United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER DANVILLE, ILLINOIS AND LOCAL 1963, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 92 FSIP 54

DECISION AND ORDER

Local 1963, American Federation of Government Employees (AFGE), 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 Veterans Affairs, Veterans Affairs Medical Center, Danville, Illinois (Employer or VA).

After investigation of the request for assistance concerning a respirator policy and environmental differential pay (EDP),[1/] the Panel directed the parties to meet informally with Panel Chairman Edwin D. Brubeck for the purpose of resolving the issues. The parties were advised that if no settlement were reached, Chairman Brubeck would notify the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the dispute. After considering this information, the Panel would take whatever action it deemed appropriate to resolve the impasse.

1/ Environmental differential pay is "additional pay that has been authorized as specified in Appendix J for a duty involving unusually severe hazards or unusually severe working conditions." FPM Supplement 532-1, S8-2a(25). Appendix J of the Supplement provides that 8-percent additional pay may be provided for "working in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury."

Chairman Brubeck met with the parties on August 14, 1992, in Danville, Illinois, and toured the site. Since all issues in dispute were not resolved during the conference, he reported to the Panel based on the record developed by the parties. The Panel has now considered the entire record, including his recommendations for settlement.

BACKGROUND

The Employer provides medical, surgical, and psychiatric care to veterans. The Union represents 2 bargaining units, 1 of approximately 800 nonprofessional employees, and another of about 400 professional employees who work in a variety of support positions throughout the hospital. Only employees in the nonprofessional unit who work in engineering and at the supply depot will be affected by the outcome of the dispute. The two units are covered by separate agreements and are part of different nationwide consolidated units. The local and national agreements governing working conditions for affected employees will expire on July 13 and August 13, 1993, respectively.

Buildings at the facility were constructed between 1900 and 1965. The Employer is engaged in contracting out for the removal of asbestos in patient care facilities. In the course of their work, affected employees may be required to enter steam tunnels and tanks where the potential for exposure to asbestos exists, and remove asbestos-containing floor tiles, underlay, and pipe insulation, among other assignments. The Employer has established a six-man team to perform such tasks. Currently, employees do not receive EDP.

ISSUES AT IMPASSE

The dispute concerns whether employees should receive EDP when they are required to wear respirators and protective equipment, and, if so, in what amounts and for what time periods. It also concerns anti-harassment and grandfather clauses regarding facial hair.[2/]

2/ During the informal conference, the parties worked on a grandfather clause to require that only those hired for the respirator program after August 1, 1992, be clean shaven. Although the Union signed the provision, at the last moment, despite indications that it also would sign, the Employer refused to do so.

THE POSITIONS OF THE PARTIES

1. The Union's Position

The Union's proposals are:

> 6B. Employees required to wear respirators will be paid 8-percent EDP: (1) for the entire shift when the job requires wearing of a respirator, in excess of 2 hours, or (2) for actual time of respirator use when it is less than 2 hours in any shift.
>
> 6C. When protective clothing is required in addition to a respirator, an additional 4 percent EDP will be paid: (1) for the entire shift when job duration exceeds 2 hours, or (2) for actual duration of the job, when less than 2 hours.
>
> 6E. Danville VA Medical Center, agrees that no employee in the respirator program will be harassed in any way by any supervisor in connection with facial hair.

Exposure to any level of asbestos is hazardous to employees' health. Since Appendix J authorizes EDP for employees who are exposed to such hazards, the Employer should be required to compensate employees for exposure to such risks. In this regard, at least six other VA medical centers make such payments to employees. In addition, protective equipment supplied by the Employer is not infallible; face seals can break, valves fail, and filters clog. The potential for such defects in equipment underscores the justification for such compensation. As to employees with beards or other facial hair, the measure is needed as supervisors have harassed them because of such hair. Furthermore, forcing these long-term employees, accustomed to their bearded visages, to shave would be traumatic, so only new hires, who enter the program expecting to be clean shaven, should be subject to such requirements.

2. The Employer's Position

The Employer is opposed to all three of the Union's proposals. It argues that Appendix J was never intended to be interpreted in a manner that would allow employees to receive EDP whenever they are required to wear a respirator or don protective clothing. Such equipment is provided to employees as a precaution, but monthly test data demonstrate that, with two exceptions, airborne asbestos levels are well below the VA trigger level of .1 f/cc of

asbestos.[3/] Although the Union claims that no level of airborne asbestos is safe, an appellate court decision[4/] and Office of Personnel Management regulations[5/] make it clear that some quantitative measure of exposure must be applied to establish a threshold level for entitlement to EDP. Levels at or above the threshold would establish an unusually severe hazard. A thorough analysis also must consider whether the hazard has been practically eliminated by the protective equipment.

The Union, which under O'Neall bears the burden of proving employees' entitlement to EDP, has not demonstrated that employees in the program are exposed to conditions that would justify such payments, or that the Employer's protective measures have failed practically to eliminate the hazard. Should the Union, however, believe that such circumstances exist, it could pursue a remedy through the negotiated grievance procedure under Article 25, Section 1, of the VA/AFGE master agreement.[6/]

3/ Department of Veterans Affairs, Circular 00-88-6, Supplement No. 4, January 31, 1992.

4/ In O'Neall v. United States, 797 F.2d 1576 (Fed. Cir. 1986) (O'Neall), cited by the Employer, employees sued for payment of EDP for exposure to airborne asbestos. The Court of Appeals for the Federal Circuit upheld a district court's ruling that employees bear the burden of proof in establishing that a trigger level for exposure to asbestos has been met entitling them to EDP. It also stated that 2 f/cc was a reasonable standard to use as a trigger level.

5/ See supra, note 1.

6/ That section provides as follows:

> Section 1 - Environmental Differential (Federal Wage System)
>
> A. In accordance with the criteria set forth in FPM Supplement 532-1, the appropriate environmental differential will be paid to an employee who is exposed to unusually severe hazard, physical hardship, or a working condition meeting the standards described under the categories in Appendix J.
>
> B. If at any time an employee and/or the union believes that differential pay is warranted under FPM Supplement 532-1 and Appendix J, the matter may be raised at Step 3 of the negotiated grievance procedure.

Finally, it denies that employees have been harassed because of their facial hair. If it were to accept the Union's provision, it might incorrectly be perceived as acknowledging such previous conduct. While the Employer does not agree to the grandfather clause crafted during the informal conference, it provides no arguments against the provision.

CONCLUSIONS

Having considered the evidence and arguments presented by the parties, we are persuaded that under the facts of this case, and in order to bring about a complete resolution of this dispute, the Union should withdraw proposals 6B and 6C which link EDP for exposure to airborne asbestos to the use of protective equipment and clothing. The parties shall be ordered, however, to adopt Union proposal 6E regarding harassment over facial hair, and the grandfather clause, modified to apply the requirement for being clean shaven only to employees hired after the date of this Decision.

As to protective equipment and EDP, we agree with the Employer that applicable regulations require a specific analysis to determine whether such compensation is warranted. In this regard, (1) quantitative data on airborne asbestos must be evaluated through the lens of an established threshold level for such fibers at or above which the potential for adverse health affects exists,[7/] and (2) protective measures used must be evaluated to determine whether they have practically eliminated the hazard.[8/] By requiring compensation under appropriate circumstances as outlined above, Appendix J and related regulations serve to encourage employers to provide employees with as clean and safe a work environment as possible. The Employer has provided evidence that it has taken steps in this direction by monitoring the air in the workplace for asbestos, and providing protective equipment to employees who may be exposed to asbestos fibers. It, however, has

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7/ This is consistent with the Panel's decision in Department of the Air Force, Fairchild Air Force Base, Fairchild AFB, Washington and Local 11, National Federation of Federal Employees, Case No. 84 FSIP 63 (September 24, 1984) (Fairchild), Panel Release No. 228, where the Panel concluded that the regulatory framework required it to recognize a specific level of exposure that would trigger EDP. It adopted a threshold level, identical to that provided in VA regulations, that was recommended by the National Institute for Occupational Safety and Health (NIOSH) as establishing that a potential for risk to health may exist. NIOSH continues to recommend this threshold.

8/ See supra, note 1.

not shown whether such equipment and clothing have practically eliminated the hazard.

We find that the Union, on the other hand, has not established that employees' exposure exceeded the threshold level set by VA regulations or some other appropriate trigger level. Its position that no threshold level should be applied because any amount is hazardous is contrary to the regulatory scheme,[9/] and turns the use of protective equipment rather than the quantitative level of risk into the triggering mechanism. It also presents no evidence of defects or inadequacies in the protective equipment to justify why employees should receive such compensation despite the Employer's use of protective measures. Although it points out that other Veterans Affairs facilities have agreed to similar contractual provisions, it fails to describe the circumstances and similarities between those facilities and the Danville workplace which might provide a basis for such payments in the instant case. Without such support in the record, we are unable to adopt the Union's position.

The parties have a shared burden to create a record on which the Panel can make a decision. In the case before us, the record does not enable us to determine whether the respirators and protective clothing have practically eliminated the hazard. Accordingly, in these circumstances, we conclude that the status quo should be maintained, and shall order the Union to withdraw proposals 6B and 6C. Notwithstanding the foregoing, should future incidents arise that raise questions about whether employees face a health risk despite protective measures instituted by the Employer, Article 25 of the master agreement, cited by the Employer, provides a mechanism for dealing with such concerns.[10/]

On the issue of harassment, the Union alleges that some employees in the program have experienced such problems in the past stemming from facial hair. Although the Employer has denied the allegations, we believe that the adoption of Union proposal 6E is warranted nonetheless as a reminder of employees' sensitivity to this matter, and because of the availability of special respirators designed to accommodate bearded employees. Finally, in our view, adoption of the grandfather clause permitting current employees to retain their facial hair appropriately balances the interests of both parties in this regard.

9/ Fairchild supra, note 7.

10/ See supra, note 6.

ORDER

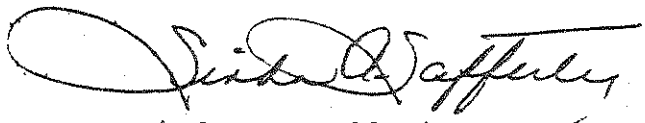
Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C §7119, and because of the failure of the parties to resolve their dispute during the course of the proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under § 2471.11(a) of its regulations, hereby orders the following:

The Union shall withdraw proposals 6B and 6C.

The parties shall adopt Union proposal 6E, and the following wording:

> Any employee seeking a job, in a position identified as requiring a respirator, shall be clean shaven while using the respirator, except for all employees of the Medical Center employed before November 2, 1992.

By direction of the Panel.



Linda A. Lafferty
Executive Director

November 2, 1992
Washington, D.C.