United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE AIR FORCE CARSWELL AIR FORCE BASE CARSWELL AIR FORCE BASE, TEXAS and LOCAL 1364, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	)	Case No. 91 FSIP 248

DECISION AND ORDER

Local 1364, 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 section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between it and the Department of the Air Force, Carswell Air Force Base, Carswell Air Force Base, Texas (Employer).

After investigation of the request for assistance, the Panel directed the parties to meet informally with Staff Associate Harry E. Jones for the purpose of assisting them in resolving any outstanding issues. If no settlement were reached, he was to notify the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the issues. Following consideration of this information, the Panel would take whatever action it deemed appropriate to resolve the dispute.

Mr. Jones met with the parties on September 19, 1991, in Fort Worth, Texas, but no agreement was reached on the outstanding issue which involves random drug testing. He has reported to the Panel, and it has now considered the entire record.

BACKGROUND

The Employer is the home base for a wing of fighter aircraft. The bargaining unit consists of approximately 600 employees who

work in a variety of technical and administrative occupations. The parties have agreed to continue the terms and conditions of their 1981 collective-bargaining agreement until such time as the status of their successor agreement is determined. This dispute affects approximately 200 dual-status Air Reserve Technicians (ARTs) who are responsible for the repair and maintenance of F-16 military aircraft. As a condition of their civilian employment, these employees are required to be members of the Air Reserve and to serve in an active duty status on 12 weekends per year. While on active duty, they are subject to random testing under the provisions of the Air Force's military drug-testing program. They are also subject to random testing under the provisions of the Air Force's civilian drug-testing plan since ARTs have been designated as "employees in sensitive positions" in accordance with the provisions of Executive Order No. 12564, 51 Fed. Reg. 32,889 (1986).

ISSUE AT IMPASSE

The issue is whether ARTs should be excepted from the random testing provisions of the agency's civilian drug-testing plan.

1. The Union's Position

The Union proposes the following:

> Where the records are available to the Employer, it is agreed that dual status employees who are tested for drugs by either military or civilian [sic] will not be subject to additional tests except for reasonable suspicion.

The Union maintains, contrary to the Employer's allegations, that its proposal is negotiable, and, therefore, is properly before the Panel.[1] On the merits, it contends that the net effect of its

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[1] In support of its position, the Union relies on a portion of the Federal Labor Relations Authority's (FLRA or Authority) decision in American Federation of Government Employees, Department of Education Council of AFGE Locals and U.S. Department of Education, Washington, D.C., 38 FLRA 1068 (1990) (Proposal 1). In that case, the Authority found the following proposal to be negotiable:

> The employer agrees that the establishment and administration of its drug abuse testing program will be done in strict compliance with the U.S. Constitution and all applicable laws, rules and regulations, and this agreement.

proposal would be to allow random testing of ARTs under only the military plan; in its view, this would provide a sufficient deterrent against the use of controlled substances. In this regard, it emphasizes that ARTs are required to serve in active duty status on 12 weekends per year and are subject to testing on any of those occasions; since employees do not know whether they might be tested on a given weekend, they are deterred from using illegal drugs. Moreover, since both the military and civilian drug-testing records are kept at the same location, the Union argues that civilian supervisors who may want access to the records would not be inconvenienced. Finally, the Union points out that since each test costs the Employer between $50 and $75, adoption of its proposal would result in a significant cost savings.

As an added benefit of its proposal, the Union stresses the positive impact that its plan would have on employee morale. With respect to this point, it notes that a number of ARTs have been tested several times within a short period of time, and some believe that they are being overly scrutinized. The Union emphasizes that not one civilian employee has tested positive for illegal substances and further points out that some civilian employees, who are not Air Reserve members but who work side by side with ARTs, are subject to testing under only the civilian plan. According to the Union, having a different standard for ARTs is discriminatory and does nothing to enhance the overall impact of the agency's drug-testing program.

2. The Employer's Position

The Employer alleges that the Union's proposal is outside the duty to bargain because: (1) it conflicts with its right to determine which positions are subject to random testing as established by Executive Order 12564;[2] and (2) it interferes with

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The Union urges the Panel to exercise its mandate as set forth in Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988) (Carswell), by applying the holding of Department of Education to the facts of this case, and resolving the negotiability question in its favor.

[2] Section 3(a) of Executive Order No. 12564 provides as follows:

> The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or

its right, under section 7106(a) of the Statute, to determine its internal security practices. It points to a number of Authority decisions in which proposals similar to the one at issue in this case have been found nonnegotiable.[3] In the Employer's view, the Panel should apply existing case law to the facts of this case and resolve the negotiability question in the Employer's favor.

> national security that could result from the failure of an employee adequately to discharge his or her position.

Section 7(d) of the Executive Order defines the term "employee in a sensitive position" as:

> (1) An employee in a position that an agency head designates Special Sensitive, or Noncritical Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;
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> (2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under section 4 of Executive Order No. 12356;
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> (3) Individuals serving under Presidential appointments;
>
> (4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and
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> (5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

[3] The Employer cites the following Authority cases: International Federation of Professional and Technical Engineers, Local 128 and U.S. Department of the Interior, Bureau of Reclamation, 39 FLRA 1500 (1991); Graphics Communications International Union, Local 98-L and U.S. Department of Defense, Defense Mapping Agency, Hydrographic Topographic Command, Washington, D.C., 39 FLRA 437 (1991); American Federation of Government Employees, Local 738 and U.S. Department of the Army, Fort Leavenworth, Kansas, 38 FLRA 1203 (1990); and National Federation of Federal Employees, Local 1437 and U.S. Army Armament Research, Development, and Engineering Center, Dover, New Jersey, 31 FLRA 101 (1988).

Should the Panel reach the merits of the dispute, however, the Employer proposes that ARTs be subject to random testing under the agency's civilian drug-testing plan. In its view, the Union's proposal is defective because it fails to recognize that ARTs have advance knowledge of their active-duty weekends; for example, the Employer notes that the weekend-duty schedule for calendar year 1992 was due to be released in late 1991. Since, under the Union's proposal, ARTs could be tested only on their scheduled active-duty weekends, drug users would be able to take advantage of the advance notice and stop using drugs just prior to their scheduled weekends. Because cocaine and other illegal drugs are detectable only within a short period of time after their use, and often do not significantly impair an employee's job performance, drug users would not be identified. The Employer stresses, therefore, that testing under both the civilian and military plans is essential to maintain a drug-free workplace.

CONCLUSIONS

Turning first to the duty-to-bargain question, we find it unnecessary to consider the validity of those arguments because we find the Employer's position on the merits to be more reasonable. Given that ARTs are responsible for the maintenance of highly sophisticated military aircraft, we believe that their inclusion in all aspects of the civilian drug-testing program is essential. We are particularly mindful of the disastrous consequences which could result from a lapse on the part of a drug-impaired employee. Excepting these employees from such testing would significantly dilute the deterrent effect of the program and could allow drug users to escape detection. Moreover, we concur with the Employer's view that relying only on random testing under the military plan would be insufficient because a drug user could refrain from using drugs for a short period of time prior to going on active duty, only to resume following completion of his or her scheduled weekend. Since random testing under both plans would subject ARTs to testing at any time, the Employer's proposal strengthens the overall deterrent effect of the agency's drug-testing program. Accordingly, we shall order its adoption.

ORDER

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

The parties shall adopt the Employer's proposal.

By direction of the Panel.

Linda A. Lafferty
Executive Director

January 29, 1992
Washington, D.C.