

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE AIR FORCE
87th AIR BASE WING
JOINT BASE MCGUIRE-DIX-
LAKEHURST, NEW JERSEY

and

LOCAL 1778, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 7

DECISION AND ORDER

Local 1778, American Federation Government of Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Air Force, 87th Air Base Wing, Joint Base McGuire-Dix-Lakehurst, New Jersey (Employer).

After investigation of the request for assistance, concerning a dispute over the implementation of Air Force Instruction 40-102 (AFI 40-102) concerning tobacco use, the Panel determined that the issues should be resolved through an informal conference with Panel Chairman Mary E. Jacksteit. The parties also were notified that if no settlement were reached, Chairman 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, Chairman Jacksteit convened an informal conference with the parties on February 6, 2013, 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 Employer, a component of the U.S. Air Force, is a part of Joint Base McGuire-Dix-Lakehurst, New Jersey. As the result of a Base Realignment and Closure Commission recommendation, three separate installations were consolidated and the Joint Base now contains members of every branch of the military with overall command by the Air Force. The Employer provides global support for the 87th Air Base Wing's missions. The Union represents approximately 1,150 bargaining unit employees. The unit is comprised of all non-professional appropriated fund General Schedule and Wage Grade employees "who are serviced by the Air Base Wing Civilian Personnel Office." The parties are covered by a local collective bargaining agreement (CBA) that is due to expire in June 2015.

Executive Order 13,058, "Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace" (E.O. 13,058), in addition to banning indoor smoking prohibits smoking outdoors near air ducts. It also permits agency heads to enact "more restrictive policies" on outdoors smoking.^{1/} Similarly, Department of Defense Instruction Number 1010.15, "Smoke-Free DoD Facilities" (January 2, 2001), prohibits smoking near air ducts and points of ingress/egress. Neither of these authorities establishes any specific distances for restricting outdoor smoking. Relying on the foregoing, the parties negotiated a tobacco policy, Article 17, "Tobacco Use," as part of their previous CBA.^{2/} This policy states, in relevant part, that employees may smoke outdoors but "away from points of ingress/egress (i.e., doors)," windows, and "air intake units/vents." It does not establish any specific distance requirements. The General Services Administration (GSA), however, issued regulations in 2009 concerning outdoor smoking on federal property. Specifically, pursuant to 41 C.F.R. § 102-74.330, smoking is prohibited within 25 feet of "doorways and air intake ducts."

1/ Executive Order No. 13,058, 62 FR 23,451 (Aug. 9, 1997).

2/ Although the parties are now governed by a new CBA, the parties agreed that Article 17 would remain in effect until the parties reach agreement on, or the Panel imposes, a new tobacco policy.

In March 2012, the Secretary of the Air Force promulgated AFI 40-102, which is titled "Tobacco Use in the Air Force." Its primary goal is to establish "tobacco-free [Air Force] installations and decrease supportive environments for tobacco use." As relevant, AFI 40-102 prohibits indoor smoking and limits outdoor smoking to "Designated Tobacco Areas" (DTAs). DTAs may not be established within 50 feet of buildings, walkways, or parking lots, and may not be within 100 feet of playgrounds. Under the instruction, the Employer is also required to designate specific locations for DTAs. That is, smoking will not be permitted in any areas inside the distance requirements set forth above. In addition, smoking must take place in specific locations (such as adjacent to a "smoke lamp," trash can for cigarette butts, or in a smoking shelter).

AFI 40-102 also prohibits any tobacco use on "Medical Treatment Facilities" (MTFs) campuses. Under AFI 40-102, medical treatment facility "campuses" include the contiguous areas (grounds, parking lots, walks) surrounding the MTFs (up to 200 to 250 feet). DTAs are to be established beyond MTF campus boundaries in accordance with the distance requirements of the instruction set forth above (50 feet).^{3/} AFI 40-102 would affect primarily two MTFs at the Joint Base, the dental building and the main clinical facility.^{4/}

Of further relevance, AFI 40-102 also subjects the use of electronic smoking devices (electronic cigarettes) to its limitations and classifies them as tobacco products. AFI 40-102 applies to "all military and civilian Air Force . . . personnel," and can be "supplemented at any level." That is, the instruction will apply to all civilian employees, military personnel, and visitors. The Employer plans to implement AFI 40-102 after this matter has been resolved.

3/ The Employer has proposed two specific DTAs for each of the two MTFs involved in this dispute. It has yet to designate any other DTA locations however.

4/ There is also a third MTF on base that would fall under the AFI, the Lakehurst clinic. This facility, however, is under the control of the U.S. Navy, and the Navy has already implemented an instruction making it a tobacco free facility. The Lakehurst facility is not in dispute in this matter.

ISSUES

The parties essentially disagree over: (1) the locations of DTAs; (2) whether smoking should be permitted on MTF campuses; (3) whether employees should be permitted to use electronic cigarettes throughout the base, both indoors and outdoors; and (4) whether electronic cigarettes should be classified as tobacco products.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union does not object to the portions of AFI 40-102 that ban indoor smoking. It disagrees with the outdoor restrictions. The Union's proposal is that DTAs be 50 feet from common points of entry/egress, and that smoking be permitted in all "common areas" - which include sidewalks, walkways, and other general outdoor areas - that meet this 50-foot requirement. Parking lots and privately-owned vehicles that are 50 feet away from points of entry/egress would also be designated as DTAs. Unlike AFI 40-102, there would be no specific locations for DTA sites, i.e., employees would be permitted to smoke once they were anywhere beyond the 50-foot boundaries. The Union also would not place any smoking limitations on MTF campuses other than the general DTA requirements established by its proposal, nor does it propose any additional distance requirements.

The Union's proposed DTA parameters address the health concerns raised by AFI 40-102 and the Employer. Requiring bargaining unit employees to smoke 50 feet away from points of entry/egress and common areas would create a sufficient buffer to ensure that other individuals would not be exposed to secondhand smoke. In fact, these requirements go further than E.O. 13,058, other federal regulations, and the *status quo* at Joint Base McGuire-Dix-Lakehurst. Additionally, sidewalks and other common areas are sparsely populated throughout the day, so the chance that individuals in these areas could be exposed to secondhand smoke is slight. Thus, it is illogical to conclude that smoking in these areas must be prohibited. Indeed, there has been no evidence of, or complaints about, exposure to smoke in these areas. Similarly, a smoking ban for MTF campuses is unnecessary because the Union's proposed DTA distances would sufficiently prevent secondhand smoke exposure.

The Employer's proposal is essentially nothing more than an attempt to address image issues associated with smoking. That is, the Air Force and the Employer believe that allowing employees to smoke in the presence of others presents an "unprofessional image" and sends "the wrong message." The Employer's stated concerns about safety, therefore, are nothing more than a pretext. Its true goal is to project a professional image of non-smoking and deter tobacco use. But it is not the job of the Air Force or the Employer to influence the personal behavior of its employees. Although there are health risks associated with tobacco use, it should be up to individual employees to decide whether they wish to use tobacco products. Indeed, the Employer's claims about health concerns ring hollow given that exchanges at the Employer's facilities continue to sell cigarettes at *discount prices*.

In addition to its proposed DTA parameters, the Union further proposes that electronic cigarettes be permitted throughout the entirety of the Employer's facilities, both indoors and outdoors.^{5/} Because electronic cigarettes do not emit smoke or use any tobacco, there is no chance that users would expose others to secondhand smoke or other harmful emissions. Indoor use of these products, therefore, is entirely appropriate. Additionally, a growing body of anecdotal evidence demonstrates that individuals have been using electronic cigarettes as an effective tobacco cessation product. One of the Union's representatives testified at the informal conference that he has used electronic cigarettes to help him quit smoking. Thus, electronic cigarettes should be considered permissible safe tobacco cessation products until scientific and/or medical studies prove otherwise. Finally, since electronic cigarettes do

5/ Electronic cigarettes are small metallic tubes that are designed to look like actual cigarettes or cigars (the ends actually light up). These devices contain a battery, a "vaporization chamber" and a cartridge filled with water usually mixed with liquid nicotine. Cartridges can also contain, in addition to nicotine, flavors such as mint or bubblegum. Some devices can be used without any nicotine at all. A user "puffs" an electronic cigarette like an actual cigarette; the device then heats the liquid and changes it to a visible vapor which is emitted by the e-cigarette. If the liquid in the chamber contains nicotine, there is nicotine content in the vapor. Electronic cigarettes, unlike the real things, do not contain any actual tobacco, they do not involve combustion, and do not give off smoke.

not contain any tobacco, they should not be classified as tobacco products. Thus, placing them under the requirements of AFI 40-102 is inappropriate.

2. The Employer's Position

The Employer is unwilling to deviate from any of the requirements of AFI 40-102. Thus, its final proposal merely implements its requirements. It should be adopted because AFI 40-102 promotes three important goals: (1) reducing exposure to secondhand smoke; (2) promoting cessation of tobacco use; and (3) creating an environment where non-tobacco use is the norm. Medical research and data, presented primarily in a 2006 U.S. Surgeon General Report concerning secondhand smoke and its effects, demonstrate that there is simply no amount of exposure to secondhand smoke that can be considered safe. That is, even minimal exposure can lead to some degree of illness. Thus, reducing secondhand smoke exposure is of paramount importance. Furthermore, tobacco cessation amongst Department of Defense (DoD) personnel has stagnated within the past decade when compared to tobacco cessation amongst the general population. The implementation of AFI 40-102, therefore, would ensure that more DoD personnel cease using tobacco products. This is particularly vital because tobacco use results in \$200 billion in health-related costs in the United States per year and results in 450,000 deaths. In fact, 10 percent of the DoD's annual budget is spent on health-related costs. Tobacco use also reduces annual work production because of employee illness and time spent on tobacco breaks.

The DTA distances established by AFI 40-102 help to further the above goals. These distances, along with the prohibition of smoking in common areas, help to reduce the chance that other individuals will be exposed to secondhand smoke. While walkways and other outdoor areas are indeed sparsely populated, a smoking ban in these areas is appropriate because even minimal secondhand smoke exposure still creates health concerns. Further, placing DTAs in areas that are less visible to others, particularly children, might prevent individuals from observing behavior that could inspire them to smoke. Requiring employees to follow a tougher set of rules regarding cigarette use also might discourage them from smoking at work, which, in turn, could encourage them to stop smoking altogether. Allowing different DTAs for bargaining unit employees would confuse, and send the wrong message to members of the military, contractors, visitors and other individuals who will be bound by all of the requirements of AFI 40-102.

Smoking is not appropriate on MTF campuses because society is gradually moving towards a new social norm wherein smoking is prohibited on the grounds of medical facilities. Indeed, the Employer provided evidence that shows that many medical facilities nationwide currently have such a prohibition in place. Permitting tobacco use on MTF campuses also could adversely affect individuals at these facilities who are receiving treatment for tobacco-related illnesses and/or are taking advantage of tobacco cessation programs offered by the Employer. That is, individuals could be exposed to harmful secondhand smoke or could receive mixed messages if they view individuals using tobacco products.

Electronic cigarettes are correctly classified as tobacco products and are, therefore, properly subject to the limitations of AFI 40-102. In this regard, the Employer is merely following the lead of the United States Food and Drug Administration (FDA) which has classified electronic cigarettes as a tobacco product and is in the process of drafting regulations to govern their use. Additionally, there is no medical consensus regarding whether electronic cigarettes are an effective tobacco cessation product and the FDA does not afford such treatment to electronic cigarettes. Nor does any major tobacco cessation program include the use electronic cigarettes as part of the program. Finally, medical studies have not conclusively determined whether the vapor emitted by electronic cigarettes is harmless to individuals who are exposed to it. Many electronic cigarettes contain nicotine, and no study has definitively stated what, if any, health effects water vapor mixed with nicotine could have on individuals exposed to the vapor.

CONCLUSIONS

Having fully considered the evidence and arguments presented by the parties, we conclude that a modified version of the Union's final offer provides the more reasonable basis for resolving their dispute. Thus, we shall order the adoption of the portion of the Union's proposal concerning DTAs, *i.e.*, DTAs will be 50 feet away from common points of entry/egress, and include common areas, parking lots, and privately-owned vehicles that meet this distance requirement. These rules will apply to MTF campuses. In our view, the Union's proposed DTA requirements sufficiently satisfy the concerns raised by AFI 40-102 and the Employer. The Employer concedes that requiring employees to smoke 50 feet away from buildings and points of entry/egress will provide individuals with enough of a distance barrier to ensure that they are not exposed to secondhand smoke or tobacco

use in general while near buildings. Permitting smoking on sidewalks, parking lots, and other common areas is appropriate because these areas are spread out throughout its facilities and are sparsely populated. There is no evidence that secondhand smoke exposure is a problem there. Therefore, we find that the minimal chance that individuals *could* be exposed to tobacco use does not support a conclusion that tobacco use in these areas should be banned. Similarly, completely banning tobacco use on MTF campuses is inappropriate because the Employer provided no evidence to demonstrate why such a ban would be more effective at reducing exposure to secondhand smoke or cigarette use than the Union's proposed DTAs.

We are not persuaded, however, to adopt the Union's proposal to permit the use of electronic cigarettes anywhere on the facility. In this regard, in the face of concerns about safety there is no scientific evidence that conclusively addresses whether the vapor emitted by electronic cigarettes could harm others. Given this uncertainty, it would be inappropriate to allow the indoor use of electronic cigarettes because other individuals could be exposed to potentially harmful substances. We believe that permitting the outdoor use of such products in accordance with the parameters established by the Union's proposed DTA requirements is an appropriate way to address safety concerns outdoors. Since we are adopting the Union's proposal with respect to DTAs, employees using electronic cigarettes for tobacco cessation purposes will not be forced to be exposed to cigarette smoking when outdoors.

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 in full with the exception of the portion concerning use of electronic cigarettes. Use of electronic cigarettes shall be permitted only outdoors in accordance with the parameters established by the Union's proposal. To reflect that the parties' tobacco policy also addresses electronic cigarettes, it shall be renamed

from "Tobacco Use" to "Use of Tobacco Products and Electronic Cigarettes."^{6/}

By direction of the Panel.



H. Joseph Schimansky
Executive Director

March 22, 2013
Washington, D.C.

^{6/} As indicated above, the parties disagree over the designation of electronic cigarettes as a tobacco product. It is unnecessary to decide this issue to resolve the parties' impasse. Renaming the parties' article, however, acknowledges the parties' disagreement.