

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
LOCAL 32

Case No. 18 FSIP 036

DECISION AND ORDER

This request for assistance concerning a ground rules agreement for negotiations of the parties' successor collective bargaining agreement (successor CBA) was filed by the United States Office of Personnel Management (Agency or Management) under §7119 of the Federal Service Labor-Management Relations Statute (the Statute). Following investigation of the request for assistance, on June 4, 2018, the Federal Service Impasses Panel (Panel or FSIP) determined that the dispute should be resolved through a Written Submissions procedure with an opportunity for rebuttal statements. The parties timely submitted their arguments and accompanying documents. The record is closed and the Panel issues the following decision in accordance with 5 U.S.C. §7119 and 5 C.F.R. §2471.11 of its regulations.

BACKGROUND

The Agency is an independent agency of the United States Federal government that manages the government's civilian workforce. It provides Federal human resources policy, oversight and support, and tends to healthcare, insurance and retirement benefits and services for Federal government employees. The American Federation of Government Employees, Local 32 (Union) represents nearly 2,000 employees stationed in Washington, D.C.

The parties are governed by a CBA that was reopened in June of 2017. The Union promptly requested negotiations over ground rules. The parties exchanged proposals on at least 3 occasions and participated in 3 face-to-face bilateral negotiation sessions between June 2017 and February 2018. On February 23, 2018, the Agency reached out to the Federal Mediation and Conciliation Services (FMCS) to request mediation services but the Union objected on the grounds that it believed further bargaining was necessary. However, the Union eventually agreed to participate in mediation. The parties received 2 days of mediation assistance on May 11 and May 15 in Case No. 201811350038. The Mediator released the parties on May 15 after concluding "the parties . . . made as much progress as they could during mediation." Accordingly, the Agency filed a request for assistance with the Panel.

ISSUES AT IMPASSE

Of 12 articles in the parties' proposed ground rules, parts of 9 remain in dispute. All total, the parties disagree over nearly 20 proposals.

POSITIONS OF THE PARTIES

I. Article 2-Terms and Conditions

- Publicity-Agency Section 2.2

Agency-Other than with those with direct involvement in negotiations, including negotiators and those they report to, subject-matter experts, and legal counsel, the parties agree not to disseminate information around the substance of bargaining discussions throughout the bargaining process including during mediation and impasse proceedings and agree not to publicize any such information. The parties recognize that they may need to consult with stakeholders including union members and Agency management to the extent that such consultation does not delay bargaining.

Union-Proposes striking Management's proposal.

The Agency argues that its language is necessary to "promote candid and open dialogue" at the bargaining table by minimizing publicity. Management maintains that "unnecessary" publicity could "undermine necessary trust, chill open dialogue, and detrimentally politicize bargaining proceedings." The Agency's language still allows the parties to discuss matters

with their respective stakeholders, so any claim that the proposal infringes speech or representational rights is unfounded.

The Union maintains that the Agency's proposal interferes with 5 U.S.C. §7102(a). This Statute states that, in addition to guaranteeing the right to join labor organizations, employees have the right "to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." The Agency's proposal would prevent the Union from "present[ing]" its views to the Government or "appropriate authorities" and, as such, the proposal chills the Union's rights. Similarly, 5 U.S.C. §7114(a)(1) requires all Federal Unions to "represent[] the interests of all employees" within a unit, something that would be hindered by the Agency's language because it would prevent the Union from speaking to non-member employees.

CONCLUSION

The Panel declines the Agency's proposal. Management maintains that the proposal is necessary to encourage open and robust dialogue but it offers no empirical evidence that bargaining efforts would flail in the absence of such language. Indeed, the parties have been bargaining over ground rules related to the successor CBA for over 1 year and the Agency does not argue that any sort of publicity issue has hindered bargaining efforts. Thus, there is no reason to believe such language is necessary moving forward. Based on this conclusion, it is unnecessary to address the Union's various legal claims.

II. Article 3-Bargaining Representatives/Attendees

- Official Time-Parties' Section 3.3

Agency- Members of the Union's negotiating team who are also bargaining unit employees will be authorized official time for negotiations pursuant to 5 U.S.C. 7131(a) and Article 2 of the CBA, including for attendance at mediation and impasse proceedings, during time the employee would otherwise be in duty status. To ensure team members are available for bargaining sessions, individual managers will consider reasonable requests for adjustments to employee work schedules. Official time will be recorded as "Term Negotiations."

Union- Members of the Union's negotiating team who are also bargaining unit employees will be authorized official time for negotiations pursuant to 5 U.S.C. 7131(a) and Article 2 of the CBA, including but not limited to preparation for negotiations, caucuses, attendance at mediation and, impasse proceedings. Such activities will generally take place when the employee would otherwise be in duty status. To ensure team members are available for bargaining sessions, individual managers will consider reasonable requests for adjustments to employee work schedules. If the Agency cannot or does not make reasonable schedule adjustments due to its workload and mission objectives, then the bargaining session will be rescheduled when the Union employee team members are available to participate on official time and there is no impairment to the Agency's workload and mission. Official time will be recorded as "Term Negotiations." The Agency will provide the Union with three (3) days of official time to prepare in advance of the commencement of bargaining as well as one (1) day to prepare for bargaining in advance of each subsequent week of bargaining.

The Agency agrees that under 5 U.S.C. §7131(a) the Union has the right to official time when it is at the bargaining table. However, "preparation time" for negotiations and time spent in "caucuses" prior to or after bargaining sessions fall under 5 U.S.C. §7131(d) and, therefore, are not statutory entitlements. Management believes the Union wants a "blank check" of official time for these two items because the Union has not placed any limitation on the amount of time it will use for them. The Union's request does not constitute efficient and effective bargaining.¹ The Union has proffered language for Section 7.4 which states:

It is agreed that either team's Chief Negotiator may request a caucus. The parties agree to make a good faith effort to keep the number and length of caucuses to a minimum. If the parties seek to meet amongst themselves at the beginning of the day or at the end of the day on the day of negotiations, it is anticipated that any such caucus will take place prior to 9:30 when bargaining begins and after 4:30 when bargaining concludes and that any such meeting will

¹ The Agency also argues that its proposal is more consistent with the recently issued Executive Order 13837, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time."

not encroach upon bargaining time between 9:30 and 4:30.

According to the Agency, the above language "if the parties seek to meet amongst themselves at the beginning of the day or at the end of the day on the day of negotiations, it is anticipated that any such caucus" means that the Union acknowledges a distinction between caucus time spent during bargaining and caucus time that is really preparation time in disguise. (emphasis added). The Union should not receive official time for such sessions.

The Agency also takes issue with the Union's proposal that requires Management to make "reasonable adjustments" to an employee's schedule in order to allow them to participate in bargaining. This requirement trammels upon supervisory discretion. Nothing in §7131(a) states that an Agency *must* allow the use of official time for bargaining at any time an employee wishes.

Finally, the Agency takes umbrage over the fact that the Union submits a newly revised proposal that had not been previously bargained or even discussed with the Agency. The Union's current request of 3 days of preparation time prior to general bargaining and 1 day of such time for specific bargaining sessions arose for the first time solely in the Union's submission to the Panel dated July 9, 2018. It is inappropriate for the Union to alter its proposal in such a significant substantive fashion. But, in any event, Article 2 of the CBA has several provisions that concern grants of official time. The parties may simply abide by that language.

The Union believes official time for preparation is paramount because the CBA has not been renegotiated since 1999, so there will be much to review and discuss prior to bargaining. Moreover, the Agency has proposed (in the Union's view) a limited time table for bargaining, so the Union will need preparation time prior to bargaining sessions to expedite the bargaining process. Thus, it requests a "modest" amount of preparation time of 3 days prior to general bargaining and 1 day prior to each week of bargaining. As to caucus time, the Union maintains that the FLRA has found in one decision that such time is part of the negotiation process,² thus, it should be treated comparable to guaranteed time under §7131(a). Finally, in terms

² Citing *SSA and AFGE*, 18 FLRA 511, 524 (1985) (FLRA adopted ALJ's conclusion that that "caucus time was part of the negotiation process" in the circumstances of that case).

of scheduling bargaining sessions, the Union's proposal balances Management's work load needs by ensuring "reasonable" requests for official time are granted but also requires bargaining sessions to be rescheduled if members are not available to bargain. The Agency's proposal requires bargaining to proceed if Union members cannot step away from work. The Union maintains such an approach interferes with the statutory right to official time for collective bargaining.

CONCLUSION

The Panel will adopt a modified version of the Agency's proposal, bolded language is new language:

Members of the Union's negotiating team who are also bargaining unit employees will be authorized official time for negotiations pursuant to 5 U.S.C. §7131(a) and Article 2 of the CBA, including for attendance at mediation and impasse proceedings, during time the employee would otherwise be in duty status. **Negotiation team members may spend caucus time during bargaining sessions [after the beginning of the negotiation session and prior to the conclusion of the negotiation session] on official time, consistent with §7131(a), but time spent in such sessions will not otherwise alter or extend the bargaining schedule set forth in this agreement.** To ensure team members are available for bargaining sessions, individual managers will consider reasonable requests for adjustments to employee work schedules. Official time will be recorded as "Term Negotiations."

The above compromise language is an effort to balance the parties' various interests. The Agency wishes to ensure bargaining continues in a timely fashion while also permitting its operations to continue without obstruction. The Union believes it needs sufficient time to discuss matters with its own bargaining team. To meet the foregoing, we will modify the language to clarify that caucus time spent in negotiations is to be counted under official time, however, we also clarify that such time will not otherwise alter the bargaining schedule which will be adopted in the remainder of this decision. Thus, the onus will be on the Union to decide how much time to spend caucusing. Further, pre- and post-caucus official time will not be granted under this proposal. However, as the Agency acknowledges, the existing CBA may address official time for such situations. Finally, the record does not reveal that the

Union offered, or that the parties bargained over language requiring certain days be set aside for preparation time. Thus, it would be inappropriate for the Panel to rule on it now. Finally, we adopt Management's language concerning release from work because it is more efficient in terms of allowing the Agency's mission to continue with minimal disruption.

- Closed Meetings-Agency Section 3.6

Agency- All meetings shall be considered closed except for official members of the negotiating teams.

Union - Union proposes striking Management's proposal.

The Agency argues that its proposal is necessary because the Union has a habit of disrupting bargaining meetings. Specifically, in the past, Union individuals who were not always part of the Union's team would occasionally arrive or leave while bargaining was ongoing. Management found this to be disruptive. Thus, Management wishes to keep bargaining sessions focused and limited to only those members who are on their respective teams. The parties have already agreed to language that excludes observers and guests, so the Agency is not sure why the Union objects to this language.

The Union opposes this language on the grounds that it will prohibit the Union from effectively communicating to its bargaining team members. Thus, it violates the Union's duty of fair representation.

CONCLUSION

The Panel adopts the Agency's proposal. The proposal is intended to ensure that the only individuals who will participate during bargaining are those who are a part of the bargaining team(s). This approach is better suited to keep bargaining focused and productive. It is unclear how limiting bargaining to bargaining team members will prevent the Union from communicating to its members as the Union claims. The proposal says nothing about restricting what is discussed during bargaining. Moreover, we have already struck the Agency's publicity proposal in Section 2.2. Thus, the Union continues to have the ability to speak to its constituents.

III. Facilities

- Bargaining Location - Parties' Section 4.1

Agency- All negotiation sessions will take place at the TRB Building, OPM Headquarters at 1900 E Street, in Washington, DC.

Union- All Union bargaining team members shall have access to the OPM facility to participate in bargaining. In the event the Agency does not permit all AFGE bargaining team members to access the building, then the location for negotiation sessions will alternate between the TRB Building, OPM Headquarters, 1900 E Street, Washington, DC, and at the AFGE District 14 Offices at 80 M Street, SE, Suite 340, Washington, DC, with the first two (2) sessions at one (1) location and the next two (2) sessions at the other location. The first two (2) sessions will take place at OPM Headquarters.

The Agency requests that all bargaining occur at its facilities because the Union already has office space and resources available there. Disrupting bargaining by requiring the parties to move personnel, documents, and resources between locations will not foster expeditious or efficient bargaining. Management also proposes that all bargaining occur at its facilities because one of the Union's personnel (a retired Federal employee) has been banned from the building because of her actions during an incident that lead the Agency's security personnel to deem her a threat. The Union filed an unfair labor practice (ULP) charge alleging that the Agency violated its bargaining rights by barring this individual from the building. However, the FLRA subsequently dismissed the charge after concluding that the Agency had a legitimate basis for excluding her from its premises. Alternating between locations will mean this individual could be physically present at the Union's facilities which might give rise to further incidents. The Agency has no objection, however, to her participation during bargaining by telephone. Indeed, that is how she participated during bargaining after the aforementioned incident.

The Union maintains that its proposal creates greater balance and allows both parties to fully participate in all bargaining. The Union individual in question has a wealth of knowledge and experience with regard to the current CBA and the parties' relationship. If she is not permitted to attend in person then bargaining could be hampered. The Union is also worried that Management could use her banning as precedent to ban other members of the Union's team as the Union does not agree that its ULP charge should have been dismissed (indeed, it is currently pursuing an appeal of that dismissal).

CONCLUSION

We will adopt the Agency's proposal. As noted by the Agency, both parties have office space and resources at the Agency's facilities, thus, holding all bargaining at this facility will promote more efficient bargaining. Moreover, although the Union continues to litigate the exclusion of the Union individual discussed above, there is sufficient evidence in the record to support the Agency's determination that she may pose a security risk. Further, nothing in the Agency's proposal prohibits her participation during negotiations by telephone (or video teleconferencing if it is available).

IV. Initial Proposals

- Illegal existing CBA Provisions- Agency Section 5.5

Agency- Each party may include in its notification under paragraph 5.1 above, other provisions and articles it contends are inconsistent with or contrary to applicable law, rule, or regulation. The parties shall address any such issues as part of negotiations without affecting or counting as one of the number of articles initially proposed for negotiation. When one party raises an issue related to a provision that is inconsistent or contrary to law rule or regulation, the parties will attempt to agree upon language that is compliant with law, rule and regulation and if unsuccessful, will submit the issue for resolution through a negotiability appeal pursuant to section 8.0. Any agreement to address such issues shall not constitute an agreement to negotiate the substance of such articles unless it has been otherwise opened for negotiations pursuant to paragraph 5.1 above.

Union- Union proposes striking Management's proposal.

The Agency argues that its proposal is necessary because much time has passed since the original CBA was enacted in 1999. As such, there may be provisions which are no longer consistent with existing law that will need to be reevaluated. The parties have agreed elsewhere that each side may reopen 6 articles in the CBA; the Agency's proposal would allow "illegal" provisions to be reopened without counting against the foregoing number. This approach allows the parties to address "obsolete" provisions that are no longer good law without depriving the parties the ability to address 6 other provisions.

The Union disputes inclusion of the above language. Article 3, Sections 1 and 2 of the existing CBA already cover this matter. Section 1 states that the parties are "governed by the provisions of existing and future laws and regulations of appropriate authorities." Section 2 states that the parties "shall meet to determine to what extent there is a need to engage in impact and implementation bargaining" when the CBA conflicts with Government-wide rules and regulations that come into effect after the CBA was executed. President Trump's recently issued Executive Order 13836, "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining" (Collective Bargaining Order) also states that existing agreements should not be abrogated. Thus, the Agency's proposal violates this order as well. Finally, the Union takes umbrage with the Agency's language requiring the parties to pursue legal challenges solely in the negotiability appeal forum.

CONCLUSION

The Panel will adopt a slightly modified version of the Agency's proposal for Section 5.5. The Union's primary objection to Management's proposal is that it is allegedly covered by the existing CBA. However, neither of the Union's cited contract provisions deal with bargaining over a new CBA. While the Panel lacks the authority to interpret the parties' CBA, it believes that the Union's proffered contractual language is not colorable enough to serve as a basis for barring the Agency's suggested language.

However, we find that the parties should not be limited solely to the negotiability realm. Instead, to preserve the parties' respective statutory appeal rights, the Panel imposes the following language, with bold being the new portion:

When one party raises an issue related to a provision that is inconsistent or contrary to law rule or regulation, the parties will attempt to agree upon language that is compliant with law, rule and regulation and if unsuccessful, will submit the issue for resolution **in an appropriate forum.**

V. Bargaining Schedule

- General Meeting Schedule- Parties' Section 6.3

Agency- Following the meeting to discuss initial proposals, the parties agree to meet the first week of every month until the parties have discussed each proposal in each Article and made an earnest effort to reach agreement, but no longer than for a period of 6 (six) months. By mutual agreement of the chief negotiators, the parties may decide, in a given month, to meet during a week other than the first week of the month. During that week of negotiations, the parties will follow the schedule provided in section 6.4. The parties also understand that if they agree to alter the schedule in this manner, they will then revert back to meeting the first week of every month.

Union- Following the meeting to discuss initial proposals, the parties agree to meet three (3) times each month, with the first week of the month being the preferred meeting time, until the parties have discussed each proposal in each Article, made an earnest effort to reach agreement, and exhausted all such efforts to no avail.

• Days and Times for Bargaining- Parties' Section 6.4

Agency- For the weeks in which the parties meet, meetings will take place from 9:30 to 4:30 p.m., ET on Tuesdays, Wednesdays, and Thursdays. These schedules may be changed upon mutual agreement by the Chief Negotiators. No negotiations will be held on Federal holidays. The parties are expected to be punctual and remain at the table throughout bargaining.

Union- On the days when the parties meet, meetings will take place from 9:30 a.m. to 4:30 p.m., ET. These schedules may be changed upon mutual agreement by the Chief Negotiators. No negotiations will be held on Federal holidays. The parties are expected to be punctual and remain at the table during bargaining.

The proposals for sections 6.3 and 6.4 are intertwined because they concern the general topic of days of the month and week the parties shall meet to bargain. Management believes that its proposals provide structure to facilitate focused and productive bargaining because they establish set days and times for negotiations. They also provide "predictability necessary for planning, work flow, and availability." Most importantly, Section 6.3 establishes a goal of completing bargaining within a 6-month period. The proposals also allow the parties to alter times and dates by "mutual agreement," so there is indeed a degree of flexibility contrary to the Union's claims. Management vigorously disputes the Union's claims that

establishing a concentrated bargaining schedule somehow equates to a waiver of the Union's right to bargain.

The Union prefers its proposals which, while requiring the parties to meet 3 times a month, do not specify which days they will actually do so. If the Union has a conflict with another matter - say, an arbitration or bargaining over a different collective bargaining agreement - the Agency's rigid language will place the Union in a position of having to decide whether to waive its bargaining rights or forego pursuing other Union rights. Thus, the Union offers a compromise approach that generally acknowledges that bargaining will occur in the first week of each month but allows for scheduling conflicts to take priority. Moreover, the Union believes that the Agency's proposed framework would effectively prohibit the Union from being prepared to bargain and/or constitute a waiver of its right to bargain. Such a framework is inconsistent with the ideas espoused by President Trump's Collective Bargaining Order that require orderly and effective bargaining in good faith.

CONCLUSION

The Panel adopts Management's proposals. The Union's primary concern appears to be scheduling conflicts. Yet this concern ignores the fact that bargaining over this contract is a matter to be scheduled in itself. Moreover, the Union has not alleged that all members of the Union bargaining team would have to be pulled away from bargaining in the event of a different conflict. That is, the Union could continue to participate in bargaining even in the absence of some team members. The Union's claim that it would somehow be waiving its right to bargain, therefore, is unfounded. Finally, the Agency's proposed 6 month window will ensure that the parties bring bargaining to a conclusion in a meaningful fashion.

- Submission of counterproposals- Agency Section 6.6

Agency- The parties agree that for each month of bargaining following the meeting on initial proposals, they will provide to the other party counterproposals at least one week prior to the beginning of the week of negotiations.

Union- Union proposes striking Management's proposal.

The Agency argues that its proposal is "designed to ensure that bargaining will be effective and efficient by requiring that both parties engage in necessary due diligence and that

each is permitted to review the other parties' proposals prior to bargaining." The Union's opposite position would require the parties to "scramble" at the bargaining table and waste time reviewing language instead of discussing it. Further, the Agency's proposal is consistent with Section 5(e) of the Collective Bargaining EO because it requires Agency negotiators to "request the exchange of written proposals" to facilitate resolution of negotiability and other legal issues. Finally, contrary to the Union's claim, this proposal does not stand for the proposition that a failure to submit proposals ahead of time would constitute a waiver of future bargaining. Although Management had such language in prior versions of this proposal, it is no longer seeking such language.

The Union opposes the Agency's language in its entirety. The Union would be agreeable to language stating that the parties would "generally" exchange proposals the week prior to bargaining if Management agreed to provide the Union with official time for preparation purposes. But, because it will not do so, the Agency's proposal would not grant the Union "time to meet, discuss or draft counterproposals" prior to bargaining sessions. The Union also objects to the extent that the Agency's proposal stands for the proposition that a failure to submit proposals prior to a bargaining session constitute a waiver over term bargaining.

CONCLUSION

The Panel adopts the Agency's proposal. The Agency's proposal requiring a prior exchange of proposals is a commonsense method of promoting timely and effective bargaining. The Union argues that this language would be sufficient if it were granted official time to prepare for negotiations. However, the record does not establish that the Union ever offered such language previously.

- Contacting FMCS- Agency Section 6.7; Union Section 6.6

Agency- If after the six months of negotiations, the Parties have made an earnest effort to reach agreement but have not resolved all outstanding issues, the Parties will make a joint request for mediation assistance from the Federal Mediation and Conciliation Service (FMCS) per 9.0 [of the ground rules agreement].

Union- If after the parties have exhausted all efforts to reach agreement, the Parties have not resolved all outstanding issues,

the Parties will make a joint request for mediation assistance from the Federal Mediation and Conciliation Service (FMCS) per 9.0 [of the ground rules agreement].

CONCLUSION

The disputed topic in this proposal concerns when the parties must reach out to FMCS during their bargaining efforts. The sole disagreement is whether the parties must do so after 6 months of negotiations or after the parties "have exhausted all efforts to reach agreement." In section 6.3 discussed above, the Panel has already adopted the Agency's proposed 6-month window for bargaining. Thus, because the Agency's proposal on this topic is consistent with the prior decision, we will adopt the Agency's proposal to resolve this dispute as well.

VI. Bargaining Procedures

- Electronic exchange of initial proposals- Parties' Section 7.1

Agency- All initial proposals as well as proposals that have been provided to the other party at least one week prior to bargaining consistent with section 6.6, will be provided in electronic format and these proposals will also be distributed in hard copy when meeting in-person. All initial and subsequent proposals will be in Microsoft Word track changes format from the existing CBA. In each subsequent counter-proposal, the parties will annotate language from the prior proposal which has been accepted/agreed upon. Such agreed upon language will be shown as clean language without mark-up or annotation in subsequent proposals. Proposals will be identified as either Union or Agency, dated and numbered successively. Unless otherwise agreed, the parties will discuss their proposals in the numerical order as they appear in the current contract. If the parties open the same Article, they will alternate taking up Union and Agency proposals first. Proposals for new Articles of the CBA will be considered last. Once an Article is put on the table for bargaining, it will be the only Article opened for negotiation until agreement is reached, the parties mutually agree to put the Article aside for future consideration or either party determines that the parties have reached impasse on that Article.

Union- All proposals will be provided in electronic format and in hard copy when meeting in-person. All initial and subsequent proposals will be in Microsoft Word track changes format from

the existing CBA. In each subsequent counter-proposal, the parties will annotate language from the prior proposal which has been accepted/agreed upon. Such agreed upon language will be shown as clean language without mark-up or annotation in subsequent proposals. Proposals will be identified as either Union or Agency, dated and numbered successively. Unless otherwise agreed, the parties will discuss their proposals in the numerical order as they appear in the current contract. If the parties open the same Article, they will alternate taking up Union and Agency proposals first. Proposals for new Articles of the CBA will be considered last. Once an Article is put on the table for bargaining, it will be the only Article opened for negotiation until agreement is reached, the parties mutually agree to put the Article aside for future consideration or the parties reach impasse.

CONCLUSION

This issue concerns the exchanging of proposals between the parties. The sole difference is that the Agency's proposal includes language requiring the parties to exchange them "one week prior to bargaining consistent with [Agency] section 6.6." This language was adopted in the discussion above for Management's Section 6.6. Consistent with this adoption, then, the Panel imposes Management's language for this proposal as well.

- **Caucuses- Parties' Section 7.4**

Agency- It is agreed that either team's Chief Negotiator may request a caucus. The parties agree to make a good faith effort to keep the number and length of caucuses to a minimum. If the parties seek to meet amongst themselves at the beginning of the day or at the end of the day on the day of negotiations, it is anticipated that any such meeting will take place prior to 9:30 when bargaining begins and after 4:30 when bargaining concludes and that any such meeting will not encroach upon bargaining time between 9:30 and 4:30.

Union- It is agreed that either team's Chief Negotiator may request a caucus. The parties agree to make a good faith effort to keep the number and length of caucuses to a minimum. If the parties seek to meet amongst themselves at the beginning of the day or at the end of the day on the day of negotiations, it is anticipated that any such caucus will take place prior to 9:30 when bargaining begins and after 4:30 when bargaining concludes

and that any such meeting will not encroach upon bargaining time between 9:30 and 4:30.

The Agency's primary objection, which was also discussed in Section 3.3 above, is that it believes the Union is trying to seek a "blank check" of official time for pre- and post-bargaining strategy sessions. In the third sentence of the proposal, the Union's proposal refers to pre- and post-bargaining meetings as a "caucus." By contrast, the Agency refers to such events as a "meeting." The distinction, according to Management, is that the Union is seeking preparation official time for non-bargaining strategy sessions.

In its rebuttal argument, the Union confusingly stated that it had dropped all language concerning caucuses from Section 7.4. Yet, as the Union's last best offer shows, that is not the case.

CONCLUSION

Consistent with our decision in Section 3.3 above, the Panel adopts Management's language for Section 7.4.

VII. Impasse Procedures

- Requesting FMCS assistance- Parties' Section 9.2

Agency- If all proposals have been thoroughly discussed prior to the six month bargaining period described in 6.3 above, and the parties are unable to reach agreement on all outstanding issues, the parties, individually or jointly, may request the FMCS to provide mediation services for those articles on which the parties were unable to reach agreement.

Union- If all proposals have been thoroughly discussed and the parties are unable to reach agreement on all outstanding issues, the parties, individually or jointly, may request the FMCS to provide mediation services for those articles on which the parties were unable to reach agreement.

CONCLUSION

This section provides clarification as to when the parties must contact FMCS during the course of bargaining efforts. The Agency relies upon the "six month bargaining period" adopted in Section 6.3. The Union prefers that FMCS be contacted only after "the parties are unable to reach agreement on all.

outstanding issues." Consistent with our decision elsewhere concerning the Agency's proposed 6-month window, the Panel adopts Management's language.

- Requesting FSIP assistance- Parties' Section 9.3

Agency- If the parties are unable to resolve all outstanding issues at mediation, per 5 U.S.C. § 7119, either one may seek the assistance of the Federal Service Impasses Panel (FSIP) to request that the FSIP, itself, resolve any issues at impasse. If the request to the FSIP is made individually, the other party will be notified at the time the assistance is sought. The utilization of mediation and the involvement of the FSIP does not, in any respect, preclude the parties from engaging in direct negotiations at any time to attempt to resolve the disputes at issue.

Union- If the parties are unable to resolve all outstanding issues at mediation, the parties agree to utilize interest arbitration and will make a request for an interest arbitrator through FMCS. The selected arbitrator will resolve any and all disputes between the parties.

The Agency argues that under its proposal either party may seek assistance from FSIP, whereas the Union's proposal limits impasse assistance to interest arbitrators. By Federal law, the Panel has broad authority to resolve impasses through a variety of different methods; the Agency argues that the Union's proposal needlessly trammels upon this authority and these methods without justification. Thus, the Agency's proposal should be adopted.

The Union maintains that impasse arbitration is well utilized through Federal sector collective bargaining. As such, this process should be used to resolve any ultimate dispute(s) concerning the parties' successor collective bargaining agreement. Indeed, in the past and in other matters, the Panel has imposed language directing parties to submit their dispute to an external arbitrator.

CONCLUSION

The Panel adopts the Agency's proposal. The Union offers no justification for why this dispute should be directed automatically to an external arbitrator who is not affiliated with the Panel. Were a party to file a request for assistance with the Panel, either party could request external arbitration

and the Panel would take that request under advisement. There is no basis for concluding that the Panel should be locked out in determining how the parties should resolve any matters that remain at impasse.

VIII. Ratification-Parties' Section 10

Agency-10.1 If the Union chooses to ratify the agreement, it will transmit the agreement to its membership for a ratification vote within seven (7) days of the execution of the agreement and that transmission will contain its recommendation that members vote in favor of ratification. A copy of this transmission will be provided to the Agency within seven (7) days of distribution to union membership. Failure to transmit the agreement within seven (7) days to its membership and/or failure to provide a copy of this transmission to the Agency within the required time will constitute an adoption of the agreement in full, and a waiver of the right to renegotiate the agreement notwithstanding the results of a ratification vote.

10.2 Once the agreement is transmitted, the Union will have seven (7) days to hold a ratification vote. Failure to vote within seven (7) days from transmission of the agreement will constitute an adoption of the agreement in full and a waiver of the right to renegotiate the agreement notwithstanding the results of a ratification vote.

10.3 The Union will advise the Agency of the results of the ratification vote, or of its acceptance without ratification, no later than twenty one (21) calendar days following the parties' execution of the new Collective Bargaining Agreement. Failure to notify the agency by this deadline constitutes an adoption of the agreement in full, and a waiver of the right to renegotiate the agreement notwithstanding the results of a ratification vote.

10.4 If the Union advises the Agency that the CBA was not ratified pursuant to 10.2, each party shall notify the other which specific articles it seeks to reopen for negotiation by providing written notice to the other party containing this information no later than seven (7) days of the date that the Union advised the Agency that the CBA was not ratified. Failure to notify the other party by this date of specific articles it seeks to bargain and failure to include the specific articles it seeks to bargain in this notice constitutes a waiver of the right to bargain over any article and the agreement will be considered ratified. The only articles eligible for reopening

are those specific articles that were included in the notice to the other party that the parties seeks to renegotiate and only those articles that were bargained as part of CBA negotiations and no others.

10.5 If either party invokes the right to reopen articles, the parties will resume negotiations within fifteen (15) days of that invocation and the parties will meet at least once weekly for a period of sixty (60) days. If after sixty (60) days, the parties are unable to reach an agreement on any remaining issues, the parties will jointly request assistance from the Federal Service Impasse Panel. On any or all articles over which the parties are able to reach agreement, those agreements will be final and not be subject again to ratification.

. . .

Union-10.1 When there is no further action necessary to finalize the agreement (e.g., the date the last Chief Negotiator signs the signature page or initials the last Article in dispute, or when a decision from the interest arbitrator is considered final and binding on the parties, whichever is sooner), the parties will review and finalize a draft of the CBA. Once the parties agree to the finalized draft, the Union ratification process will commence.

10.2 The Union has thirty (30) days to hold a ratification meeting concerning the CBA and notify the Agency concerning the ratification vote. If the Union fails to provide notification within the thirty (30) day ratification period, the CBA is thereby ratified. If the Union votes against ratification, the parties will then mutually agree on a date to resume negotiations. The Articles identified by the Union as problematic during the ratification process will be subject to negotiations.

The Agency takes the position that there should actually be no provisions for ratification. Nothing in the labor statute authorizes ratification, and certainly the Agency is afforded no similar opportunity. It is the view of Management that ratification "undermine[s] the goal of ensuring that . . . duly authorized representatives [at the bargaining table] are fully empowered to enter into final and binding agreements." Thus, the Agency argues that the Panel should simply adopt language stating that the agreement becomes final and binding once it makes it through the Agency Head review process.

Although Management opposes the inclusion of ratification language, in the event the Panel elects to include a section on it, the Agency's proposed language establishes various benchmarks and deadlines that ensure the process will move smoothly and without delay. So, for example, the Union has 7 days to transmit the executed agreement to its members for a ratification vote and then the members have 7 days to vote on ratification. Should ratification fail, the Agency proposes a strict timeline of 2 months of bargaining with a focus on solely specifically identified articles that either party may reopen. Also key to Management's proposal is a requirement that the Union bargaining team must recommend to its members that they vote *in favor* of ratification. Finally, the Agency has no opposition to including language clarifying that ratification is to occur in conjunction with Agency Head review.

The Union's proposal states that ratification begins after the agreement has been drafted and signed, which offers more guidance than the Agency's proposal which merely states the process begins upon "execution" of the agreement (without offering a definition for execution). Thus, the Union's proposal offers clearer guidance. The proposal provides additional guidance because it establishes that ratification will occur simultaneous to Agency Head review. Further, contrary to Management's claims, the FLRA has held that ratification is a right that flows from the labor statute so long as: (1) the other party has notice that an agreement is subject to ratification; and (2) the Union does not waive its right to ratification.³

The Union opposes the Agency's proposed framework for several reasons. First, the Agency's framework offers no language concerning drafting an agreement for review. Second, it creates a "confusing" multi-step process. Third, the Agency's framework ignores internal Union guidelines for review. Fourth, requiring the Union to recommend that its members accept an agreement runs afoul of the Union's counsel legal and ethical obligations to provide the best advice possible. Fifth, granting the Agency the right to reopen articles failing ratification is unheard of in the Federal sector and should not be adopted. Finally, the numerous references to an "automatic" ratification in the event of missed deadlines are "problematic" and unfair to the members of the bargaining unit.

CONCLUSION

³ Citing *Soc. Sec. Admin. and AFGE, Council 220*, 46 FLRA 1401 (1993).

The Panel will adopt a modified version of the Agency's framework for the ratification process. To begin with, the Panel rejects the Agency's implied claim that ratification is illegal. It provided no authority in support of this argument. Moreover, although FLRA precedent does not explicitly state that ratification is a statutory right, it has long authorized its use.⁴

On the merits, the Agency's proposals provide clearer guidance and benchmarks that will ensure ratification proceeds in a timely fashion. The timeframes will ensure the parties move in an expeditious manner. As to this last point, the Panel is unaware of any authority that would prevent the Agency from re-opening an article following ratification failure, but the onus will be on Management to decide whether to continue to pursue matters or allow them to remain in stasis in order to complete the process with haste.

The Panel, however, strikes the Agency's proposed language that compels the Union to recommend to its members that they vote in favor of ratification. Although the Agency's goal of maximizing the efficiency of negotiation time is laudable, it should not come at the expense of requiring a party to emphasize certain virtues. Indeed, the Agency offers no comparable language for Agency Head review, for example. Thus, this language from Section 10.1 should be stricken: **"and that transmission will contain its recommendation that members vote in favor of ratification."**

To address what appears to be confusion among the parties as to whether ratification is to run concurrent to Agency Head review, the Panel adds a section 10.6 that would state **"Ratification shall run concurrently with Agency Head review."**

IX. Agency Head Review-Parties' Section 11

- Effect of Rejection on Remainder of Language- Parties' Section 11.2.

Agency- When the Agency Head disapproves any provision Agreement under 7114(c) of the Statute, the parties agree to implement all portions of the agreement not disapproved by the Agency.

⁴ See *id.*; see also, e.g., *Dep't of the Air Force and AFGE, Local 2612*, 25 FLRA 579, 592 (1987).

Union- When the Agency Head disapproves any provision under 7114(c) of the Statute, no portion of the CBA will take effect absent mutual agreement of the parties.

The Agency contends that its proposal is more reasonable and that any agreement should become final and binding pending completion of the Agency Head process.

The Union argues that, under well-established FLRA precedent, Agency Head disapproval of one section of a CBA results in disapproval of the entire agreement.⁵ The Union's proposal is consistent with this precedent. Moreover, as a practical matter, it is difficult to say whether matters that would go into effect turn upon matters that have been disapproved on Agency Head review. Thus, it makes most sense to wait until everything has survived the foregoing process before any full agreement goes into effect.

CONCLUSION

The Panel adopts the Agency's proposal. The Union is correct to point out that the FLRA has clarified that an agreement is not effective if disapproved upon Agency Head review. However, the very same decision cited by the Union also states that parties may agree to language stating that other provisions of an agreement do go into effect.⁶ Thus, there is nothing legally improper about the Agency's proposal. The Union also argues that it is difficult to say whether rejected language could impact accepted language or vice versa. However, the Union's argument is equally speculative. The Agency's approach, by contrast, promotes more focused bargaining and an expedited bargaining resolution.

• Effect of Negotiability Petition-Parties' Section 11.3

Agency- If the Union files a petition for review following the Agency Head's disapproval of a contract provision under 5 USC 7114(c), the parties agree to sever the challenged provision from the agreement and the remaining provisions will go into effect.

Union- If the Union files a petition for review following the Agency Head's disapproval of a contract provision under 5 USC

⁵ Citing *IRS and NTEU*, 40 FLRA 985, 990 (1991).

⁶ See *id.*

7114(c) no portion of the CBA will take effect absent mutual agreement of the parties.

CONCLUSION

The proposals for the above sections also concern the other portions of the CBA going into effect following the Agency Head review process. Consistent with the rationale set forth for the above for Section 11.2, we will adopt Management's proposal for Section 11.3 as well.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.



Mark A. Carter
FSIP Chairman

August 3, 2018
Washington, D.C.

