In the Matter of

DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, D.C.

and

NATIONAL JOUNT COUNCIL OF FOOD
INSPECTION LOCALS, AFGE, AFL-CIO

Case No. 09 FSIP 37

ARBITRATOR'S OPINION AND DECISION

The National Joint Council of Food Inspection Locals, American Federation of Government Employees (AFGE), AFL-CIO (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, between it and the Department of Agriculture, Food Safety and Inspection Service, Washington, D.C. (Employer or FSIS).

After an investigation of the request for assistance, which arises from bargaining over a one-time change in the pay period during which performance awards are processed, the Panel directed the parties to mediation-arbitration with the undersigned. Accordingly, on January 25, 2010, a telephonic mediation-arbitration proceeding with representatives of the parties was held. During the mediation phase, the Union agreed to withdraw one proposal dealing with administrative leave, but two other issues remained unresolved for Panel Member Edward Hartfield to decide in the role of arbitrator. In reaching this decision, I have considered the entire record in this matter, including the parties' final offers and statements of position.

BACKGROUND

The Employer's mission is to ensure that the nation's supply of meat, poultry, and egg products is safe, wholesome and accurately labeled. FSIS visually inspects animals before and after slaughter, and the handling and packaging of these products. The Union represents approximately 7,500 employees

who work as food inspectors, consumer safety inspectors and food safety inspectors, at grades GS-5 through GS-10. The parties' labor master agreement (LMA) is due to expire in June 2011.

In October 2008, the Union was notified by FSIS that monetary performance awards which previously were processed by Pay Period 25 would now be processed by Pay Period 7. The parties engaged in bargaining over the matter, which included assistance from the Federal Mediation and Conciliation Service. They agreed to numerous provisions in a Memorandum of Agreement (MOA), including the processing of awards by Pay Period 7 in 2009. The MOA with the agreed upon provisions was implemented and awards were processed in Pay Period 7 of 2009.

ISSUES AT IMPASSE

The parties disagree whether: (1) employees should be paid interest or administrative leave for the period between Pay Period 25 in 2008, when they previously would have received awards, and Pay Period 7 in 2009, the new date for receipt of awards; and (2) agreements reached by the parties, or imposed by third parties, concerning any future changes regarding the processing of performance awards should automatically apply retroactively.

POSITIONS OF THE PARTIES

1. Payment of Interest or Administrative Leave

a. The Union's Position

The Union proposes the following wording:

Union Proposal #1

> Pay Interest for the 1st payment for payments received in 2009. Interest paid from the current Pay period 25 until payment is made in Pay Period 7 2009. Any interest will be paid at the same rate as paid for late payment of travel vouchers. At the option of the Agency, the Agency can elect to pay the appropriate employee interest, or provide the employee with 5 hours of Administrative time off.

Preliminarily, the Union asserts that there is no evidence that its proposal is nonnegotiable. It allows employees who receive a performance award a one-time benefit upon initial

implementation of the change in pay periods. In this regard, the change in the pay periods had the effect of penalizing those employees who normally got their awards in Pay Period 25 by requiring them to wait until Pay Period 7. Its implementation also would provide an incentive to the Employer to complete the processing of awards in a timely manner. It further argues that the cost to the Employer in either interest or administrative leave is minimal.

b. The Employer's Position

The Employer does not have a counter offer regarding this issue and requests the Arbitrator to order the Union to withdraw its proposal. It contends that the portion of the proposal granting administrative time directly interferes with its right to manage its work force and to assign work, under section 7106(a)(2)(B) of the Statute. Adoption of the portion of the proposal seeking interest to cover the period between Pay Period 25 in 2008 and Pay Period 7 in 2009 is unwarranted because these awards were paid on time and, thus, there was no principal upon which interest would accrue during that time period.

The Union also has not established how the change in the processing of awards has caused actual harm since awards were processed in accordance with the parties' agreement, and there have been no grievances filed to the contrary. Finally, the determination as to when awards are processed is discretionary and there is no entitlement to pay these awards in Pay Period 25 without a specific agreement to do so.

CONCLUSION

After carefully considering the evidence and arguments presented by the parties, I shall order the Union to withdraw its proposal on Union Proposal 1, Payment of Interest or Administrative Leave.

In my view, the Union has not demonstrated a need to include this provision in the Memorandum of Agreement (MOA) on processing awards. Not only has the Union failed to show that employees were actually harmed by the change; its assertion is contradicted by the fact that employees who earned awards actually received them at the time agreed upon in the parties' MOA.[1/]

1/ During the mediation-arbitration session, the Union did indicate that two employees did not receive their awards by

2. **Automatic Retroactivity Regarding Agreements Reached on Any Future Changes to the Processing of Performance Awards**

a. The Union's Position

The following is proposed by the Union:

Union Proposal #8

> At the election of the Union, to the extent management implements any Performance Award change for Bargaining Unit employees due to an "overriding exigency" management agrees to give retroactive effect to any agreement later reached by or imposed on the parties, to the maximum extent it is feasible to do so, or allowable by law.

The proposal would protect employees from changes that could have an adverse impact should the Employer contemplate more changes in how awards are processed. While the Union recognizes that there could be a mandate requiring the Employer to make further changes, the bargaining unit should not be punished if the Union is unable to deal with the change in a timely manner. It also protects the Union's bargaining rights by enabling it to bargain on the issues as if the change has not occurred.

The Union desires to have the opportunity to bargain over issues retroactively, in the event a third party rules in favor of the Union over a change implemented by the Employer at its own peril. Finally, its proposal provides flexibility in those situations where retroactive effect may not be feasible.

b. The Employer's Position

The Employer proposes the following:

> Should management implement a change to the performance award program for bargaining unit employees, the Agency will meet its bargaining obligation under the Statute and the parties' Labor Management Agreement. At that time, the parties are

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Pay Period 7 in 2009. The Union, however, did admit that the Employer did process the awards immediately upon being notified by the Union of their situation.

free to consider the retroactive effect to any agreement reached by or imposed on the parties.

The proposal provides that if any future changes are proposed, the Employer will meet its statutory bargaining obligations and, at that time, the parties may consider retroactivity. It gives both parties the opportunity to deal with the actual change that might occur in the future. The Union's proposal seeks to penalize the Agency for negotiating and implementing the MOA on processing awards in this case by binding it in some as yet unknown future circumstance. It is unreasonable to require that future agreements be given automatic retroactive effect for unknown, unspecified changes that may or may not be *de minimus*.

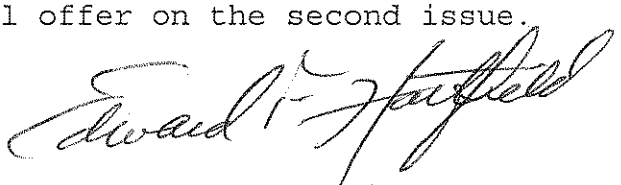
CONCLUSION

Having carefully considered the evidence and arguments presented by the parties, I conclude that the Employer's final offer provides the more reasonable basis for resolving the dispute. It meets both parties' concerns in that it provides flexibility to negotiate further changes while also protecting the Union's statutory right to bargain over these proposed changes.

In my view, the Union's proposal does not take into account situations where proposed changes requiring a retroactive implementation date could have adverse consequences on the bargaining unit it represents. In that regard, I am not persuaded that only the Union should have the right to determine those changes where retroactivity is applicable as it fails to give both parties the flexibility they would need to fulfill their bargaining obligations.

DECISION

The Union shall withdraw Union Proposal #1 and the parties shall adopt the Employer's final offer on the second issue.



Edward F. Hartfield
Arbitrator

February 23, 2010
Troy, Michigan