

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF VETERANS AFFAIRS  
VA SAN DIEGO HEALTHCARE SYSTEM  
SAN DIEGO, CALIFORNIA

and

LOCAL R12-228, NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES, SEIU

Case No. 07 FSIP 48

**DECISION AND ORDER**

Local R12-228, National Association of Government Employees, SEIU (Union) 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 Veterans Affairs (DVA), VA San Diego Healthcare System, San Diego, California (Employer).

Following an investigation of the request for assistance the Panel determined that the dispute, which concerns the Employer's decision to close the outdoor smoking area on the 1<sup>st</sup> floor northeast corner of the main building outside the Prosthetics Unit, should be resolved through single written submissions from the parties. The parties were advised that, after considering the entire record, the Panel would take whatever action it deems appropriate to resolve the dispute, which could include an additional procedure and/or the issuance of a binding decision. The parties' written submissions, which included their final offers, were received pursuant to this procedure, and the Panel has now considered the entire record.<sup>1/</sup>

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1/ Panel representatives conducted a conference call with the parties to clarify certain facts central to the dispute subsequent to receiving their written submissions in lieu of an additional procedure.

## BACKGROUND

The VA San Diego Medical Center (VASDMC) is the primary facility responsible for providing quality health care to veterans within the VA San Diego Healthcare System. The Union represents approximately 1,100 nonprofessional employees at the VASDMC who work in a variety of positions, e.g., as technicians, physical therapists, medical assistants, housekeepers, secretaries, and in food service. They are either in the General Schedule (GS) or Wage Grade (WG) systems, or occupy "hybrid" positions whose conditions of employment are governed by aspects of both Title 5 and 38. The parties' master collective-bargaining agreement is due to expire in October 2007.

The parties have been negotiating a smoking policy for the facility over the past year. At the beginning of that process, the Employer approached the Union about closing an existing outdoor smoking area located toward the front of the VASDMC next to the emergency room (the southwest corner smoking area) because of complaints it had received that second-hand smoke was entering the main building.<sup>2/</sup> The parties agreed to open a new outdoor smoking area outside the Prosthetics Unit, on the first floor northeast corner of the main building (the northeast corner smoking area). After it had been in place for about 4 months, the Employer unilaterally closed the northeast corner smoking area on August 28, 2006, once again citing complaints that smoke was entering the main building. The Union filed an unfair labor practice charge against the Employer concerning this action that was withdrawn when the Employer agreed to negotiate over the change.

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2/ The VASDMC currently has three smoking areas, other than those designated for the exclusive use of psychiatric patients. One is located on the 2<sup>nd</sup> floor northwest patio that is accessible to psychiatric patients as well as employees; there is also an outdoor area at the east end of the rose garden in front of the Spinal Cord Injury (SCI) building, and an area at the east end of the picnic area located across the service road on the northwest corner of the facility.

**ISSUE AT IMPASSE**

The parties essentially disagree over whether the smoking area outside the Prosthetics Unit, on the first floor northeast corner of the main building, should be reopened.

a. The Employer's Position

The VASDMC's three existing smoking areas are in "full compliance" with Executive Order 13058 - Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace,<sup>3/</sup> and are "readily accessible and sufficient to accommodate smokers regardless of their work location." After the northeast corner smoking area was closed because of "numerous complaints of second-hand smoke in office areas adjacent to the smoking area which resulted in having a negative impact on the health of those affected employees," management "continued to negotiate in good faith" with the Union. The Employer has been unable to find an alternative area for smoking that complies with the Executive Order, however. An "underlying factor" in its inability to find such an area is the major construction project for seismic retrofitting the facility is undergoing which is to be completed in 2008. The VASDMC has been in "continuing turmoil" during this project, which raises concerns regarding the safety of employees wanting to congregate next to the building. Finally, the Employer is "still willing" to provide a canopy to the smoking area at the east end of the rose garden in front of the SCI building that would protect employees from the elements, even though inclement weather "is almost nonexistent in San Diego."

b. The Union's Position

The Union proposes that the Employer re-establish "the southwest corner of Floor 1 of the main building" as a designated smoking area. As an alternative, it proposes that "the northeast corner of the main building" be used. The Employer has "wholly failed to provide cause" for closing either

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<sup>3/</sup> 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," with certain exceptions that are not relevant to the issue in this case.

of these areas. Management premises its position on the assumption that, as a provider of public health services, it "must set an example to the public at large through [its] proposed alternatives." However, it has not shown "by rigorous scientific and/or empirical evidence that the existing smoking area must be closed" because it is an actual or potential hazard to patients, employees, or visitors, or that continuation of the existing smoking area would be inconsistent with Executive Order 13058 or DVA regulations. Rather, the justification for its actions are "anecdotal claims about smoke penetrating into the main building from the smoking area," when in reality the Employer was "permitting individuals to enter and exit the main building through an emergency door adjacent to the smoking area." For this reason, the Employer's position should be rejected.

If the Panel nevertheless decides to adopt the Employer's proposal to provide a canopy to the smoking area in front of the SCI building, certain "accommodations" should be provided as part of the resolution. In this regard, among other things, management should be required to construct a "staked shelter" sufficient to permit its use by up to 10 employees at one time; to provide coverings, waste disposal cans, and outdoor heaters; and to add 10 minutes to employees' morning and afternoon breaks. The same accommodations also should be provided for the other two existing smoking areas. They are necessary, in the Union's view, to protect employees from adverse weather conditions in the San Diego area and because the smoking area at the east end of the rose garden requires a considerable length of time for employees to access.

#### **CONCLUSIONS**

Having carefully considered the evidence and arguments presented by the parties in this case, we conclude that the Employer has failed to support its contention that the smoking area at the northeast corner of the main building resulted in any adverse impact on employees, patients, or visitors during the 4-month period before it was unilaterally closed in August 2006. In this regard, the record establishes that there is no access to the main building from that area, other than through an emergency door, and there are no air intake ducts nearby that would result in smoke entering the building. Thus, there would be no adverse impact on any person inside the building unless there is unauthorized use of the emergency door, a circumstance that management should not permit. Accordingly, we shall resolve the impasse by ordering the Employer to re-establish the

designated smoking area at the northeast corner of the main building.

**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 Employer shall re-establish the designated smoking area at the northeast corner of the main building.

By direction of the Panel.

H. Joseph Schimansky  
Executive Director

June 26, 2007  
Washington, D.C.