

CHAPTER 5

IMPASSE RESOLUTION

5-1. Introduction.

During the course of negotiating a collective bargaining agreement, certain union proposals may be unacceptable to management, so management will refuse to agree to the proposals. If the union feels strongly about the proposals, it will pursue them further. In the private sector, the strike serves as an incentive for the resolution of negotiation impasses. Because strikes are illegal in the federal sector (5 U.S.C. § 7311), there must be some other means of impasse resolution if collective bargaining is to be meaningful. The Federal Mediation and Conciliation Service and Federal Service Impasses Panel serve as this means. Impasse resolution in general is merely an extension of the collective bargaining process.

5 U.S.C. § 7119 authorizes the use of the Federal Service Impasses Panel (hereinafter referred to as the Panel) and the Federal Mediation and Conciliation Service (hereinafter referred to as the FMCS). Both existed under the Executive Order, the latter operating through regional offices located throughout the country.

5-2. The Federal Mediation and Conciliation Service.

The FMCS is an independent agency of the federal government created by Congress with a Director appointed by the President. Federal mediators, known as commissioners, are stationed throughout the country.

FMCS rules require that parties to a labor agreement file a dispute notice if they do not agree to a new collective bargaining agreement at least 30 days in advance of a contract termination or reopening date. The notice must be filed with the FMCS and the appropriate state or local mediation agency. The notice alerts FMCS to possible bargaining problems. If an impasse evolves, either party may request the services of the FMCS.

While methods and circumstances vary, the mediator will generally confer first with one of the parties involved and then with the other to get their versions of the pending difficulties. Then he will usually call joint conferences with the employer and the union representative to try to get them to agree. If this fails to resolve the impasse, either or both parties, or the FMCS on its own, may request the Panel to become involved by considering the issue itself or approving the use of binding arbitration.

5-3. Federal Service Impasses Panel.

The Panel consists of a chairman and at least six members, all of whom serve part-time to the extent dictated by caseload. The Panel meets monthly in Washington, D.C. with three members constituting a forum. The Chairman is responsible for overall leadership and direction of its operations. An Executive Secretary, assisted by a professional staff of several associates, is responsible for the day to day administration of the Panel's responsibilities.

The Panel attempts to avoid actions which might inhibit the growth of the bargaining process by constantly seeking to prevent its service from being used as a substitute for the parties' own efforts. With this in mind, an impasse has been defined as that point at which the parties are unable to reach full agreement, notwithstanding their having made earnest efforts to reach agreement by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. 5 C.F.R. § 2470.2(e). The Panel will not take jurisdiction of a suit until these requirements have been met.

The Panel's involvement is a two-tiered system. It will first attempt to mediate the impasse, just as the FMCS does. As the Panel can impose a settlement, the parties are often willing to settle at this stage. The second stage is the imposition of a settlement.

Request for Panel consideration of a negotiation impasse must include information about the issues at impasse and the extent of negotiation and mediation efforts. An investigator will be appointed, and a preliminary investigation of the request will be made, to include consultation with the national office of FMCS whose evaluation of mediation efforts is a critical element in the Panel's determination whether it will take jurisdiction. The Panel may decline to assert jurisdiction if it finds that no impasse exists or for other good reason.

If it has determined, however, that voluntary efforts have been exhausted, the Panel normally recommends procedures for the resolution of the impasse or assists the parties in resolving the impasse through whatever methods it considers appropriate. If a hearing to ascertain the positions of the parties is deemed necessary, it is conducted by a designee of the Panel who may also conduct a prehearing conference to inform the parties about the hearing, obtain stipulations of fact, clarify the issues to be heard, and discuss other relevant matters. Basically a formal, but nonadversary proceeding, the hearing gives the parties an opportunity to present evidence relating to the impasse through the testimony of witnesses and the introduction of exhibits. An official transcript is made of the proceeding.

It is the duty of the factfinder to develop a complete record upon which he will base his report to the Panel. The report includes findings of fact on such matters as the history of the current negotiations, the unresolved issues and negotiation efforts with respect to them, justification for the proposals made on the impasse issues, and prevailing practices in comparable public sector bargaining units. These posthearing reports of the factfinder or other designee of the Panel may contain the factfinder's recommendations for settlement, if authorized by the Panel. Absent such authorization,

the report goes directly to the Panel which has the authority to take whatever action it considers appropriate at that point of its procedures. The Panel will normally take one of three actions: (1) require both parties to submit written submissions stating their positions and rebuttals, (2) require both parties to submit a final offer and the Panel will pick one of them, or (3) approve a request to have the matter arbitrated. With the former two alternatives, the Panel will give the parties its "recommendation."

The parties have 30 days to accept the recommendations of the Panel or its designee, or otherwise reach a settlement, or notify the Panel why the dispute remains unresolved. If there is no settlement at this stage despite the Panel's efforts, it can take whatever action it considers appropriate, such as imposing the previously issued recommendations or ordering binding arbitration. The regulations underline the fact that such "final action" is binding upon the parties. Failure to comply at this stage may result in an unfair labor practice (5 U.S.C. § 7116).

In those cases when the parties request approval of outside binding arbitration, the parties must furnish information about the bargaining history, issues to be submitted to the arbitrator, negotiability of the proposals, and details of the arbitration procedure to be used. After consideration of such data, the Panel will either approve or disapprove the request.

5-4. Decisions of the Impasses Panel.

Panel decisions were published under the Executive Order and are presently published under Title VII. As each case before the Panel generally turns on its own unique factual situation and is not considered precedent for subsequent cases, it would not be useful to include a multitude of Panel cases in this chapter. The following two cases are included merely to offer an illustrative example of the types of factors which the Panel considers in reaching its recommendations and demonstrates the procedures involved.

**In the Matter of
DEPARTMENT OF THE ARMY, ARMY RESERVE PERSONNEL CENTER
ST. LOUIS, MISSOURI**

and

**LOCAL 900, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO**

Case No. 93 FSIP 124 (1993)

DECISION AND ORDER

Local 900, 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 the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Army, Army Reserve Personnel Center, St. Louis, Missouri (Employer).

After investigation of the request for assistance, the Panel determined that the dispute, which concerns a change in smoking policy, should be resolved through an informal conference with a Panel representative. The parties were advised that if no settlement were reached, the Panel's representative would notify the Panel of the status of the dispute, including the final offers of the parties, and would make recommendations for resolving the impasse. After considering this information, the Panel would take whatever action it deemed appropriate to resolve the impasse, including the issuance of a binding decision.

The parties met with Panel Member Charles A. Kothe on July 20, 1993, in St. Louis, Missouri. During the informal conference, the parties were unable to resolve the issue in dispute. He has reported to the Panel based on the record developed by the parties, and it has now considered the entire record.

BACKGROUND

The Employer's primary mission is to plan and implement the mobilization of the U.S. Army Reserves should such action become necessary. The bargaining unit represented by the Union consists of approximately 1,200 nonprofessional employees who hold positions such as file clerk and secretary. The parties' collective bargaining agreement has expired but continues to be honored until a successor agreement is

implemented. The dispute arose during negotiations over smoking policy of Building 100 and 101, and the newly-constructed Prevedal Building; the new building is near completion and the older building is being renovated. The parties have already reached agreement in permitting smoking in certain areas. However, the Union wants more indoor smoking areas as well an enclosed ventilated outside area which will provide protection from the elements. The Employer wants smoking to be prohibited indoors, except for areas already agreed to, but contends it will provide adequate outside protection from the elements.

ISSUE AT IMPASSE

The parties primarily disagree over whether smoking should be permitted in certain indoor areas, and whether the Employer should construct an enclosed, ventilated area in the courtyard for smokers.

POSITIONS OF THE PARTIES

1. The Employer's Position

In essence, the Employer proposes that smoking be prohibited, except in areas already agreed to. In this regard, the dangers of second-hand smoke is well documented, and its prohibition will serve to protect nonsmokers from its risks. However, there will be an overhang in the courtyard to protect smokers from the elements. Additionally, a tent will be erected, with plastic sides capable of being rolled up or down, depending on the weather. Therefore, smokers will be adequately protected while nonsmokers will not suffer the detriments of second-hand smoke.

2. The Union's Position

The Union proposes that smoking be permitted in the following areas: (1) restroom on the second, fourth and fifth floors in Building 100; (2) the Union office; (3) Room 4150 or that the Agency build a smoking room on the fourth floor of building 100; and (4) that the Agency construct an enclosed area in the courtyard for smokers with proper ventilation. It is appropriate to permit smoking in these areas because it is in accordance with Federal regulations. In this regard, it permits the designation of those areas for smoking. Also, permitting smoking in the Union office would help alleviate the high level of stress and tension employees may have when they come into the office to register a complaint. Further, an enclosed area in the courtyard would protect employees from weather hazards.

CONCLUSIONS

Having considered the evidence and arguments presented, we conclude that a compromise solution should be adopted. Due to the increasing evidence of the detrimental effects of second-hand smoke, we believe that the Union is not justified in its attempts to seek further indoor smoking areas. In our view, its reliance on Federal regulations to justify indoor smoking demonstrates that it fails to grasp the significance of the health hazards involved. Furthermore, the regulations state that "nothing in these regulations precludes an agency from establishing more stringent guidelines." However, the Employer's proposal does not go as far as it should in establishing a smoke-free workplace. Therefore, although the parties may have reached an earlier agreement concerning where smoking will be permitted, we find it necessary that smoking be prohibited in all indoor areas of the buildings in question. However, since construction and renovation are not as of yet fully completed, we shall order that smoking be allowed to continue in the areas previously agreed to by the parties, including the vending machine area,⁽⁴⁾ until such time as only construction at the facility is completed and the buildings are declared smoke free. There will be no smoke breaks, rather smoking will be permitted in the designated outdoor areas during the regular breaks only.

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 pursuant to 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:

Smoking will be permitted in the following areas until construction at the facility is complete:

Cafeteria in the east end of Building 101; east entrance of Building 100; loading dock in Building 100 (exclusive of areas where smoking is prohibited); main entrance to the Prevedel Building; courtyard; and the vending machine area.

When construction is completed and the buildings are declared smoke free, only outdoor areas provided for smokers will be used. There will be no smoke breaks; rather smoking will be permitted in the designated outdoor areas during the regular breaks only.

By direction of the Panel.

Linda A. Lafferty

Executive Director

August , 1993

Washington, D.C.

1. / This case was consolidated with Case No. 93 FSIP 126, which involved the same parties and pertained to the issue of which form employees would have to fill out for internal promotion purposes. The parties resolved that issue when the Employer withdrew its proposal.

2. / The parties have agreed that smoking will be permitted in the following areas:

In the east end of the cafeteria in Building 101; east entrance of Building 100; loading docks of Building 100 (exclusive of areas where smoking is prohibited); the main entrance of the Prevedel building; and in the courtyard.

3. / 41 C.F.R. 101-20.105-3.

4. / The parties had previously agreed that smoking in the vending machine area would be prohibited. However, an inspection by Member Kothe indicated that it was not being enforced.

**In the Matter of
DEPARTMENT OF THE ARMY, HEADQUARTERS 10TH MOUNTAIN DIVISION
AND FORT DRUM,
FORT DRUM, NEW YORK**

and

**LOCAL R2-61, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES, SEIU,AFL-CIO**

Case No. 95 FSIP 95 (1995)

AND

**DEPARTMENT OF THE ARMY, HEADQUARTERS 10TH MOUNTAIN DIVISION
AND FORT DRUM,
FORT DRUM, NEW YORK**

and

**LOCAL 400, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO**

Case No. 95 FSIP 117 (1995)

AND

**DEPARTMENT OF THE ARMY, HEADQUARTERS 10TH MOUNTAIN DIVISION
AND FORT DRUM,
FORT DRUM, NEW YORK**

and

**LOCAL F-105, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO**

Case Nos. 95 FSIP 114 (1995) and 95 FSIP 132 (1995)

DECISION AND ORDER

The Department of the Army, Headquarters 10th Mountain Division and Fort Drum, Fort Drum, New York (Employer); Local R2-61, National Association of Government Employees, SEIU, AFL-CIO (NAGE); Local 400, American Federation of Government Employees, AFL-CIO; and Local F-105, International Association of Firefighters, AFL-CIO (IAFF), each filed separate requests for assistance with the Federal Service Impasses Panel (Panel) to consider negotiation impasses under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119. After investigation of the requests for assistance, the Panel consolidated the cases and determined that the dispute, which concerns the smoking policy at Fort Drum, should be resolved on the basis of the parties' written responses to an order to show cause.⁽¹⁾ Following consideration of those responses, the Panel would take whatever action it deemed appropriate to resolve the impasses. Pursuant to this procedural directive, only NAGE, AFGE, and the Employer submitted responses. The record is now closed, and the Panel has considered all relevant information contained therein.

BACKGROUND

Fort Drum is home to over 10,000 troops who serve in combat and peacekeeping missions. The installation is located near Watertown, New York, which is approximately 70 miles north of Syracuse and 30 miles from the Canadian border. NAGE represents two separate units at the installation. One consists of approximately 400 blue collar employees who work primarily

in skilled trades positions, with the other unit consisting of approximately 200 nonappropriated fund employees who work in the child care center, the recreation centers, and the guest-housing facilities; each unit is covered by a separate collective-bargaining agreement. The AFGE unit consists of approximately 400 administrative and clerical employees who are covered by a collective-bargaining agreement which expired on June 22, 1995; the parties are currently bargaining over ground rules for a successor agreement. The IAFF unit consists of approximately 45 employees, most of whom are firefighters; the IAFF contract expired in March 1995, but is currently being renegotiated.

In each of these cases, the parties have reached impasse following mid-term negotiations over the Employer's proposed revised smoking policy. The issue was originally discussed in the joint partnership council and a recommendation to deviate from DOD policy was sent forward to the commander. After that recommendation was rejected, formal negotiations began between the Employer and each union.

ISSUE

Whether provisions similar to those adopted by the Panel in Malmstrom AFB should be ordered to resolve the instant dispute over smoking policy.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer agrees in principle with the Panel's proposed wording, with the following modifications:

1. Smoking is prohibited in any Government vehicle, building, or entryway, with the exception of in Military Family Housing and the designated areas in the following places: Fort Drum clubs (Officer's Club, Mountaineer Club (NCO Club), Spinners Club, Pennants Club); the following AAFES snack bars: Bonnie's Snack Bar and Emma's Snack Bar; the Bowling Center; and soldiers' barracks.

2. For Case No. 95 FSIP 95: Smoke breaks will be provided in accordance with the collective-bargaining agreements, except that employees may make arrangements with their supervisors to divide the breaks into two or three break periods.

For Case Nos. 95 FSIP 114 and 132: Breaks, for smoking and other purposes, will be provided in accordance with the collective-bargaining agreement.

For Case No. 95 FSIP 117: Reasonable smoke breaks will be allowed, not to exceed 15 minutes per four hour work period. This may be broken into two or three break periods subject to work requirements.

3. Current employees may attend one smoking cessation class at no cost to them and on duty time.

4. The terms of this order will be effective 30 days after the date of the order to allow for dissemination of the new requirements to the workforce.

5. In the 120-day period following the effective date of the new policy, those who violate the policy will be given a verbal warning prior to initiation of progressive disciplinary action.

Adopting a resolution similar to the one in Malmstrom AFB is appropriate, as the climates at the two installations are "essentially the same." Moreover, Fort Drum has already implemented a total ban on smoking in some buildings, which is comparable to the situation at Malmstrom.

The modifications that it proposes in paragraph 1 reflect the specific names of facilities at Fort Drum. That paragraph also clarifies, for purposes of Case Nos. 95 FSIP 114 and 132, that the firefighters' sleeping area is not considered living quarters, but is, instead, a work area. The proposed changes to paragraph 2 are consistent with the provisions of the parties' respective collective-bargaining agreements, as well as agreements reached on some collateral items during negotiations. The Employer's paragraph 3 reflects its commitment to cessation programs, but only for current employees. Paragraph 4 of the proposal reflects its view that a 30-day phase-in period is sufficient given that the revised DOD policy has already received considerable publicity. Finally, the proposed changes to paragraph 5 should clarify that once the 120-day grace period is over, progressive discipline will be used whenever violations of the smoking policy are detected.

2. NAGE's Position

NAGE proposes the retention of those areas currently designated as indoor smoking areas with the installation of ventilation systems, where necessary, to ensure circulation of fresh air. In the alternative, it proposes that any one of the following options be adopted:

1. Provide outdoor sheltered smoking areas that are protected from the elements, that are lighted, heated, and ventilated, and that are sufficient in size to accommodate, and to be furnished with, a table and six chairs. The shelters are to be located in close proximity to where bargaining-unit employees are assigned.

2. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide an indoor smoking area in each facility that bargaining-unit employees who smoke are assigned for use between 1 November and 30 April.

3. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide an indoor smoking area in each facility that bargaining-unit employees who smoke are assigned for use when the temperature is 32°F or below and during periods of inclement weather.

4. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide at one entrance to each facility a smoking area that is covered and protected from the elements.

5. a. The Employer shall designate one entrance to each facility as being the common point of entrance into the facility. Employees who choose to smoke

may not smoke within 50 feet of the designated entrance. Employees may smoke at all other entrances to the facility, including loading docks, porches, and pavilions.

b. The Employer shall provide sheltered smoking areas in close proximity to each facility in which unit employees are assigned. The shelters shall provide protection from the elements.

The facts of this case are significantly different from those in Malmstrom AFB and, therefore, the provisions set forth in the show cause order should not serve as a basis for resolving this dispute. First, since the Panel's Decision and Order in Malmstrom AFB was issued, Department of Defense Instruction No. 1010.15 (March 7, 1994) was promulgated. That instruction establishes a department-wide smoking policy which requires "the designation of outdoor smoking areas, when possible, which are reasonably accessible to employees and provide a measure of protection from the elements." Second, the installation's Labor-Management Partnership Council thoroughly discussed the smoking issue and reached consensus that the existing policy ought to be maintained; overturning this consensus would undermine the integrity of the partnership council and could have a negative impact on its ability to function successfully. Third, the winter weather conditions (including temperature, wind chill, and snowfall) at Fort Drum are "a significant and material fact that distinguishes this case from Malmstrom AFB." Finally, the Employer in this case can afford to fund the construction of smoking shelters as evidenced by its expenditure of "tremendous amounts of tax dollars" on less worthy projects.⁽²⁾ For these reasons, the Panel ought to reject the approach taken in Malmstrom AFB and adopt one of the Union's proposed solutions.

3. AFGE's Position ⁽³⁾

AFGE apparently would have the Panel adopt the same approach as it did in Department of the Air Force, Griffiss Air Force Base, Griffiss Air Force Base, New York and Local 2612, American Federation of Government Employees, AFL-CIO, Case No. 89 FSIP 214 (January 24, 1990), Panel Release No. 290. In that case, the Panel ordered the adoption of the following modified version of the employer's proposal:

Effective on the first day of the month following the signing of this agreement, or within 2 weeks after the signing of this agreement, whichever is longer, the Employer will implement its smoke-free policy with certain outdoor-condition exceptions. Therefore, when the weather is not suitable for outdoor smoking, employees will be allowed to use those designated

smoking areas (DSAs) in existence on May 12, 1989, the date these negotiations began.

The following conditions shall be considered unsuitable for purposes of permitting smoking in DSAs:

- a. temperatures lower than 35 degrees;
- b. precipitation and no outside area with an overhead shelter;
- c. gusting winds such that it would make conditions incompatible and smoking impractical outside.

Recreational areas such as clubs and the bowling center will continue to maintain DSAs.

Management shall consider exceptions to this policy in cases of hardship.

Smoking cessation classes will continue to be made available under the provisions of the November 1987 negotiated agreement.

If management decides to terminate this agreement, the base shall return to the smoking policy in effect at the signing of this agreement.

Any subsequent initiative to alter the smoking policy is subject but not limited to sections 7114 and 7117 of the Federal Service Labor-Management Relations Statute.

AFGE maintains that the approach set forth in Griffiss AFB, is more reasonable and humane for unit employees, given the extreme weather conditions that exist in the area. In addition, Fort Drum is dissimilar from Malmstrom Air Force Base in that it is an open post which is not secure; requiring employees to smoke outdoors at night or on weekends could expose them to injury or foul play. Finally, while a uniform smoking policy may have been appropriate at Malmstrom, it is not appropriate for this installation because of the diverse nature of the workforce.

CONCLUSIONS

Having carefully reviewed the record in these cases, we conclude that the dispute over smoking should be resolved on the basis of a modified version of the provision we adopted in Malmstrom AFB. This approach strikes an appropriate balance between the competing interests of smokers and nonsmokers by coupling the elimination of indoor smoking with some accommodation for those who continue to smoke. Moreover, because our solution will require the parties jointly to identify outdoor areas which are appropriate for smoking, it should, in the long run, serve their respective interests better than any attempt by the Panel to identify outdoor areas without benefit of an on-site inspection. Finally, this provision recognizes that there are facilities and practices at Fort Drum which are unique to that installation; we shall, therefore, tailor our Order accordingly.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their disputes 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 following:

1. Smoking is prohibited in any Government vehicle, building, or entryway, with the exception of in Military Family Housing and the designated areas in the following places: Fort Drum clubs (Officer's Club, Mountaineer Club (NCO Club), Spinners Club, Pennants Club); the following AAFES snack bars: Bonnie's Snack Bar and Emma's Snack Bar; the Bowling Center; and soldiers' barracks.

2. The parties shall jointly identify existing outdoor areas where employees may smoke. The areas shall meet the following criteria: they shall provide overhead coverings; they shall be reasonably accessible to employees' worksites; and they shall meet safety, health, and security concerns. Any disagreements as to the areas identified should be resolved through grievance arbitration.

3. Case No. 95 FSIP 95: Smoke breaks will be provided in accordance with the collective-bargaining agreements, except that employees may make arrangements with their supervisors to divide the breaks into two or three break periods.

Case Nos. 95 FSIP 114 and 132: Breaks, for smoking and other purposes, will be provided in accordance with the collective-bargaining agreement.

Case No. 95 FSIP 117: Reasonable smoke breaks will be allowed, not to exceed 15 minutes per 4-hour work period. This may be broken into two or three break periods subject to work requirements.

4. Current employees may attend one smoking cessation class at no cost to them and on duty time.

5. A 90-day accommodation period will follow implementation of the no-indoor smoking policy; and

6. In the 120-day period following the effective date of the new policy, those who violate the policy will be given a verbal warning prior to initiation of progressive disciplinary action.

By direction of the Panel.

Linda A. Lafferty

Executive Director

September 27, 1995

Washington, D.C.

1. More specifically, the parties were directed to show cause why wording similar to that ordered in Department of the Air Force, Malmstrom Air Force Base, Malmstrom AFB, Montana and Local 2609, American Federation of Government Employees, AFL-CIO, (Case No. 92 FSIP 32, October 27, 1992)(Malmstrom AFB), should not be imposed. The Panel provided the following wording to the parties:

1. Smoking is prohibited in any Government vehicle, building, or entryway, with the exception of the designated areas in the NCO Mess, Bowling Center, Military Family Housing, and designated dormitory areas;

2. Smoke breaks will be provided in accordance with Air Force Regulation 40-610;

3. Employees may attend one smoking cessation class at no cost to them and on duty time;

4. A 90-day accommodation period will follow implementation of the no-indoor smoking policy; and

5. Smokers will be subject to a 120-day period of gradual and progressive discipline, with those who violate the no-smoking policy to be given verbal warnings prior to any disciplinary actions.

2. The following examples of "questionable" projects were submitted by NAGE: construction of a new officers' club; construction of a new skeet range; resodding of the golf driving range; the addition of a fountain and a stained glass window in Building P-10000; the remodeling of the LeRay Mansion; Mountain Fest; remodeling jobs at Buildings T-7 and T-13; hydroseed for the parade field for the Change of Command ceremony in 1993; and the construction of tree stands, used for hunting.

3. AFGE's written response does not contain actual typewritten proposals clearly identifiable as its final offer on the issue of smoking policy.

NOTE 1: As the preceding case indicates, the Panel first recommends a resolution to the parties. Usually, the parties either adopt that recommendation or resolve the impasse in some other way. However, the Panel has occasionally ordered the parties to write prescribed terms into their next agreement. See *e.g.*, AFGE (National Border Patrol Council) v. Immigration & Naturalization Service, 73 FSIP 14 (March 19, 1975); American Federation of Government Employees Local 2151 v. General Services Administration Region III (Washington), 73 FSIP 18 (July 11, 1974).

NOTE 2: The Panel's rules and regulations can be found at 5 C.F.R. §2470.01 *et. seq.*. These should be consulted to ascertain the specific procedures to be used when the Panel's services are needed. In addition, the Panel's "Guide to Dispute Resolution Procedures" is available online at http://www.flra.gov/fsip/fsip_drp.html.

NOTE 3: There is no statutory provision permitting direct review of an imposed adverse Panel decision. Parties have, therefore, occasionally refused to cooperate with an FSIP order, thereby voluntarily submitting themselves to a ULP proceeding. This lays the groundwork for review by the Authority and possibly the courts. Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984); Florida National Guard and National Association of Government Employees, 9 FLRA 347 (1982).

NOTE 4: FSIP may use a variety of methods to resolve an impasse, but it cannot resolve the underlying obligation to bargain. NTEU, 11 FLRA 626 (1953). The panel can resolve an impasse relating to a proposal concerning a duty to bargain if it applies to existing (Authority) case law. Canswell AF Base v. AFGE, 31 FLRA 620 (1988).

NOTE 5: The Authority ruled in Patent and Professional Association and Department of Commerce, 41 FLRA 795 (1991), that impasses resolved by the FSIP under the provisions of § 7119(b)(1) are subject to Agency Head review under § 7114(c). Impasses resolved through outside arbitration agreed to by both parties under § 7119(b)(2) are not subject to Agency Head review under § 7114(c), but are reviewable by the FLRA under § 7122.

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