United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS NORTHWESTERN DIVISION PORTLAND, OREGON and UNITED POWER TRADES ORGANIZATION	Case No. 10 FSIP 102

DECISION AND ORDER

The Department of the Army, U.S. Army Corps of Engineers (COE), Northwestern Division, Portland, Oregon (Employer) filed a request for assistance with the Federal Services 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 United Power Trades Organization (Union or UPTO).

Following investigation of the request for assistance, which arises from the parties' negotiations over a successor collective bargaining agreement (CBA), the Panel determined that the primary reason the parties were unable to make significant progress in reaching an agreement was because of their different approaches concerning the architecture/structure of their successor CBA.[1/] Accordingly, the Panel took the preliminary step of ordering each side to show cause why its preferred architecture/structure should be used when negotiating the successor CBA. After receiving the parties' responses to the *Order to Show Cause* (*OSC*), the Panel found that the Union had demonstrated that its preferred architecture/structure should be used. The Panel then directed the parties to resume negotiations over their successor CBA, with the assistance of a private Factfinder of their choice, using the Union's proposed architecture/structure. If any issues remained

---

1/ In this regard, the Employer proposed to reduce the number of articles in the current CBA approximately by half, while the Union proposed new articles in addition to those already in the current CBA.

unresolved at the conclusion of facilitated bargaining, the Factfinder would submit a written report with recommendations for settling the issues, including supporting rationale,[2/] to the parties and the Panel. In the event that a party did not accept the Factfinder's recommendations for resolution of the issues it would notify the Panel and the other party, in writing, and identify the unresolved provisions. Thereafter, the Panel would take whatever action it deemed appropriate to resolve the issues.

The Factfinder had 17 meetings with the parties, either jointly or separately, during which agreements were reached on 4 articles and the Preamble. Consequently, the Factfinder's Report and Recommendations for Settlement addressed 32 articles. The Employer reported that it could not accept seven items recommended by the Factfinder while the Union reported that it could not accept six of his recommendations.[3/] After due consideration of the parties' responses to the Factfinder's Report and Recommendations for Settlement, the Panel determined that the remaining issues should be resolved through the issuance of another *OSC*. In this regard, the parties were directed to show cause why the Panel should not impose the recommendations for settlement of the Factfinder to resolve the 13 issues the parties identified as unacceptable. As part of this procedure, each side was permitted to submit alternative wording, if any, to replace the Factfinder's recommendations identified as unacceptable in their earlier responses. The parties also were directed to submit statements of position, with supporting evidence and argument, on the 13 issues. After considering the entire record, the Panel would issue a

---

2/ The Factfinder's supporting rationale consists of general comments that his recommendations represent his "sense of what the two parties can live with for a new contract term," and some brief notes next to the text of some of the recommendations.

3/ The Employer identified the Factfinder's recommendations on the following seven sections of the CBA as unacceptable: (1) Article 2.1(b); (2) Article 2.5(a); (3) Article 5.9(c)(2); (4) Article 6.2; (5) Article 22.4(a); (6) Article 25.4; and (7) New Agency Article XX - Impact and Implementation (I&I) Ground Rules. The Union initially identified the Factfinder's recommendations on the following six sections of the CBA as unacceptable: (1) Article 8.8; (2) Article 15.3; (3) Article 16.6; (4) Article 22.3; (5) Article 24.3; and (6) Article 28.3. Three days before the parties' responses to the *OSC* were due, the Union submitted an "Error Correction" wherein it also identified Article 28.2(b), (c), (d), and (e) as unacceptable.

binding decision to resolve the 13 remaining issues. Pursuant to the Panel's determination, both parties submitted: (1) alternative wording concerning the recommendations they could not accept; and (2) statements of position in response to the *OSC*. In reaching this decision, the Panel has now considered the entire record.

BACKGROUND

The Employer operates 20 hydroelectric plants in the northwestern quadrant of the United States; they are located on the Snake, Willamette, and Columbia Rivers. The Employer is also responsible for flood control and other environmental projects. The Union represents approximately 600 bargaining-unit employees who work in trades and crafts at various hydroelectric plants, and at dams and locks within the Northwestern Division. Bargaining-unit employees occupy positions such as laborer, utility worker, rigger, crane operator, welder, painter, carpenter, power plant operator, mechanic, and electrician. Unit employees' wages are set through surveys conducted by the Department of Defense Wage Fixing Authority. The parties' CBA expired on September 19, 2007, but remains in full force and effect until a successor agreement is implemented.

ISSUES AT IMPASSE

The parties essentially disagree over: (1) Article 2.1(b) - Disciplinary and Adverse Actions (whether warnings, counselings, and admonishments should be presented to employees in writing; (2) Article 2.5(a) - Disciplinary and Adverse Actions (whether written reprimands should be treated like any other form of discipline); (3) Article 5.9(c)(2) - Grievance and Arbitration Procedure (whether the management official at the 3rd step of the grievance procedure should be required to meet with the grievant and the Union); (4) Article 6.2 - Hours of Work (whether the Employer should be permitted to change employees' compressed work schedule (CWS) regular days off (RDOs) unilaterally); (5) Article 8.8 - Annual Leave (whether the Employer should be permitted to restrict employees' use of annual leave to avoid overtime); (6) Article 15.3 - Official Time (whether Union representatives should be required to inform their supervisors where they will be using their official time); (7) Article 16.6 - Premium Pay (whether the Union should be permitted to pursue efforts to negotiate over premium pay); (8) Article 22.3 - Safety and Health (whether employees' standard work attire should include long-sleeved shirts); (9) Article 22.4(a) - Safety and Health (the extent to which the Union should be permitted to negotiate over mid-term changes in policies concerning Personal Protective Equipment (PPE); (10) Article 24.3 - Union Officials and Project Representatives (whether the Union should

designate the District Vice President as the point of contact for representational issues that arise at projects where there are no designated Union representatives); (11) Article 25.4 - Voluntary Allotment of Union Membership Dues (the procedures that should be followed to rescind dues withholding); (12) Article 28.2(b), (c), (d), and (e) and Article 28.3 - Effective Date, Duration of the Agreement, and Bargaining Ground Rules (whether the CBA should contain ground rules governing successor CBA negotiations); and (13) New Agency Article XX - Impact and Implementation Ground Rules (whether the CBA should contain ground rules governing negotiations over mid-term changes in conditions of employment).[4/]

1. Article 2.1(b) - Disciplinary and Adverse Actions

a. The Union's Position

The Union proposes that the Panel order the adoption of the Factfinder's recommendation, which states as follows:

> Warnings, counselings or admonishments, on which the Agency wishes to rely in supporting an action based on misconduct, must have been made in writing and shown to the employee. The employee will initial any such entry, signifying only that they have been shown it, not that they agree with it. Entries of this nature will be deleted or obliterated from the file no later than one (1) year after the date of the entry unless reversed earlier through a grievance decision or unless made the basis for additional entries or discipline within that time.

Versions of this provision have been in the parties' CBAs since 1993 without preventing the Agency from "maintaining proper discipline in the workplace," and the only reasons the Employer has given to support its alternative wording are "clarity" and "that's our proposal." Its explanations are insufficient to change the parties' long-standing practice. Moreover, requiring warnings, counselings and admonishments to be presented to an employee in writing if the Agency is going to use them to support disciplinary or adverse actions is fair because "they are a form of minor discipline." Continuation of the provision also would prevent supervisors from using undocumented claims to support harsher

---

4/ In what follows, the position of the party supporting the Factfinder's recommendation is presented first with the exception of Article 25.4 - Voluntary Allotment of Union Membership Dues, where neither party supports his recommendation.

discipline and the creation of "secret lists" that may violate the Privacy Act.

b. The Employer's Position

The Employer opposes the adoption of the Factfinder's recommendation on this issue. Instead, it proposes the following wording:

> Warnings, counseling, or admonishments are informal communications designed to advise the employee of the Agency's concerns regarding an employee's misconduct or work performance. Warnings, counseling, or admonishments can be used to support formal actions based on misconduct or performance.

The Factfinder's recommendation is "overly restrictive of the Agency's ability to discipline" because it limits the type of evidence that can be used to support a disciplinary action. Its alternative wording, on the other hand, "is intended to avoid interfering with the Agency's ability to discipline," and would ensure that management could use verbal warnings, counseling, and admonishments as evidence to support disciplinary and adverse actions. This is consistent with the practice of the Merit Systems Protection Board, which does not restrict what kinds of evidence either party submits upon appeal, requiring only that evidence be material and relevant.

CONCLUSIONS

Preliminarily, as our use of the *OSC* implies, the Panel begins with the presumption that the party objecting to the imposition of the Factfinder's recommendation on a specific issue bears the initial burden of demonstrating why it should not be adopted. The Factfinder in this case spent considerable time with the parties assessing the evidence and arguments presented in support of their respective positions. Accordingly, the Panel will normally defer to the Factfinder's recommendations, particularly where he has provided supporting rationale and the recommended wording otherwise appears to be legal.

Having carefully considered the parties' responses to the *OSC* on this issue, we shall order the adoption of the Factfinder's recommendation. In our view, the Employer has failed to show cause why a provision that has been in the parties' CBAs for almost 20 years should be replaced by its proposed wording. Finally, to the extent the Employer is contending that the recommended wording interferes with management's right to discipline employees, under 5

U.S.C. § 7106(a)(2)(A), the Federal Labor Relations Authority (FLRA) previously has found a substantively identical proposal negotiable.[5/]

2. Article 2.5(a) - Disciplinary and Adverse Actions

a. The Union's Position

The Union accepts the Factfinder's recommended wording that "the Agency shall prepare a proposed notice stating specifically, and in necessary detail, the reason for the disciplinary or adverse action," including where the proposed discipline involves a written reprimand. It is "only fair to the employee" to treat written reprimands like any other form of discipline (*i.e.*, suspensions, reductions in grade and removals) by requiring a two-step process whereby management notifies the employee of its proposed action and the employee has the opportunity to respond. In this regard, there have been "situations where supervisors have issued an unwarranted written reprimand knowing it would take at least a year for a grievance to process and for the letter to be removed." Adoption of the Factfinder's recommendation, therefore, "may often avert" the cost and stress of the grievance process by getting "all the facts out on the table" and establishing the employee's response before a written reprimand is placed into the employee's file.

b. The Employer's Position

The Employer objects to the Factfinder's recommendation and, in the alternative, proposes that "except for written reprimands, the Agency shall prepare a proposed notice stating specifically, and in necessary detail, the reason for the disciplinary or adverse action." Unlike the recommendation, the Employer's proposal would continue the parties' practice "dating back to 1993" of treating written reprimands as a lesser disciplinary action not meriting the two-step process used for more severe forms of discipline. Neither the Factfinder nor the Union has shown that there is a need to change the current practice "which has worked well for over [20] years." In addition, if the Factfinder's recommendation is adopted "unit employees would undergo a disciplinary process different from all other Army employees" and "the federal government more generally." Rather than simplifying and clarifying the disciplinary process, as the Factfinder may have intended, it "imposes a cumbersome process on everyone" that "will not remedy any identified problem or concern." Contrary to the Union's position, like any formal disciplinary action, letters of reprimand can be grieved by employees "which affords them due process." The

---

5/ *See* NTEU and Customs Service, 46 FLRA 696 (1992).

Employer's proposal, on the other hand, "ensures that the burden of the administrative process matches the severity of the punishment."

CONCLUSIONS

After thorough review of the parties' responses to the Factfinder's recommendation that written reprimands be treated like any other form of discipline, we are persuaded that the Employer's alternative wording provides the more reasonable basis for resolving this issue. The Factfinder did not provide specific rationale for changing a provision that has been included in the parties' CBAs since 1993. Although the Union refers to past "situations" as justification for changing the *status quo*, it also provides no specifics. Given these circumstances, we find that the Employer has shown cause as to why the Factfinder's recommendation should not be adopted.

3. Article 5.9(c)(2) - Grievance and Arbitration Procedure

a. The Union's Position

The Factfinder recommended the following wording:

> When the Chief of Program Support Division, Northwestern Agency, receives the written grievance, he/she **will** meet with the aggrieved employee and a Union Official within ten (10) calendar days after receipt of the grievance. The Chief of Program Support Division, Northwestern Agency will give a written decision to the aggrieved employee, the employee's representative, and the Union President within thirty (30) calendar days after receiving the grievance. [Emphasis added.]

The recommendation, which changes the existing contract wording from "may" to "will," is acceptable to the Union because "when deciding a grievance the third step official should at least have a meeting with the grievant." As the Union's bargaining unit spans the States of Oregon, Washington, Idaho and Montana, the chance that the Division Chief of Program Support located in Portland, Oregon "would have ever met the grievant is minimal."

b. The Employer's Position

The Employer opposes the imposition of the Factfinder's recommendation and, instead, proposes that the recommended wording be modified to substitute "may" for "will." The Panel should reject the Factfinder's recommendation because it requires a meeting between the Chief of the Program Support Division and the

aggrieved employee regardless of whether either of them desires one. This "is contrary to what either party wants," as indicated by the Union's final offer to the Factfinder, which states that a meeting would occur "at the request of the grievant." Its adoption also could lead to anomalous outcomes, such as multiple meetings between the same individuals over separate grievances relating to the same issue. Moreover, by the time the grievance reaches the third step, each side's position is normally well known and "a decision can be made without the time and expense of a meeting." In addition, the Factfinder's recommendation could lead to future disputes because it does not clarify how the meeting is to take place, whether by telephone, videoconference, or face-to-face. The Employer interprets the word "meet" broadly, as a more narrow definition mandating only in-person meetings "would be overly burdensome to the Agency and the employees and would not be aligned with current practice." Finally, requiring that the Chief of the Program Support Division meet with the grievant and the Union in every instance within 10 days may "interfere with the Agency's ability to assign work unless it is clear that the Chief may appoint a designee and that the timeframe may depend on other considerations." For these reasons the Employer's proposal, which essentially maintains the practice established in the expired CBA, should be imposed.

CONCLUSIONS

On this issue, we are once again persuaded that the Employer has shown cause as to why its alternative proposal should be imposed to resolve the parties' impasse. In the absence of specific rationale supporting a change from the practice established in the current CBA the Panel in unwilling to defer to the Factfinder's recommendation.

4. Article 6.2 - Hours of Work

a. The Union's Position

The Union agrees with the Factfinder's recommendation that "employees' normally scheduled days off shall remain unchanged unless otherwise agreed-upon by the union or affected employee(s) or as otherwise permitted by current statutory provisions." With the exception of the phrase "unless otherwise agreed-upon by the union or affected employee(s) or as otherwise permitted by current statutory provisions," this wording has been in the parties' CBAs since 1993 without harming the Agency's ability to accomplish its mission. The Factfinder added the phrase to give "the Agency more latitude than the current CBA," and the Union does not oppose its adoption. What it cannot do is agree to any provision that enables

management "to change an employee's schedule at any time for any reason." The parties already have agreed to language in Article 6.3 that allows for temporary changes in work schedules in emergency situations, and the Union has not opposed language that creates alternative schedules when vacancies exist in operator shift rotations. The Employer, however, wants the additional flexibility to "split maintenance crews up and have employees working weekends whenever" it feels it is necessary. It knows it cannot meet its burden of demonstrating that employees' compressed work schedules (CWS) are causing adverse agency impact under the Federal Employees Flexible and Compressed Work Schedules Act (Act), 5 U.S.C. § 6120 *et seq.*, so "it wishes to bypass employee protections in the law and the CBA with language that removes statutory requirements of schedule negotiations."

b. The Employer's Position

The Employer opposes implementation of the Factfinder's recommended wording on this issue. First, the provision "is non-negotiable" because it is contrary to 5 C.F.R. § 610.121 "which allows work schedules to be changed if the agency determines it would be seriously hindered in carrying out its functions or if costs would be substantially increased,"[6/] and 5 C.F.R. § 610.121(b)(1), which states that "[t]he head of an agency shall schedule the work of his or her employees to accomplish the mission of the agency. The head of an agency shall schedule an employee's regularly scheduled administrative workweek so that it corresponds with the employee's actual work requirements." Second, the Factfinder's recommendation is internally inconsistent with his recommendation on the first paragraph of Article 6.2,[7/] to which

---

6/ The Employer cites the FLRA's decision in *IAMAW, Local 726 and Naval Air Rework Facility, North Island, San Diego, CA*, 31 FLRS 158 (1988) to support its legal position.

7/ On the first paragraph of Article 6.2, the Factfinder recommended the following wording:

> The parties recognize that due to the number and varying sizes of projects, it is in their mutual interest to tailor hours of work and schedules to the needs at each project. The parties' interest is in maintaining flexibility to schedule hours of work and tours of duty to satisfy mission needs and allowing employees to plan and control their work schedules so as to minimize disruption and inconvenience to their personal lives.

neither side objects, and other provisions within this article of the CBA. Finally, "the proposed language creates an undue hardship on the Agency." It needs the ability to adjust CWSs "to minimize overtime and be responsive to mission requirements such as increased electric reliability, safety, environmental compliance, capital investments, and seasonal work." In this regard, the Employer estimates potential savings of approximately $7 million per year if the Factfinder's recommended wording were removed from the parties' CBA.

CONCLUSIONS

Upon careful consideration of the parties' responses to the *OSC* on the disputed portion of Article 6.2, we conclude that the Employer has not demonstrated why the Factfinder's recommendation should not be adopted. With respect to the Employer's non-negotiability contention, among other things, the wording it finds unacceptable specifically states that employees' normally scheduled days off shall remain unchanged unless "otherwise permitted by current statutory provisions." Therefore, the recommendation permits the Employer unilaterally to change the RDO of an employee on a CWS if, in fact, its interpretation of the requirements of 5 C.F.R. § 610.121 is correct. For this reason alone, the Employer's non-negotiability contention appears to be without merit. In addition, the FLRA case cited by the Employer to support its position did not involve CWS. This is significant because 5 C.F.R. § 610.121, *Establishment of work schedules*, implements the requirements of 5 U.S.C. § 6101(c) by establishing basic requirements for a workweek consisting of 5 8-hour days. Congress subsequently enacted the Act in 1982 based on a finding that "the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater service to the public."[8/] The Act gives the Panel the role of determining whether agency heads have met their statutory burden when determining not to establish, or to terminate existing, alternative work schedules. In our view, contrary to the Employer's contention, the Act is an exception to the requirements of 5 C.F.R. § 610.121 and 5 U.S.C. § 6101(c). Consequently, adoption of the Employer's approach to this matter would amount to waiving the Union's rights under the Act by permitting management unilaterally to change employees' RDOs, *i.e.*, terminate and reinstate existing CWSs at will. Thus, we conclude that the Employer's appropriate recourse is to comply with the requirements of the Act if it believes that existing CWSs are causing an adverse agency impact through increases in overtime costs, present its evidence to the Union and, if the Union disagrees, file a request

---

8/ 5 U.S.C. § 6120.

for assistance with the Panel. For the foregoing reasons, we shall order the parties to adopt the Factfinder's recommendation to resolve their impasse over Article 6.2.

5. Article 8.8 - Annual Leave

a. The Employer's Position

The Employer favors the adoption of the following wording, recommended by the Factfinder, on Article 8.8:

(a) Five and Six Operator Plants on Eight (8) Hour Shifts

1. In order to ensure the accomplishment of work and the avoidance of overtime at five (5) and six (6) operator plants, the Agency has established the concept of overtime coverage days or hours at those locations, whereby employees may obtain the opportunity to be excused on annual leave even though such excusal will result in the payment of overtime to another employee.

2. At single operator plants with five (5) or less operators of the same grade and 8 hour shifts, each operator will be allowed four (4) overtime coverage days each year for scheduled leave and two (2) additional overtime coverage days for unscheduled leave. Up to two (2) unused overtime coverage days can be carried over to the following year, but in no case may an employee accumulate more than eight (8) overtime coverage days.

3. At single operator plants with six (6) operators of the same grade and 8 hour shifts, each operator will be allowed one (1) overtime coverage day each year for scheduled leave and one (1) additional overtime coverage day for unscheduled leave. Up to two (2) unused overtime coverage days can be carried over to the following year, but in no case may an employee accumulate more than six (6) overtime coverage days.

4. If an operator, who previously was covered under the five (5) operator provisions of this Article, moves to a six (6) operator environment then they shall not be able to accrue any more overtime coverage days if they are over the maximum of six (6) days. If they carry more than six (6) days to the new environment, the operator shall be allowed to maintain this number until they are used and then drop to the maximum of six (6) days.

(b) Five and Six Operator Plants on 12 Hour Shifts

1. At single operator plants with five or less operators of the same grade, each operator will be allowed thirty-six (36) hours of overtime coverage hours each year for annual leave. Up to twenty-four (24) unused overtime coverage hours can be carried over to the following year, but in no case may an employee accumulate more than sixty (60) overtime coverage hours.

2. At single operator plants with six (6) operators of the same grade, each operator will be allowed twenty-four (24) overtime coverage hours each year for annual leave. Up to twenty-four (24) unused overtime coverage hours can be carried over to the following year, but in no case may an employee accumulate more that forty-eight (48) overtime coverage hours.

3. Except in emergencies, operators wishing to use overtime coverage days or hours for unscheduled annual leave must request the leave at least twenty-four (24) hours in advance.

In the event a request for unscheduled annual leave is prompted by an emergency, where the operator has no overtime coverage days, the operator shall be entitled to an advance of the overtime coverage day(s) or hours the operator will earn in the following year.

While the Union identifies all of the recommendation in Article 8.8 as unacceptable, its argument focuses on the ability of operators to use their annual leave. In this regard, however, "there is absolutely nothing" in the recommended wording (which also is in the current CBA) that "precludes operators from taking their leave," nor can the Union point to a single grievance associated with an operator unable to use leave. This is because the Agency's philosophy is to "make every attempt to accommodate employees' requests for leave, particularly when the leave is scheduled in advance." Moreover, the Union "grossly mischaracterizes how and when operators may use their leave" when "in fact the Agency is simply complying with the terms of a negotiated contract" which "maintains a balance between allowing the employee the ability to use their leave and the Agency's ability to effectively schedule that leave in a fiscally responsible way with the least impact on the mission." The Panel, therefore, should reject the Union's approach, which appears to be based on an argument that the Agency should increase the number of positions and "allow employees to take leave whenever and however they would like, regardless of

Agency impact, mission requirements, or the cost to the United States."

b. The Union's Position

The wording recommended by the Factfinder in this section of Article 8 is unacceptable to the Union, which it would replace with the following: "The Agency will not deny an operator's request for annual leave based on having to pay overtime to cover the operator's absence." The Factfinder chose to roll over existing contract language "in spite of the fact that circumstances have changed." His recommendation would continue a practice dating from the 1980's whereby operators, most of whom work 12-hour shifts, can only take annual leave 3 days a year on weekends or at night so that the Employer can save on overtime costs. In 1998, however, the Northwestern Division reached an agreement with the Bonneville Power Administration (BPA) "to direct fund our operation and maintenance activities with revenues generated by selling the electrical power produced at our dams." The agreement resulted in the addition of over a quarter billion dollars annually to the Employer's coffers that was used to hire "countless positions in the District Offices and to staff each individual dam with large numbers of engineers, administrative personnel and layers of supervisors" but no increase in the number of operators at the dams. Given the increase in funding, the restrictions the Union previously agreed to "are no longer needed and the Agency has the option of adding more positions if they want so an operator taking a day off won't cause overtime." The adoption of the Union's proposal also would be consistent with the practices at BPA, which "doesn't restrict the leave usage of [its] own operating personnel," and whose employees' wages are surveyed in calculating the wages of the Northwestern Division's operators.

CONCLUSIONS

Having carefully considered the Union's response to the *OSC* on this issue, we conclude that it has not established that the *status quo* should be rejected in favor of its proposed alternative wording. Its argument is based on the assumption that the Employer has denied operators' requests for annual leave in order to avoid the payment of overtime but there is no evidence in the record to support the claim. Accordingly, we shall order the adoption of the Factfinder's recommendation to resolve the impasse.

6. Article 15.3 - Official Time

a. The Employer's Position

The Employer agrees with the Factfinder's recommendation that, "with prior approval of a Union Officer's Supervisor and/or Project Manager, the Union Officer may use official time to perform his/her representational duties at locations other than at his/her assigned duty station; such as a home/union office." It believes, however, that he unintentionally used the word "officer" rather than "official," which would preclude project representatives from being covered under the provision. Therefore, the Employer recommends that the Panel incorporate this edit into the CBA. On the merits of the Factfinder's recommendation, it is "disingenuous and patently incorrect" for the Union to suggest that, currently, its representatives merely notify the Agency that they intend to use official time and "do not have to obtain approval from the Agency." Moreover, the Union's implication that the Agency is monitoring the Union's activity "is false." Army regulations specifically permit only system and network administrators to access employees' email accounts and prohibit the monitoring of Union representatives' computers if they are "conducting Union business on approved official time." The Union's concerns about its inability to attend arbitration hearings if the Factfinder's recommendation is adopted also are "void of any facts to support this conclusion." Furthermore, the Employer objects to the Union's proposed wording permitting Union officials to "work from wherever they like." Supervisory decisions to approve off-project work are "made on a case-by-case basis given that many of the Union officials work limited official hours and their jobs are such that mission needs mandate that they are available." In summary, the Factfinder's recommendation should be adopted because it "meets the needs of the parties and will further the public interest."

b. The Union's Position

Instead of the Factfinder's recommendation, the Union would substitute the following wording: "Union Officials may use official time at the location that they determine will be best suited to accomplish their representational duties. If that is off Project they will tell their supervisor where they are."[9/] Contrary to the Factfinder's conclusion, his recommendation does not "capture the

---

9/ The Union also requests in its response to the *OSC*, apparently as an alternative to the wording it initially recommended, that the Factfinder's recommendation be changed from "with prior approval of" to "with prior notice to."

parties' current practice." Currently, Union officers "do not have to obtain approval from the Agency; rather they give notice to the Agency." Otherwise, the Agency could "control the Union's location of official time usage to the point where the official time cannot be used by the Union to represent the bargaining unit employees at all." The Agency also could refuse to grant the Union President approval to use his official time to attend arbitration and thereby "control who could represent the Union at a hearing." The adoption of the Union's alternative wording, on the other hand, would continue the parties' current practice whereby Union officers do not have to obtain approval from the Agency to use their official time wherever they please. It would also result in less litigation between the parties over this issue, permit Union officers to avoid the use of Agency office equipment, which is monitored by management, and guarantee that Union officers can use confidential internet connections and phone and fax services provided by the Union at no cost to the Agency.

CONCLUSIONS

Unlike most of the other issues before the Panel in this case, the Factfinder provided specific rationale to support his recommendation on Article 15.3. In this regard, he stated the following:

> The Union proposed and the parties negotiated over the issue of the Union's use of official time at "remote" sites. The Union presented substantial evidence that Union officers have often in the past been allowed to perform their representational duties at their home/union offices with Management approval. The full extent of the "practice" was not demonstrated, but documents clearly demonstrate its existence. I can only presume that the practice was done with prior approval of Management, since such approval is contractually necessary for official time use. My proposed language (Article 15.3) is intended to allow the parties to continue to employ a practice that facilitates the efficient and productive use of Official Time.

In our view, based on evidence provided *by the Union* to the Factfinder that his recommended wording would continue the *status quo*, the Union has failed to show cause why it should not be imposed to resolve the parties' impasse over this issue. In addition, however, we are persuaded that the wording should be modified by substituting the term "Officer/Representative" for "Union Officer." In this connection, we note both the Employer's contention that the Factfinder intended the provision to cover all

Union officials, not just Union officers, and the Union's use of the more inclusive term "Officer" in its proposed alternative. The modification is consistent with wording found elsewhere in Article 15, and should clear up any ambiguity concerning the scope of the provision's application.

7. Article 16.6 - Premium Pay

a. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the following wording should be included in the parties' CBA: "The parties recognize that, under existing law, they cannot create or rescind an entitlement to basic pay or premium pay. However, where such an entitlement exists, it will be administered in accordance with applicable law and regulations." This provision has been in the parties' CBAs since 2001, and is consistent with numerous Comptroller General and FLRA decisions involving the parties.

b. The Union's Position

The Union urges the Panel to delete the Factfinder's recommended wording from the parties' CBA. When it agreed to the provision in the current CBA, it believed that the first sentence was accurate. The Union "now know[s] it is not." In this regard, among other things, it has "bargaining notes that show that [the] bargaining unit bargained on Premium Pay prior to 1972." Consistent with the requirements of Section 9(b) of Public Law 92-392 and Section 704 of the Civil Service Reform Act of 1978, the Union "is entitled to negotiate on any matters that our bargaining unit negotiated prior to 1972." Therefore, the adoption of the Factfinder's recommendation would deny the Union its right to negotiate with the Agency over premium pay. Although it did not persuade the Factfinder to recommend that the parties adopt the Union's proposal for premium pay, "the current language is inaccurate," the Union "cannot be compelled to agree to inaccurate statements about the law," and "it takes nothing away from the law or the relationship if there is nothing in the CBA addressing this point."

CONCLUSIONS

Upon careful review of the parties' responses to the *OSC* with respect to Article 16.6, we shall order the adoption of the Factfinder's recommendation to resolve the dispute. In our view, the record confirms that the issue of whether the Union is entitled to negotiate over premium pay appears to be a well settled matter of law, and the Union has failed to provide a sufficient basis for

overturning a contract provision that has been in the parties' CBA since 2001.

8. Article 22.3 - Safety and Health

a. The Employer's Position

The Employer agrees with the Factfinder that the following wording should be included in the parties' CBA:

> WORK ATTIRE. Employees shall wear clothing and apparel suitable for weather and work conditions, and that prevent exposure to known or expected hazards. Standard work attire will include full length pants and shirts with full length sleeves (as required by OSHA or Agency [HQ] standards). Standard work attire, including undergarments, shall be made from non-melting or untreated natural fiber.

The need for standard work attire that includes a long-sleeved shirt "is based on the unique requirements and conditions of these employees' work." Among other things, unit employees are exposed to the sun, pesticides, epoxy products, solvents, chemicals, and dust in the course of their work, and a requirement that they wear long-sleeved shirts is warranted to reduce allergic reactions, accidents from cuts, and electrical accidents. While it is true that the COE Safety Manual states that short-sleeved shirts are a minimum requirement, this should not necessarily be the standard. The Safety Manual applies to COE employees "worldwide from Afghanistan to South America to sub-Arctic Alaska to Hawaii." For the conditions that these unit employees and their supervisors work in, "the Agency has determined that the standard need be long-sleeved shirts and clothing made of natural fibers, items that everyone has in their closet." Contrary to the Union's allegations, the Agency is fully committed to purchasing PPE for its employees when appropriate, but long-sleeved shirts are considered standard work attire whose purchase is not specifically authorized by law. The Union's claim that long-sleeved shirts are "inherently unsafe," which it supported by showing the Factfinder a picture of a man accidentally killed in a lathe accident, also is inaccurate. The Occupational Safety and Health Administration (OSHA) concluded that the accident was caused by improper operation of the machinery, and not because he wore a long-sleeved shirt. Given that "he determined that long-sleeved shirts are indeed appropriate," the Factfinder was not persuaded by the photograph, and "the substance of his proposed language should stand."

b. The Union's Position

Instead of what the Factfinder recommended, the Union proposes the following wording: "The basic work clothing requirement is short sleeve shirt, long pants (excessively long or baggy pants are prohibited) and leather work shoes or boots. Any other clothing requirements by the Agency will be considered Personal Protective Equipment." There is "nothing in the current CBA on this issue." The Factfinder's recommendation "is inaccurate and confusing" because neither OSHA nor the Safety Manual require "standard work attire" or full length sleeves. In fact, the Safety Manual establishes the short sleeve shirt as the minimum clothing requirement for COE employees. Long sleeves, on the other hand, "can be a significant safety hazard for employees working with or around rotating machinery," which many unit employees must operate on a routine basis. As written, the Factfinder's recommendation will be interpreted to require "that long sleeves must be worn by all bargaining unit employees at all times," something that is "very very dangerous." The reason the Employer wants long sleeves to be the minimum clothing requirement is because it "doesn't want to purchase arc flash clothing for our bargaining unit employees to wear when and where it is needed." If the Panel is unwilling to adopt its proposed wording, the Union requests that the term "full length sleeves" be changed to "short sleeves," or that the passage be dropped entirely so the Safety Manual would control the matter. Either alternative would permit the wearing of protective long sleeves when needed but would "not mandate them at all times."

CONCLUSIONS

Having carefully considered this matter in light of the parties' responses to the *OSC*, we find it necessary to modify the Factfinder's recommendation. In agreement with the Union, we note that neither OSHA regulations nor COE's Safety Manual require that employees wear long-sleeved shirts as standard work attire, yet that is what the recommended wording suggests. Without specific rationale supporting the recommendation it is unclear what the Factfinder intended. Regardless, we are not persuaded that the Employer has demonstrated the need for its determination that unit employees in the Northwestern Division be required at all times to wear long-sleeved shirts as part of standard work attire. Consistent with this conclusion, and in an effort to maintain those portions of the Factfinder's recommendation to which the Union does not object, we shall modify its second sentence to state that "standard work attire will include full length pants and shirts with full length sleeves to the extent required by OSHA or Agency [HQ] standards."

9. Article 22.4(a) - Safety and Health

a. The Union's Position

The Union agrees with the Factfinder's recommendation on this issue, which states as follows:

> *PERSONAL PROTECTIVE EQUIPMENT AND SAFETY EYEWEAR AND FOOTWEAR.* a. Employees who are required by the Agency to wear Personal Protective Equipment shall be provided with those items and necessary replacements, as prescribed in appropriate regulations such as EM 385-1-1 or its current equivalent and Agency policies, as may be agreed by the parties.

Its adoption would ensure that the Union's bargaining rights over changes in Agency policies regarding PPE are not waived. Its right to bargain over the topic "is well established," while the Employer's proposal is "beyond the duty of the Union to bargain." In essence, management is demanding to be able to unilaterally make changes regarding the Agency providing PPE without having to bargain over "any past practice changes or changes to the policies or regulations."

b. The Employer's Position

The Factfinder's recommendation is unacceptable to the Employer, which proposes the adoption of the following wording:

> *PERSONAL PROTECTIVE EQUIPMENT AND SAFETY EYEWEAR AND FOOTWEAR.* a. Employees who are required by the Agency to wear Personal Protective Equipment shall be provided with those items and necessary replacements, as prescribed in appropriate regulations such as EM 385-1-1, its current equivalent, or Agency policies.

The last phrase of the Factfinder's recommendation, "as may be agreed by the parties," is "ambiguous and could be interpreted as requiring the parties to agree to the policies themselves, rather than merely bargaining the impact and implementation of a particular policy on the [PPE] to be provided." Its alternative wording is intended to prevent the Union from negotiating over the substance of Agency policies regarding PPE while preserving its right to negotiate the impact and implementation of changes to those policies, which are most often Government-wide safety policies that are outside the discretion of the Agency. The Employer also believes that this is what the Factfinder intended.

CONCLUSIONS

In our view, the Factfinder's recommendation with respect to Article 22.4(a) should be clarified to ensure that the Union's right to negotiate over changes to Agency policies concerning PPE are not waived. We are not persuaded, however, that the wording the Employer proposes is suitable because it does not address the Union's bargaining rights at all. Rather than speculate on whether the Union would be entitled to negotiate over the substance or only the impact and implementation of changes in the Agency's PPE policies, we shall order a modified version of the Factfinder's recommendation that includes the following wording: "In the event that the Agency's policies concerning Personal Protective Equipment change during the term of this collective bargaining agreement, the Union will have the right to negotiate such changes to the extent permitted under the Statute."

10. Article 24.3 - Union Officials and Project Representatives

a. The Employer's Position

The Panel should adopt the Factfinder's recommendation to resolve the parties' dispute over this issue, which reads as follows:

> If there is no Project Representative or Alternate at a project, at any given time, the District Vice President, or someone designated by the District Vice President, may serve in the capacity of the Project Representative. All contacts shall be initiated by the project without a Project Representative to the District Vice President unless the Union believes that the situation existing at the project has implications for the bargaining unit outside the individual project.

The identical wording is in the current CBA, and retaining it would benefit the parties by identifying who management should contact at project sites without a Union representative, a benefit that the Factfinder recognized when he recommended that the Employer include it in its last best offer. The Panel also should order its adoption because identifying roles "impacts the contract as a whole," e.g., "hours of training and official time are calculated, in part, based on the functions of different officials." While the Union's alternative proposal indicates "a willingness to negotiate Union representation," it is "problematic" because it does not include grievances among the list of representational duties for which the Vice President can be "point of contact." It also does not indicate that the point of contact would serve in the capacity

of the Project Representative. This is important, as the Project Representative "is the Union official at the lowest level with the greatest capacity to solve problems early on."

b. The Union's Position

The Factfinder's recommendation involves a subject of bargaining permissive to the Union over which it has chosen not to negotiate. As an alternative, the Panel should adopt the following wording:

> The District Vice President (or someone designated by the Union) will be the point of contact for a Project without a Representative or Alternate in regards to Weingarten meetings, formal meetings, I&I bargaining and other such Agency initiated contacts. This Article in no way restricts the Union's right to designate anyone to perform any representational task at any level nor to receive official time in accordance with Article 16 to accomplish Union assigned representational responsibilities.

The Factfinder apparently made his recommendation because the identical wording "was in the previous CBA." Nevertheless, it is beyond the Union's duty to bargain and "must be removed" from the CBA. In addition, by submitting the wording as part of its last best offer to the Factfinder, the Agency violated a previous unfair labor practice (ULP) settlement agreement with the San Francisco FLRA Regional Director and the Union's rights under the Statute.

CONCLUSIONS

After thorough consideration of the parties' responses to the *OSC* on this issue, we conclude that the Union has shown cause as to why the Factfinder's recommendation should not be adopted. In this regard, it is well settled that a union is entitled to designate its representatives and that third parties are without authority to impose terms where a union is unwilling to negotiate over the matter.[10/] Although the Union's alternative wording only partially meets the Employer's interest in having the Union designate a representative at project sites without one, given these

10/ American Federation of Government Employees, AFL-CIO and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 4 FLRA 272 (1980).

circumstances, we shall order its adoption to resolve the parties' dispute.

11. Article 25.4 - Voluntary Allotment of Union Membership Dues

a. The Union's Position

The Factfinder recommended that the following wording be included in the parties' CBA:

> Participating employees may voluntarily revoke their allotments for Union membership dues after one (1) full year of such deductions by submitting form SF1188, which can be obtained from the Project Administration Officer and then must be submitted to the Division Labor Relations Officer through the Project Administrative Officer after completion by the employee.
>
> The effective date of the revocation will be the first complete pay period from which dues are withheld after January 1 of each year. The District Labor Relations Specialist will notify the Union Treasurer and District Payroll Office of the receipt of SF1188. A revocation must be received in the Project Administrative Office prior to the beginning of the earliest period for which it can be effective.

His recommendation should not be imposed by the Panel because it is contrary to the requirements of 5 U.S.C. § 7115(a). In this regard, by allowing Union members to cancel dues allotments only on a single fixed calendar date, it creates a situation in which new members can be compelled to remain in a dues-paying status for a period exceeding 1 year. The FLRA found substantively identical wording to be inconsistent with 5 U.S.C. § 7115(a) and, hence, unenforceable, in a previous case involving the same parties.[11/] The Employer's proposed language, however, also violates "[FLRA] case law" because it allows employees to revoke dues allotments "at any

---

11/ In UPTO and U.S. Department of the Army, U.S. Army Corps of Engineers, 62 FLRA 493 (2008), the FLRA denied the Union's exceptions to the award of a grievance arbitrator who found that Article 26.4 of the parties' CBA was unenforceable because it conflicted with FLRA precedent interpreting 5 U.S.C. § 7115(a) as prohibiting dues withholding provisions from requiring employees to pay union dues for more than 1 year.

time after the first year."[12/] Instead of the wording recommended by the Factfinder or the Employer, the Panel should order the adoption of the following wording on this issue:

> Participating employees may voluntarily revoke their allotments for Union membership dues after one (1) full year of such allotments, provided the employee submits the form SF 1188 to the Project Administrative Office during the window seven (7) days before the anniversary of the date that employee's initial allotments were started. Following the first year of such allotments, the employee may voluntarily revoke their allotments for Union membership dues effective on the first pay period in the next January provided the employee submits the SF 1188 during an open season window of November 15 through December 15. Thereafter, such revocation will be effective the first full pay period in the following January provided the SF 1188 form is received during an open season window of November 15 through December 15. Forms received by the Agency from employees outside the open season window will be returned to the employee without any action. The SF 1188 to revoke dues can be obtained from the Project Administrative Officer and must be submitted to the Project Administrative Office, which will forward it to the District Labor Relations Specialist or designee. A copy will be sent to the Union Treasurer.

This is the same wording "as the Union's last best proposal and is the only language on the table that does not violate the law."

b. The Employer's Position

The Employer agrees with the Union that the Factfinder's recommendation should not be imposed by the Panel because it is inconsistent with the requirements of 5 U.S.C. § 7115(a). In the alternative, the Panel should impose the following wording to resolve the parties' impasse:

12/ In support, the Union cites Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 19 FLRA 586 (1985) and U.S. Army, U.S. Materiel Development and Readiness Command, Warren, Michigan, 7 FLRA 194 (1981) (Development and Readiness Command), both of which state that "authorized dues allotments *may be revoked only at intervals of 1 year.*" [Emphasis added.]

> Participating employees may voluntarily revoke their allotments for Union membership dues after one (1) full year of such deductions by submitting form SF1188, which can be obtained from the Project Administration Officer and then must be submitted to the Division Labor Relations Officer through the Project Administrative Officer after completion by the employee. The effective date of the revocation will be the first day of the first pay period following receipt of the properly completed SF1188 in the District Payroll Office. For an employee who has been on dues allotment for less than one year, the revocation is effective the first day of the first pay period following the first anniversary of the initiation of the dues allotment.

Its approach to the revocation of dues withholding "resolves all legal issues and provides language that is clear and manageable." Moreover, the Panel should not consider the Union's alternative wording because its objection to the Factfinder's recommendation is untimely under the procedures the Panel set forth to resolve the parties' impasse. In the event the Panel "chooses to consider the substance of the late submission," however, the Union's alternative wording should not be adopted because it is complicated and provides "gotcha" periods for new and existing members that would be difficult to manage for employees and the Agency.

CONCLUSIONS

Upon careful review of the parties' responses to the *OSC* on Article 25.4, we conclude that both the Factfinder's recommendation and the Employer's proposed alternative arguably are inconsistent with FLRA decisions interpreting 5 U.S.C. § 7115(a). With respect to the former, the parties agree that the Factfinder's recommendation is inconsistent with a previous FLRA decision involving virtually the same wording because it could require Union members completing their first year who wish to revoke their dues to continue to make payments to the Union for more than 1 year. As the Union points out, however, the Employer's proposal also appears to conflict with previous FLRA decisions which unequivocally state that authorized dues allotments may be revoked only at intervals of 1 year. While the Employer correctly notes that the Union's rejection of the Factfinder's recommendation was not submitted in accordance with the time frames established in the Panel's procedural determination letter, we are persuaded that, on balance, it is more important to ensure that the wording imposed to resolve this issue is legally sufficient than to sustain the Employer's

technical objection.[13] In our view, on the merits of this issue, the Union's alternative wording provides a reasonable basis for settling the dispute. In this regard, it would ensure the "greater measure of union security, thereby fostering stability in labor-management relations" that the FLRA concluded Congress intended when it enacted 5 U.S.C. § 7115(a),[14] by providing the Union certainty as to the amount of money it will receive during the next calendar year from members who have been paying dues for more than 1 year. Accordingly, we shall order its adoption.

12. Article 28.2(b), (c), (d), and (e) and Article 28.3 - Effective Date, Duration of the Agreement, and Bargaining Ground Rules

a. The Employer's Position

The Panel should impose the Factfinder's recommendation regarding these sections of Article 28. In this regard, the Factfinder recommended the following wording in Article 28.2(b), (c), (d), and (e):

> b. The parties agree that two weeks (14 calendar days after post mark) after notice from the notifying party, the notifying party shall submit proposals representing the notifying party's intended revisions to the existing agreement.
>
> c. The party receiving notice must respond with their proposals to revise the existing agreement within forty-five (45) days from post mark date of notifying party's proposals.
>
> d. No new subject matter proposals will be introduced after the initial exchange, unless mutually agreed.
>
> e. Negotiations shall commence no later than 45 days from the postmarked date the party receiving notice responds with their proposals or no later than 120

13/ We note that, even if the Union's objection to the Factfinder's recommendation were rejected as untimely, it still would have been permitted to question the legality of the Employer's alternative wording in its response to the *OSC*. In such circumstances, the Panel naturally would have examined the entire record, including the Union's last offer to the Factfinder, in deciding how the issue should be resolved.

14/ Development and Readiness Command, 7 FLRA 194 (1981) at 199.

days from the date the notice of intent to renegotiate was received, whichever is earlier.

On Article 28.3, "CONTRACT BARGAINING GROUND RULES," the Factfinder recommended the following:

> The parties agree that the following ground rules will be used to negotiate the successor agreements:
>
> a. Negotiations between the Agency and UPTO will be held in Portland, Oregon at a place agreed upon by the Parties. If there is any cost incurred for the meeting facilities, such expense shall be borne equally by the Parties.
>
> b. The Agency agrees to adjust the work schedule for each UPTO negotiation team member and provide official time for travel on the Sunday immediately preceding the negotiations in the amount of time required to reach the negotiation location in Portland. During the week of negotiations the UPTO team members will be on a 5/8 work schedule and face to face negotiations will be conducted from 0800 to 1200 and from 1300 to 1700 Monday through Thursday. On Friday, the UPTO team members will be provided 8 hours of official time for preparation and/or travel time. The 80-hour pay period for the UPTO negotiation team members will be adjusted by the Agency to accommodate this schedule to ensure that the UPTO team members are paid a total of at least 80 hours regular time for the appropriate pay period.
>
> c. The members of the UPTO negotiating team who are at least Northwestern Division employees and are present in the negotiating session shall be on official time during the negotiation sessions. The number of UPTO negotiating team members on official time will not exceed the number of individuals designated as representing the Agency in negotiation sessions.
>
> d. Subject matter specialists may be invited by either one of the Parties to clarify issues within their field of expertise. Any payment for time and/or travel and per diem will be the obligation of the inviting party.

e. UPTO alternates, if Northwestern Division employees, will be entitled to official time only for the time they replace an UPTO negotiator and/or for the time spent in preparation, pursuant to this agreement. Travel and per diem for alternate UPTO negotiators will be the same as the entitlement of the negotiator they replace.

f. A list of the initial negotiators and alternates for UPTO and the Agency will be furnished to the other party not less than 30 days prior to the first negotiation session.

g. The Union shall be entitled to utilize a bank of 140 hours of official time in order to prepare for the negotiations, prior to the commencement of the negotiations. No official time allocated under these ground rules shall be charged against the official time bank provided in Article 15.1. In connection with preparation for negotiations, the Agency agrees to reimburse up to three UPTO representatives for their reasonable travel and per diem expenses in accordance with governing travel regulations for one two-day round trip to Spokane, Washington or another location mutually agreed upon.

h. Upon completion of negotiations, including all impasse procedures, UPTO ratification vote, and approval of the Agreement by the designee of higher headquarters as provided in 5 U.S.C. § 7114(c) or expiration of the 30-day Agency review period, the agreement will become effective.

i. As to negotiability determinations which have been appealed, the Parties will meet again to continue negotiations within 30 days after a ruling from the FLRA. Any official time and travel reimbursement still available to the Union (i.e., not previously used) under these ground rules may be used for those continuing negotiations.

j. The Agency shall ensure that a complete copy of the collective bargaining agreement (less negotiability issues) is ready for the signatures of the Division Commander and the UPTO President within 5 working days from the completion of the Union ratification vote, if the contract is ratified. The Agency's

30-day review period under 5 U.S.C. § 7114(c) begins to run on the date the Division Commander signs the agreement.

k. Each of the Parties shall designate a chief negotiator with full authority to bind their party during negotiations. The Parties retain their right to designate representatives of their own choosing.

l. Each party shall be permitted to have one silent observer in the negotiating sessions without mutual consent of the Parties. Silent observers, however, may be dismissed by either party at their discretion. All individuals present shall be considered either representatives of UPTO or representatives of the Agency.

m. All caucuses occurring during the time allocated for negotiations shall entitle bargaining unit employees present to remain on official time if otherwise in a duty status. Caucuses may be called at any time by any Party, but shall be of the shortest duration possible.

n. When the Parties reach an agreement as to an article or section, the agreement shall be reduced to writing and initialed by the chief negotiators. Initialed articles are binding agreements unless the contract is reopened for further negotiation by agreement of the chief negotiators, or as a result of a negative Union ratification vote or disapproval by Agency headquarters.

o. At the outset of negotiations, the chief negotiator for UPTO will choose the first article to be negotiated. After discussion of the first article has been completed, each Party will alternately raise the next article to be discussed until all articles have been covered.

p. A statement of the Agency's position on the negotiability of a proposal will be provided in response to a written request from the Union. Proposals deemed to be nonnegotiable will include written justification for that conclusion.

q. The Agency agrees to grant official time, travel and per diem for a minimum of two UPTO negotiators, if otherwise in a duty status, for attendance at Impasse Hearings. If the Agency has more than two representatives in attendance, the number of UPTO representatives on official time and travel and per diem will be equal in number to the Agency.

r. The Agency shall ensure that the Union has access to all applicable regulations and other reference material maintained by the Agency. The Agency shall also afford Union reasonable access to Corps facilities (e.g., copier, library, telephones) for the purpose of discharging the Union's obligation to bargain in good faith.

s. The Agency agrees to pay the travel and per diem expenses incurred by up to five Union negotiators, who are Agency employees, in accordance with applicable travel regulations, for time spent in negotiations as follows:

1. 100% reimbursement for the first two weeks of negotiations.
2. 50% reimbursement of expenses for the third and fourth weeks of negotiations.
3. No reimbursement of expenses for negotiations beyond the fourth week.

t. If final agreement on the contract is not reached prior to the beginning of the fourth week of the negotiation sessions, the parties shall request the assistance of a mediator from the FMCS, or any other mutually agreed procedure, to resolve the impasse(s) then existing. The parties agree to use their best efforts to persuade such a mediator not to schedule or request negotiations past the fourth week.

u. It is agreed that elements of these ground rules may be modified, added to, or deleted from by mutual agreement of the parties.

As a preliminary matter, the Union did not identify Article 28.2(b), (c), (d), and (e) of the Factfinder's recommendation as unacceptable until 3 days before the parties' responses to the *OSC* were due. Thus, the Employer objects "to this late addition and recommends that the Panel not consider it." On the merits of the

Factfinder's recommendations, contrary to the Union's claims, there is nothing in his ground rules for successor CBA negotiations that would "preclude[] the Union [from] requesting and getting any data through data request[s] as provided for in the Statute." In addition, the Union can request information under 5 U.S.C. § 7114(b)(4) at any time, and does not have to "wait until a contract is opened to do so." As the Factfinder confirmed in making his recommendations, the parties' bargaining "history has demonstrated that this contract needs ground rules and it needs timelines." He "clearly understood the difficulty and challenges facing the parties and felt that inclusion of these provisions is important," and his recommendations "should not be second-guessed."

b. The Union's Position

The Factfinder's recommendation on these sections of Article 28, which add new provisions to the CBA regarding ground rules for successor CBA negotiations, "should not be adopted by the Panel." The time lines established therein would "preclude[] the Union [from] requesting and getting any data through data requests as provided for in the Statute" prior to drafting proposals or counterproposals and engaging in negotiations. Because this would deprive the Union of a statutory right "it is beyond the duty to bargain." In addition, adoption of the recommendations is unnecessary as the Panel "has effectively set out ground rules for this present round of CBA negotiations," and those ground rules "would undoubtedly carry forward to future CBA negotiations."

CONCLUSIONS

Having carefully considered the parties' responses to the *OSC* concerning the Factfinder's recommendation on these sections of Article 28, we conclude that the Union has not shown cause as to why it should not be imposed.[15/] In support of the recommendation, the Factfinder specifically stated that establishing ground rules in the CBA permitting the parties to "jump-start" negotiations over its successor are necessary "because of the extreme difficulty and protracted disputes the parties have experienced in these current negotiations." Moreover, the Union's contention that the time lines established in the recommendation conflict with its right to request information under section 7114(b)(4) appear to be speculative. In this regard, there is nothing in the Statute or FLRA case law establishing a union's right to require all of its

15/ Given this outcome, it is unnecessary to address the Employer's objection that the Union's rejection of the Factfinder's recommendation on Article 28.2(b), (c), (d), and (e) is untimely.

administrative remedies regarding denials of information requests to be exhausted before successor CBA negotiations can begin. For these reasons, we shall order the adoption of the Factfinder's recommendation to resolve the parties' dispute over this issue.

13. New Agency Article XX - Impact and Implementation Ground Rules

a. The Union's Position

The Union agrees with the Factfinder that the parties' CBA should not include a new article containing ground rules for impact-and-implementation bargaining. Ground rules need to be "flexible enough to cover different issues, different situations, and different times." The Employer's proposal, however, sets time lines so short that the Union cannot reasonably be expected to meet them. In addition, the time lines violate the Union's right to request and receive data necessary for bargaining, and would impermissibly require the Union to craft proposals for procedures "that can only be tailored for employees adversely affected by a change," both of which are "beyond the Union's duty to bargain." Its requirement that bargaining occur by email is also inconsistent with 5 U.S.C. § 7103(a)(12) which defines collective bargaining as a mutual obligation of the parties to "meet at reasonable times." In this connection, the National Labor Relations Board has found that it is a ULP for a private employer to insist on bargaining other than face-to-face, and "the Panel should not impose bargaining ground rules on a Federal sector union that would be a ULP in the private sector."

b. The Employer's Position

The Employer disagrees with the Factfinder's recommendation that the following wording not be included in the parties' CBA:

> XX.1. Agreements under this Article
>
> This Article is to address negotiations, including mid-term and Impact and Implementation (I&I) negotiations, and any other negotiations that might take place during the period in which this CBA is in effect, other than negotiation of a successor agreement. Any agreements reached under the provisions of this Article shall be deemed to be supplemental to this Agreement and subject to approval by the Agency Head.

XX.2. Changes

A. If a future statute, Executive Order, government-wide regulation, judicial decision, Agency decision, or essential mission need changes personnel policies, practices, and working conditions of bargaining unit employees, the Agency will notify the Union, in writing, of the change (s) that may affect personnel policies, practices, and working conditions of bargaining unit employees, and the Agency's plan for implementing change.

B. If the Union desires to negotiate the impact and implementation of the change to the extent permitted by law, it shall notify the Agency within five (5) calendar days of receipt of the notice identified in XX-2A. Such request to negotiate shall include a specific timely and negotiable proposal that addresses either the procedure for implementation, appropriate arrangements, or both, for employees adversely affected by the change.

C. Failure to respond to the Agency's notice within 5 days are required in Section XX-2B above shall constitute a waiver of any right to negotiate arising from the announced change.

XX.3. Information Requests Related to Bargaining Changes

A. The Union will ensure that any request for information is accompanied by a demonstration of "Particularized Need," consistent with current case law precedents of the Federal Labor Relations Authority and appropriate courts.

XX.4. Implementation

A. The Agency will, where reasonable, delay the implementation of such change and will maintain the status quo until such time as the parties reach agreement on all negotiable issues connected with the change, unless the Agency reasonably determines that an overriding exigency exists. Notwithstanding the above, nothing shall affect the authority of the Agency to take whatever actions may be necessary to carry out its mission during emergencies.

XX.5. Negotiating Procedures

The following procedures shall govern the conduct of all negotiations pursuant to this Article:

A. Negotiations shall proceed with the Agency responding to the Union's proposal within 5 working days of the Agency's receipt of the Union's notice and proposal to the Agency as described above, unless otherwise mutually agreed by the parties.

B. The negotiations will take place by the exchange of proposals by email. This provision does not preclude the parties' consideration of non-mandatory face-to-face bargaining. The Agency will provide a site for negotiations or arrange for video conference or telephonic negotiations.

C. The Union will authorize the same number of Union representatives on official time as the Agency has representatives at the negotiating table.

D. Negotiations will take place between Monday and Friday, and between the hours of 6:30 am to 6:00 pm. Which days and hours within this schedule are to be used for a particular negotiation will be determined on a case by case basis subject to the scope of proposals exchanged. If travel time on official time is appropriate, travel will occur within this schedule. Overtime is not authorized for negotiations.

E. Once commenced, negotiations will continue with reasonable breaks until agreement is reached or impasse is declared. Within 30 days of the Agency's receipt of the Union's proposal, if agreement has not been reached the parties will seek assistance from FMCS.

The Panel should reject the Factfinder's recommendation because ground rules for I&I and other mid-term bargaining are "extraordinarily important to avoid unnecessary delays in negotiations and implementation of policy." There are a number of "striking examples" where ground rules negotiations "have repeatedly delayed I&I negotiations between the parties." The benefit of having such ground rules in the CBA "is readily apparent and equally as important as having established ground rules included to negotiate successor agreements," yet the Factfinder failed to explain why he recommended the latter but not the former. Given his conclusion that ground rules for successor CBA negotiations should be included in the agreement to "jump-start" negotiations, and that the same rationale applies for the need to include I&I ground rules in the CBA, the Panel should impose the Employer's recommended wording to resolve the dispute.

CONCLUSIONS

After careful consideration of the parties' responses to the *OSC* on the matter of whether I&I ground rules should be included in the CBA, we shall order the parties to adopt the Factfinder's recommendation. This is another issue where he provided specific rationale in support of his recommendation that the Employer's proposal not be included in the parties' CBA. In this connection, the Factfinder stated that during his limited time with the parties there was little discussion of the article and that he "knows little of the history or significance of these issues." In addition, our review of the Employer's proposal reveals that it contains a number of provisions that arguably involve permissive subjects of bargaining, among them, wording that would permit management to implement a proposed change prior to the completion of bargaining if it reasonably determines that an "overriding exigency" exists. In our view, the Employer has failed to show cause why the Factfinder's recommendation should not be adopted to resolve the parties' impasse.

ORDER

Pursuant to the authority invested 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, orders the following:

1. Article 2.1(b) - Disciplinary and Adverse Actions

   The parties shall adopt the Factfinder's recommendation.

2. Article 2.5(a) - Disciplinary and Adverse Actions

   The parties shall adopt the Employer's alternative wording.

3. Article 5.9(c)(2) - Grievance and Arbitration Procedure

   The parties shall adopt the Employer's alternative wording.

4. Article 6.2 - Hours of Work

   The parties shall adopt the Factfinder's recommendation.

5. Article 8.8 - Annual Leave

The parties shall adopt the Factfinder's recommendation.

6. Article 15.3 - Official Time

The parties shall adopt the following wording:

With prior approval of a Union Officer's/Representative's Supervisor and/or Project Manager, the Union Officer/Representative may use official time to perform his/her representational duties at locations other than at his/her assigned duty station; such as a home/union office.

7. Article 16.6 - Premium Pay

The parties shall adopt the Factfinder's recommendation.

8. Article 22.3 - Safety and Health

The parties shall adopt the following wording:

WORK ATTIRE. Employees shall wear clothing and apparel suitable for weather and work conditions, and that prevent exposure to known or expected hazards. Standard work attire will include full length pants and shirts with full length sleeves to the extent required by OSHA or Agency [HQ] standards. Standard work attire, including undergarments, shall be made from non-melting or untreated natural fiber.

9. Article 22.4(a) - Safety and Health

The parties shall adopt the following wording:

PERSONAL PROTECTIVE EQUIPMENT AND SAFETY EYEWEAR AND FOOTWEAR. a. Employees who are required by the Agency to wear Personal Protective Equipment shall be provided with those items and necessary replacements, as prescribed in appropriate regulations such as EM 385-1-1, its current equivalent, or Agency policies. In the event that the Agency's policies concerning Personal Protective Equipment change during the term of this collective bargaining agreement, the Union will have the right to negotiate such changes to the extent permitted under the Statute.

10. Article 24.3 - Union Officials and Project Representatives

The parties shall adopt the Union's alternative wording.

11. Article 25.4 - Voluntary Allotment of Union Membership Dues

The parties shall adopt the Union's alternative wording.

12. Article 28.2(b), (c), (d), and (e) and Article 28.3 - Effective Date, Duration of the Agreement, and Bargaining Ground Rules

The parties shall adopt the Factfinder's recommendation.

13. New Agency Article XX - Impact and Implementation Ground Rules

The parties shall adopt the Factfinder's recommendation.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

September 14, 2011
Washington, D.C.