United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE ARMY U.S. ARMY MEDICAL MATERIEL AGENCY FORT DETRICK, MARYLAND and LOCAL 1923, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 07 FSIP 23

DECISION AND ORDER

The Department of the Army, U.S. Army Medical Materiel Agency (USAMMA), Fort Detrick, Maryland (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 1923, American Federation of Government Employees, AFL-CIO (Union).

Following an investigation of the request for assistance, the Panel determined that the impasse concerning sections of five articles for the parties' successor collective-bargaining agreement (CBA) should be resolved through an informal conference with Panel Member Andrea Fischer Newman. The parties were informed that, if a complete settlement were not reached during the informal conference, Member Newman would notify the Panel of the status of the dispute. The notification would include, among other things, the final offers of the parties and her recommendations to the Panel for resolving the issues. The parties also were informed that, after considering the entire record, the Panel would resolve the dispute by taking whatever action it deemed appropriate, which could include the issuance of a binding decision.

In accordance with the Panel's procedural determination, on June 14, 2007, Member Newman met with representatives of the parties at the Panel's offices in Washington, D.C. A voluntary settlement was reached on 18 issues in two of the five articles,

but the parties were unable to agree on the issues involving three remaining articles. Member Newman has reported to the Panel regarding the remaining issues, and it has now considered the entire record, including the parties' post-conference written submissions.

BACKGROUND

The Employer, a subordinate activity of the U.S. Army Medical Research and Materiel Command, provides logistics support for the Army's medical healthcare missions worldwide, develops and implements innovative logistics concepts and technological advances, and acts as the focal point for acquisition and sustenance of medical materiel and technology. The Union represents 85 non-professional employees who typically work as computer technicians, in acquisition, and in various support staff positions, at grades GS-7 through -11. The parties' CBA expired in April 2004; however, its terms and conditions of employment will remain in effect until a successor agreement is implemented.

ISSUES AT IMPASSE

Essentially, the parties disagree over whether: (1) employees should continue to receive 3 hours of administrative leave per week to participate in physical exercise training, monitoring, and/or education; (2) a designated Union representative should be permitted to use the Union office as his/her workstation for 50 percent of his/her normal or regular work time; and (3) the article in the expired CBA titled "Details and Temporary Positions" should be modified to include procedures for: (a) non-competitively filling detail assignments that last more than 30 days, and (b) temporary promotions to positions that are expected to last 30 days or more.

1. Administrative Leave to Participate in Physical Fitness Programs

a. The Union's Position

The Union proposes the following wording:

> The USAMMA Healthy Workplace Program is an employee wellness program established by the USAMMA Commander as an employee investment, to promote and maintain employee health and morale, sustain productivity and reduce employee lost time due to illness.

> The Employer and the Union agree to facilitate and/or encourage programs in such areas as weight reduction, stress reduction and management, nutritional counseling, smoking cessation, prevention of injuries, and exercise. The past practice of the USAMMA healthy workplace exercise program shall remain unchanged.

Its proposal differs from the Employer's in two significant ways. First, under the Union's wording, the parties would "encourage" employee involvement in smoking cessation programs, weight reduction, and nutritional counseling, while "the Employer is silent on these issues." Secondly, the Union proposes to continue a 15-year practice of permitting employees to receive up to 3 hours per week to participate in fitness programs "without establishing any artificial limits." The Healthy Workplace Program (HWP) has "greatly enhanced" the health and morale of civilian programs without "distracting from mission requirements or day-to-day operations." Moreover, the HWP is consistent with guidelines established by President Bush and the Office of Personnel Management to improve employee health through physical fitness, and studies have shown that persons are more productive when engaged in an exercise program. Since its inception, "there has not been one problem of any person abusing this program, nor has a single grievance been filed because an employee could not participate on a particular day due to workload considerations."

The Employer's proposal would continue "this vital program," but would limit participation "to an unknown length of time." In one document management provided, it would grant 1 hour of administrative leave per week for 6 to 8 weeks, while its proposal cites the Army regulation which allows participation for up to 6 months. This would "only cause the parties difficulties in interpreting the actual intent of the Agency's proposal." Finally, "it is disingenuous" for the Employer now to allege that the HWP interferes with management's right to assign work after negotiating over this issue for more than 2 years. If the Panel takes the Employer's duty-to-bargain argument seriously, it should "withdraw its jurisdiction on this proposal" so the Union can file a negotiability appeal with the Federal Labor Relations Authority (FLRA).

b. The Employer's Position

The following is the Employer's counteroffer:

> The Ft. Detrick Healthy Workplace Program [] is a wellness initiative that encourages employee participation in fitness programs in order to improve and maintain mental and physical health. The HWP will be conducted in accordance with Army Regulation 600-63, Army Healthy Promotion.

Consistent with Army Regulation 600-63, its proposal would "'jumpstart' an employee's effort to incorporate positive health habits into his or her daily routine," and promotes the Employer's interest in the health and well being of its employees. Under the regulation, however, supervisors are not authorized to give employees administrative leave to participate in the HWP after an initial 6-month period. The expectation is that positive health habits would become "ingrained in the employee's daily routine" and continue after the program ends. In this regard, existing flexible and compressed work schedule options would facilitate employees' ability to sustain such activities. Although a previous Commander may have stated that he approved of unlimited participation in the HWP, as the Union claims, "neither that Commander nor any of his successors has ever issued a regulation or other policy directive that established such a policy in contravention of the Army regulation." Nor does the fact that a small number of employees have participated in the HWP without regard to its time limits, because "some supervisors inadvertently established" the practice, support its continuation.

Contrary to the Union's position, there is no evidence that under the current practice employee productivity has increased or sick leave use has been reduced. Sick leave use at USAMMA is "at about the same rate" as the average rest for the rest of the Federal government - 9.4 days per year per employee. Even if sick leave was completely eliminated under the Union's proposal, it would be a bad "investment"; if every employee at USAMMA took 3 hours of administrative leave per week to participate in fitness programs, it would require the equivalent of 19.5 workdays per year of administrative leave to save an average of 9.4 sick leave days per year, thereby reducing productivity rather than improving it. Finally, the Union's proposal interferes with management's right to assign work, under section 7106(a)(2)(B) of the Statute. In numerous cases, the FLRA has found that "these types of fitness proposals are not proper,

even in situations where employees have fitness standards that must be met to maintain employment." USAMMA does not have physical fitness standards for bargaining-unit positions.

CONCLUSION

Having carefully considered the evidence and arguments presented by the parties on this issue, we shall order the adoption of the Employer's proposal to resolve the dispute. In this regard, we are not persuaded of the need to continue the practice that has previously existed, and that is inconsistent with Army Regulation 600-63. After 15 years of experience, there is little evidence in the record to conclude that granting employees 3 hours of administrative leave per week to participate in fitness programs has resulted in tangible benefits that support the accomplishment of USAMMA's mission.

2. Use of the Union Office as a Workstation

a. The Union's Position

The Union proposes that:

> The designated Primary Union representative will utilize the Union Office for half of their normal duty week. At any point in time, when they wish to engage in representational duties they will request official time in accordance with this article, shut the door and post a sign informing all concerned. Nothing in this article shall be interpreted as waiving the Union's right to designate its representative.

The adoption of its proposal would allow the Union's designated representative to "have set hours" at the Union office. This would afford greater privacy for, and better facilitate scheduling of, discussions with bargaining-unit employees about representational matters as well as with management. It is not substantially different than the current practice in which the designated Union official performs representational functions for the Union, and Agency work, at his workstation. In addition, given the location of the Union office in another building, the space is "greatly underutilized"; even after all the parties have been properly released "the Union representative is forced to meet with employees in the parking lot, or at a conference room, when available." There also is no merit to the Employer's argument that the Union's proposal would make it more difficult to interact with supervisors and fellow employees. Employees are

scattered throughout several buildings, and most interaction occurs via e-mail or by telephone.

b. The Employer's Position

In essence, the Panel should order the Union to withdraw its proposal because it has "failed to demonstrate why the *status quo* should not be maintained." It is true that regular workstations are unsuitable for private discussions between employees and Union representatives; this explains why the parties have agreed in Article 11 of the CBA that they would not be used for such purposes. A Union representative who needs privacy for a representational discussion currently goes to the Union office, or schedules one of the conference rooms, like supervisors do when they require privacy for discussions with employees, and the Union "has never reported a problem with the *status quo* arrangement." In addition, Union representatives are readily available to employees, and this would not improve under the Union's proposal because the maximum time between any location in USAMMA's space and the Union office "is about 2½ minutes."

The mixing of mission and representational activities under the Union's approach would also be inefficient, and could result in situations where two Union representatives are in the Union office at the same time in violation of the "one representative per issue rule" adopted elsewhere in the parties' CBA. Furthermore, it "would prevent management from being able to use the current Union office at least 50 percent of the time" even though the parties have negotiated a Memorandum of Understanding permitting management to use the Union office for counseling and other purposes when privacy is necessary. Finally, permitting a Union representative to work in isolation 50 percent of the time reduces opportunities for "knowledge transfer" with coworkers, and may be inconsistent with management's right to determine the methods and means of performing work by preventing placement of employees within proximity of co-workers in a "functional subgroup."

CONCLUSION

After thoroughly reviewing the parties' positions on this issue, we conclude that the Union has not demonstrated that the *status quo* should be changed. In our view, the fact that the Union office may be underutilized provides an insufficient basis for permitting a Union representative to spend half of his duty time at that location without a specific Union-related reason to

be there. Moreover, the parties already have adequately addressed the need for privacy concerning discussions involving representational matters elsewhere in their CBA. Accordingly, we shall order the Union to withdraw its proposal.

3. Procedures for Filling Details and Temporary Promotions

a. The Union's Position

Among other things, in Section 6 of its proposed article, the Union would establish procedures for non-competitively filling detail assignments that last more than 30 days. In this regard, it would require the Employer to solicit volunteers prior to filling the detail, and select employees primarily on the basis of seniority. In Sections 7 through 9, which concerns non-competitive details of employees to higher graded positions, or positions with known promotion potential, lasting more than 30 but less than 120 days, it proposes that the Employer be required to temporarily promote, and pay at a higher rate, the employee assigned to the higher graded duties "effective the first day of the next pay period."[1/]

Its proposal contains "a procedure for instituting involuntary details" that "strikes a balance between the Agency's need to efficiently effectuate a non-competitive detail while allowing employees to volunteer." This is necessary because there have been several instances where employees are detailed to other parts of the United States or overseas, which cause "tremendous disruptions" to employees' personal lives. Comparable wording can be found "in numerous collective-bargaining agreements." Its proposed procedure is "concise" and meets the Employer's legitimate interest in having a streamlined process for soliciting volunteers while addressing the

1/ See Attachment A for the full text of the Union's proposed article. With Member Newman's concurrence, the Union revised Sections 6 and 7 of its offer on June 27, 2007, after the conclusion of the informal conference. In Section 6 of the revised proposal, employees would have 1 workday to contact their supervisors to volunteer for non-competitive details of more than 30 calendar days, and be responsible for determining whether they are qualified for the detail. In Section 7, the proposal would permit the Employer to detail employees non-competitively to higher graded positions, or positions with known promotion potential, for 120 days or less.

employees' concerns. Moreover, as the FLRA noted in concluding that a substantially similar proposal is negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute,[2/] it "would allow employees to compete for career-enhancing details while also minimizing the adverse effects of involuntary details.

Another major point of disagreement between the parties concerns when an employee would be eligible to be compensated for performing higher graded duties. Unlike the vague wording proposed by the Employer on this issue, the Union's proposal clearly states that employees detailed to higher graded duties in excess of 30 days must be given a temporary promotion. It is essential that the CBA clearly inform the parties of their rights and responsibilities to "prevent potential disputes."

b. The Employer's Position

The Employer proposes that the article on details and temporary promotions in the parties' expired CBA be retained.[3/] In this regard, the Union "is seeking to change an effective existing practice which has raised no grievances, and to replace it with a regimented, inflexible system that will undermine the ability of the Agency to respond quickly to unforeseen events." More specifically, in Section 6 it proposes a procedure for non-competitively filling temporary detail assignments lasting more than 30 days that would be "overly time consuming, administratively burdensome," and eliminates management's ability to select the employee who is best suited for the assignment. It also would create "multiple opportunities for procedural errors, misunderstandings and unnecessary grievances to arise." Moreover, unlike the current practice, management would be unable to consider whether the individual required to be selected could be spared from his or her job, and implementation of the procedure could lead to a "domino effect" whereby subsequent details would be necessary to backfill other displaced positions. In addition, the Employer is "especially opposed" to the proposed procedures for temporary promotions in Sections 7, 8, and 9 of the Union's final offer that would

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2/ The Union cites Local 1923, AFGE and Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 41 FLRA 618 (1991), to support its position.

3/ See Attachment B for the full text of the Employer's proposed article.

replace the wording in the current CBA "with new language that is convoluted and confusing." It also would eliminate the current condition that employees must meet all requirements for promotion to be temporarily promoted, and the Union "has not demonstrated a need for this change."

CONCLUSION

Upon careful consideration of the record created by the parties in support of their proposed articles, we shall order the adoption of the Employer's final offer to resolve the impasse. The Union has not persuaded us that the *status quo* should be changed. For example, it has provided no evidence of how frequently temporary detail assignments lasting more than 30 days have occurred in the past, or whether the same employees receive them. At a minimum, evidence of the unfairness of the current system is required to justify the burdens its procedure would impose on management, particularly the possibility that its implementation would lead to unnecessary additional details. Similarly, it is unclear from the record how often, if ever, the Employer has failed to temporarily promote employees detailed for more than 30 days to higher graded duties. In this regard, the provision that addresses this issue in the expired CBA (*i.e.*, the Employer's current proposal) states that employees assigned to perform temporary service for more than 30 days in an established position of higher grade level "normally" would be paid the higher rate, yet there is no evidence that grievances have been filed over this matter that would support a need for the Union's proposal.

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 5 C.F.R. § 2471.11(a) of its regulations, hereby orders the following:

1. Administrative Leave to Participate in Physical Fitness Programs

The parties shall adopt the Employer's proposal.

2. Use of the Union Office as a Workstation

The Union shall withdraw its proposal.

3. Procedures for Filling Details and Temporary Promotions

The parties shall adopt the Employer's proposal.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

August 24, 2007
Washington, D.C.

ATTACHMENT A -UNION'S PROPOSAL

ARTICLE 29 DETAILS AND TEMPORARY POSITIONS

Section 1 - A detail is a temporary assignment of an employee to a different or the same position (i.e. same grade and job series) for a specified period, with the employee returning to his or her regular duties at the end of the detail. Details are intended for meeting temporary needs of the Employer when necessary services cannot be obtained by other desirable or practicable means. Circumstances for which details may be utilized include, but are not limited to, the following:

a. Periods of abnormal workloads

b: Changes in mission or organization

c. Unanticipated absences

d. Pending description and classification of new positions

e. Pending security clearance determinations

Section 2 -Assignments
Details may be made to classified positions of the same or higher grade or to unclassified duties. A classified position is recorded on a position description, approved by the appropriate supervisor and evaluated as to title, series and grade by the appropriate classification authority.

a. Employees detailed to an established position will be informed of the reasons for the detail, provided with a description of the duties to be performed, and the duration of the detail. Employees detailed to a set of duties that is not an established position will be formally notified in the same manner. Details of more than thirty (30) calendar days will be documented by a Request for Personnel Action (Standard Form 52), email 52 or memo that will be maintained as a permanent record in the Employee's Personnel File maintained by the Employer. A copy of the SF-52 shall be provided to the employee within 14 calendar days.

b. Any employee detailed to a classified position shall be given a position description. Any employee detailed to an unclassified position will be given a written statement of duties if such assignment is more than thirty (30) calendar days.

Section 3 - Procedures in Article XX Merit Promotion of this Agreement will be followed in all cases where experience resulting from the detail would be qualifying for later promotion.

Section 4 -The Employer agrees that details of higher grade- level employees to lower grade-level positions should be kept to a minimum. Should the requirements of the Employer necessitate an employee being detailed to a lower-graded position, it will not

adversely affect the employee's ability to apply for any job for which he or she would have been eligible had he or she not been detailed to the lower-level job.

Section 5 -Detail Limits
Details may be made initially in writing for up to 120 calendar days and extended thereafter by the Employer in accordance with laws, rules and regulations.

Section 6
Filling Noncompetitive Details

a. Noncompetitive Details in Excess of Thirty (30) Calendar Days. The following shall apply when offering noncompetitive details in excess of thirty (30) calendar days to both classified and unclassified positions.

1) The Employer will list the position and the basic qualifications and performance attributes (e.g., general relevant experience, knowledge, skills, and training) determined to be necessary to perform the detail. Qualifications and performance attributes will be objective and job related.

2) The Employer will canvass all the employees (via e-mail, memo, etc.) informing bargaining unit employees of the detail and basic qualifications necessary.

3) Any employees who believe they possess the needed skills and qualification may contact their supervisor within one workday to volunteer for the detail.

4) If the same number of employees volunteer as vacancies exists, these employees shall be selected.

5) If more employees volunteer than vacancies exist, the Employer will select from the volunteers. Seniority will be the selection criterion unless unusual circumstances require some other bona fide factor.

6) If there are no volunteers, then the least senior employee(s) with the necessary qualifications will normally be selected unless unusual circumstances require some other bona fide factor.

7) If there are fewer volunteers than vacancies, then the volunteers will be selected and additional persons will be selected as in subparagraph 6.a.5) of this Article.

7) Seniority will be based on an employee's Service Computation Date (SCD).

8) The area of employees to be considered will be within the component of similar grade and occupation. The component is understood to start at the

lowest organizational level and progressing to division and finally to bargaining unit wide until the vacancy is filled.

b. Exceptions. The procedures in Section 6.a. of this Article shall apply, except in the following circumstances:

1) When the Employer can demonstrate that the position to which an employee must be detailed requires unique skills and abilities that are not possessed by any other qualified employee.

2) When the Employer must make a detail to respond to an unusual, sudden, and unforeseen situation of an urgent nature. However, after the initial detail, the Employer will fill the detail under the provisions of Section 6.a.

3) When a bona fide medical or operational emergency requires or precludes the detail of a particular employee.

4) When the Employer makes a detail to accommodate a substantiated medical or health problem.

Section 7 -Higher-Graded Duties

a. Employees may be non-competitively detailed to higher-graded positions or positions with known promotion potential for one hundred and twenty (120) days or less. Formal details to classified positions of higher graded duties and temporary promotions will be processed in accordance with the Merit Promotion article.

b. When employees are temporarily assigned to a higher graded position for a period in excess of 30 calendar days, the assignment must be made via temporary promotion effective the first day of the next pay period.

Section 8

Examples of actions that would not be processed as temporary promotions are:

a. Assignment primarily for purposes of evaluation or training.

b. Assignments where duration is administratively uncontrollable and where the Employer has reason to believe that the duration of any processed temporary promotion would be less than thirty (30) days. (See also Section 9 below)

c. Any other instance where a temporary promotion would be effective for less than thirty (30) days.

Section 9

In connection with Section 8.b. above, if the Employer later determines that the duration of the assignment will last longer than 30 days, the employer will process a temporary promotion in accordance with Section 7, provided that:

a. the temporary promotion will be effective at the beginning of the first pay period practicable, retroactive, where applicable, consistent with section 7b of this article.

b. the temporary promotion resulting from the temporary assignment cannot be made retroactive, unless the Agency violates any government wide laws, rules, regulations or any provision of this CBA.

c. the temporary promotion will be at least 30 days in duration.

Section 10 Voluntary Reassignment
An Employee seeking voluntary reassignment shall be entitled to prompt and fair consideration of his /her request within the constraints of the Merit Promotion System (MPS).

Section 11
Prior to acting on an employee's request for a voluntary reduction in grade, the Employer will strongly encourage the employee to consult with Human Resources professionals at the Civilian Personnel Advisory Center and/or the Civilian Personnel Operations Center in order to discuss the effects of such an action and possible alternatives. Upon request, the employee will be afforded the opportunity to consult with a Union representative.

Section 12 -Light Duty Assignments

a. Reasonable efforts will be made to provide light duty assignments for employees who through illness or injury are temporarily unable to perform the full range of their duties instead of placing such employees on leave.

b. The Parties agree that it is mutually beneficial to return ill or injured employees to full or light duty as soon as possible, provided the employee is medically fit to do so, and agree to cooperate to this end. No employee, whether injured on or off the job, will be permitted or directed to return to full or light duty without adequate medical documentation supporting the return to duty. Such documentation will be obtained from the employee's health care provider and will be subject to further review by the Employer's physician (Occupational Health Clinic).

c. Nothing in this article shall be construed as requiring the assignment of light duty, preventing the termination of such assignments, or in any manner inconsistent with the right to the Employer to assign work except insofar as

such an assignment may be required as a reasonable accommodation to a qualifying handicap.

Section 13- Reassignments

For the purposes of this article, a reassignment is defined as any permanent change of an Employee from one position to another within USAMMA, without gain or loss of pay.

ATTACHMENT B -EMPLOYER'S PROPOSAL

ARTICLE 29 DETAILS AND TEMPORARY POSITIONS

Section 1 – All details of employees in the bargaining unit for periods of 180 days or details of more than thirty (30) days to a higher grade-level position will be formally recorded on a SF 52 *Request of Personnel Action.* Employees detailed to an established benchmark or other position will be informed of the reasons for the detail, provided with a description of the duties to be performed, and the duration of the detail. Employees detailed to unestablished duties will be formally notified in the same manner. Employees detailed to an established benchmark or other position for sixty (60) days or more will be given performance standards at the start of the detail and a special performance appraisal at the end of the detail.

a. Informal Detail- The detail of an employee for thirty (30) calendar days or less without formal personnel action or change or pay status.

b. Formal Detail- The detail of an employee in excess of thirty (30) calendar days with formal personnel action required, but without a change of pay status.

Section 2 -Competitive procedures of the present Merit Promotion Plan will be followed in all cases where experience resulting from the detail would be qualifying for later promotion.

Section 3 -The Employer agrees that details of higher grade-level employees to lower grade-level positions should be kept to a minimum.

Section 4 -The assignment of an employee to perform temporary service for more than thirty (30) days in an established position of higher grade-level will normally be processed as a temporary promotion provided that a detail or other action would not be more appropriate (See Section 6) and provided that the assigned employee meets all requirements for promotion. When the Employer knows in advance or has reason to believe that a temporary promotion will last more than 120 days in a 12 month period, the action will be processed in accordance with the competitive procedures of Article 34 of this Agreement.

Section 5 - An established position is defined for purposes of temporary promotion as a set of duties which has been described on a benchmark or other position description. approved *by* the appropriate supervisor and evaluated as to title, series and grade-level by the appropriate classification authority. The Employer is not required to establish positions in instances of assignments lasting less than thirty (30) days. However, if the Employer believes the duties of a position might provide an opportunity for a temporary promotion, it may submit an Establish/Fill request personnel action through the Civilian Personnel Advisory Center (CPAC) to the controlling Civilian Personnel Operations Center (CPOC).

Section 6 -Examples of actions not properly processed as temporary promotions are:

a. Assignment primarily for purposes of evaluation or training.

b. Assignments where duration is administratively uncontrollable and where the Employer has reason to believe that the duration of any processed temporary promotion would be less than thirty (30) days.

c. Any other instance where a processed temporary promotion would be effective for less than thirty (30) days.