

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
NATIONAL INSTITUTES OF HEALTH  
BETHESDA, MARYLAND

and

D.C. LODGE #1, FRATERNAL ORDER  
OF POLICE

Case No. 10 FSIP 87

DECISION AND ORDER

The Department of Health and Human Services (HHS), National Institutes of Health, Bethesda, Maryland (Employer or NIH) and D.C. Local Lodge #1, Fraternal Order of Police (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 single written statements of position concerning NIH's policy prohibiting all tobacco use on its Bethesda campus.<sup>1/</sup> The parties were advised that, after considering the entire record, the Panel would take whatever action it deems appropriate to resolve the dispute, which may include the

---

<sup>1/</sup> NIH's "Tobacco-Free Campus Policy," which implements HHS's Tobacco-Free HHS Initiative, went into effect on October 1, 2008, and covers all employees, contractors and visitors except for employees represented by the Union and Local 2419, American Federation of Government Employees, AFL-CIO. Local 2419, which represents about 400 employees on the NIH campus, is currently bargaining with the Employer over the tobacco-use policy in its successor CBA negotiations.

issuance of a binding decision. The parties' final offers and supporting statements were received pursuant to this procedure, and the Panel has now considered the entire record.

### BACKGROUND

NIH's mission is to seek fundamental knowledge about the nature and behavior of living systems and to apply that knowledge to enhance health, lengthen life, and reduce the burdens of illness and disability. The Union represents approximately 100 police officers whose job is to ensure the safety and security of the Employer's facilities, employees and visitors. The parties' CBA expired on March 22, 2010, but its terms and conditions continue until a successor CBA goes into effect.

### ISSUE AT IMPASSE

Essentially, the parties disagree over whether bargaining unit employees should be prohibited from using tobacco products on the Employer's premises.

#### 1. The Employer's Position

The Employer proposes that the Panel order the adoption of a Memorandum of Agreement (MOA), dated August 5, 2009, to resolve the parties' impasse.<sup>2/</sup> In essence, the MOA includes: (1) a Preamble stating the Employer's reasons for implementing a tobacco-free campus; (2) Section 1, confirming that the policy is designed to include all tobacco products; (3) Section 2, prohibiting tobacco use "in all NIH owned or leased buildings, on all outside property or grounds, including parking areas and in government vehicles"; (4) Section 3, authorizing employees who smoke to enroll in smoking cessation programs and providing information regarding such programs; (5) Section 4, stating that all vacancy announcements will include wording informing applicants about the tobacco-free policy; and (6) Section 5, informing employees that those who fail to comply with the MOA or NIH policy may be subject to discipline.

According to the Employer, "the nation looks to the NIH for leadership and direction in all areas of health research,

---

<sup>2/</sup> The complete text of the Employer's proposed MOA is attached to the Panel's *Decision and Order*.

developments, administration, and action." It also cites numerous studies that establish that "tobacco use is the leading preventable cause of death in the U.S." By implementing its tobacco-free policy on the Bethesda campus, "NIH seeks to live up to the agency's mission and reputation by setting an example through the creation of a healthy atmosphere." As a result of eliminating tobacco use, its employees are not subjected to secondhand smoke, more employees have quit smoking, and there are additional benefits such as increased productivity, decreased absenteeism, and lower costs of medical expenditures associated with tobacco use. No employees have been forced to quit smoking and they "have ample opportunity and space to use tobacco just outside of the NIH campus, none of which require crossing of off campus roads." Adoption of the Union's proposal, on the other hand, would "exempt FOP bargaining unit members from the Tobacco Free campus policy" and be unacceptable "due to the major health risks posed to other NIH employees" because it would allow them "to smoke in many public spaces throughout the NIH campus." Moreover, forcing NIH to accept the proposal would "run counter to [its] mission of good health, and responsibility" and distract from its ability and efforts to "set an example for good health for the nation." Finally, permitting uniformed law enforcement officers to use tobacco on campus "could cause confusion for employees viewing officers using tobacco in public areas in seeming violation of the known policy."

## 2. The Union's Position

The Union's proposal is as follows:

1. No smoking in Government Buildings and vehicles.
2. No smoking within 25 feet of building entrances and 50 feet of Hospital entrances.
3. No smoking near building air intakes.
4. Members will still be able to use smokeless tobacco products.
5. Members will still be able to smoke in their privately-owned vehicles while on NIH government property.

The Union's interest is to have the employees it represents "treated like all other federal employees." In this regard, the adoption of its proposal would continue the *status quo* with respect to the employees it represents by prohibiting smoking in Government buildings, vehicles, and within established setback or designated areas near the hospital and building air intakes. This practice is consistent with Executive Order 13058,<sup>3/</sup> which applies to most other federal employees. When the Employer implemented its tobacco free policy on October 1, 2008, however, it cited Executive Order 13058 and a number of statutes, none of which "support an absolute tobacco ban on the NIH Bethesda campus." Rather, NIH was required to negotiate with the Union, and during that process it proposed a "one-sided position demanding an absolute ban of tobacco" where "no real dialogue occurred" and its interests were not shared with the Union. Contrary to the Employer's position, a complete ban on tobacco products also would not fulfill NIH's mission, as NIH has placed ashtrays on the perimeter of the campus for smokers' use "despite [the ashtrays] still being on the NIH property." Similarly, banning smokeless tobacco "serves no purpose" because it is not always apparent that an employee uses smokeless tobacco. Finally, the Employer's attempt to control an employee preference that does not impact his/her ability to perform assigned responsibilities "creates an unnecessary infringement." Will it next try to eliminate foods that cause obesity from its premises or to include exercise as a job requirement? The implementation of a tobacco free policy "legitimately raises these questions" and they "should be addressed before a decision is rendered."

#### CONCLUSIONS

Having carefully considered the evidence and arguments presented by the parties in this case, we shall resolve their impasse by ordering the adoption of the Union's proposal but restrict its application only to current bargaining unit employees. While we are sympathetic to the Employer's expressed

---

<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.

interest in setting an example of good health for the nation, in our view it has not demonstrated a need to change the *status quo*. In this regard, there is no evidence in the record to substantiate the claim that the policy that currently applies to unit employees, which is consistent with the requirements of Executive Order 13058, poses health risks to other NIH employees, contractors or visitors. For this reason, we are persuaded that the only accommodation to the Employer's interests that is justified under the current circumstances is to apply NIH's tobacco free policy to bargaining unit employees hired after the date of this decision.

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 but it shall apply only to current bargaining unit employees. All bargaining unit employees hired after October 5, 2010, shall be subject to the tobacco free policy NIH implemented on October 1, 2008.

By direction of the Panel.



H. Joseph Schimansky  
Executive Director

October 5, 2010  
Washington, D.C.

**Memorandum of Agreement  
Between  
FOP and National Institutes of Health  
Smoking and Smokeless Tobacco-NIH Facilities  
August 5, 2009**

**Preamble**

The Parties recognize the importance of the NIH mission related to scientific research and application of that knowledge to extend a healthy life while reducing the burdens of illness and disability. A significant amount of research has been conducted on the health effects of smoking. Further, the research has clearly identified that the use of tobacco remains the leading preventable cause of death in this country and second hand smoke is a known cancer causing agent. Therefore, the tobacco free campus is to improve the health of all staff and visitors, and ensure the NIH actions and policies remain consistent with its mission and, at the same time, positioning the NIH as the model for other agencies and organizations.

**Section 1: Definition**

Tobacco is defined as a cigar, cigarette, pipe, or any other form of lit or oral use tobacco product. Use of cigarettes, cigars, pipes, smokeless tobacco, and any other tobacco products lead to disease and death. Therefore, this policy is designed to include all tobacco products.

**Section 2: Policy**

Tobacco use is prohibited in all NIH owned or leased buildings, on all outside property or grounds, including parking areas and in government vehicles.

**Section 3: Smoking Cessation**

The Agency encourages all employees who wish assistance in eliminating their dependence on the use of tobacco products to enroll in an authorized Smoking Cessation Program (SCP). When ever possible, Agency authorized or sponsored programs will be offered during duty hours. Information on these programs will be publicized and communicated throughout the Agency community. For more information regarding the smoking cessation program see the attached document.

**Section 4: Vacancy Announcements**

All vacancy announcements shall include a statement that Tobacco use prohibited in NIH owned or leased space facilities, NIH campuses, vehicles (private or government), and motorized equipment.

**Section 5: Compliance**

An employee's failure to abide with this MOU and it provisions or NIH policy may be subjected to discipline.