United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND and COUNCIL 220, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 07 FSIP 38

DECISION AND ORDER

Council 220, 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 Social Security Administration, Baltimore, Maryland (Employer or SSA).

After investigating the request for assistance, which concerns negotiations over a Memorandum of Understanding (MOU) that would implement a new hardship reassignment policy in SSA's Field Operations component, the Panel determined that the dispute should be resolved through an informal conference with Panel Member Grace Flores-Hughes. The parties were advised that if no settlement were reached during the informal conference, Member Flores-Hughes would notify the Panel of the status of the dispute, including the final offers of the parties and her recommendations for resolving the issues. After considering this information, the Panel would take whatever action it deems appropriate, which may include the issuance of a binding decision.

In accordance with the Panel's procedural determination, Member Flores-Hughes met with the parties on April 18, 2007, at the Panel's offices in Washington, D.C. Although the parties' differences were narrowed, the effort did not result in a complete settlement of the dispute. The parties have submitted their final offers and supporting statements of position on the

remaining issues. The Panel has now considered the entire record.

BACKGROUND

The Employer's mission is to administer retirement, Medicare, disability, survivor, and Supplemental Security Income entitlement programs. The Union represents approximately 43,000 employees in a nationwide consolidated unit, about 25,000 of whom work in one of 1,300 field offices or teleservice centers in the Field Operations component. The parties' successor National Agreement (NA) went into effect in August 2005, and is due to expire in August 2009.

Bargaining between the parties commenced shortly after the Employer notified the Union on October 17, 2006, that a new hardship reassignment policy governing SSA field offices and teleservice centers would be implemented on November 20, 2006. The Employer contends that it is entitled to implement a new hardship reassignment policy because a previous, broader reassignment policy, dating from 1992, expired when the parties' NA went into effect in August 2005. According to the Union, however, the 1992 reassignment policy was terminated illegally. In this regard, it has filed two national level grievances and an unfair labor practice (ULP) charge challenging the Employer's actions.

ISSUES AT IMPASSE

The parties disagree, among other things, over whether: (1) the Employer should be required to suspend implementation of its new hardship reassignment policy until the Union's national level grievances and ULP charge are resolved; (2) the definition of "hardship" should include circumstances that "are beyond the employee's control"; (3) the Employer should be required to seek Union concurrence on all hardship reassignment requests before deciding on them; (4) the Employer should be prohibited from using the opinions of medical sources who have not examined/treated the applicant as a basis for denial of a request for hardship reassignment; (5) employees, and the Union, should receive "specific explanations" of why a hardship reassignment request was denied; (6) the Union should be permitted to audit applicants' files; (7) the MOU should specify the types of activities for which administrative leave would be granted to employees approved for hardship reassignments and include wording stating that such employees would not be

eligible for reimbursement of travel and relocation expenses; (8) employees approved for reassignments should have the "right of return" if a hardship ends shortly after a move is effectuated; and (9) management should be required to confer with local Union representatives, upon request, regarding issues not covered by the parties' MOU or NA.

POSITIONS OF THE PARTIES

1. Suspension of Implementation of Hardship Reassignment Policy Until Related Grievance and ULP Charges are Resolved

a. The Union's Position

The Union proposes the following wording:

> (1) Agency suspend the new hardship policy of not seeking union concurrence implemented mid 10/06 until resolution of the Union's May 26, 2006 Grievance over management's abrogation of all MOUs, Supplemental Agreements and Past Practices which were unilaterally terminated; (2) Agency suspend the new hardship policy of not seeking union concurrence implemented mid 10/06 until resolution of the Union's April 6, 2007 Grievance over Management's unilateral termination of seeking union concurrence prior to issuing notice to Union and opportunity to bargain over such proposed changes; (3) Agency suspend and stay new hardship policy of not seeking union concurrence implemented mid 10/06 until resolution of the Union's April 13, 2007 ULP over bad faith bargaining.

The adoption of its proposals would restore the parties' long-standing practice, which arose out of an arbitration decision by a former Panel Member in 1991,[1/] of seeking Union concurrence before management can make hardship reassignment decisions.

1/ The former Panel Member's Opinion and Decision in Department of Health and Human Services, Social Security Administration, Field Office Component, Baltimore, Maryland and Council 220, AFGE, Case No. 91 FSIP 196 (June 1, 1992), concerned the more general issue of whether a seniority-based selection procedure should be used in making noncompetitive reassignments, and became part of an MOU between the parties that was implemented in 1992.

Doing so is justified because the Employer's unilateral termination of the practice is illegal, and its restoration until the Union's grievances and ULP charge is decided would minimize the "perception of favoritism" that employees have concerning the Employer's decision-making process regarding hardship reassignment requests.

b. The Employer's Position

Essentially, the Panel should order the Union to withdraw its proposals because they interfere with management's right to assign and direct employees and involve an issue, Union concurrence on hardship reassignment decisions, that was never "on the table." Thus, the proposals are "far outside the scope of bargaining." Moreover, as the Union wants to suspend the current practice of no longer seeking its concurrence in hardship reassignment decisions, adoption of the proposals would "accomplish[] nothing for the Union since the *status quo* is precisely what the Union seeks to change."

CONCLUSIONS

Having carefully considered the parties' positions on this issue, we shall order the Union to withdraw its proposals. Regardless of whether they interfere with management's rights, as the Employer contends, they involve a subject - the suspension of the current practice of no longer seeking Union concurrence in hardship reassignment decisions pending the outcome of disputes in other forums - raised for the first time at the conclusion of the informal conference. Thus, the proposals were never the subject of negotiations or mediation assistance and, therefore, are not within the Panel's authority to resolve as part of the impasse between the parties in this case.

2. Definition of Hardship

a. The Union's Position

The following wording is proposed by the Union:

> Hardship is defined as a set of circumstances that: (1) require a permanent reassignment or detail; (2) are so severe that they jeopardize the employee's or his or her family's health or financial security.

Its proposed definition of "hardship" is consistent with the wording in the 1992 MOU, and has served the parties well. Including the phrase "beyond the employee's control" as a criterion, as the Employer proposes, would "severely limit" employees who need hardship reassignments by providing management with "additional denial reasons." Decisions as to whether a matter is within an employee's control are also "very subjective," and use of the criterion would give management the ability, for example, to restrict family members from advancing in their careers "by refusing to reassign an employee whose partner has been promoted and needs to relocate."

b. The Employer's Position

The Employer proposes the following on this issue:

> Hardship is defined as a set of circumstances that: (1) require a permanent change of station; (2) are beyond the employee's control; and (3) are so severe that they jeopardize the employee's or his/her family's health or financial security.

Including circumstances that are beyond an employee's control in the definition of hardship would prevent employees from "gaming the system." It would be clear to all affected parties that employees "who create their own situation" (for example, by purchasing a house in a geographical location where they desire to move "for non-hardship reasons") do not meet the definition of a "hardship."

CONCLUSIONS

With regard to this issue, in our view the Employer's proposed definition is more likely than the Union's to ensure that employees' requests for hardship reassignments are *bona fide*. Accordingly, we shall order the adoption of the Employer's proposal.

3. Union Concurrence on All Hardship Reassignment Requests

a. The Union's Position

The Union's proposal is as follows:

> Employees may file for a hardship transfer/reassignment as necessary. To file an

> application for hardship reassignment or hardship detail, the employee must submit an SSA-4100, SSA-45 and a letter explaining the circumstances surrounding the hardship to the RPO/SPO as directed in the SSA-4100. Management will continue to seek union concurrence on all reassigment based on hardship. If it is management's intent to deny the hardship request, the deciding management official will contact the Union Local President or designee in writing in the area where the hardship was initiated. The parties will make an effort to resolve the request, e.g., obtain necessary documentation, statements, etc. If the parties are unable to reach resolution, the Agency will issue its decision on the case within 20 calendar days. Nothing in this agreement waives the employee's or union's right to grieve or pursue appropriate redress with respect to management's decision.

Its proposal essentially would re-establish the practice of seeking Union concurrence before management makes decisions on hardship reassignment requests unilaterally terminated by the Employer in October 2006. Without such Union involvement, "there will not be any checks and balances and management's unilateral decisions will result in increased and inconsistent decisions in hardship cases that will increase litigation." In this connection, the Union has successfully intervened on behalf of employees during the past 15 years and secured approvals of hardship reassignment requests that otherwise would not have occurred. Adoption of the Employer's position, on the other hand, inevitably will lead employees to once again perceive management's decisions on hardship reassignment requests as being based on personal favoritism. Furthermore, reliance on the parties' grievance procedure to ensure fairness and consistency requires employees to wait a long time to have their cases determined, without assurances they will prevail, in "hardship" circumstances that are already stressful by definition.

b. <u>The Employer's Position</u>

The Employer proposes that:

> Employees may file for a hardship reassignment at any time. In order to file an application for a hardship reassignment, the employee must submit an SSA-4100, an

> SSA-45, and a letter explaining the circumstances surrounding the hardship to the Servicing Personnel Office as directed on the SSA-4100.

The Employer's proposal preserves management's right to make determinations with respect to hardship reassignments without the Union's concurrence or direct involvement. The Union's proposal, on the other hand, is nonnegotiable "because it requires the Agency to involve the Union in its internal, deliberative, decision-making process concerning management's right to assign work.[2/]" Moreover, the issue of seeking Union concurrence on reassignment decisions was never "on the table," as the decision was made "in the exercise of a reserved management right."

CONCLUSIONS

After carefully reviewing the evidence and arguments presented by the parties concerning the issue of Union concurrence in hardship reassignment decisions, we conclude that the Employer's proposal provides the more reasonable basis for resolving their dispute. There are some examples in the record of where the Union's pre-decisional involvement resulted in favorable outcomes for applicants during the period from 1992 until the practice was unilaterally terminated. The record does not demonstrate, however, that management's decisions concerning hardship reassignment requests have been based on personal favoritism, or would have been, but for the Union's involvement. In addition, the claim that there would be no "checks and balances" regarding management's decisions in this area unless the past practice is reestablished is simply untrue. The Union can continue to monitor the integrity of the decision-making process through its traditional role of representing employees under the parties' negotiated grievance procedure. For these reasons, we shall order the adoption of the Employer's proposal to resolve the impasse.

2/ In support of this claim, the Employer cites American Federation of Government Employees, Local 1923 and Department of Health and Human Services, Health Care Finance Administration, Baltimore, Maryland, 44 FLRA 1405 (1992).

4. Use of Opinions of Medical Sources in Hardship Reassignment Decisions

a. The Union's Position

The Union proposes the following wording:

> Deciding Officials may request additional documentation to support the hardship request, but will refrain from requesting excessive documentation and will work with the employee as necessary around what documentation may be available. Medical documentation provided by a treating physician will be given appropriate weight. Opinions of medical sources who have not examined/treated the applicant cannot be used as a basis for denial of hardship over medical evidence from treating sources.

By adopting its proposal, management would be prevented from requiring employees and/or their family members to submit "excessive medical documentation" to support requests for reassignment based on a medical hardship. There have been "many occurrences" of this in the past, which caused the Union to file a national level grievance. Because the Employer's proposal would permit this to continue, it is "unreasonable and unacceptable." The last sentence of the Union's proposal is necessary to stop the Agency's unfair practice of using the opinions of medical personnel who have not examined the applicant to deny requests for hardship reassignment supported by the applicant's personal physician.

b. The Employer's Position

The Employer's final offer is the following:

> Deciding Officials may request additional documentation to support the hardship request and will work with the employee to identify what documentation would be appropriate. Medical documentation provided by a treating physician will be given appropriate weight provided information submitted meets the criteria requested. If the hardship is denied medically, the employee may obtain additional information and resubmit the request.

Its wording "clearly defines" management's right to request appropriate documentation in making its decision to reassign an employee on the basis of medical hardship. In this regard, "there are many instances" that require additional information to determine whether a medical hardship exists, and some requests may require review by SSA's medical office "to ensure medical findings are consistent with accepted medical practices," that medical limitations can, in fact, be attributed to the employee's condition, and that a reassignment to another location may be appropriate. The portion of the Union's proposal that precludes the Agency from considering the opinions of its own medical experts is nonnegotiable "because it impermissibly interjects the Union into management's decision-making process."

CONCLUSIONS

Upon reviewing the evidence presented by the Union in support of its proposal, we are not persuaded that management previously has requested excessive documentation to substantiate hardship requests, or that it has been unreasonable when using its own medical experts to evaluate the medical evidence provided by applicants.[3/] Based on the record, the Employer's offer to permit employees to resubmit requests, with additional information, if a hardship reassignment is denied appears adequate to protect their interests. Accordingly, we shall order the adoption of the Employer's proposal.

5. Specificity of Explanation of Denials of Hardship Reassignment Requests

a. The Union's Position

The following proposal is offered by the Union:

3/ The record includes a letter from a management official to an employee in 1998 requesting answers to certain medical questions before he would make a decision on a hardship reassignment request, and an email from an employee to a Union official in 2005 asking if she was aware of other cases where management demanded medical releases from an employee's spouse and his parents to substantiate the need for a hardship reassignment based on their medical conditions.

> a. All decisions will be in writing to the employee and the Union in a timely fashion. b. If the request for hardship is denied or cannot be honored at that time Management will issue a decision to the employee and the Union with a specific explanation related to the employee's personal hardship circumstances of why the applicant does not meet the hardship definition, and/or other applicable reason for decision.

It is reasonable to require management to provide hardship reassignment applicants and the Union with a "specific explanation," directly related to the employee's personal hardship circumstances, as to why the request cannot be accommodated. Adoption of the Employer's proposal could lead to dissatisfaction over the adequacy of the explanation and result in litigation between the parties.

b. The Employer's Position

The Employer's proposed wording is the following:

> Decisions will be provided in writing to the employee in a timely manner. If the hardship request is denied or cannot be honored at that time, the decision notice will contain a brief explanation of the basis for why management cannot grant the request.

Under its proposal, the "brief explanation" management would provide to unsuccessful applicants would "certainly include enough specificity to inform [] employee[s] why their request was denied." Moreover, if employees are dissatisfied with the reasons given, they have recourse through the negotiated grievance procedure. The Union's proposal, on the other hand, "is over burdensome and could be interpreted to require that management produce lengthy and formal explanations whenever it denies a hardship reassignment request." In addition, because such decisions often involve "highly personal information that employees may prefer not to disclose to the Union," the portion of the proposal requiring that the explanation be provided to the Union also is unacceptable.

CONCLUSIONS

Having carefully reviewed the parties' positions on this issue, we shall order the adoption of the Employer's proposal to resolve the dispute. As the Employer points out, applicants can

challenge the adequacy of management's explanation in the grievance forum if they have any doubts as to why their request was denied. More importantly, however, we are persuaded that applicant's should determine for themselves whether to share management's explanation with the Union, given the personal nature of the information involved.

6. Retention of Files and Availability to the Union

a. The Union's Position

The following constitutes the Union's proposal:

> Management agrees to retain the application and all related documents including decision notice(s) for 1 year after reassignment and/or denial is issued. Union can audit files if requested to do so, and/or if reason exists, management will provide union access to all reassignment files.

Union access to reassignment files would allow it to ensure that management is administering the hardship reassignment process fairly and consistently throughout the Agency. Without such access, which enhances the Union's ability to monitor management's decision-making, "the perception of favoritism will increase again, and the principles of merit, fairness, and equity will be open to increased questioning leaving both employee and Union the only option of initiating litigation."

b. The Employer's Position

The Employer's counter-offer is the following:

> If the agency is unable to approve or accommodate a hardship request, management will retain the application and all related documents for 1 year from the date the SSA-4100 was signed.

The parties' proposals are similar, except for the Union's insistence that it be permitted to "audit" applicants' hardship reassignment request files. This would give the Union access to information "even for employees who have not designated the Union as their representative," and raises the same privacy concerns as in the previous issue. In addition to being contrary to the Privacy Act, the proposal is unnecessary because

"the Union already has a statutory procedure available in order to obtain information from the Agency" under 5 U.S.C. § 7114(b).

CONCLUSIONS

In reviewing the merits of this issue, it is clear that the Union's proposal would provide it with access to highly personal information without the applicant's prior consent. In our view, the Union's interests are adequately met through the existing statutory mechanisms. Consistent with the outcome on the previous issue, therefore, we shall order the adoption of the Employer's proposal.

7. Administrative Leave and Travel Reimbursement if Hardship Request is Approved

a. The Union's Position

The following is proposed by the Union:

> Employees approved for reassignment based on hardship are eligible for a reasonable and sufficient amount of en route leave for relocation related activities such as: a. en route leave for travel generally 8 hours for every 300-350 miles by car, and/or depending on the type of transportation used to relocate. b. administrative leave to make arrangements for child/elder enrollment and/or care. c. leave for utilities connections, car and voter registration including license renewal if in a new state and other related matters. d. reimbursement of travel and relocation expenses will be paid according to applicable law and the travel regulations.

Among other things, the Union's proposal should be adopted because of a survey it conducted in 2002 that "shows the inconsistent amounts of administrative leave granted" by management in various geographical areas of the country when applicants' hardship reassignment requests have been approved. The need to include the specific matters for which administrative leave would be granted in the parties' MOU also is established by three instances, in 2002, 2005, and 2006, respectively, where the approval of such leave for individual employees was facilitated by the Union. With respect to reimbursement of travel and relocation expenses, "although the parties have generally followed the Federal Travel Regulations

(FTR)," the Employer has prohibited such payments on budgetary grounds. The issue involves a negotiable condition of employment, however, because the "Union has arbitrated this issue and won relocation expenses for employees." The Employer's proposal should be rejected as it does nothing "to reduce the perception of favoritism."

b. The Employer's Position

The Employer proposes the following:

> Eligible employees approved for a hardship reassignment will be provided with administrative leave when appropriate and in accordance with applicable and controlling rules and regulations. Employees approved for reassignment based on a hardship will not be eligible for reimbursement of travel or relocation expenses.

The FTR does not "mandate reimbursement for voluntary reassignments," and the Employer's proposal makes it clear that if a hardship reassignment request is granted, "the employee will be responsible for his own travel and relocation expenses." This is as it should be because such requests are granted for the benefit of the employees and not the Agency. With respect to administrative leave in connection with such reassignments, the Union's proposal would require that it be granted in some circumstances where it is not currently required by contract or regulations, and in other situations "where local management should have discretion, as they currently do." Therefore, "it is more appropriate to continue following the applicable travel regulations," as the Employer proposes.

CONCLUSIONS

Upon thorough examination of the arguments and evidence presented by the parties in support of their proposals on this issue, we are convinced that the Employer's approach provides the more reasonable basis for settling the matter. The 1998 arbitration award cited by the Union does not support the merits of its proposal because the case involved a reassignment that was not primarily for the convenience or benefit of the employee. In our view, the Employer's position that the payment of travel and relocation expenses in connection with hardship reassignments is inappropriate is reasonable. With respect to administrative leave, the information the Union provided in its

survey is dated, and does not by itself demonstrate that employees' treatment in different geographical areas was unfair or arbitrary. Rather, the results appear to be consistent with the Employer's contention that local management should continue to be permitted to exercise its discretion regarding the granting of administrative leave on a case-by-case basis. Redress in circumstances where employees and the Union believe management decisions are unreasonable and/or inconsistent with the applicable regulations should be sought through the negotiated grievance procedure. For these reasons, we shall order the adoption of the Employer's proposal.

8. Right of Return

a. The Union's Position

The Union proposes that, "if a hardship ends unexpectedly or shortly after a move is effectuated, the employee [will] retain[] the right of return."

b. The Employer's Position

The Panel should order the Union to withdraw its proposal. By definition and intent, "'reassignments' are permanent." The adoption of the Union's proposal could result in situations where two employees would be available to do the same job in the same location, which "could lead to serious inefficiencies in the agency's workforce."

CONCLUSIONS

Having carefully considered the parties' positions on this issue, we shall order the Union to withdraw its proposal. In this regard, it has provided no justification for granting employees whose hardships end shortly after a move occurs the right to return to their original locations. We note that a hardship that ends unexpectedly or shortly after a move is effectuated could result in a new hardship entitling the employee to request reassignment again under the Employer's policy.

9. Requirement to Confer with Local Union Representatives

a. The Union's Position

The wording proposed by the Union is that "management will, upon request, confer with the Local Union rep[resentative] regarding issues not covered by this MOU or the General Agreement."

b. The Employer's Position

The Union's proposal concerns a "permissive subject of bargaining." Because the Employer "elects not to agree to it," the Panel should order that it be withdrawn. Should any local representative file a demand to bargain, however, "the Agency will comply with its statutory obligation."

CONCLUSIONS

As in the previous issue, the Union has provided no evidence or arguments for requiring management to confer with local representatives regarding issues not covered by the parties' MOU or NA. Accordingly, we shall order the Union to withdraw its 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 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 adoption of the following:

1. Suspension of Implementation of Hardship Reassignment Policy Until Related Grievance and ULP Charges are Resolved

The Union shall withdraw its proposals.

2. Definition of Hardship

The parties shall adopt the Employer's proposal.

3. Union Concurrence on All Hardship Reassignment Requests

The parties shall adopt the Employer's proposal.

4. Use of Opinions of Medical Sources in Hardship Reassignment Decisions

The parties shall adopt the Employer's proposal.

5. Specificity of Explanation of Denials of Hardship Reassignment Requests

The parties shall adopt the Employer's proposal.

6. Retention of Files and Availability to the Union

The parties shall adopt the Employer's proposal.

7. Administrative Leave and Travel Reimbursement if Hardship Request is Approved

The parties shall adopt the Employer's proposal.

8. Right of Return

The Union shall withdraw its proposal.

9. Requirement to Confer with Local Union Representatives

The Union shall withdraw its proposal.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

July 6, 2007
Washington, D.C.