United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE ALEXANDRIA, VIRGINIA and PATENT OFFICE PROFESSIONAL ASSOCIATION	Case No. 06 FSIP 109

DECISION AND ORDER

The Department of Commerce, Patent and Trademark Office, Alexandria, Virginia (Employer or PTO) 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, between it and the Patent Office Professional Association (Union or POPA).

Following an investigation of the request for assistance, the Panel determined that the dispute, which concerns ground rules governing negotiations over a successor collective-bargaining agreement (CBA), should be resolved through an informal conference with Panel Member Joseph C. Whitaker. The parties were informed that if a complete settlement was not reached during the informal conference, Member Whitaker would notify the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the matter. After considering this information, the Panel would take whatever action it deems appropriate, which may include the issuance of a binding decision.

Pursuant to the Panel's procedural determination, the parties participated in an informal conference with Member Whitaker on February 13 and 14, 2007, in the Panel's offices in Washington, D.C. During the course of the meeting, they were able to resolve 19 of 20 issues; however, at the close of the meeting, the parties remained at odds over an Employer proposal that a "severability clause" be included in the ground rules agreement. In accordance

with the Panel's procedural determination, the Employer submitted its final offer and the parties filed written statements of position concerning the issue. The Panel has now considered the entire record.

BACKGROUND

The Employer's mission is to examine applications for, and issue, patents. The bargaining unit consists of approximately 4,500 professional employees, the vast majority of whom are patent examiners. The parties' current CBA was negotiated in the early and mid-1980's, with an effective date of July 1986.[1/]

ISSUE

The parties disagree over whether the Employer's severability proposal involves a mandatory subject of bargaining that should be included in the ground rules agreement.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer essentially proposes that if, as a result of the agency head review process, any provisions in a newly-negotiated CBA are disapproved, no contract provisions would go into effect until a "final decision" on negotiability has been rendered. If the "final decision" is that one or more provisions are nonnegotiable, they would be severed from the remainder of the CBA, and all other CBA provisions would go into effect immediately. The parties then could attempt to modify the nonnegotiable provisions and, if agreement is reached, implement them at that time.

Including a severability clause in the ground rules agreement is necessary to ensure that the parties do not have to endure years of litigation, as they have with the current CBA, over whether various aspects of the agreement are legally in effect. Equally important, it would prevent the Union from re-opening the entire CBA in the event that a previously-agreed

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1/ For a history of the parties' extensive litigation over their current CBA, see the Federal Labor Relations Authority's (FLRA) decision in U.S. Department of Commerce, Patent and Trademark Office, Arlington, Virginia and Patent Office Professional Association, 60 FLRA 869 (April 22, 2005).

upon or Panel-imposed provision, is determined to be illegal during the agency head review process. Thus, it would eliminate a need for the parties to return to "square one" in bargaining, thereby saving the time and expense of re-negotiating, potentially, the entire CBA. Moreover, the Employer's approach represents a fair compromise because implementation of the CBA would be delayed until there is a "final decision" on any negotiability matters, rather than immediately after agency head disapproval of any contract provisions. Furthermore, the Panel has imposed severability provisions before. As to the jurisdictional question raised by the Union, a severability provision is a mandatory subject of bargaining, notwithstanding the Union's refusal to address the issue during mediation. Consequently, the Panel should retain jurisdiction and resolve the matter on the basis of the Employer's proposal.

2. The Union's Position

The Panel should either decline to retain jurisdiction over the Employer's proposal, or order that it be withdrawn. A bargaining impasse over the merits of the issue has not been reached because the Union has not participated in negotiations or mediation over a severability proposal. In addition, there is no FLRA case law establishing that a severability provision is a mandatory subject of bargaining for the parties. To the contrary, in Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, 41 FLRA 795, 802 (1991), the FLRA addressed the effect of an agency head's disapproval of a CBA because portions were asserted to be nonnegotiable. It stated that:

> Where an agency head timely disapproves an agreement under section 7114(c) of the Statute, the agreement does not take effect and is not binding on the parties. . . . Of course, parties may agree to implement all portions of the local agreement not specifically disapproved by the agency head.

In footnote 1 of its decision, the FLRA further stated:

> We do not conclude that where, for instance, the parties become embroiled in litigation over certain subjects in the course of negotiations, they could not agree to sever those subjects and consummate an agreement consisting of those areas that are not in dispute, to be supplemented when their dispute is

> resolved. *That question is not before us here and we do not reach it in this case.* [Emphasis added.]

Absent clear FLRA precedent finding that a proposal substantively identical to the Employer's involves a mandatory subject of bargaining, the Panel may not conclude that the Union is obligated to negotiate over it. In this connection, the Union has filed an unfair labor practice charge against the Employer for pursuing the issue to impasse.

CONCLUSIONS

After carefully considering the parties' positions on this matter, we shall relinquish jurisdiction over the dispute. In our view, the parties have not reached a bargaining impasse over the Employer's proposal because of the underlying question concerning the Union's obligation to bargain. In this regard, the record reveals that the Union consistently has refused to participate in bargaining and mediation over a severability clause because it believes the issue involves a permissive subject that it is legally entitled to elect not to negotiate. While FLRA case law suggests that parties may voluntarily agree to the piecemeal implementation of a CBA, and to resume bargaining only over those provisions that are disapproved on agency head review, the Panel only has authority to consider the merits of a proposal where parties have reached a negotiation impasse.[2/] Accordingly, the underlying threshold question raised by the Union must be resolved in an appropriate forum, and an impasse reached, before the Panel may consider the merits of the Employer's proposal.[3/]

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, the Federal Service Impasses Panel under § 2471.11(a) of its

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2/ It does not appear that jurisdictional questions were raised in previous cases involving ground rules disputes where the Panel has imposed severability clauses.

3/ Our determination to decline to retain jurisdiction is made without prejudice to the right of either party to file another request for assistance once the Union's bargaining obligation has been established and an impasse has been reached over the matter.

regulations hereby declines to retain jurisdiction over the parties' dispute.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

March 27, 2007
Washington, D.C.