United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE OFFICE OF CHIEF COUNSEL WASHINGTON, D.C. And NATIONAL TREASURY EMPLOYEES UNION	Case No. 10 FSIP 123

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, Office of Chief Counsel (OCC), Washington, D.C. (Employer).

After investigation of the request for assistance, concerning two articles that arose during negotiations over a successor collective-bargaining agreement (CBA), the Panel determined that the issues should be resolved through an informal conference with Panel Chair Mary E. Jacksteit. The parties also were notified that if no settlement were reached, Chair Jacksteit would notify the Panel of the status of the dispute, including the parties' final offers and her recommendations for resolving the impasse. After considering this information, the Panel would resolve the matter by taking whatever action it deemed appropriate which could include the issuance of a binding decision.

Pursuant to this procedural determination, Chair Jacksteit convened an informal conference with the parties on November 16, 2010, at the Panel's offices in Washington, D.C. A voluntary settlement was not reached during the course of the meeting. In rendering its decision, the Panel has considered the entire

record, including the parties' final offers and pre-conference submissions.

BACKGROUND

The mission of the OCC is to "serve America's taxpayers fairly and with integrity by providing correct and impartial interpretation of the internal revenue laws and the highest quality legal advice and representation for the Internal Revenue Service." The Union represents a bargaining unit consisting of approximately 1,700 professional and non-professional employees; of those, 600 are stationed at the Employer's headquarters office and 1,100 are assigned to field offices throughout the U.S. Typical bargaining-unit positions are attorney and paralegal. The parties' current CBA, which was to have expired on January 5, 2008, automatically rolls over on an annual basis unless either party requests to negotiate a successor.

ISSUES

The parties essentially disagree over whether: (1) OCC's awards program should provide mandatory performance awards linked to bargaining unit employees' annual performance ratings, and include a performance award pool for bargaining unit employees based on the ratio of bargaining unit salaries to total salaries (Article 14); and (2) the CBA should have a 3- or 4-year term with a reopener provision (Article 54).

POSITIONS OF THE PARTIES

1. Article 14, Awards

a. The Union's Position

The Union's final offer consists of eight separate sections addressing awards. Its most significant features are as follows: (1) The Employer would be required to determine each year the total amount of money available for awards to all of the OCC's non-Senior Executive Service (SES) employees and to subdivide the money into bargaining unit and non-bargaining unit awards pools based on the ratio of bargaining unit salaries to total salaries; any additional funding for awards that may become available after the initial awards pool determination also would be subject to this formula; (2) Bargaining unit employees with Outstanding performance ratings would receive 1.5 percent of salary and employees with Exceeds Fully Successful ratings would receive 1 percent of salary; employees with Fully

Successful ratings could receive .5 percent of salary at the Employer's discretion; (3) Any employee receiving a Quality Step Increase (QSI) would have the option of receiving a cash award instead; (4) The option of offering Time Off Awards (TOA) in lieu of cash would be within OCC's sole discretion; however, where an employee requests time off in lieu of a cash award, the OCC would normally grant the request absent workload demands; (5) The OCC's National Awards Program (dealing with "Quick Hit," special act, and non-monetary awards) would be continued; (6) The Union's national office would receive the estimated funding levels of the bargaining unit awards pool within 30 days of the beginning of the fiscal year, and an Excel spreadsheet containing a variety of different information no later than 30 days after performance awards are issued each year; (7) If the OCC determines that it cannot fund the awards program in accordance with the requirements specified earlier in the Union's proposal, it would be have to notify the Union not later than June 1 of each year; upon such notice, either party could reopen the article to negotiate implementation and impact of the proposed change or deviation, and such negotiations would conclude in no more than 30 days from their initiation, including impasse resolution procedures, unless otherwise mutually agreed; and (8) Non-discretionary awards determinations would be grievable.

A mandatory awards program linking performance awards to annual performance appraisals is justified because the Employer's current discretionary awards program is "inconsistent in its application and has resulted in significant disparity in the amounts of performance award monies granted to similarly-situated bargaining unit employees within and between sub-organizations who receive the same overall performance rating." This occurs because each of the OCC's sub-organizations has its own awards budgets, and discretion to allocate and award these funds. As a result, there are different criteria and practices for awards across the OCC, creating an awards program that is arbitrary, unfair, bears no reliable relationship to performance as documented in the official rating,[1/] and makes OCC employees feel underappreciated and cheated. The disparities are demonstrated through an analysis of awards data from 2004 - 2009, which show that in 2004, 12 of 144 bargaining unit

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1/ The Union offered into evidence an internal OCC document (30.4.2 Personnel Guidance) stating in section 30.4.2.5.6.1 that Performance Awards are to be given for high-level performance "as reflected in the most recent rating of record."

employees got Outstanding ratings but no performance award; in 2005, 4 of 159 got Outstanding ratings but no performance award; in 2006, 9 of 160 got Outstanding ratings but no performance award; in 2007, 14 of 192 got Outstanding ratings but no performance award; in 2008, 12 of 194 got Outstanding ratings but no performance award; and in 2009, 31 of 170 got Outstanding ratings but no performance award.

Even worse, in 2004, 178 of 664 bargaining unit employees got Exceeds Fully Successful ratings but no performance award; in 2005, 182 of 730 got Exceeds Fully Successful ratings but no performance award; in 2006, 151 of 657 got Exceeds Fully Successful ratings but no performance award; in 2007, 160 of 806 got Exceeds Fully Successful ratings but no performance award; in 2008, 159 of 732 got Exceeds Fully Successful ratings but no performance award; and in 2009, 181 of 690 got Exceeds Fully Successful ratings but no performance award. Further, in 2004, 100 bargaining unit employees had no performance rating but got performance awards; in 2005, 65 had no performance rating but got performance awards; in 2006, 64 had no performance rating but got performance awards; in both 2007 and 2008, 34 had no performance rating but got performance awards; and in 2009, 72 had no performance rating but got performance awards.[2/] The data also show that some employees have received two performance awards in the same calendar year. The Union's proposal should be adopted because it would eliminate these disparities by requiring all bargaining unit employees who get Outstanding ratings to receive a performance award of 1.5 percent of salary and all bargaining unit employees who get Exceeds Fully Successful ratings to receive a performance award of 1 percent of salary.

OCC's current awards program also has resulted "in a disparity in the amounts of award monies granted to bargaining unit and non-bargaining unit employees relative to those employees' contributions" to the accomplishment of the Employer's mission. From 2006 - 2009, the Employer has allocated just over 50 percent of its total awards to non-bargaining unit employees even though they make up only about

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2/ The Union also introduced emails from three bargaining unit employees, two who complained either about the size or frequency of their performance awards, and one who complained about not receiving a performance rating in a timely manner, and an anecdote about a librarian in Manhattan who received Exceeds Fully Successful ratings for 4 years in a row but no performance awards.

one-third of the workforce. Under the Union's awards pool formula, approximately 60 percent of the awards budget would go to bargaining unit employees, rectifying the current "injustice." In addition, the sections of its final offer addressing QSIs and TOAs, which would be within management's sole discretion, are comparable to provisions in the Union's CBAs with the IRS, the Department of Health and Human Services and the Food and Nutrition Service, which also require mandatory performance awards tied to performance ratings. More specifically, permitting employees who receive QSI to convert them into cash would benefit employees about to retire and some lower graded employees. TOAs would help newer employees and others with a particular need for paid leave.

Requiring the Employer to provide extensive data on an annual basis would permit the Union to monitor the awards program to ensure it is applied non-discriminatorily and consistent with OCC's internal regulations requiring awards to be "uniformly and fairly distributed nationwide," without having to file information requests under the Statute or the Freedom of Information Act. Generally, since around calendar year 2000, the Employer has operated its awards program without transparency; this places employees in a situation where they do not know why awards are given or how to get one. Even though the Employer has now agreed to publicize annually the names of bargaining unit employees who receive awards, adopting the Union's proposal would eliminate completely the lack of transparency. The annual reopener provision would apply whenever the requirements of its proposed Section 2 cannot be met and provides the Union with an opportunity to address the adverse impact of the Employer's inability to fund the bargaining unit employees' awards pool at the required level through an expedited negotiations process. Finally, the Panel should disregard the Employer's data on employee satisfaction with the awards program, since the survey is given to both non-bargaining unit and bargaining unit employees.

b. The Employer's Position

With certain exceptions, the Employer proposes that the wording in the current contract article on awards be retained. This means that the performance awards program "shall be based on employee achievement," and focused on "Sustained Superior Performance Awards," which are to be "based on [an] employee's overall performance appraisal rating." Within an individual work unit, employees with Outstanding annual appraisal ratings would be considered first for performance awards. At the

Union's request, the Employer would publicize the names of bargaining unit employees who receive awards annually. And each year, the Union would be provided with the names of employees who were granted awards for the previous fiscal year, the award amounts, and the employees' organizational components, and notified of those employees who achieved Outstanding or Exceeds Fully Successful ratings but were not provided an award. The Employer's final offer drops a section from the current article which made the non-receipt of a performance award "not in and of itself the basis for an employee grievance," and adds the following wording: "If an employee with an 'Outstanding' (5) annual appraisal rating does not receive a performance award, the [OCC] will provide NTEU and/or the employee, upon request, with a written explanation."

Its final offer is consistent with the decision of the previous Panel, which examined essentially the same Union arguments in 2004 and rejected them in favor of a continuation of the Employer's discretionary awards program.[3/] Contrary to the Union's contentions, based on the record established by management since 2004, the current awards program continues to be "robust" and fair, and compares well with other Federal agencies and the Federal government as a whole, as demonstrated by the various charts the Employer has submitted. In this regard, from 2006 - 2009, the percentage of bargaining unit employees receiving any kind of award fluctuated from 54 percent to just over 60 percent and, among the 1,230 bargaining unit employees that were at the OCC for the entire 4-year period from 2006 - 2009, only 14 percent (175 employees) failed to receive an award of any kind during that period. In the Employer's view, a few emails from disgruntled employees or anecdotes from the Union's bargaining team do not demonstrate that the current system has caused morale problems or been abused by management. In fact, OCC's employees are generally satisfied with the awards program, as reflected in surveys from 2007 - 2010 which indicate that the percentage of those who give favorable ratings on award-related issues is roughly the same as the percentage of employees receiving awards. These surveys also show that OCC employees are more satisfied with their awards program than IRS employees who have a mandatory awards system like the Union is proposing.

3/ *Department of the Treasury, Internal Revenue Service, Office of the Chief Counsel, Washington, D.C. and National Treasury Employees Union*, Case No. 04 FSIP 5 (June 30, 2004).

Most of the alleged anomalies cited by the Union in the 2004 - 2009 awards data are few in number and can be accounted for by the fact that employees' annual performance rating years are based on when they started their service at the OCC, while performance awards are allocated once per year, normally at the end of the fiscal year.[4/] After adjusting for the misalignment between performance rating cycles and calendar year performance awards data, and taking into account Outstanding and Exceeds Fully Successful employees who received any award (not just performance awards), of those who got Outstanding ratings, only 4 failed to receive an award in 2006, 11 in 2007, 6 in 2008, and 8 in 2009. Moreover, 95 percent of those receiving Outstanding ratings get some type of award, and the tiny number who do not typically have left the Agency or been promoted. Of those who got Exceeds Fully Successful ratings, only 147 failed to receive an award in 2006, 124 in 2007, 123 in 2008, and 101 in 2009. While the Employer concedes that there is a larger number of employees that receive Exceeds Fully Successful ratings who receive no performance awards (about 60 percent of this category typically get awards), these are legitimate assessments by supervisors based on comparing the level of contribution of employees. In addition, discretion in giving awards is important to allow management to account for supervisors who are more liberal in giving high performance ratings, and to permit consideration of employee performance during what can be a lengthy period between rating and award.

Conceptually, the Union's view that performance awards should be directly linked to annual performance ratings is flawed. Performance ratings are based on whether employees have met their standards under specific elements, while performance awards are based on a relative comparison of employees' contributions in meeting the OCC's mission. Thus, employees who receive the same ratings do not necessarily contribute equally to the accomplishment of the mission in a given performance year, and supervisors should have the flexibility to reward those who have achieved more because of performance on specific work assignments relative to others. Exercising such flexibility will necessarily mean that not all employees getting Outstanding or Exceeds Fully Successful ratings will get a performance award every year. The Union's approach to performance awards also is at odds with contemporary scientific research, as reflected in the book *Drive*, by author Daniel Pink, who argues that "carrot

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4/ This is because awards are, to a significant degree, funded from unspent expert witness fees determinable only at the end of the fiscal year.

and stick" rewards systems have been shown not to motivate high performance, while "intrinsic rewards" - autonomy, mastery and purpose (meaning) - do, particularly where the work to be performed requires a high degree of creativity, as is the case with the attorneys at OCC. Although the Employer concedes that its awards program involves pay-for-performance, going to a mandatory system nevertheless would make the deleterious effects of a carrot-and-stick award system even worse.

Turning to other aspects of the Union's final offer, applying its formula for distributing awards pools would decrease the overall amount of money available for non-bargaining unit employees and adversely affect their morale. Most are at the GS-15 level and require larger bonuses than GS-14 and GS-15 bargaining unit employees to recognize their additional responsibilities and to incentivize them to continue to be supervisors of employees who are at the same grade.[5/] Adoption of the Union's proposal also would reduce the average award amounts since all bargaining unit employees at the top two performance levels would have to receive awards, diminishing the effectiveness of awards as a motivational tool. From an administrative point of view, because the Union did not anticipate how the individualized performance rating years would affect implementation of a mandatory awards system, its proposal is likely to have unforeseen consequences. Portions of the Union's final offer also appear to have been lifted out of the IRS-NTEU contract and are ill-suited for application at OCC. For example, the section permitting QSIs to be converted into cash is unnecessary since OCC supervisors rarely give them to employees, and the section on TOAs requiring time off to be calculated by dividing an employee's hourly rate into the recommended award amount involves an unnecessarily complex process that would lead to inconsistencies. Furthermore, the information the Union requests would be burdensome for management to provide and is unjustified given the size of the bargaining unit and the fact that similar information provided to the Union prior to the informal conference failed to reveal any problems suggesting improper discrimination in the way the current awards program has been administered. Finally, the reopener provision requiring the Employer to inform the Union by June 1 each year whether it can fully fund the awards program is impractical. At that point in the fiscal year management still may not know its budgetary situation, as funding decisions are often made closer to the end of the fiscal year.

5/ According to the Employer, 9 percent of the bargaining unit is GS-15, the same grade as their non-SES managers.

CONCLUSIONS

Having fully considered the evidence and arguments presented by the parties concerning the Awards article, we conclude that the Employer's final offer provides the more reasonable basis for resolving their dispute. Preliminarily, the current Panel decides impasses on a case-by-case basis after thoroughly evaluating the record created by the parties. In our view, in the particular circumstances of this case, the Union has not demonstrated the need to change the *status quo* by imposing a mandatory performance awards program at the OCC. It has alleged widespread abuse of management's discretion and employee dissatisfaction under the current awards program, but this is simply not borne out by the record evidence. In this regard, we are persuaded that the discrepancies the Union cited from the 2004 - 2009 awards data are mostly accounted for by the fact that employees' annual performance rating years are based on when they started their service at the OCC, while performance awards are allocated once per year, normally at the end of the fiscal year. As a result, there is a misalignment in the way the OCC's computers keep performance rating and awards data, making it appear as if some employees received no rating but got a performance award, or received an Outstanding rating but got no award, when in fact there was a rating or an award within their rating year, but not in the calendar year when awards were paid. Nor are we convinced that there is widespread employee dissatisfaction with the current system. The Employer's surveys suggest otherwise and were not effectively refuted by any Union surveys or the Union's other evidence.

Although the Panel's decision will not result in a mandatory performance awards program, the Employer's final offer provides some notable incremental changes in the current article that are responsive to the Union's interests. The Employer now will publicize annually, at the Union's request, the names of bargaining unit employees who receive awards. This addresses the lack of transparency under the current program which undoubtedly contributed to the Union's and unit employees' perceptions of unfairness. The Employer will also provide a written explanation, upon request, to the Union and/or an employee who gets an Outstanding rating but does not receive a performance award. In conjunction with the fact that the Employer's final offer also now makes grievable the non-receipt of an award by an employee who achieves a specific rating, the attainment of the Union's goal of monitoring the awards program should be enhanced. If the Union can demonstrate, through its future monitoring efforts, that the Employer is abusing its

discretion, it can use that evidence during its next bargaining opportunity. Accordingly, for the reasons stated above, we shall order the adoption of the Employer's final offer.

2. Article 54, Effective Date and Duration

a. The Union's Position

The Union proposes a 4-year CBA and that "either party may reopen three (3) existing article, and propose two (2) new articles on the other party at mid-point of this Agreement." Although a 4-year agreement with a mid-point reopener permitting no more than 5 articles to be negotiated per party would provide a longer duration than the Federal sector norm, it also gives the parties the flexibility to react to circumstances that may arise that neither side can anticipate today. For this reason, its adoption is warranted.

b. The Employer's Position

The Employer proposes that the *status quo*, *i.e.*, a 3-year contract with no reopener provision, be retained. Given the parties' bargaining history, where it took over 3½ years to negotiate an initial CBA, and another 2½ years (and counting) to negotiate a successor agreement, mid-term bargaining under the Union's proposed reopener probably would not be completed before the entire contract would be reopened again. The Employer would like a respite from negotiations for a 3-year period, the standard length of Federal sector agreements.

CONCLUSIONS

Upon full consideration of the parties' positions on this issue, we shall order the adoption of the Employer's final offer to resolve the impasse on this article. Neither side has identified any problems since the current article was implemented in 2004, so the Union's contention that a reopener provision is necessary to accommodate unknown circumstances appears to be speculative. Moreover, 3 years is the standard length of contracts in both the Federal and private sectors and there is no basis in the record for deviating from this well-established practice.

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. **Article 14, Awards**

The parties shall adopt the Employer's final offer.

2. **Article 54, Effective Date and Duration**

The parties shall adopt the Employer's final offer.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

December 17, 2010
Washington, D.C.