

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NAVAL SUPPLY SYSTEMS COMMAND
FLEET LOGISTICS CENTER
NORFOLK, VIRGINIA

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 53, AFL-CIO

Case No. 19 FSIP 063

DECISION AND ORDER

This case, filed by the American Federation of Government Employees, Local 53 (Union) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, concerns a dispute over implementing a new fitness program. The Naval Supply Systems Command (NAVSUP) is a shore activity of the United States Navy. NAVSUP oversees seven lower level shore activities, including the Fleet Logistics Center in Norfolk, Virginia (Agency). The Agency's mission is to provide the Navy, Marine Corps, Coast Guard, Joint and Allied Forces with timely, effective, and efficient global logistics capabilities in defense of the United States of America. These capabilities include full-spectrum logistics support to a Navy fleet; contracting support for both ashore and operational forces; and support to regional commanders and Navy installations.

The Union represents a bargaining unit of approximately 642 professional and non-professional employees assigned to the Agency and located at the Agency's various work sites including Norfolk, VA; Philadelphia, PA; and Mechanicsburg, PA. The Union's bargaining unit consists of employees in the Federal General Schedule pay scale, ranging from grades six through thirteen, and includes positions such as Logistic Managers, Contract Specialists, and Supply Technicians. None of the employees in the Union's bargaining unit have a physical fitness component within their position descriptions.

The parties' current Collective Bargaining Agreement (CBA) was executed on June 6, 1997. The parties' CBA expired on June 6, 2000, but continues to roll over on a year-to-year basis. Both parties have confirmed that there are no negotiated agreements, including their CBA, that establish or reference a physical fitness program. However, in Article 1, Section 1 of the CBA, the parties agree to be governed by the Department of the Navy's policies and regulations.

BARGAINING AND PROCEDURAL HISTORY

In March 2007, the Department of the Navy issued OPNAVINST 6100.2A (Issued: March 15, 2007) entitled "Health and Wellness Promotion Program." OPNAVINST 6100.2A establishes a comprehensive health and wellness promotion program throughout the Department of the Navy, which is applicable to Department of the Navy employees as well as servicemen and women. The Department policy includes the opportunity for agencies to create programs and initiatives that establish healthy and active lifestyles to achieve and maintain an optimal level of physical fitness.¹

In May 2017, NAVSUP issued NAVSUPINST 6100.1G (Issued: May 3, 2017), an enterprise-wide instruction, establishing a two-year Civilian Physical Fitness Program for all NAVSUP. Authorized participants may use of up to 3 hours/week of excused absences (e.g., administrative leave) to spend working out during regular duty time on a continuous basis for up to 2 years. NAVSUPINST 6100.1G specifies that the Civilian Physical Fitness Program, and all authorization pursuant to the policy, would lapse on May 3, 2019, 2 years after the issuance of the instruction. In order to participate, employees needed an authorized participant agreement, which outlined the length of the agreement (2-year maximum), approved physical fitness activities, and supervisor approval. The participant agreement also established that employee participation may be terminated in writing at any time by either party, subject to expire in May 2019. Employees participating in this Civilian Physical Fitness Program were eligible to receive up to approximately 159 hours of administrative leave each calendar year.

With the pending lapsing of the May 2017 program authorization, on July 19, 2018, the Agency notified the Union of its intent to implement a new Civilian Physical Fitness Program pursuant to NAVSUP Instruction: NAVSUPINST 6100.3

¹ See OPNAVINST 6100.2A, Section 5, Part E

(Issued: July 12, 2018) and requested the Union's input/comments. This program would be significantly different from the prior program. The reason for the change is based, for the most part, on a revised interpretation of the Department of Navy's authorization.² NAVSUPINST 6100.3, a NAVSUP-issued, enterprise-wide instruction, establishes a civilian physical fitness program for all NAVSUP entities authorizing participation with a one-time use of up to 3 hours/week of excused absences (e.g., administrative leave) for an employee to spend working out during regular duty time for a total of 90-calendar days. In order to participate, employees are required to obtain an authorized participant agreement, which outlines that the agreement lasts for no more than 90 days, approved physical fitness activities, and supervisor approval. The participant agreement also establishes that employee participation may be terminated in writing at any time by either party. Employees participating in this Civilian Physical Fitness Program are eligible to receive up to approximately 39 hours of administrative leave within 90 calendar days. After completion of the 90-calendar day participation, employees are no longer eligible for administrative leave to work out during regular duty time.

The Union responded to the Agency's July 19, 2018, notification by requesting records and/or evidence of employees' abuse of the current Civilian Physical Fitness Program. The Agency did not respond to the Union's request for evident of program abuse and the issue was dormant until spring 2019³. While the parties have continued to bargain, the execution of the Civilian Physical Fitness Program (pursuant to NAVSUPINST 6100.1G) has continued as a mutually agreed past practice, but will terminate upon execution of a new agreement.

On April 2, 2019, and again on April 16th, the parties negotiated face-to-face over the implementing the new Civilian Physical Fitness Program pursuant to NAVSUPINST 6100.3. Then, on July 9th, the parties took part in mediation with a Federal Mediation and Conciliation Services (FMCS) Mediator. The parties were unable to reach an agreement and the FMCS Mediator released

² See November 19, 2014-memo, issued by the Department of the Navy's Office of Civilian Human Resources, Office of Counsel.

³ While neither party offered an explanation for re-igniting the discussions in Spring, the timeframe is consistent with the pending lapse of the Civilian Physical Fitness Program on May 3, 2019. Additionally, the Agency had completed negotiating the new Civilian Physical Fitness Program with the remainder of its bargaining units.

the parties on July 10th. On August 1, 2019, the Union filed the instant request for Panel assistance.

On September 17, 2019, the Panel asserted jurisdiction over the dispute and directed the parties to resolve the issues through a one-day Informal Conference at the Panel's Office in Washington, D.C. on November 20, 2019. During the Conference, the parties were unable to resolve the issues in dispute. Therefore, the Panel ordered the parties to submit their final offers and written positions to the Panel by December 18, 2019. The Panel also ordered the parties to submit written rebuttal statements, if any, to the Panel by January 8, 2020. The parties timely provided their final offers, written positions, and rebuttal statements, which were considered by the Panel.

FINAL OFFERS AND POSITIONS OF THE PARTIES

1. The Union's Final Offer and Position

The Union's final offer is to eventually implement the Agency's new Civilian Physical Fitness Program pursuant to NAVSUPINST 6100.3, but the Union is requesting a period of 2-years prior to such implementation. Specifically, the Union proposed for all employees to, "...be allowed to maintain the status quo for an additional two years based on the existence of valid bilaterally signed participant agreements as well as the Agency's previous policy interpretation, past practice and working conditions that have existed uninterrupted for at least the past five years."

The Union takes the position that the new Civilian Physical Fitness Program should not be implemented until January 2022 because: (1) there are existing signed participant agreements between employees and the Agency, (2) NAVSUP in NAVSUPINST 6100.3 improperly interpreted a Department of the Navy policy, (3) the Agency improperly interpreted the Administrative Leave Act⁴, and (4) the Agency continues to have discretion and latitude to manage physical fitness programs.

First, the Union argues that the new Civilian Physical Fitness Program should not be implemented until January 2022 to continued execution of existing signed participant agreements between employees and the Agency, which permit employees to use up to 3 hours of excused absences each week to work out. The

⁴ Administrative Leave Act of 2016, enacted under section 1138 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328, 130 Stat. 2000, December 23, 2016).

Union asserts that at least 32 of the 966 employees in the bargaining unit have current, signed participant agreements, with a majority of those agreements not having an expiration date. Based on principles of private sector contract law, the Union argues that the Agency cannot terminate the existing participant agreements, and therefore, may not implement the new Civilian Physical Fitness Program for a period of at least 2 years.⁵

Next, the Union suggests that NAVSUP misinterpreted a Department of the Navy-issued document in its issuance of NAVSUPINST 6100.3 (July 12, 2018). Specifically, the Union claims that in NAVSUPINST 6100.3, NAVSUP references the Department of the Navy Civilian Human Resources Manual, Subchapter 792.4 (April 2005). According to the Union, Subchapter 792.4 uses permissive rather than mandatory language when it states that, "(a) command/activity sponsored fitness program should normally be limited (e.g. not to exceed 3 months) in duration." The Union argues that NAVSUP's specific limiting of the Civilian Physical Fitness Program to not exceed 3-months in NAVSUPINST 6100.3 misapplies Subchapter 792.4, which for years was interpreted to allow employees to participate in the Civilian Physical Fitness Program without limitation.

Third, the Union claims that the Agency has improperly interpreted the Administrative Leave Act in support of its proposed change to the Civilian Physical Fitness Program. The Union claims that the Administrative Leave Act does not address leave to participate in physical fitness programs nor does it affect an agency's discretion to excuse an employee from duties without loss of pay or leave.

Last, the Union argues that the Agency continues to have great latitude in interpreting policies and guidelines in the management of fitness programs. The Union claims that there are numerous other Commands in the Agency's local area, including the Defense Logistics Agency, that continue to authorize administrative leave as part of established fitness programs. The Union claims that the Agency's new Civilian Physical Fitness Program dismisses the Agency's own interpretations and applications, which the Agency consistently deemed appropriate for over 5 years.

⁵ The Union cites specifically to *Burford v. Accounting Practice Sales, Inc.*, 786 F.3d 582, 586 (7th Cir. 2015), overruled by *LHO Chicago River, L.L.C. v. Perillo*, 942 F.3d 384 (7th Cir. 2019).

2. The Agency's Final Offer and Position

The Agency's final offer is to implement the new program as quickly as possible. Specifically, the Agency proposes, "Fleet Logistics Center Norfolk (FLC-N) will implement NAVSUP Instruction 6100.3, Civilian Physical Fitness Program (12 July 2018) effective 5 January 2019."

The Agency takes the position the new Civilian Physical Fitness Program should be implemented as soon as possible because: (1) the reduction of excused absences for employees to work out during duty time will significantly increase the efficient use of the Agency's resources towards accomplishing its mission, (2) the new program complies with higher-level Department of the Navy policy and guidance; and (3) all of the subordinate organizations within the Agency's command will follow the same program.

First, the Agency provides data to show the Agency's cost savings upon implementing the new Civilian Physical Fitness Program. The Agency noted that the current Civilian Physical Fitness Program has an employee participation rate of 10% and none of the employees eligible to participate in the fitness program have a physical fitness requirement within his or her job description or duties. Specifically, the Agency's data showed that in FY2019, employees used 4,050 hours working out during duty time at an estimated cost of \$135,000. The Agency estimates that had it implemented the new Civilian Physical Fitness Program on October 1, 2019, the Agency would have saved approximately \$72,000. The Agency further estimates that as each employee would only receive excused absences for 3 hours each week for 90 days once, thereafter only new employees would receive excused absences resulting in a 95% cost savings over FY19.⁶ Overall, the Agency estimates that once the new Civilian Physical Fitness Program is implemented, the Agency will save approximately 4,500 work hours at an estimated cost of \$144,000; the hourly equivalent of more than two full-time employees and the salary equivalent of three logistics management specialist employees at the GS-7 grade.

Next, the Agency argues that NAVSUPINST 6100.3 (July 12, 2018), which establishes the new Civilian Physical Fitness

⁶ The Agency used the current employee participation rate of 10% and the number of new hires from FY 2019, 49. The Agency's savings estimates also assumed that the new hires exercise three hours a week for 90 days, and are all GS-11, step 1, receiving the Virginia Beach locality.

Program, complies with Department of the Navy policy and guidance. The Agency specifically cites to the Department of the Navy's Civilian Human Resources Manual (CHRM), Subchapter 792.4, which states that command sponsored fitness programs "...should normally be limited (e.g., not to exceed 3 months) in duration." The Agency relies on a November 19, 2014-memo, issued by the Department of the Navy's Office of Civilian Human Resources, Office of Counsel, that reiterates that physical fitness programs are to be limited to three months and that physical fitness programs cannot be consecutively sponsored to circumvent the 3-month limitation. The Agency acknowledges a delay in implementing the 3-month limitation but argues that such a delay does not remove the Agency's obligation to come into compliance with the Department of Navy policy.

Last, the Agency seeks to implement the new Civilian Physical Fitness Program as soon as possible to bring consistency across NAVSUP and ensure the same policy applies to all NAVSUP employees, regardless of assignment or location. As of February 2019, 13 of NAVSUP's 14 bargaining units adopted the new Civilian Physical Fitness Program. With immediate implementation of the Agency's proposal, NAVSUP will finally be in full compliance with NAVSUPINST 6100.3.

CONCLUSIONS

The Panel orders the parties to execute the terms and conditions of the Civilian Physical Fitness Program consistent with the applicable Department of the Navy policy and provide a reasonable transition period (i.e., 90 days) for employees currently participating in the program. The Agency supports employees having the opportunity to participate in a fitness program, albeit limited in use of Agency time and duration of participation. Here, the Union is not contesting the terms of the new policy as it has proposed to eventually follow the policy, but rather the parties do not agree when to implement the new policy.

The Agency contends that applying the new Civilian Physical Fitness Program as soon as possible will limit the amount of time that employees may use to work out during duty time, thus creating a cost saving opportunity for the Agency. The Agency supports its argument with data that implementing the new Civilian Physical Fitness Program will eventually save the Agency approximately \$144,000, which is 95% of the program's current cost. Such a savings would allow the Agency to efficiently and effectively manage its resources in support of

its mission by redirecting the hours of paid duty time from fitness activities to work tasks such as providing logistical support and services to sustain Navy and Department of Defense warfighters.

The Union does not refute the Agency's data, but rather argues that the Agency has permitted employees to spend up to 3 hours of duty time each week to work out for years, thus implying the appropriateness of the cost of the Civilian Physical Fitness Program. Further, the Union argues that employees have current participant agreements that permit employees to take up to 3 hours of duty time each week to work out. Relying on private sector contract law, the Union argues that the new Civilian Physical Fitness Program should not be implemented until a time in which those agreements have expired, or as they offer, by 2022. However, the Union's application of private sector contract law is misplaced. The participant agreements executed under the former Civilian Physical Fitness Program actually expired upon the lapse of the program on May 3, 2019, or in this case, by mutual agreement of continuing the terms of the 2017 program until new agreement is reached, the participant agreements expire when the parties negotiate a new program (unless ordered by the Panel or agreed otherwise).

The Union claims that the Agency's proposal misapplies the Administrative Leave Act, but such an argument is moot as the Agency did not rely on the Administrative Leave Act in support of its position presented to the Panel. Additionally, the Union's argument that NAVSUP improperly interpreted a Department of the Navy policy in issuing NAVSUPINST 6100.3 is not an appropriate matter before the Panel. Ensuring proper application of Department of the Navy policies is consistent with the parties' commitments under the CBA, Article 1, to adhere to such policies. Litigating such arguments through a grievance of the CBA is a more appropriate avenue for such resolution.

In light of the above and because the Civilian Physical Fitness Program policy expired in May 2019 and the parties are before the Panel negotiating a successor program, the Panel orders the following: (1) the Agency will execute the terms and conditions of the Civilian Physical Fitness Program consistent with OPNAVINST 6100.2A or its predecessor; and (2) the Agency, in effectuating this policy, will allow for a 90-day transition period for current program participants before bringing those employees in compliance with the new policy.

ORDER

Pursuant to the authority vested in 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 parties to adopt the provisions as stated above.

By direction of the Panel.

A handwritten signature in black ink, appearing to read 'Mark A. Carter', with a long horizontal flourish extending to the right.

Mark A. Carter
Chairman, FSIP

February 3, 2020
Washington, D.C.