

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. Department of the Treasury
Office of the Comptroller of the
Currency

And

National Treasury Employees Union

Case No. 18 FSIP 026

DECISION AND ORDER

The National Treasury Employees Union (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, concerning changes in bargaining unit employees' conditions of employment created by an office relocation of employees that work for the U.S. Department of the Treasury, Office of the Comptroller of the Currency (Agency or OCC).

The OCC is a bank regulatory agency. Its mission is to ensure that national banks and federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations. The OCC does not receive appropriations from Congress. Instead, the OCC's operations are funded primarily by assessments on national banks and federal savings associations.

The Union represents a nationwide consolidated bargaining unit consisting of approximately 3,500 employees, who primarily populate the position of Bank Examiner. There are 28 bargaining unit employees impacted by this office relocation: 26 Bank Examiners; 1 Administrative Assistant; and 1 Examining Technician. The bargaining unit employees work on-site at a PNC Bank. The Bank Examiners provide specific regulatory functions such as monitoring commercial and retail loans, information technology security, and compliance with banking laws and regulations. The Examiners must review and analyze highly

complex bank information and documents to determine if the bank is in compliance with laws and regulations, that the bank has sufficient capital and appropriately trained personnel, and that the risk to the institution, its depositors, creditors, and the banking system as a whole is at an appropriate level. The Bank Examiner Technician and the Administrative Assistant help the Bank Examiners by performing a range of clerical duties.

The parties are covered by a master collective bargaining agreement (MCBA) that expires in December 2018 (term 2013 - 2018). It continues to remain in effect until it is renegotiated. Office relocations are covered by Article 15 of the MCBA; however, Article 15 applies to Agency-leased space, not Agency-occupied space, which is at issue in the instant case.

The Agency does not have a contractual relationship with the Bank, i.e. it is a guest in the building and the bargaining unit employees work in the building, using the Bank's offices, equipment, and facilities at no cost to the Agency. Therefore, its discretion is limited. The Agency does not have actual authority to implement the Union's proposals; however, the Agency is obligated to make recommendations based on the content of the Union's proposals to the Bank, but is not required to demand that the Bank implement the proposals.¹ Notwithstanding, the Agency must take a fine-line tactic when it comes to making requests to the Bank that it regulates. The Agency must guard against regulatory capture,² and maintain its independence, or it could be perceived to be unduly influenced by the Bank and compromise the public's interest.

BACKGROUND

In or around April or May 2016, the Agency notified the Union that the 28 bargaining unit employees would be relocating from a PNC Bank located at Two PNC Plaza in Pittsburgh, Pennsylvania to another PNC Bank across the street located at

¹ In *Library of Congress*, 699 F.2d 1280 (D.C. Cir. 1983) concerning a similar situation to the instant case where the decision making authority over an office relocations was not with the employer but, rather, was with the Architect of the Capitol, the FLRA held that the employer's obligation to bargain was limited to making recommendations to the Architect of the Capitol which was the "ultimate authority" over such matters. The District of Columbia Circuit Court upheld the Authority's ruling.

² Regulatory capture refers to the concept that the regulator, the Agency in this case, is controlled or unduly influenced by the regulated entity, PNC Bank.

One PNC Plaza in June 2017. The Union requested impact and implementation bargaining over changes to bargaining unit employees' conditions of employment as a result of the office relocation.

The parties engaged in bilateral negotiation sessions; however, the parties were unable to reach a resolution during negotiations. They enlisted the services of the Federal Mediation and Conciliation Service (FMCS). The parties could not resolve the dispute in mediation. Accordingly, FMCS released the parties.

The Union filed a request for assistance with the Panel in Case No. 17 FSIP 016. The Panel asserted jurisdiction in that case and ordered the dispute to be resolved through an Informal Conference. However, the Union subsequently withdrew the request for assistance because the Agency advised the Union that it would not be relocating the employees to One PNC Plaza.

In or around May 2017, the Agency notified the Union that it was, in fact, going to move the employees to One PNC Plaza with a new implementation date of March 23, 2018. The parties again engaged bilateral negotiation sessions. The parties were unable to reach a resolution during the negotiations. The parties again enlisted the services of FMCS. The parties participated in mediation with FMCS; however, the parties could not resolve the dispute in mediation. Accordingly, FMCS released the parties. Thereafter, the Union filed the instant request for Panel assistance.

During bargaining and mediation, the parties reached agreement on a number of proposals related to the office relocation, but were unable to reach agreement over the following issues: Workstations; Bottled Water Service; Project Room; Men's Restroom; Breakroom; Chairs; and Office Selection procedures.³ Following an investigation of the aforesaid issues in the Union's request for assistance, the Panel asserted jurisdiction over the dispute and concluded that the impasse should be resolved through an Informal Conference procedure. The Informal Conference was held at the PNC Bank located at One PNC Plaza in Pittsburgh, Pennsylvania. The parties were informed that if settlement was not reached during the Informal Conference, the Panel would be notified of the status of the dispute. The Panel would then take whatever action it deemed appropriate to resolve the impasse, which may include the

³ During the investigation of this case, the parties resolved the Office Selection issue.

issuance of this Decision and Order. The parties were unable to reach a resolution. The Panel has now considered the entire record, including the parties' written submissions and final offers.

ISSUES

1. Workstations⁴

a. Union's Final Offer

Modesty panels, raise height of side panels, lockable overhead storage.

Alternatively, modesty panels between facing workstations that go down to one foot above the floor, raising the height of the side panels to 50 inches over the extensions.

The Union asserted that the employees perform highly technical work and need to maintain concentration for a significant period of the day; the 36 inch side panels will allow for more distractions. Therefore, the Union argued that it is necessary to enclose the workstations and lengthen the side panels to 50 inches so that the employees can maintain better focus throughout the day.

The Union also argued that modesty panels are needed, which extend from the desk to the floor to provide privacy to the employees. Finally, the Union asserted that the employees need more than one lockable cabinet at their workstation to store their work documents, laptop, and personal items. Alternatively, the Union stated that it would agree to add modesty panels that extend from the desk to one foot above the floor to comply with PNC Bank's open-space building design concept that promotes air circulation, and raise the side panels to 50 inches above the desk.

b. Agency's Final Offer

The PNC-provided workstations in the new space will generally align with the "Professional Workstation" description included with the initial briefing materials. The PNC-provided workstations will be similar to those

⁴ The workstations provided by PNC Bank are cubicles with side panels that are 36 inches and front panels that are 50 inches from the top of the desk. The workstations do not have modesty panels and have one lockable cabinet.

workstations viewed during the tour provided to the parties on August 17, 2017.

The Agency argued that it has no right to make modifications to PNC-owned furniture, nor would it be appropriate to pressure PNC Bank to make modifications. Nevertheless, it requested that the Bank make the modifications to the workstations pursuant to the Union's proposal. However, the Bank objected to the modifications because adding panels and overhead storage to the workstations would compromise the structural integrity of the cubicles, and disrupt air circulation in PNC's open-space workplace concept. Therefore, the Agency asserted that what the Bank is providing is acceptable - 36 inch high side panels, 50 inch high front panels, and one lockable cabinet. The Agency also asserted that the parties reached agreement to provide the employees 77 lockable filing cabinets and 46 lockers.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal, modified to reflect the employees' current conditions of employment, is the better alternative to resolve the impasse. In this regard, the Agency requested that PNC Bank modify the workstations; however, since the Bank owns the furniture, it's up to the Bank to decide what kind of furniture it wants in its office, and what, if any, modifications it should make to the furniture. The Bank indicated that it cannot make modifications to the workstations. Thus, the workstations provided by the Bank are adequate for the employees, and the additional storage agreed to by the parties provides for a sufficient amount of space for employees to store their work and personal items. Accordingly, the Panel orders the adoption of the following language:

"The employees will work at the PNC-provided workstations."

2. Bottled Water Service

a. Union's Final Offer

Bottled water service similar to what has been provided.

However, if the Agency is unwilling to continue to pay for the service, the employees are willing to share the costs for the bottled water service.

The Union argued that the water quality in Pittsburgh is notoriously poor, and there are frequent advisories to boil tap water or avoid it altogether.⁵ The Union asserted that the Agency previously paid for and provided bottled water service at Two PNC Plaza for its employees; therefore, the Union argued that the Agency should continue to provide this service to its employees at One PNC Plaza. The Union further argued that the bargaining unit employees are offered bottled water at meetings, bottled water is sold in the cafeteria, employees have been purchasing their own bottled water and bringing it in the office, and other bank regulators that work in the building are permitted to use a bottled water service. The Union stated that having a bottled water service is more cost effective for its employees, environmentally friendly, and safer to drink. Alternatively, the Union stated that it would agree to allow the employees to pay the cost for the bottled water service.

b. Agency's Final Offer

The OCC staff in the new space will be provided with filtered water from PNC-provided water coolers whose filters will be replaced by PNC as needed.

The Agency argued that it provided a bottled water service at Two PNC Plaza because there were concerns about the water quality in Pittsburgh at that time, and PNC Bank did not provide filtered water fountains. However, in the new location, at One PNC Plaza, the Bank has installed filtered water fountains in the building. Further, the Agency stated that it hired an independent company to test the water quality in January and February 2018, and the test results indicated that the water was safe to consume. Notwithstanding, the Agency discussed with PNC Bank, the Union's desire to continue bottled water service. The Bank expressed concerns over this request, making it clear that it does not want a bottled service in the building because it conflicts with its environmental performance goals - to reduce carbon emission, energy, and water consumption.

⁵ The Union cited to two reports to support its position: Emma Schultz, M.S., *Problems with Pittsburgh Drinking Water*, <http://www.hydroviv.com/blogs/water-quality-report/pittsburgh> (2018); and Ralph Iannotti, *Boil Water Advisory Issued for Thousands of PWSA*, <http://pittsburgh.cbslocal.com/2017/01/31> (2017).

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, One PNC Plaza offers filtered water fountains for the bargaining unit employees. Notwithstanding, the Agency requested that PNC Bank allow a bottled water service in the building to accommodate the Union, but the Bank declined this request because, in part, it is providing filtered water fountains throughout the building. Thereafter, the Agency hired an independent company to test the water in January and February 2018, after the Union voiced concerns over the quality of the water in the building. The results of the testing indicated that the water is clean. The Agency's proposal sufficiently ensures that the water is safe for the employees to consume. Therefore, the Panel imposes the Agency's proposal.

3. Project Room⁶

a. Union's Final Offer

Lockable door with screen or other shading so it can be used as needed for changing clothes, quiet room, etc.

The Union argued that the primary purpose of the room would be to provide privacy to employees to make personal phone calls, and to occasionally use it for changing clothes during periods of inclement weather or for a meeting that required business attire. The Union asserted that the employees cannot change their clothing at their cubicles because there is no privacy, and the restrooms do not offer a viable alternative because there is only one stall that it is often in use.

b. Agency's Final Offer

The project room in the new space will have a door and it can also be used by OCC staff intermittently for private calls.

The Agency asserted that it asked PNC Bank to make the modifications to the project room pursuant to the Union's proposal; however, the Bank advised the Agency that the purpose of the room is for employees to easily access the room when they need a quiet place to work, or to make a call. The Agency

⁶ The project room has a glass wall that is partially frosted, a table, chairs, and a telephone.

stated that the project room's glass wall is partially frosted, but must remain mostly transparent so that employees can quickly scan the room to determine if it's in use. The Bank advised the Agency that it was unwilling to add a lock to the door because it wants the room to be easily accessible to the employees.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, PNC Bank partially frosted the project room to allow for some privacy if the employees need to work, or to make a call. The Agency's proposal achieves the Union's primary purpose of the room - to allow the employees to make calls when needed. Therefore, the Panel imposes the Agency's proposal.

4. Men's Restroom⁷

a. Union's Final Offer

Second stall in the men's room. Limiting access to the restrooms to OCC personnel and visitors.

Alternatively, restrict the access to the restrooms to OCC personnel and visitors.

The Union argued that the men's restroom is insufficient for the 20 male employees that work on that floor. The Union stated that the men's restroom is accessible from the floor below, which has a large cafeteria, and will cause overcrowding in the restroom. The Union asserted that the Occupational Safety and Health Administration (OSHA) requires each place of employment with more than 15 employees of the same sex to have a minimum of two bathroom stalls.⁸ Therefore, the Union argued that the Agency should replace the one urinal in the restroom with a second stall, and restrict the access to the restroom to only Agency employees and visitors. Alternatively, the Union stated that if PNC Bank would agree to restrict the access of the restroom on the employees' floor to Agency employees and visitors, it would at least minimize the impact from the lack of facilities.

⁷ The men's restroom has one urinal and one bathroom stall.

⁸ 29 CFR 1910.141(c).

b. Agency's Final Offer

The restrooms constructed in the new space will be compliant with the applicable building codes of the City of Pittsburgh.

The Agency asserted that its proposal reflects the assurance that PNC Bank provided over the Union's concerns about the men's restroom, i.e. the men's restroom meets all applicable city codes. The Agency argued that the OSHA regulation cited by the Union does not require two bathroom stalls located on the same floor, within a specific distance of each other. Instead, the Agency cited to OSHA guidance on toilet facilities, which it claimed indicates there are no specific distance or location requirements for toilet facilities.⁹

The Agency stated that the Bank has decided to allow access between floors to those with access to the building. That means that individuals who have been admitted to the building, including bargaining unit employees, may use the elevator or stairs to access restrooms on other floors. Therefore, the Agency asserted that the current layout of the building, which has men's restrooms on the employees' floor and the floor below it, is in compliance with the OSHA regulation.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, the OSHA regulation, 29 CFR 1910.141, does not appear to require two men's stalls on the same floor. 29 CFR 1910.141(c)(1)(i) appears to indicate that if there are between 16 and 35 employees, there must be a minimum of two bathroom stalls, but it does not state that the stalls must be located on the same floor. The OSHA guidance interpreting 1910.141(c)(1)(i) states that "there are no specific distance or location requirements for toilet facilities in 29 CFR 1910.141(c)."¹⁰ "If an employer provides the required toilet facilities for all employees in the same building and provides unobstructed free access to them, it appears the intent of the standard would be met..."¹¹ Thus, in the instant case, the men's

⁹ OSHA, *Standards Interpretations*, 29 CFR 1910.141(c), <https://www.osha.gov/laws-regs/standardinterpretations/1983-07-05> (1983).

¹⁰ *Id.*

¹¹ *Id.*

restroom is in compliance with the OSHA regulation. To the extent that the parties have a dispute over the application of this regulation, the Panel is not the proper forum to challenge it. Accordingly, the Panel imposes the Agency's proposal.

5. Breakroom¹²

a. Union's Final Offer

Add a table and 6 chairs.

Alternatively, add a round table of the same diameter as the existing table, but at an appropriate height for working or eating with 4 chairs.

The Union argued that the additional table and chairs are needed because the employees will utilize the breakroom to meet with other employees to eat and discuss work assignments. The Union stated that the cafeteria is not a suitable alternative because employees cannot discuss work assignments around the general public. The Union also stated that the two conference rooms on the employees' floor are often in use and unavailable. The Union claimed that a small table and chairs were recently added to the breakroom, but the table is too low and not suitable for eating or working. Alternatively, the Union stated that it would agree to add to the breakroom a round table of the same diameter as the small table, but at an appropriate height for working or eating, with four additional chairs.

b. Agency's Final Offer

The PNC-provided pantry will provide total seating for eight (8) employees. Seating will be distributed around four (4) individual chairs and two (2) banquettes within the pantry with each banquette having seating capacity for two (2) individuals.

The Agency argued that the breakroom has a sufficient amount of seating for the employees. The Agency asserted that if there is not enough seating for the employees, the cafeteria is just one floor away with seating for 200, and there are two conference rooms on the employees' floor. Nonetheless, the Agency asked PNC Bank to accommodate the Union's request by adding more seating; however, the Bank would not agree to add a large table to the breakroom because it would inhibit its

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The breakroom has two banquettes with seating for four, four tables with four chairs, and a small table with two chairs.

access, and therefore, would not be compliant with the Americans with Disabilities Act. Notwithstanding, the Bank added a small table and two chairs to the breakroom.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal, modified to reflect the employees' current conditions of employment, is the better alternative to resolve the impasse. In this regard, the breakroom has a sufficient amount of seating for the employees. PNC Bank added a table and two chairs. If the employees need even more seating, there are two conference rooms on the employees' floor, and there is a cafeteria one floor below the breakroom. Accordingly, the Panel orders the adoption of the following language:

"The PNC-provided breakroom will provide total seating for ten (10) employees.

6. Chairs

a. Union's Final Offer

The employees are provided the option of choosing an OCC-provided ergonomic chair (e.g. Aeron), or a PNC Bank-provided chair.

The Union argued that during bargaining, the Agency agreed to permit employees to have either an Aeron Herman Miller ergonomic chair, or a PNC-provided chair; however, the Agency reneged on this agreement, and the employees were forced to accept PNC chairs. The Union stated that the Agency has offered employees at other bank locations the option of choosing between the two chairs. Therefore, the Union asserted that the Agency should offer the employees in the instant case the same choice.

b. Agency's Final Offer

PNC will provide the OCC staff with ergonomic desk chairs at the new space.

The Agency argued that during bargaining it was willing to allow the employees to decide to either bring their Agency-provided chair to the new location, or select the PNC-provided chair; but, the Union wanted the employees to have the option of changing their mind at a later time and choosing a different

chair. The Agency, however, did not have a place to store the additional chairs if the employees changed their mind, so it opposed this option. The Agency also stated that during mediation it even offered the Union the option to allow the employees to choose between the PNC Bank-provided chairs or the Agency chairs, but the employees would only get one choice. The Union, however, would not agree. Therefore, the Agency had to select a chair for the employees since the office relocation was approaching. The Agency selected the PNC Bank-provided chairs, which the Agency claimed are suitable; they are the same ergonomic chairs that the PNC employees use. The Agency further stated that employees may request a new chair through the Reasonable Accommodation program, or the Workspace Solutions program.¹³

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, the Agency offered the Union the choice between PNC-provided chairs, or OCC-provided chairs prior to the relocation; however, the Union would not agree to that option unless the employees could later change their mind. The employees were provided the PNC chairs, which are ergonomic. If the employees are not satisfied with their current chairs, there is a process that they can utilize to request a replacement - the Reasonable Accommodation program, or the Workspace Solutions program. Accordingly, the Panel imposes the Agency'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 § 2471.11(a) of its regulations hereby orders the adoption of the following to resolve the impasse:

¹³ The Reasonable Accommodation program allows employees to request accommodations if they have a medical condition that affects their ability to work. The Workspace Solutions program allows employees to request an accommodation even if they do not have a medical condition.

1. Workstations. The employees will work at the PNC-provided workstations.
2. Bottled Water Cooler. The OCC staff in the new space will be provided with filtered water from PNC-provided water coolers whose filters will be replaced by PNC as needed.
3. Project Room. The Project Room in the new space will have a door and it can also be used by OCC staff intermittently for private calls.
4. Men's Restroom. The restrooms constructed in the new space will be compliant with the applicable building codes of the City of Pittsburgh.
5. Breakroom. The PNC-provided breakroom will provide total seating for ten (10) employees.
6. Chairs. PNC will provide the OCC staff with ergonomic desk chairs at the new space.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

July 11, 2018
Washington, D.C.