



UNITED STATES
FEDERAL SERVICE IMPASSES PANEL

WASHINGTON, DC 20424-0001

December 3, 2002

VIA CERTIFIED MAIL

LTC Keith H. Tanouye
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SSgt. Brian Y. Takafuji
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RE: Department of Defense
National Guard Bureau
Hawaii National Guard
Honolulu, Hawaii and
Local 1213, AFGE, AFL-CIO
Case No. 02 FSIP 123

Gentlemen:

Enclosed herewith is the Decision and Order in the above-referenced case.

Sincerely yours,

A handwritten signature in cursive script that reads "H. Joseph Schimansky".

H. Joseph Schimansky
Executive Director

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Enclosure

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United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF DEFENSE
NATIONAL GUARD BUREAU
HAWAII NATIONAL GUARD
HONOLULU, HAWAII

and

LOCAL 1213, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 02 FSIP 123

DECISION AND ORDER

The Department of Defense, National Guard Bureau, Hawaii National Guard, Honolulu, Hawaii (Employer), 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 Local 1213, American Federation of Government Employees, AFL-CIO (Union).

Following an investigation of the dispute, arising from negotiations over a smoking policy, the Panel determined that the matter should be resolved through the issuance of an Order to Show Cause. In this regard, the Panel directed the parties to show cause why their dispute should not be resolved by adopting the following wording:

1. All indoor smoking shall be prohibited.
2. The Employer shall designate outdoor smoking areas which (a) are reasonably accessible to employees, and (b) provide a measure of protection from the elements.

After considering the entire record, including any proposals which may differ from the wording in the Order to Show Cause, and the parties' statements of position, the Panel would issue a binding decision to resolve the impasse. The parties submitted final offers and written statements of position

pursuant to this procedure. The Panel has now considered the entire record.

BACKGROUND

The Employer's mission is two-fold; its Federal mission is to provide support during national emergencies and maintain readiness of the Army and Air National Guard; its state mission is to provide support for the directives of the Governor of the State of Hawaii, which may include responding to disasters, both man-made and natural. The Employer has facilities state-wide, including those at Fort Ruger, Hickman Air Force Base, Wheeler Army Air Field, and Army units on each of the islands. The Union represents two bargaining units, one consisting of Army National Guard employees and the other Air National Guard employees, which fluctuate in size due to mobilizations. Currently, there are approximately 500 employees in the two bargaining units, the majority of whom are civilian technicians who must, as a prerequisite to their employment, become and remain military members of the National Guard unit in which they are employed and maintain the military grade specified for their technician positions.^{1/} The parties are covered by two collective-bargaining agreements (CBAs); the agreement for the Air National Guard was implemented in 1977, and the agreement for the Army National Guard was implemented in 1978. Both CBAs are in full force and effect.

The dispute arose when the Employer proposed a new Policy Directive on smoking to supercede one last issued in September 1987. The parties disagree over what the current smoking policy is for employees. The Union maintains that some bargaining-unit employees who "work in State buildings on State land" are permitted to smoke indoors. The Employer denies that any of its employees may smoke indoors; rather, the ban on indoor smoking has been in effect at least since August 1997, when Executive Order 13058, "Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace," went into effect.

1/ See National Guard Technicians Act of 1968, 32 U.S.C. § 709. The Union also represents about 20 General Schedule civilian technicians who do not have to maintain military membership as a condition of their employment; they are not required to retire at age 60, as the dual status civilian technicians must.

ISSUES AT IMPASSE

Essentially, the parties disagree over whether there should be exceptions to a general ban on indoor smoking and whether smoking shelters, including amenities for them, should be mutually agreed upon by the parties.

POSITIONS OF THE PARTIES^{2/}1. The Employer's Position

The Employer's position is that the Panel should impose the wording in its Order to Show Cause to resolve the parties' dispute over smoking policy. In this regard, it is willing to include in its new directive provisions that would ban indoor smoking and require the Employer to designate outdoor smoking areas which are reasonably accessible to employees and provide a measure of protection from the elements. This is consistent with its view that the 1987 Policy Directive should be revised to make clear that smoking is prohibited in the workplace.^{3/} Moreover, the wording in the Panel's Order to Show Cause concerning outdoor designated smoking areas is consistent with the Employer's position that facility managers should designate

2/ The parties' positions are taken from their responses to the Panel's Order to Show Cause and from documents submitted and statements made by the parties' representatives during the Panel's initial investigation into the request for assistance.

3/ Pursuant to a policy issued by the Office of the Adjutant General, State of Hawaii, on September 23, 1987, smoking was permitted in: (1) designated smoking areas established by the respective facility commanders; (2) private offices; (3) portions of an office work area where affected employees agreed to permit smoking as a part of a smoking accommodation plan, and (4) enclosed office work areas where smoking was permitted by a simple majority of affected employees. At the time it was implemented, the policy of the Office of the Adjutant General was consistent with the 1987 Hawaii State law (Act 245/87), which permitted smoking indoors in the workplace. However, in 1997, the Governor of the State of Hawaii issued an Executive Memorandum which, in essence, restricted smoking indoors with only limited exceptions.

outdoor smoking areas. The Union's objections to any Employer-designated outdoor smoking area could be addressed through the parties' negotiated grievance procedure, thereby providing the parties with a forum for resolving differences over smoking areas. Additionally, adoption of the wording in the Order to Show Cause would further the Employer's goal to have the policy of the Adjutant General conform with the Federal Executive Order ban on indoor smoking, and the Governor's 1997, Executive Memorandum, which also bans smoking in the workplace.

2. The Union's Position

The wording in the Panel's Order to Show Cause should not be imposed. Rather, the Panel should adopt the Union's proposal that indoor smoking be banned, except in: (1) designated areas that are enclosed and exhausted directly to the outside, away from intake ducts; (2) areas where a simple majority of employees on duty have agreed to allow indoor smoking; and (3) welding shops. Furthermore, smoking shelters should be placed in areas mutually agreed upon by the parties with the shelters to include, at a minimum, lighting, heat, seating, exhaust fans, doors, and cigarette urns. Finally, "joint use" portions of Federal facilities would adhere to the policy of the Federal entity controlling the facility; such facilities would provide the same smoking shelters as those described above.

Essentially, a total ban on indoor smoking would alter a long-standing past practice for some employees, and permitting the Employer to designate outdoor smoking areas may lead to grievances over whether they "are reasonably accessible and provide a measure of protection from the elements." Furthermore, the Panel's wording does not provide for a smoking cessation program for employees, which may be appropriate as part of implementing smoking restrictions. In this regard, a Presidential Executive Memorandum, dated June 27, 2000, encourages agencies to provide such programs, and an agency-wide Department of Defense (DOD) Instruction on "Smoke-Free DOD Facilities," dated January 2, 2001, mandates them. Moreover, the wording in the Panel's Order to Show Cause does not allow for a 1-year phase in of a ban on indoor smoking, even though Executive Order 13058 recommends that agencies provide one before implementing indoor smoking restrictions. Finally, the 1987 Hawaii State law which permits indoor smoking remains in effect, notwithstanding the Governor's 1997 Executive Memorandum which bans smoking in all State buildings. Therefore, civilian technicians who work in State-owned or controlled facilities

should be bound by the State law when working in State buildings.

CONCLUSIONS

Having carefully considered the positions of the parties, we shall impose the wording in the Order to Show Cause to resolve the impasse. In our view, the Union has not demonstrated why the parties' circumstances warrant any deviation from what has become the standard for Federal employers and employees to help reduce the health risks posed by tobacco products, including second-hand smoke.^{4/} As to its observations that the wording in the Panel's Order to Show Cause does not provide for either a smoking cessation program for employees, or a 1-year phase-in period before indoor smoking is banned, our decision should not be construed as prohibiting the Employer from offering either of those accommodations to smokers.^{5/} Finally, the cost of providing smoking shelters that would include, "at a minimum," lighting, heat, seating, exhaust fans, and doors has not been justified, and a requirement for further negotiations over where such shelters would be located would only serve to perpetuate the parties' dispute.

4/ While we are aware that a total ban on indoor smoking in the workplace goes beyond what is required by Executive Order 13058, which provides for indoor smoking under certain circumstances, neither party provided evidence that indoor smoking areas currently exist which meet the criteria for exceptions set forth therein. Although the Panel is mindful of the fact that the Union argues for the right of its members to engage in an activity that might be lawful under other circumstances, in addition to the reasons cited herein, the Panel is also bound by the plain language set forth in the Executive Order and Government-wide regulations regarding indoor smoking.

5/ In this regard, we note that the Union's proposal does not include such provisions either. Moreover, the issue of a 1-year phase-in period would be moot if it is true, as the Employer alleges, that a ban on indoor smoking already is in effect.

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 the proceedings instituted under the Panel's regulations 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under 5 C.F.R. § 2471.11(a) of its regulations hereby orders the following:

1. All indoor smoking shall be prohibited, and
2. The Employer shall designate outdoor smoking areas which are (a) reasonably accessible to employees and (b) provide a measure of protection from the elements.

By direction of the Panel.



H. Joseph Schimansky
Executive Director

December 3, 2002
Washington, D.C.

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