

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 97

And

INTERNAL REVENUE SERVICE

Case No. 2022 FSIP 065

BACKGROUND

This case, filed by the National Treasury Employees Union, Chapter 97 (Union or NTEU) on June 14, 2022, concerns a loss of Union office space and other issues related to an office move. The Internal Revenue Service (IRS or Agency) is responsible for the administration of the US Tax Revenue Code. Its mission is to “[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.” The Union represents a bargaining unit consisting of 3,700 employees in a variety of positions, including professional and non-professional employees of the Internal Revenue Service at the Fresno Campus in Fresno, California. The parties are governed by a national collective bargaining agreement (CBA) that went into effect in 2022, and does not expire until 2027. This matter was filed with the Federal Service Impasses Panel pursuant to Section 7119 of the Federal Service Labor Management Relations Statute (the Statute).

PROCEDURAL AND BARGAINING HISTORY

The negotiations here followed the closure of the Agency’s Fresno Campus Butler building in October of 2021. This building formerly housed Submission Processing employees as well as non-Submission Processing employees. Submission Processing was eliminated in the Fresno Campus and the impacted employees were either put in new positions or took buyouts. As a result, the Agency closed the Butler building where these employees were housed and moved any non-Submission Processing employees to one of the several remaining buildings on the Fresno Campus. The parties held numerous bargaining sessions on the movement of the employees to other existing Agency facilities or a new building leased by the Agency known as the Santa Fe building.

Agreement was reached on the majority of proposals, except proposals regarding the Union office space and a proposal for an additional breakroom in the Santa Fe building. The Union has 14 fulltime stewards and had approximately 900 square feet of office space in the now closed Butler building. During negotiations, the Agency refused to consider any proposals requesting office space in the remaining buildings on the Fresno Campus. As a result, the Union placed file cabinets, furniture and other office supplies and equipment in storage. The Union is currently working in space that has been designated for returning employees when the Agency Evacuation Order related to the Covid-19 Pandemic is lifted. Employees are expected to return in the months ahead and the Union will be required to leave this temporary space.

Pursuant to the dispute resolution procedures in the CBA, when agreement has not been reached on bargaining issues, the parties may request the assistance of a Factfinder. Article 47, Section 2.G of the CBA states in relevant part, “[I]f the parties fail to reach agreement at the end of the bargaining period, the parties agree to use the following procedure to resolve any remaining disputes:

- (a) Either party may contact the designated Factfinder that has been selected by the national parties to advise the Factfinder of the dispute. The parties will submit their final proposals and any supporting documentation to the Factfinder...prior to the initial mediation session.
- (c) The Factfinder is empowered to assist the parties in reaching agreement. The Factfinder shall determine the appropriate resolution process, including last and best offers (Article by Article or issue by issue) or amendment of final offers.
- (d) Following mediation and factfinding...the Factfinder will issue a recommendation to resolve the dispute....
- (e) Any disputes remaining after submission to the Factfinder will be resolved pursuant to 5 USC §7119, or other appropriate provisions of 5 USC §7101, et seq. **The party that moves such remaining disputes to the statutory impasse resolution process carries the burden of proof regarding the reasons the Factfinder’s report does not resolve the issue at impasse.”**

The parties followed the procedures of their CBA, specifically, Article 47, Section 2G, Impasse Procedures, and the proposals in dispute went to a Factfinder. The parties engaged in factfinding sessions in October 2021 and April 2022. The Factfinder issued her recommendation on May 31, 2022, and found for the Agency on five remaining disputed proposals. The parties’ CBA allows either party to then seek impasse resolution with the Panel pursuant to 5 U.S.C. Section 7119. Under

the terms of the CBA, the party that seeks impasse resolution with the Panel is required to pay 100% of the Factfinder's fee and carries the burden of proof.

On June 14, 2022, the Union filed a request for Panel assistance over the parties' negotiations following the closure of the Fresno Campus Butler building in October of 2021. At the time of the Union's request, the parties had agreed on all but five issues. The Panel asserted jurisdiction over the Union's request and ordered the parties to an Order to Show Cause (OSC) procedure. The Panel further advised that the OSC process would begin with the presumption that the party objecting to the imposition of a Factfinder's recommendation on a specific issue (here the Union) bears the heavy burden of demonstrating why the recommendation of the Factfinder should not be adopted.

ISSUES AT IMPASSE

In its response to the Panel's OSC, the Union clarified that the only remaining issue for which it is seeking Panel assistance is the issue of Union office space.¹ Accordingly, that is the only issue the parties addressed in their position statements. As discussed above, the Factfinder issued her recommendation on May 31st and found for the Agency on this issue.

POSITIONS OF THE PARTIES

Union's Response to Panel's Order to Show Cause

The Panel's OSC advised the parties that the Union's heavy burden was to show that the Factfinder's Recommendation did not resolve the impasse. In response, the Union suggests that the Factfinder's Recommendation: (1) defies logic; (2) is based on non-facts and unsupported, anecdotal testimony; (3) has a practical effect of denying the Union "proper" space to conduct its statutory responsibilities; and (4) is at odds with FSIP precedent. The Union essentially suggests the Agency did not make a convincing argument to the Factfinder, and that her recommendation should be given no deference. In support of its position the Union provided an internal NTEU document showing membership numbers for various locals around the country, indicating that this location is the third largest local.

Agency's Rebuttal to Union's Response to Panel's Order to Show Cause

The Agency's rebuttal to the Union's response claims that the Union failed to establish why the Panel should not order the Factfinder's Recommendation. Because the Union's response was essentially a relisting of its disagreement with what it sees as an unjust outcome, the Agency's rebuttal also repeats previous

¹ See Union Response to OSC at 1 (stating that issues have been resolved or are tied to resolution of office-space issue).

arguments it made to the Factfinder. The Agency reiterates that it negotiated for space reduction based on a bargaining unit membership number that has declined by approximately 50% in the past ten years, a reduction in the number of grievances filed by at least 50% over this time, and a clear agency-wide initiative that has been on-going since 2012 to reduce its real estate footprint. The Agency provided support for these positions to the Factfinder as well as to the Panel in this matter. In the absence of any reasoning from the Union to the contrary, the Agency requests the Panel order the Factfinder's Recommendation in this matter.

CONCLUSION

The Panel concludes that the Union has failed to show cause why the Panel should not order the Factfinder's Recommendation in this matter. Accordingly, the Panel will impose the Factfinder's Recommendation for the remaining disputed issues.

Where parties have selected a private factfinder to assist in the resolution of a bargaining impasse, the Panel will normally defer to the factfinder's recommendation. This is particularly true if the recommendation is supported by clear and convincing rationale and appears legal. For the Panel to do otherwise would undercut the effectiveness of the procedure that parties mutually agreed upon, and would instead encourage them to view the factfinding process as a "stepping stone" to initiating the Panel process.

In *Federal Election Commission, Washington, D.C. and NTEU*, 2012 FSIP 140 (2013), the 2013-Panel established a standard that if the parties select a private factfinder to assist in the resolution of a bargaining impasse, the Panel will normally defer to a factfinder's recommendations if they are supported by clear and convincing rationale and do not appear to be illegal.² Accordingly, the Panel reviews the Union's response to the Panel's Order to Show Cause to determine if the Union satisfied its high burden by establishing that the Factfinder's Recommendation met one of the following criteria: (1) it does not resolve the impasse; (2) it is not supported by a clear and convincing rationale; or (3) it is not legal.

Rather than pursue any of these three avenues to potential reconsideration, the Union's response argued that the recommendation was resolved in an

² See also, *DOL and AFGGE, Local 12*, 12 FSIP 104 (2013). On the topic of a Show Cause Order, "the Panel begins with the presumption that a party objecting to the imposition of a factfinder's recommendation on a specific issue bears a heavy burden of demonstrating why it should not be adopted. Private factfinders are selected by the parties themselves, have the benefit of working with the parties directly to explore their interests and, where voluntary settlements cannot be reached, spend considerable time assessing the evidence and arguments presented in support of their respective positions. Accordingly, the Panel will normally defer to a factfinder's recommendations, particularly where they are supported by clear and convincing rationale and the recommended wording otherwise appears to be legal.

unsatisfactory manner and was not supported by facts the Union found convincing. Moreover, the Union offered conclusory arguments concerning the legality of the recommendation. The Union suggests that the Factfinder's Recommendation: (1) defies logic; (2) is based on non-facts and unsupported, anecdotal testimony; (3) has a practical effect of denying the Union "proper" space to conduct its statutory responsibilities; and (4) is at odds with FSIP precedent. Each is discussed below.

First, the Union suggests that the recommendation defies logic. This assertion is made without any specific examples given. Rather, it is part of the Union's overall alleged narrative that the outcome defies logic because in their minds it is unjust. In support the Union offers only that the outcome leaves it without a benefit that it enjoyed for many years or the space it "needs" for its staff and equipment. The Union's argument also may be in reference to the Union's belief that its alternative proposals should have been recommended versus losing all of the 900 square feet of space it used to have in the closed Butler Building. It is not clear, however, since no direct tie to this assertion is clearly made in the Union's response.

Second, the Union argues that the recommendation is based on non-facts and unsupported, anecdotal testimony. The Union decries "dubious evidentiary findings" indicating that there has been a nearly 50% reduction in bargaining unit employees and grievance activity. However, the Agency provided specific numbers to the Factfinder showing yearly bargaining unit employee numbers which showed over 7,000 employees in 2011 and just under 3,700 in 2021. The Union's submission confirms the 2021 number and makes no argument that the 2011 number is incorrect. The Union also attacks the idea of considering future telework projections which would lower the number of on-site employees even further while at the same time urging the Factfinder to consider that their bargaining unit may grow by up to 300 people based on future hiring projections. The Agency also provides yearly grievance filing numbers showing 514 filings in 2011 and 210 in 2022, a number that was not out of line with a continuous drop in filings since a high of 556 in 2012. The Union offered no evidence to counter these numbers, instead offering only that it still has fourteen full-time stewards who need office space. Rather than showing that the recommendation was not supported by the facts in this case, the Union's submissions suggest that the weight of the evidence supported the rationale behind the recommendation.

Third, the Union argues that the practical effect of the reduction in office space will be the Union's inability to conduct its statutory responsibilities as the exclusive representative of IRS employees. Again, the only evidence put forth in support of this assertion is the fact that the Union still has fourteen full-time stewards that need office space and that there is not room for everyone in the remaining 350 square feet of Union office space. The Union here suggests that the recommendation denies it "proper" space to conduct its responsibilities without ever

defining that term. Moreover, the Union offered little empirical data to support this position. Since nothing was offered in support of this assertion, and given the rather meaningless allusion to “proper” office space, the Panel has no ability to assess the veracity of this claim.

Finally, the Union asserts that the Factfinder’s Recommendation is at odds with Panel precedent. The Union’s argument here seems to refer to an idea that the Agency should have been required to carry a heavier burden in order to reduce the benefit of additional Union office space that the Union had been enjoying. And, the Union appears to suggest the Agency has not met this burden. It is not clear, however, since the Union cited no cases or precedent of any type in support.

It is worth noting again that the Union in this most recent response has abandoned its previously claimed dispute over the other four issues in the Factfinder’s Recommendation, and chose not to address these items here even though the Panel gave them the opportunity to do so. On the sole remaining issue of Union office space, the Union does not argue that the Factfinder’s decision failed to resolve the impasse. Rather, the Union argues that it resolves the impasse in an unfavorable manner for the Union. The Union does not argue that the Factfinder’s decision is unsupported by a rationale, rather the Union argues the Factfinder’s rationale is based on non-facts and unsupported testimony, an argument we discuss above and which is not supported by the parties’ submissions. Finally, the Union offers weak argument that the Factfinder’s decision is illegal; rather, the Union argues that the Factfinder’s resolution of the impasse results in the Union not receiving “proper space” to conduct its statutory responsibilities and unsupported claims that the recommendation is at odds with precedent.

Ultimately, the Union provided no support for its arguments as to why the recommendation of the Factfinder should not be adopted in this case and the Panel orders the adoption of the Factfinder’s Recommendation on all remaining issues to resolve this dispute.

ORDER

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Section 7119 of the Statute, the Panel imposes the language as ordered above.

/Edward Hartfield/
Edward Hartfield
FSIP Member

October 20, 2022
Washington, D.C.