

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
CENTER FOR DISEASE CONTROL AND  
PREVENTION  
NATIONAL INSTITUTE FOR OCCUPATIONAL  
HEALTH AND SAFETY  
MORGANTOWN, WEST VIRGINIA

and

LOCAL 3430, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 08 FSIP 15

**DECISION AND ORDER**

The Department of Health and Human Services (HHS), Center for Disease Control and Prevention (CDC), National Institute for Occupational Health and Safety, Morgantown, West Virginia (Employer or NIOSH) and Local 3430, American Federation of Government Employees, AFL-CIO (Union) jointly 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.

Following an investigation of the request for assistance the Panel determined that the parties should submit their final offers and supporting statements of position concerning CDC's policy prohibiting the use of tobacco products on CDC-controlled premises.<sup>1/</sup> The parties were advised that, after considering the

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<sup>1/</sup> CDC's Tobacco-Free Campus Policy, which implements HHS's Tobacco-Free HHS Initiative, went into effect on August 26, 2005. CDC permitted the Employer to continue the parties' current smoking policy until they renegotiated their collective-bargaining agreement (CBA). The parties have reached agreement on all articles in their successor CBA, except for Article 30, Section 5, which is the issue before

(Cont.)

entire record, the Panel would issue a Decision and Order to resolve the dispute. The parties' final offers and supporting statements were received pursuant to this procedure, and the Panel has now considered the entire record.

### BACKGROUND

NIOSH was created by the Occupational Safety and Health Act of 1970 to help assure safe and healthful working conditions for working men and women by providing research, information, education, and training in the field of occupational safety and health. The Union represents approximately 300 professional and nonprofessional employees who work as chemists, biologists, general and safety engineers, program operations assistants, and in a variety of staff support and warehouse positions, GS-3 through -15 and WS-3 through WG-10. The parties' CBA expired on July 19, 2005, but its terms and conditions continue until a successor CBA goes into effect.

### ISSUE AT IMPASSE

Essentially, the parties disagree over whether the use of tobacco products should be prohibited on the Employer's premises.

#### a. The Employer's Position

The Employer proposes the following wording:

There shall be no smoking or tobacco product use in any area controlled by CDC. Smoking and tobacco use shall also be prohibited in Government vehicles.

The Employer shall sponsor free tobacco cessation programs during working hours. Employees shall be allowed to attend such programs during duty time.

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

According to CDC's Tobacco-Free Campus Policy, only leased facilities not under complete control of CDC are allowed to follow the requirements of Executive Order 13058 after parties

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the Panel in the instant case.

renegotiate their labor agreements to incorporate the policy's provisions regarding the prohibition on tobacco use.<sup>2/</sup> Since all of the buildings on the NIOSH campus are under direct CDC/NIOSH control, it is not within local management's "scope to change a HHS/CDC directive which is specifically addressed in the policy and therefore the NIOSH Morgantown site should be tobacco free as per existing CDC policy." Moreover, as stated in the policy, "because there is no safe tobacco product, the only logical action is to promote a campus that is tobacco free."

b. The Union's Position

The following is the Union's proposal:

The sale of tobacco products shall be prohibited on the Employer-controlled premises and the use of tobacco products shall be prohibited in Government vehicles.

Two outdoor areas will be designated as smoking areas. The designated smoking areas shall be maintained by the Employer in accordance with Executive Order 13058 to ensure non-smokers are not exposed to environmental tobacco smoke. At least one of the designated outdoor smoking facilities shall offer a measure of protection from the weather, including an electric heater during the winter.

Tobacco is an addictive drug that is difficult to quit. The Employer shall sponsor free tobacco smoking cessation programs during the working hours. We are in agreement with the current Employer policy of sponsoring free tobacco cessation smoking programs during working hours with free nicotine replacement for employees participating in the Employer-sponsored smoking cessation programs. Employees shall be allowed to attend at least one of the Employer

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<sup>2/</sup> Among other things, Executive Order 13058, issued by President Clinton on August 9, 1997, prohibits "the smoking of tobacco products in all interior space owned, rented, or leased by the executive branch of the Federal Government, and in any outdoor areas under executive branch control in front of air intake ducts."

sponsored smoking cessation programs per calendar year.

Its proposal basically would continue the parties' current practices with respect to smoking policy. It "strike[s] an appropriate balance between the needs of smokers and non-smokers" and is consistent with what the Panel has previously ordered in numerous decisions. Most importantly, it would ensure a safe and healthy workplace for all employees, including the protection of non-smokers from environmental tobacco smoke (ETS), as required by Executive Order 13058. In fact, there has never been a single documented complaint of exposure to ETS since the facility came into compliance with the Executive Order. The proposal also would provide reasonable accommodations for smokers "at no additional cost[]" because one of the two existing outdoor smoking areas already ensures a "measure of protection" from the weather. Given its unique position in the healthcare industry, the Union recognizes that NIOSH may want to be at the forefront of anti-smoking efforts. Nevertheless, CDC's tobacco-free workplace policy "is flawed." The scientific literature substantiates that "a smoke free workplace does not lead to smoke free employees" because workplace smoking intervention programs have "notoriously low success rates." Finally, implementation of the Employer's proposal "will create new hazards," for example, smokers will be forced to cross surrounding streets to leave NIOSH property to use tobacco products and "they will be in public areas that will expose the general public to ETS."

#### **CONCLUSIONS**

Having carefully considered the evidence and arguments presented by the parties in this case, we shall order the adoption of the Union's proposal to resolve the impasse. In our view, the Employer has failed to demonstrate the need to change the current smoking policy which takes reasonable steps to fully protect the health of non-smokers while providing reasonable accommodations to smokers.

#### **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:

The parties shall adopt the Union's proposal.

By direction of the Panel.

H. Joseph Schimansky  
Executive Director

February 12, 2008  
Washington, D.C.