United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF DEFENSE DEPARTMENT OF DEFENSE EDUCATION ACTIVITY DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS PEACHTREE CITY, GEORGIA and FEDERAL EDUCATION ASSOCIATION-STATESIDE REGION, NEA	Case No. 07 FSIP 62

DECISION AND ORDER

The Department of Defense, Department of Defense Education Activity, Domestic Dependent Elementary and Secondary Schools, Peachtree City, Georgia (Employer, Agency, or DDESS), 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 Federal Education Association-Stateside Region, NEA (Union).

Following an investigation of the request for assistance, which included 17 unresolved articles and three appendices in the parties' first master collective-bargaining agreement (CBA) for a consolidated bargaining unit, the Panel determined that the dispute should be resolved through an informal conference with a Panel representative. The parties were advised that, should any issues remain at impasse after the conference, the Panel would consider the parties' final offers and take whatever action it deems appropriate to resolve the matter, which could include the issuance of a *Decision and Order*. Pursuant to the Panel's procedural determination, the parties met with Panel Member Grace Flores-Hughes on July 24-26 and August 15-17, 2007, in the Panel's offices in Washington, D.C. Although the parties were able to resolve numerous issues, including wages, at the close of the informal conference portions of six articles and

one appendix remained at impasse. Thereafter, the parties submitted their final offers and summary statements of position to the Panel which now has considered the entire record.

BACKGROUND

The Employer's mission is to provide comprehensive elementary and secondary school education for the children of military personnel on military installations located at Fort Knox and Fort Campbell, Kentucky; Fort Stewart and Robins Air Force Base, Georgia; Camp Lejeune, North Carolina; and the West Point Schools in New York. The Union represents a bargaining unit consisting of approximately 700 non-professional employees who hold positions such as education aide, school secretary, information technologist, ROTC instructor, maintenance worker, bus driver, plumber, electrician, and clerk. The bargaining unit was consolidated in 2002. Prior to consolidation, each of these six school systems were in separate bargaining units. The Union also represents a separate bargaining unit consisting of professional employees, primarily teachers, who work in 15 school districts throughout the United States and Guam; the CBA for that unit is in effect until July 11, 2009. In many respects, the Union's proposals for the non-professional bargaining unit (or "classified" bargaining unit, as the Union prefers it be called) seek to mirror terms and conditions of employment found in the "teachers" contract.

ISSUES AT IMPASSE

Essentially, the parties disagree over the following issues: (1) tobacco-free school campuses; (2) payment of certification/licensure expenses; (3) the use of performance appraisals in determining retention standing during a reduction in force (RIF); (4) exceptions to the practice of progressive discipline; (5) contacting Union representatives prior to the questioning of an employee during an investigation; (6) the Union's ability to file institutional grievances; (7) the grievance form; and (8) the duration of the CBA.

POSITIONS OF THE PARTIES

1. Article 11, Health and Safety, Section 11.

a. The Employer's Position

The Employer would make school campuses tobacco free by August 1, 2009. To assist employees who smoke, it would sponsor

and/or refer employees to smoking cessation classes; those who participate in such programs would receive release time from their regular duties to attend. A total ban on the use of tobacco products "is the right thing to do" because it would promote both the overall health of the workforce and the anti-smoking message that schools, parents and boards of education favor. Furthermore, eliminating smoking on school grounds for employees would allow them to serve as role models for students who may not use tobacco products on campus. Employees who are smokers would continue to be permitted to smoke elsewhere on the military installation where it is permitted, but not on the school campus. Finally, a smoking ban would be consistent with state laws in many jurisdictions that prohibit the use of tobacco products on school property.[1/]

b. The Union's Position

The Union's position is that the Employer should be ordered to withdraw its proposal so that employees can continue to smoke in designated outdoor areas.[2/] Employees already are protected from the adverse effects of second-hand smoke because smoking is not permitted in buildings on school grounds; furthermore, smoking is allowed only in designated outdoor areas, sufficiently away from students, parents, and non-smoking employees. Some school campuses also provide enclosed and/or covered structures which further separate smokers from the schools' population. A total ban on the use of tobacco products would force bargaining-unit employees who use them to leave the school campus and likely smoke in full view of students and parents coming and going to the schools before school, after school, during non-paid lunch time, and break periods. Finally, the Employer's proposal would create a disparate situation because teachers, who work in the same schools as bargaining-unit employees, are not prohibited from smoking on school campuses.

1/ Among the states where bargaining-unit employees are stationed, it appears that only New York has a state law which prohibits smoking on school grounds.

2/ The parties disagree over what constitutes the *status quo* for the smoking policy at the West Point Schools in New York State. While the Employer maintains that the use of tobacco products on school grounds already has been banned, the Union claims to have no knowledge of the change and denies that it received notice of a proposed change in smoking policy for West Point schools.

CONCLUSIONS

After carefully considering the parties' arguments and evidence on this issue, we shall order the Employer to withdraw its proposal. In our view, the current practice of restricting employee smoking to designated outdoor areas away from the view of students conveys to minors that smoking is not promoted or freely permitted while accommodating the legitimate interests of smokers. Furthermore, by relegating smoking to designated outdoor areas, it appears that the Employer already has taken steps to protect non-smokers from the adverse effects of second-hand smoke.

2. Article 17, Certification/Licensure, Sections 2.c, 2.d, and 4.

a. The Employer's Position

Under the Employer's proposal, the Agency would continue to pay, for a period of 4 years, the fees and related expenses for those employees who currently receive reimbursement to maintain certifications/licensures that are needed to perform job-related duties. Also, in the event that the Employer places an employee in a job that requires certification/licensure to perform duties related to the position, the Employer would pay the initial costs associated with obtaining the necessary certification/licensure; thereafter, those expenses would be the responsibility of the employee. These are the only two situations where the Employer would pay certification/licensure expenses. It is willing to continue to pay such expenses for a limited time only because the practice of doing so may have evolved in one of the school districts in Kentucky. Limiting the duration to 4 years also would signal to the Union that the Employer is unwilling to extend similar payments to the professional bargaining unit. Furthermore, maintenance employees "are paid well above the equivalent Federal employee who is paid from the General Schedule and/or Wage Schedule" and, therefore, they would not be economically penalized if they have to absorb the certification/licensure expenses required for their positions.

b. The Union's Position

The Union proposes that the Employer bear the responsibility of paying the expenses incurred by employees to maintain certifications/licensures if: (1) an employee occupies a position with established certification/licensure

requirements; (2) an employee seeks or requests placement into a position with such requirements; (3) the Employer directs or requests that an employee be placed into a position with such requirements; or (4) the Employer changes established certification/licensure requirements of an encumbered position or establishes new certification/licensure requirements. Under its approach, management retains the right to determine the certification/licensure requirements for all bargaining-unit positions. In the Union's view, the Agency should pay the costs of such requirements because it reaps the benefits of having employees properly certified and licensed to perform various job-related duties, such as asbestos removal. Its proposal continues the *status quo* for employees to the extent that certification/licensure expenses already are paid by the Employer. This would not be onerous because management has only established such requirements for a total of 10 maintenance positions (at Camp Lejeune, Fort Knox, and Fort Stewart). The estimated annual expense would amount to approximately $13,000, a small sum for the Employer, but a significant expense for employees who hold maintenance jobs. The current practice also should be expanded because the Employer has never claimed that it would be a financial burden to pay the costs associated with certifications/licensures.

CONCLUSIONS

Having fully considered the parties' evidence and arguments concerning this issue, we shall order the adoption of the Employer's proposal whereby its practice of paying the costs incurred by employees to maintain job-related certifications/licensures would continue for a significant period of time, though not indefinitely.[3/] In our view, limiting the Employer's financial obligations to 4 years is a reasonable alternative to the Union's approach, which goes well beyond maintaining the *status quo.* In this regard, the Union's proposal could create unknown expenses because the Agency would have to pay the costs for employees "who seek or request placement" into a position which has certification/licensure requirements.

3/ We note that the Employer has the discretion to remove duties from positions that require the maintenance of certifications/licensures at any time and, by eliminating those duties, could avoid payment of certain expenses.

3. Article 23, Reduction in Force (RIF), Section 7.d

a. The Employer's Position

The Employer proposes that, when determining an employee's retention standing during a RIF, "credit for performance shall be granted in accordance with 5 C.F.R. § 351.504." In 5 C.F.R. § 351.504, the Office of Personnel Management (OPM) has established criteria for determining retention standing that provide additional service credit based on performance. The use of OPM's criteria is warranted because seniority should not be the only factor considered when making such determinations. Moreover, its proposal would merely continue the practice that has been used in all RIFs affecting bargaining-unit employees since December 2001. In addition, failure to adhere to OPM regulations ultimately may result in a RIF being challenged and overturned as unlawful.

b. The Union's Position

The Union's proposal is that "(o)nce a uniform OPM-approved performance evaluation instrument has been created and implemented for all bargaining-unit members in the same competitive area, credit for performance shall be granted in accordance with 5 C.F.R. § 351.504." Until then, performance ratings for RIF purposes would be adjusted to reflect either satisfactory or unsatisfactory ratings. The Employer is not in compliance with OPM regulations, that is, it does not have in effect an approved performance rating "instrument." In this regard, performance measurements currently used by the Agency lack objectivity because they do not include critical elements. Therefore, performance appraisals should be discounted for RIF purposes to level the playing field for bargaining-unit employees, and the Employer should convert all performance ratings to pass/fail when performance is used to determine an employee's priority on a retention register. Unless all employees in a competitive area competing for retention in a RIF have been given performance evaluations that comply with OPM regulations, it would be unfair to utilize performance "instruments" that may be highly subjective in nature. As a result, someone with only a few years of Government service could be retained over someone who has many years of service due solely to the use of a wholly subjective performance appraisal. Finally, using a performance "instrument" that is not in compliance with OPM regulations may give affected employees a legitimate complaint that could result in unnecessary litigation.

CONCLUSIONS

Upon consideration of the record created by the parties in support of their positions on this article, we conclude that, on balance, the Employer's final offer provides the better basis for resolving the impasse. While the Union's proposal would neutralize the effects of performance appraisal ratings which it believes lack objectivity, it also essentially would eliminate employee performance as a factor when employees are competing for higher retention standing in a RIF. Contrary to the Union's assertion, however, it is unclear whether the Employer has performance "instruments" in effect that meet OPM requirements. Even if it does not, it may, nevertheless, use "the performance rating prepared at the end of an appraisal period for performance of agency-assigned duties over the entire period," which includes a summary rating level.[4/] In our view, employee performance should be a consideration in determining RIF-retention standing. There also are administrative procedures available to employees for challenging performance appraisal ratings they consider inaccurate or unfair. Rather than discounting job performance as a factor during a RIF, we shall order the adoption of the Employer's proposal.

4. Article 25, Disciplinary Actions, Sections 1.d, 1.e, and 7.

a. The Employer's Position

The following is proposed by the Employer: (1) in Section 1.d, add a caveat to the parties' endorsement of the concept of progressive discipline that "some offenses are so egregious as to warrant more serious penalties"; (2) in Section 1.e, exclude the Union's proposal to require the Employer to "make reasonable efforts to notify" Union representatives and the Union's attorney, in the event that an employee is to be questioned during an investigation; and (3) in Article 25, add Section 7, which provides that "(t)he parties agree that the Agency retains the right to reduce the 30-day notice period specified in Section 3.d of this Article pursuant to the provisions of Section 7513(b) of Title 5, United States Code."

Wording should be added to Section 1.d to alert employees to the possibility that progressive discipline may not be used if an employee is charged with certain offenses. The Employer has learned through litigation under the professional CBA that such a provision is necessary because the Union consistently

4/ *See* 5 C.F.R. §§ 430.203, 351.203 and 351.504(a).

argues that "removal is not an appropriate penalty for a first offense." If a first offense is particularly egregious, however, perhaps involving sexual misconduct with a student or the physical abuse of a special education student, employees should be on notice that progressive discipline may not apply. The proposed wording would provide a fair and proper balance to the concept of progressive discipline and, therefore, should be included in the CBA. Section 1.e should not include the Union's proposed wording requiring "reasonable efforts" to contact Union representatives prior to questioning employees involved in an investigation because it would place an impractical requirement on management, particularly in emergency situations that could involve a lost child, bomb/terrorist threat, etc. The Employer cannot be expected in all situations, particularly those involving exigencies, to first communicate with Union representatives to provide them with an opportunity to be present prior to questioning an employee. Moreover, the proposal may lead to grievances over the meaning of "reasonable attempts." Finally, Section 7 should be added to the article to inform employees that the usual 30-day advance notice period before effectuating an adverse action may be reduced by the Employer if there is "reasonable cause to believe the employee has committed a crime for which a prison sentence may be imposed." Such wording is straightforward, unambiguous, and in exact compliance with applicable statutory provisions.

b. The Union's Position

Section 1.d should not include additional wording that would allow the Employer, for certain offenses, to deviate from the policy of utilizing progressive discipline to remedy problems with employee conduct or performance. Rather, the section should mirror the wording in the CBA that covers the professional bargaining unit. In this regard, the Employer has not demonstrated why a bargaining unit of non-professional employees should be held to different standards than teachers. Moreover, there is no need to add wording which would allow the Employer to deviate from the policy of progressive discipline because, under that concept, it is understood that the more serious the offense, the more stringent the level of discipline that would be required. Finally, it is unclear which "offenses" would be included under the Employer's proposal; without defining the offenses that may result in a deviation from progressive discipline, the proposal is vague and potentially too broad.

In Section 1.e, the Union proposes that the Employer "make

reasonable efforts" to notify Union representatives and the Union's attorney before it questions a bargaining-unit employee "to permit (the Union) to be present." The proposal is not intended to delay questioning but only to require the Employer to make "reasonable efforts" to communicate with the Union, which may or may not result in actual contact. As to the "crime provision" in the Employer's proposed Section 7, which would allow it to dispense with the usual 30-day advance notice period for effecting an adverse action, 5 U.S.C. § 7513(b) already permits the Employer to waive the notice period, so including the wording in the article would be redundant.

CONCLUSIONS

Having considered the positions of the parties on this article, we are persuaded that the Employer's proposals should be adopted to resolve the dispute. Its proposed wording in Section 1.d and Section 7 appropriately address situations where employees should not expect progressive discipline or to receive the usual 30-day notice period for the effectuation of discipline. In our view, some offenses are so serious that they warrant deviation from customary practices; the Employer's approach would place employees on notice that this is the case. As to Section 1.e, we find that the Union's proposal could inadvertently cause a delay in the questioning of an employee where expedience is crucial and, for that reason, should not be adopted.

5. Article 26, Grievance Procedure, Sections 4 and 5 and the Grievance Form

a. The Employer's Position

Essentially, the Employer proposes in Section 4, Local Grievance Procedures, that "(i)n an effort to resolve grievances expeditiously and at the lowest possible level, issues that affect one or more employees at one DDESS Local School System will be processed as local grievances"; and, in Section 5, Agency/Association Grievances, that "Agency/Association grievances may only be filed where the issue of the grievance affects bargaining-unit employees at more than one DDESS Local School System." Should the grievance decision not be satisfactory, the grieving party would have 30 days to invoke arbitration. As to the grievance form, the Employer proposes a version that would require the grievant to provide, in greater detail, information concerning the grievance.

Its proposal is designed to give the parties the opportunity to resolve purely local issues at the lowest possible level and, unlike the Union's proposal, would mandate rather than "encourage" employees to do so. Nor is it necessary to permit every local grievance to be immediately elevated to the Director's level for resolution, thereby bypassing a first and second opportunity for the matter to be considered by the school principal and the superintendent of the local school system. Requiring a grievance to proceed through all three steps of the grievance process increases the likelihood that it would be resolved and the need for arbitration eliminated. Furthermore, the proposal would ensure that only those issues affecting bargaining-unit members at more than one DDESS local school system would be processed as Agency/Association grievances and proceed directly to the third step (*i.e.*, the Director's level). Finally, a form that requires the grievant to provide more detailed information about the grievance ultimately would benefit both parties.

b. The Union's Position

Under the Union's proposal in Section 4, Local Grievance Procedure, individual employees would be encouraged to use the local grievance process to address a grievance personal to that individual. In Section 5, Agency/Association (Union) Grievances, the grievance would have to identify the names of all employees known "at that time" who are affected, and the grieving party would have 20 days to invoke arbitration if the grievance decision is not satisfactory. In addition, the Union proposes to use the same grievance form as the professional bargaining unit.

The Union should have the right to determine whether grievances are filed by individuals at the local level or by the Association (Union); grievances filed by the Union bypass the local level grievance step process and are submitted directly to the Director in Peachtree City, Georgia, for decision. The parties have had a high rate of successful resolution of grievances filed by the Union with the Director. Thus, the Union's proposal would help ensure that the trend continues. Retaining its discretion over where to file grievances is particularly important when they involve questions of interpretation of the parties' CBA. Such matters should be filed by the Union because they tend to have a broader impact on the bargaining unit and ultimately may affect many employees. If filed locally, the school principal and local school district superintendent would be making determinations on how to

interpret the CBA, rather than the parties at the highest levels. It is also important that the Union have the opportunity to file a grievance with the Director where the issue concerns a disciplinary matter. In this regard, it would be pointless for the employee to file a local grievance which would be heard by the principal (*i.e.*, the recommending official on the disciplinary action) and then by the local superintendent (*i.e.*, the deciding official) because it is unlikely that either would agree to a rescission of the disciplinary action they initially sanctioned. Taking grievances over disciplinary matters directly to the Director also increases the chances of resolution and ensures that they are heard more expeditiously. Finally, the grievance form proposed by the Union is uncomplicated and user-friendly.

CONCLUSIONS

After reviewing the positions of the parties on this article, we conclude that the impasse should be resolved on the basis of the Employer's proposals. If the Union has the right to determine where all grievances are filed, given its strong preference for filing them at the highest level, it appears that the local grievance procedure would be rarely used. Rather, we favor the implementation of a procedure that requires the parties to attempt to resolve their disputes at the lowest levels. This is more likely to avoid the need for arbitration, as full consideration of the grievance would have been rendered at more than one level. Furthermore, requiring the parties to provide, for example, the identities of those affected by the grieved action may better serve the process through the disclosure of information. We are persuaded that the Employer's proposed wording would serve that end. For these reasons, we shall order the adoption of the Employer's proposals.

6. Article 29, Duration, Section 1

a. The Employer's Position

The Employer proposes that the CBA remain in effect for 4 years. A longer duration should be imposed because the parties already have invested over 3½ years in bargaining, mediation and impasse resolution, as well 12 months negotiating ground rules. During this entire period, management has paid the travel and *per diem* expenses for the Union's bargaining team (excluding its attorney). Essentially, a longer term for the parties' initial CBA would provide a return on its considerable financial investment.

b. The Union's Position

The Union proposes that the CBA remain in effect for 3 years. In the event it does not prevail on the other issues at impasse before the Panel, the Union wants the right "to revisit these issues within the earliest possible time frame."

CONCLUSION

On this issue, we shall order the adoption of the Employer's proposal. Given the length of time the parties have been negotiating over their initial CBA, a longer duration is clearly warranted.

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 5 C.F.R. § 2471.11(a) of its regulations, hereby orders the following:

1. **Article 11, Health and Safety, Section 11**

The Employer shall withdraw its proposal.

2. **Article 17, Certification/Licensure, Sections 2.c, 2.d, and 4**

The parties shall adopt the Employer's proposals.

3. **Article 23, Reduction in Force (RIF), Section 7.d**

The parties shall adopt the Employer's proposal.

4. **Article 25, Disciplinary Actions, Sections 1.d, 1.e, and 7**

The parties shall adopt the Employer's proposals.

5. **Article 26, Grievance Procedure, Sections 4 and 5 and the Grievance Form**

The parties shall adopt the Employer's proposals.

6. Article 29, Duration, Section 1

The parties shall adopt the Employer's proposal.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

October 25, 2007
Washington, D.C.