

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of )

UNITED STATES FEDERAL TRADE )  
COMMISSION )  
WASHINGTON, D.C. )

and )

LOCAL 2211, AMERICAN FEDERATION OF )  
GOVERNMENT EMPLOYEES, AFL-CIO )

Case No. 90 FSIP 86

DECISION AND ORDER

Local 2211, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between it and the United States Federal Trade Commission, Washington, D.C. (Employer or FTC).

The Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to take whatever action it deemed appropriate to resolve the impasse. Submissions were made pursuant to these procedures and the Panel has now considered the entire record.<sup>1/</sup>

<sup>1/</sup> In its rebuttal statement, the Employer raised new allegations of nonnegotiability with respect to portions of the Union's proposal on smoking. The Union was provided with an opportunity to respond to those allegations; however, in its final submission, it presented a modified proposal on designated-smoking areas. This portion of the Union's final submission was not considered because of its untimeliness.

## BACKGROUND

The Employer's mission is to protect consumers through a variety of regulatory activities. The bargaining unit consists of approximately 250 nonprofessional and technical employees, including secretaries, research analysts, legal technicians, and clerks who are stationed at the Employer's headquarters<sup>2/</sup> in Washington, D.C. The instant impasse arose as a result of negotiations over Union-initiated mid-term proposals.

## ISSUES AT IMPASSE

The parties are at impasse over Union office space, competitive areas for reductions in force (RIF), and smoking policy.

### 1. Union Office Space

#### a. The Union's Position

The Union proposes that it be provided with a private office on a full-time (5 workdays per week) basis. The office would consist of a lockable room equipped with an operating telephone, a desk, two file cabinets, and five chairs, and would be located in the FTC Headquarters building.

Under its proposal, the Union would no longer have to search for office space and would have a permanent location in which to perform its representational functions. This would eliminate scheduling conflicts for conference rooms and shared offices and would have a positive impact on labor-management relations. Moreover, this proposal would maintain equity with other employee organizations at the FTC which have office space provided by the Employer.

According to the Union, the Employer's proposal is not adequate because it fails to recognize the Union's need for full-time office space. Requiring the Union to share an office with the employee assistance counselor would create a confidentiality problem as well as the appearance of impropriety since the employee assistance counselor is a contract employee of the Personnel Division.

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<sup>2/</sup> The Employer occupies space in two buildings in Washington, D.C. -- all of 600 Pennsylvania Avenue, NW. (the "Headquarters building") and floors three through five at 601 Pennsylvania Avenue, NW. (the "601 building"). These buildings are referred to collectively as the FTC Headquarters.

b. The Employer's Position

The Employer proposes that an office, which is currently used 2 days per week by the employee assistance counselor, be made available for the Union's use on the other 3 days of the week. The office would be furnished with one desk or table, three chairs, a lockable file cabinet, and a telephone to be used for official representational matters. If the Union should need space when the office is not available, the Employer would attempt to provide another office, if one is available.

The Employer points out that at current staffing levels, there are no offices available for the Union's use on a full-time basis. Because of budget constraints, the Employer has been forced to relinquish some leased office space and to consolidate its operations in the remaining areas. By providing a part-time office with a lockable file cabinet, the Employer is making every attempt to meet the needs of the Union; in this regard, the Employer notes that the Union already has an office at the International Trade Commission headquarters which is located less than 1 mile from the FTC headquarters. Moreover, because of the relatively small size of the bargaining unit and the lack of demonstrated need, a full-time office at FTC is unnecessary.

2. Competitive Areas for RIFs

a. The Union's Position

The Union proposes the following wording:

The competitive area for all RIFs shall be the FTC Headquarters, Washington, D.C.

This proposal pays deference to the seniority status of long-term employees and would maximize the number of positions available to them in the event of a RIF. It also should prevent the Employer from arbitrarily targeting certain employees for separation should cutbacks become necessary. The Union argues that since the area of consideration for promotions is the entire headquarters, the same should be used for RIFs.

b. The Employer's Position

The Employer alleges that the Union's proposal is nonnegotiable. Although the U.S. Court of Appeals for the District of Columbia Circuit recently held that proposals

on competitive areas are negotiable under the Statute,<sup>3/</sup> the Employer argues that the state of the law is unsettled and, therefore, adheres to its position that the issue is outside the duty to bargain.

On the merits, the Employer proposes that the status quo be maintained and that each bureau and office remain a separate competitive area. According to the Employer, this position minimizes the disruptive effects of RIFs on its operations while maximizing the savings realized from separating employees. The Union's proposal, on the other hand, would likely increase both the number of employees affected by a RIF and those separated in order to achieve a given budget reduction goal. Accordingly, there is no demonstrated reason to discontinue the longstanding practice of separate competitive areas. Moreover, the most senior employees would not necessarily be retained under the Union's proposal since retention standing is governed by factors in addition to seniority.

### 3. Smoking Policy

#### a. The Union's Position

The Union proposes the following wording:

In view of the finding of the U.S. Surgeon General's report on the hazard[s] of second-hand smoke to nonsmokers, and consistent with 41 C.F.R., Part 101-20, the [p]arties enter into this [a]greement and set forth agency policy.

#### (a) Smoking Cessation Program

In order to assist smokers who may wish to quit, the agency will offer a smoking cessation class as interest warrants. When there is insufficient interest

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3/ United States Office of Personnel Management v. Federal Labor Relations Authority, 905 F.2d 430 (D.C. Cir. 1990) (OPM), aff'g American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 33 FLRA 335 (1988); United States Nuclear Regulatory Commission v. Federal Labor Relations Authority, 905 F.2d 430 (D.C. Cir. 1990) (NRC), aff'g National Treasury Employees Union and Nuclear Regulatory Commission, 33 FLRA 400 (1988).

in an on-site smoking cessation course, the agency will pay for individuals to attend an agency-approved course. Supervisors and coworkers are asked to be supportive to those attempting to change what are often longstanding habits. The agency shall allow employees administrative leave to take part in authorized smoking cessation programs.

(b) Nonsmoking Areas

No smoking shall be allowed in any work area under the control of the agency; smoking shall only be permitted in the designated-smoking areas (all of which are nonwork areas) identified below. Smoking shall only be allowed in the designated-smoking areas. Lighted tobacco products shall not be carried into, or from, a designated-smoking area.

(c) Designated Smoking Areas

(i) The [p]arties understand that a smoking policy can increase stress to certain employees; however, the goal of the smoking policy is to minimize the exposure of nonsmoking employees to second-hand smoke which the Surgeon General has found constitutes a health hazard. This goal will be achieved by limiting all smoking to areas where the air is exhausted outside the building and not returned into the general building ventilation system.

(ii) The agency shall designate in each agency building on each floor (where there are at least two sets of men[']s and women's rest rooms) a men's and a women's rest [room] as designated-smoking areas. Each such rest room will be identified with an appropriate sign posted on its door. All designated-smoking rest rooms will be checked monthly to [e]nsure that smoke generated in the rest room is exhausted and does not enter the general workplace. The air exhaust rates of these rest rooms will be checked prior to the implementation of the smoking policy using velometers to measure the exhaust rate.

(iii) The agency shall also designate available break areas on each floor which have windows opening to the outside as smokers' lounges. These break areas (smokers' lounges) are nonwork areas for use by smoking employees. The agency shall [e]nsure that these areas are identified by appropriate signs on the

door (which shall be kept closed as much as possible). The agency will [e]nsure that in these designated areas, the windows can be opened freely to exhaust smoke directly outside, and that smoking employees be requested to keep the window at least partly opened (except in inclement weather) when smoking. No employee shall be required to enter a designated-smoking area which is strictly a nonwork area.

(iv) Fresh air, CO, and CO<sup>2</sup> levels shall be measured 3 months after this smoking policy becomes effective and every 3 months thereafter in, and adjacent to, designated-smoking areas which shall be chosen and measured at random, and a written summary of the measurement shall be sent to the Union.

(v) Reasonable amounts of time will be permitted for employees to go to areas where smoking is permitted. Requests for such absences from the workplace may be denied, subject to work needs. The quality and quantity of work products may not suffer in order to accommodate a smoker's right to smoke.

(vi) This agreement shall pertain to all persons using, assigned to, visiting, or working in the two agency locations.

(vii) The agency shall permit smoking outside the agency buildings in the courtyard areas at the junction of Constitution and Pennsylvania Avenues next to the Headquarters Building, and in the courtyard behind the 601 Pennsylvania Avenue Building.

Under the Union's proposal, smoking would be prohibited in all work areas under the control of the agency and would be permitted only in designated rest rooms and break areas which are vented to the outside. According to the Union, broad application of this policy is necessary given the mounting scientific evidence of the adverse effects of sidestream smoke on the health of nonsmokers. The Environmental Protection Agency (EPA), among other regulatory and expert groups, has recommended that smoking in buildings with closed heating, ventilation, and air-conditioning (HVAC) systems be limited to separately ventilated areas or eliminated entirely. By permitting smoking only in designated areas which vent to the outside or which are physically located outside, and by allowing smokers reasonable amounts of time for smoking in these areas, the interests of smokers and nonsmokers are

effectively balanced. Moreover, by combining this smoking policy with a smoking cessation program, the number of smokers at the FTC is likely to decline. Furthermore, having a single policy for the entire headquarters complex is reasonable because it provides consistent treatment for all employees. Finally, adoption of the Union's proposal is supported by the results of a survey of employee opinion in which 39 out of 68 respondents indicated that the smoking situation at FTC was poor or unsatisfactory.

According to the Union, the Employer's allegation of nonnegotiability with respect to designated rest rooms is without merit. The D.C. Circuit holding on which the Employer relies<sup>4/</sup> does not support such an allegation because the Union's proposal in this case is significantly different from the one found to be nonnegotiable by the court in IRS. Moreover, the Federal Labor Relations Authority (FLRA) has held, in prior cases, that proposals which would require the designation of certain areas as smoking areas are, in fact, negotiable.<sup>5/</sup>

Under the Employer's plan, smoking in work areas, especially in the 601 building, would expose nonsmokers to the hazards of sidestream smoke. It is unlikely that smokers would open their office windows during cold or inclement weather, and, therefore, secondhand smoke would still enter the work environment. Requiring office doors to be closed is an inadequate measure and would not prevent sidestream smoke from circulating into nonsmoking areas. Having separate policies for the different buildings is inconsistent and would result in disparate treatment of employees. The Employer's position also puts an unrealistic burden on nonsmokers to request that smoking materials be extinguished in work areas. Moreover, by permitting employees to refuse to enter a designated-smoking office, smoking in offices will undoubtedly have a disruptive

4/ Internal Revenue Service, Los Angeles District v. Federal Labor Relations Authority, 902 F.2d 998 (D.C. Cir. 1990) (IRS).

5/ In support of its position, the Union relies on Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma and Oklahoma Area Indian Health Service Council, National Federation of Federal Employees, 31 FLRA 498 (1988) and National Association of Government Employees, Local R14-32 and Department of the Army, Fort Leonard Wood, Missouri, 26 FLRA 593 (1987).

effect in the workplace. Finally, the air quality studies referred to by the Employer did not measure environmental tobacco smoke, and, therefore, are irrelevant to the issue at impasse. Overall, the Employer's position is unfair to nonsmokers and shows little concern with the air quality in the two buildings.

b. The Employer's Position

The Employer proposes that both the Headquarters and 601 buildings have separate smoking policies. Under its plan, smoking in the Headquarters building would be prohibited in specified areas including classrooms, conference rooms, rest rooms, stairways, elevators, the Health Unit, libraries, corridors, lobbies, and the cafeteria (except for a designated-smoking area). Smoking would be permitted in: (1) designated-smoking areas; (2) private offices that have windows opening to the outside; (3) shared offices that have windows opening to the outside and in which all employees are smokers; and (4) in an outdoor courtyard area. No employee would be required to enter an office in which smoking is permitted, all smoking materials would be extinguished if so requested by an employee who enters such an office, and doors to smoking areas would be kept closed to the maximum extent possible. Supervisors would be directed to deal immediately with any complaints about smoking, and, could if necessary, prohibit smoking in particular offices.

In addition, in the 601 building, the Employer proposes a two-stage policy. The first stage is almost identical to the policy for the Headquarters building except that smoking would be permitted in private offices and in shared offices where all employees are smokers, even though windows in those offices do not open. In the second stage, which would be implemented 6 months after Stage One implementation, smoking in the 601 building would be permitted only in designated-smoking areas that vent to the outside.

The Employer contends that its position "demonstrates continuing concern for the well-being of all of its employees." It points out that because the two buildings which make up the headquarters complex are so dissimilar in terms of the factors that contribute to air quality, separate smoking policies are necessary. Under its plan, nonsmokers would be protected by (1) restricting smoking to offices and smoking areas which vent directly to the outside (except for a 6-month period in the 601 building); (2) requiring that doors to smoking areas remain closed; (3) requiring that smokers in designated offices extinguish smoking materials at the request of nonsmokers; and (4) allowing nonsmokers to refuse to enter



smoking areas. The plan also recognizes the needs of smokers and "avoids the indignity to which smokers would be subjected . . . if they are forced to limit their smoking to rest rooms." Moreover, the Employer recognizes a potential loss of productivity among smokers (which may result if they are required to leave their offices to smoke) and seeks to balance this concern with the health concerns of nonsmokers. The Employer's proposal also provides for smoking cessation programs which would assist those smokers who wish to break the habit; since fewer employees would continue to smoke, overall air quality in the two buildings would likely be improved. Adoption of the Employer's position is supported by recent air quality studies which demonstrate that "the air quality in the Headquarters building is excellent and the air quality of the 601 building is within even the strictest limits." Overall, the Employer's plan "strikes the best possible balance" between the competing interests of the two groups of employees.

With respect to the Union's proposal, the provision which would require rest rooms to be designated as smoking areas is nonnegotiable. In IRS,<sup>6/</sup> the court found a similar proposal to be in conflict with a Government-wide regulation and, therefore, outside the employer's obligation to bargain. The Employer urges the Panel to apply IRS to the facts of this case and to decide the duty-to-bargain question in its favor.

On the merits, the Union's proposal "ignores the rights of smokers and the productivity concerns of the Employer." Under its proposal, designating rest rooms as smoking areas would make those rest rooms "unsuitable" for use by nonsmokers. Moreover, none of the floors occupied by the Employer in the 601 building have two sets of rest rooms; therefore, adoption of the Union's plan would result in a complete ban on smoking in that facility. In sum, the Union's proposal "seeks to advance only the interests of nonsmokers," and, therefore, should not be adopted.

#### CONCLUSIONS

Having considered the evidence and arguments in this case, we conclude that the Employer's position offers a suitable resolution of the dispute concerning Union office space. In reaching this decision, we are mindful of the Union's argument that requiring it to share an office with a contract employee of the Personnel Division could create the appearance of impropriety. We are persuaded, however, that such an arrangement is necessary given the space limitations faced by the agency. As pointed out in the Employer's brief, at current staffing levels, no surplus offices are available for the

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<sup>6/</sup> Note 4 supra.

Union's use on a full-time basis. Moreover, given the relatively small size of the bargaining unit, the lack of demonstrated need, and the fact that the Union has another office less than 1 mile from the FTC headquarters, we are not convinced that a full-time office at the facility is warranted.

With respect to the issue of competitive areas for RIF purposes, we shall first address the nonnegotiability allegations raised by the Employer. In examining this issue, the Panel is guided by the FLRA's decision in Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988) (Carswell). In that case, the FLRA concluded that the Panel may apply existing case law to resolve an impasse where a duty-to-bargain issue arises. In this regard, both the FLRA and the U.S. Court of Appeals for the D.C. Circuit have found proposals on competitive areas to be within the duty to bargain.<sup>7/</sup> Accordingly, we conclude that the issue is properly before the Panel.

On the merits, we find that the Union's proposal should be adopted. Retention of more senior employees during a period of reduced operations is a long-established and widely-accepted principle of labor-management relations. While we recognize that retention standing is based on factors in addition to seniority, we are of the opinion that the Union's proposal should provide a greater number of opportunities for highly qualified senior employees in the event that cutbacks occur. Moreover, given that the area of consideration for promotions consists of the FTC headquarters, we believe that basic fairness warrants that employees be allowed to compete in the same area during a RIF.

The Employer maintains that the Union's proposal would have a greater disruptive effect on the workplace, and would cost more to implement, than would the status quo. In addressing this concern, we are mindful of the fact that regardless of the number of competitive areas involved, RIFs, by their very nature, cause disruptions in the workplace. While the total cost, as well as the total number of employees reassigned, may be slightly greater if a RIF were conducted using a single competitive area (as opposed to multiple areas), on balance, we believe that the principle of retaining qualified and experienced senior employees during periods of reduced operations outweighs these concerns. Moreover, given the nature of the work performed at the FTC headquarters, we believe that the skills of headquarters employees should be readily transferable between bureaus. This factor should

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<sup>7/</sup> See cases cited at note 3 supra.

minimize the amount of time needed to "familiarize" an employee with the specifics of a particular occupation thereby maintaining continuity in the agency's operations.<sup>8/</sup> Therefore, based on the above, we remain convinced that the difference in the amount of disruption caused by the two proposals would be marginal, if any.

Turning now to the issue of smoking, we must first address the allegations of nonnegotiability raised by the Employer with respect to that portion of the Union's proposal requiring the designation of certain rest rooms as smoking areas. Once again, we are guided by the FLRA's holding in Carswell. In this instance, an examination of FLRA case law reveals that proposals requiring certain work areas to be designated as either smoking or nonsmoking areas are within the duty to bargain.<sup>9/</sup> Accordingly, we shall retain jurisdiction over the Union's entire proposal and address it on its merits.

We conclude that neither party's proposal would provide an adequate resolution to the impasse. On the one hand, we believe that the Union's proposal would not properly balance the interests of (1) smokers and nonsmokers, and (2) bargaining-unit and nonbargaining-unit employees. In this regard, we believe that the Union may have overstated the health risks to nonsmokers by failing to take into account the results of the air quality studies performed by the Employer. We also believe that allowing "reasonable amounts of time" for smoking would undoubtedly have a negative effect on productivity and could also lead to unnecessary difficulties between supervisors and smokers, as well as to resentment on the part of nonsmokers. Finally, the scope of the Union's proposal is too broad as it would restrict the rights of employees who are outside the bargaining unit.

The Employer's proposed policy, on the other hand, accords

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<sup>8/</sup> In this regard, we also note that Office of Personnel Management (OPM) regulations, which require that an employee possess the necessary qualifications before he or she can "bump" or "retreat" into a lower graded position, should serve as a check against the inherent disruptive effects of any RIF. See 5 C.F.R. section 351.702 (1990).

<sup>9/</sup> See, for example, National Association of Government Employees, Local R14-32 and Department of the Army, Fort Leonard Wood, Missouri, 26 FLRA 593 (1987).

too much deference to the preferences of smokers at the expense of nonsmokers. In this regard, allowing smoking in offices would appear to be too casual an approach given the mounting scientific evidence of the adverse effects of sidestream smoke on the health of nonsmokers. The proposal also places an unrealistic and onerous burden on nonsmokers to request that smokers extinguish smoking materials whenever a nonsmoker enters a designated-smoking office. Finally, we are persuaded that two separate smoking policies within the same headquarters complex are not warranted because it would result in inconsistent treatment of similarly-situated employees.

In accordance with the above discussion, we shall order the adoption of compromise wording which, in our opinion, strikes a better balance between the competing interests in this case. In this vein, there should be no smoking whatsoever in any area where employees represented by the Union may be assigned or sent as part of their regular duties. Moreover, in the interest of maintaining a healthy work environment for all employees and to facilitate cooperative labor-management relations, we shall order the Employer to conduct semi-annual air quality studies and to provide the Union with the written results. If it is determined through these studies that smoking in any area other than those designated in this Order is hazardous to the health of bargaining-unit employees, then smoking in those areas shall be prohibited. To accommodate the needs of smokers, we shall also order that (1) in the Headquarters building the agency shall designate one set of rest rooms per floor as smoking areas; (2) in the space occupied by the agency in the 601 building, one set of rest rooms shall also be so designated; and (3) smoking shall be permitted in the courtyard areas of both buildings. Under the circumstances, we feel that these areas should adequately meet the needs of bargaining-unit employees, and others, who smoke. Finally, to assist smokers who wish to stop smoking, and consistent with the discussion above, the Employer shall provide, periodically, smoking cessation programs to its employees on a voluntary basis.

#### ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

1. Union Office Space

The parties shall adopt the Employer's proposal.

2. Competitive Areas for RIFs

The parties shall adopt the Union's proposal.

3. Smoking Policy

The parties shall adopt the following wording:

Smoking Policy Agreement between AFGE Local 2211  
and the U.S. Federal Trade Commission (FTC)  
for the FTC Headquarters at 600 and 601  
Pennsylvania Avenue NW., Washington, D.C.

a. Scope of Agreement

There shall be no smoking whatsoever in any area where bargaining-unit employees represented by the Union may be assigned or sent as part of their regular duties.

b. Designated Smoking Areas

(i) In the Headquarters building (600 Pennsylvania Avenue, NW.), the agency shall designate one set of rest rooms per floor as designated-smoking areas. Each such rest room will be identified with an appropriate sign posted on its door.

(ii) In the space occupied by the Employer in the 601 building (601 Pennsylvania Avenue, NW.), the agency shall designate one set of rest rooms as designated-smoking areas. Each such rest room will be identified with an appropriate sign posted on its door.

(iii) The agency shall permit smoking outside the agency buildings in (A) the courtyard areas at the junction of Constitution and Pennsylvania Avenues next to the Headquarters building, and (B) the courtyard behind the 601 building.

(iv) Appropriate receptacles will be provided in these designated-smoking areas. The doors to these areas will be kept closed as much as practicable.

(v) Lighted tobacco products shall not be carried into or from these designated smoking areas.

c. Smoking Cessation Programs

In order to assist smokers who may wish to quit smoking, the Employer will offer smoking cessation classes whenever sufficient interest warrants, or will pay the fees for individuals to attend a course approved by the Employer. Employees will be placed on administrative leave to attend such classes.

d. Air Quality Studies

The agency shall, on a semi-annual basis, conduct air quality studies in each building. A written summary of the results shall be provided to the Union. If it is determined through air quality studies that smoking in any area other than those designated in this Order is hazardous to the health of bargaining-unit employees, then smoking in those areas shall be prohibited.

By direction of the Panel.



Linda A. Lafferty  
Executive Director

November 20, 1990  
Washington, D.C.