



UNITED STATES
FEDERAL SERVICE IMPASSES PANEL

WASHINGTON, DC 20424-0001

March 23, 2004

VIA FACSIMILE TRANSMISSION

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RE: Department of the Air Force
Headquarters Air Force
Materiel Command
Wright-Patterson AFB, Ohio
and Council 214 , AFGE, AFL-
CIO
Case No. 03 FSIP 175

Gentlemen:

Enclosed herewith is the Decision and Order in the above-referenced case.

Sincerely yours,

H. Joseph Schimansky
Executive Director

United States of America
BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MATERIEL
COMMAND
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

and

COUNCIL 214, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 03 FSIP 175

DECISION AND ORDER

The Department of the Air Force, Headquarters Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (the Employer) and Council 214, American Federation of Government Employees, AFL-CIO, (the Union) jointly filed a request for assistance with the Federal Service Impasses Panel (the Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7119.

Following an investigation of the request for assistance concerning the use of smokeless tobacco in the workplace, the Panel determined that the dispute should be resolved by ordering the parties to show cause why it should not impose the same result here as it did in *Department of the Air Force, Dover Air Force Base, Dover AFB, Delaware and Local 1709, American Federation of Government Employees, AFL-CIO*, Case No. 99 FSIP 88 (September 21, 1999), Panel Release No. 424 (*Dover AFB*).^{1/} The

1/ In *Dover AFB*, the Panel ordered the employer to withdraw its proposal to implement the portion of Air Force Instruction (AFI) 40-102 which, among other things, prohibits the use of smokeless tobacco in the workplace. In addressing the employer's rationale in that case, the

parties were advised that following the receipt of their submissions, the Panel would take whatever action it deemed appropriate to resolve the matter, which may include the issuance of a *Decision and Order*. Written statements were made pursuant to this procedure, and the Panel has now considered the entire record.

BACKGROUND

The Employer's mission is to advance, integrate, and use technology to develop, acquire, and sustain weapons systems. The Union represents a nationwide unit of approximately 36,000 employees who typically work as accounting technicians, aircraft mechanics, civil engineers, painters, and in various support staff positions, including recreational services positions, at grades GS-5 through -12 and WG-3 through -10. In addition, there are a few GS-15s and WG-15s through -16s in the bargaining unit.^{2/} The collective bargaining agreement covering these employees is due to expire on March 31, 2005.

ISSUE AT IMPASSE

The parties essentially disagree over whether employees should be permitted to continue to use smokeless tobacco in the workplace.

POSITIONS OF THE PARTIES

1. The Union's Position

The Panel should impose the same result in this case as it

Panel stated that "[t]here is no credible evidence in the record . . . that the use of smokeless tobacco . . . has presented a health hazard to anyone but the users of the product." The Panel also rejected the employer's argument concerning disposal of smokeless tobacco products, stating that "it appears that employees who fail properly to dispose of 'byproducts' are subject to disciplinary action." The instant case essentially involves the implementation of the same portion of AFI 40-120.

2/ Employees are located in Arnold AFB, TN; Brooks AFB, TX; Eglin AFB, FL; Kirtland AFB, NM; Robins AFB, GA; Wright-Patterson AFB, OH; Battle Creek, MI; Edwards AFB, CA; Newark, OH; and Tinker AFB, OK.

did in *Dover AFB*. In this regard, the Employer should be ordered to maintain the *status quo*, i.e., employees should continue to be allowed to use smokeless tobacco in the workplace. Further, the Employer should permit "employees who use these products to police themselves by using containers for tobacco spit and to dispose of these containers in an appropriate manner." The only justification the Employer offers for implementing AFI40-102, which prohibits its use in the workplace, is that it is intended to "protect the health of all workers." To this end, the Employer has provided no evidence that using smokeless tobacco in the workplace harms anyone but the user of the product. As to concerns, if any, about the hazards of dropping chewing tobacco byproducts in airplane engines, the Union is not aware of any such incidents. Even if this concern is a valid one, it is already addressed in other Memoranda of Understanding between the parties regarding the proper handling of tools and the prevention of damage to aircraft and aerospace equipment by foreign objects.

2. The Employer's Position

The Panel should not impose the same result in this case as it did in *Dover AFB*. Rather, it should reconsider its decision as it relates to:

[P]roposals intended to limit the use of smokeless tobacco products consistent with reasonable time, place and manner restrictions vice the presently existing ban on use found in AFI 40-102.

AFI 40-120 clearly "addresses a health hazard to the user." Furthermore, evidence "unequivocally demonstrates" that smokeless tobacco use "causes oral cancer, damages gums, teeth, and oral soft tissue."^{3/} Use of smokeless tobacco "costs the

3/ In support of its argument, the Employer submitted the following four articles: (1) *Smokeless Tobacco as a Possible Risk Factor for Stroke in Men, A Nested Case Control Study*, Kjell Asplund, MD, Salmir Nasic, BSc, Urban Janlert, MD, and Birgitta Stegmayr, PhD, November 2002; (2) *Smokeless Tobacco Use and Cancer of the Upper Respiratory Tract*, by Brad Rodu, DDS and Philip Cole, MD, DrPH, University of Alabama at Birmingham, January 2002; (3) *Smokeless Tobacco: Harm Reduction or Nicotine Overload?* by H. Vainio and E. Weiderpass, *European Journal of Cancer Prevention* 2003; (4) *Health Affects Associated with Smokeless Tobacco: a Systemic Review*, by J.A. Critchley and

United States government and the taxpayer unquantified lost productivity due to absences from the workplace and valuable medical dollars." The portion of AFI 40-120 in question should be adopted because a "government of the people, for the people and by the people oftentimes has to make tough decisions, those in the best interest of the citizenry." The prohibition on smokeless tobacco in the workplace has a "rational nexus to the government's stated purpose and is therefore reasonable and permissible." Finally, the proposal is supported by evidence that other branches of the Armed Forces have successfully implemented provisions similar to the one proposed in this case to restrict the use of smokeless tobacco.

CONCLUSION

Having carefully considered the evidence and arguments presented by the parties on this issue, we conclude that the Employer has not shown that a different result from the one imposed in *Dover AFB* is warranted. The primary justification the Employer provides in support of its proposal appears to be that smokeless tobacco is hazardous to the health of the user, and results in unacceptable and unnecessary costs to society in general.^{4/} Regardless of the merits of that argument, the specific question before the Panel is whether the use of smokeless tobacco, which remains a legally manufactured and purchased product, should be prohibited in the workplace. In this regard, there is no evidence in the record that its use has adversely affected the health of others, or had any demonstrable adverse impact on the accomplishment of the Employer's mission. Accordingly, we shall order the Employer 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 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 the following:

B. Unal, November 2002.

^{4/} Given the breadth of this argument, it is interesting that AFI 40-120 still permits the use of smokeless tobacco in designated tobacco use areas.

The Employer shall withdraw its proposal.

By direction of the Panel.



H. Joseph Schimansky
Executive Director

March 23, 2004
Washington, D.C.