loan would protect recipients' credit scores and avoid late fees. Further, the annual report the Employer would be required to provide to the Union would permit it to track the effectiveness of the program, and ascertain whether it is being administered in a discriminatory or non-discriminatory manner.

According to the Union, there are many reasons for rejecting the Employer's final offer. For instance, while it mirrors regulatory wording regarding the eligibility requirements that must be considered in determining when and whether to provide student loan repayments to job candidates or current employees, leaving such decisions to the discretion of management would inevitably result in inconsistencies and confuse employees. As with the Employer's final offers regarding the retention and recruitment incentive programs, the factors that the Employer would consider do not satisfy the requirements of 5 C.F.R. § 537.103 that the Agency establish a plan for implementing student loan repayments. Adopting its proposal would lead to additional bargaining over the impact and implementation of whatever plan the Employer comes up with, resulting in unnecessary delay. Finally, the annual report the Employer proposes to provide would not include such things as the race, age, gender, or national origin of the recipients, making it difficult to monitor whether the program is being applied in a discriminatory manner.

b. The Employer's Position

In essence, the Employer proposes, consistent with 5 C.F.R. §§ 537.101 – 537.110, to establish a Student Loan Repayment program under which, among other things: (1) a candidate would have to agree to complete a term of at least 3 years of continuous service with the Agency to receive payments; (2) the candidate or current employee would have to sign a Service Agreement consistent with the requirements of the regulations; (3) payments would be applied only to the indebtedness outstanding at the time the Agency and the employee enter into the Service Agreement; (4) eligibility requirements and requirements for repayment when an employee fails to complete the period of employment established under the Service Agreement would be consistent with and/or identical to the applicable regulations; and (5) the Agency would adhere to merit systems principles and take into consideration the need to maintain a balanced workforce when selecting employees to receive student loan repayments. In addition, the Employer proposes to provide the Union with an electronic report annually regarding the

previous fiscal year's disbursements to unit employees by occupation, series, grade, division and function, post of duty, entrance on duty date or hire date, and total dollar amount of the student loan repayment. Also, the parties' LOU would become effective upon agency head review or on the 31st day after execution, whichever occurs first, and terminate when the Agency serves notice on the Union.

The law (5 U.S.C. § 5379) and implementing regulations that govern student loan repayment programs permit agencies to repay employees' federally insured student loans as an incentive to recruit and retain highly qualified candidates. An agency can offer to repay applicants or current employees' student loans if it determines that, in the absence of offering loan repayments, it would encounter difficulty in filling positions with highly qualified candidates or in retaining highly qualified employees in their positions. The regulations, 5 C.F.R. § 537.106, specifically state that "student loan repayments will be made at the discretion of the agency." Its final offer is consistent with the Government-wide regulations authorizing such programs, providing it with the flexibilities that Congress and OPM intended when granting agencies the discretion to determine the need for their use. Under the Union's final offer, on the other hand, student loan repayments would be mandatory under the conditions specified therein. This would eliminate the discretion permitted the Agency under 5 C.F.R. § 537.106 to provide such payments only when it sees a specific business need to do so.[6/]

In addition, the portions of the Union's proposal that would: (1) implement the program as a 1-year pilot; (2) name it "The IRS-NTEU Student Loan Repayment Program"; (3) require the Employer to provide the Union with a "burdensome yearly report"; (4) permit the Employer to withdraw from the program only upon a showing of adverse impact as defined in 5 U.S.C. § 6131(b); and (5) allow management to avoid payments only if it can persuade the Union or a private arbitrator that it has "just cause" for doing so, "are unreasonable for the same reasons" it provided in

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6/ In this regard, the Employer concedes that the regulations governing student loan repayment programs, unlike the other two programs under consideration in this case, do not grant it "sole and exclusive discretion" to determine whether and in what manner they will be implemented. Thus, its arguments are based solely on the merits of the parties' final packages on this issue, and not on their legality.

connection with the Union's retention and recruitment incentive final offers. Similarly, the arguments it made showing the flaws of mandatory payments and the "lack of linkage" between the Union's proposals for those programs and "the requirements of the regulations" apply equally to the Union's student loan repayment proposal.

There are "additional failings" regarding the majority of the Union's remaining student loan repayment program proposals. For example, its final offer "adds an additional level of complexity" by requiring that such repayments be provided to the same group of employees to whom the Agency must also grant recruitment incentives. Thus, it is unclear how the Union's recruitment and student loan repayment proposals would work together, and the ambiguity would undoubtedly lead to litigation between the parties over the matter after the Panel issues its final decision. The part of the Union's proposal that mandates student loan repayments for employees hired under qualification requirements that "exceed the OPM standard for that job family" would apply to all of the Agency's 11,300 bargaining-unit revenue agents "regardless of whether the positions are difficult to fill" or the IRS has a "special need for the employees making it essential to retain the employee and where the employee [is] likely to leave Federal service in the absence of the payment." The latter constitute the criteria the Agency is required to use under the regulations. In this regard, the proposal "is simply a transparent ploy to augment the salary of these employees."

Requiring that "similarly situated employees" receive the same repayment amounts could lead to "endless litigation" as to what that term means, and the creation of a mentality that employees are "entitled" to the benefit. There also is no authority for the Employer to waive the requirement that employees sign a service agreement committing them to remain with the Agency for a minimum period of 3 years, so this portion of the Union's proposal is misleading because it appears to convey a benefit where none exists. Though the Union's proposal is consistent with regulatory limitations on repayment amounts, it appears to require the Employer to repay separate student loans simultaneously; this extra administrative burden on the Agency does not seem to provide any additional benefit to employees because the total amount of the repayment is the same regardless of how many loans the employee has. A similar administrative burden exists with the Union's requirement that loan repayments must coincide with payment due dates. Moreover, the portion of its final offer regarding the circumstances under

which the Agency can terminate a student loan is "incomplete and misleading," as is the portion requiring repayment only if the employee voluntarily leaves the Agency. Hence, this wording is either inconsistent with the regulations or ineffective in informing employees of their responsibilities. Finally, requiring the Agency to waive the reimbursement of debt on a *pro rata* basis if it is "reasonable" to do so conflicts with the parties' National Agreement, which establishes a different standard for the waiving of debt, and is inconsistent with Government-wide regulations, which provide that an agency can waive debt if it determines that "recovery would be against equity and good conscience or against the public interest."

CONCLUSIONS

After thoroughly weighing the merits of the parties' positions on the student loan repayment issue, we conclude that the Employer's final offer would provide the more reasonable basis for resolving their impasse. In this regard, it permits management far more flexibility than under the Union's approach to determine whether, in the absence of offering student loan repayments, the Agency would encounter difficulty in filling positions with highly qualified candidates or in retaining highly qualified employees. We also note that the regulations authorizing the establishment of such programs require that agencies include "a system for selecting employees to receive repayment benefits that ensures fair and equitable treatment," and do not include restrictions regarding grievances or appeals. Therefore, the Union may challenge the fairness of the Employer's determinations regarding when and whether to provide student loan repayments before third parties, if necessary. Accordingly, we shall order the adoption of the Employer's final offer.

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. **Retention Incentives**

The parties shall adopt the Employer's final offer.

2. Recruitment Incentives

The parties shall adopt the Employer's final offer.

3. Student Loan Repayment

The parties shall adopt the Employer's final offer.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

October 25, 2007
Washington, D.C.