United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON ADMINISTRATIVE
SERVICE ORGANIZATION
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 10 FSIP 119

DECISION AND ORDER

The National Treasury Employees Union (NTEU or 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 the Interior (DOI), National Park Service (NPS), Washington Administrative Service Organization, Washington, D.C. (WASO or Employer). The request, which arises from the parties' negotiations over an initial collective bargaining agreement (CBA), involved the entire CBA, including the preamble, 61 articles, and 10 appendices.[1/]

1/ The parties have been attempting to effectuate their first CBA since NTEU replaced the National Federation of Federal Employees (NFFE) as the exclusive representative of the bargaining unit in 2003. Among other things, the history of their attempt includes: (1) a *Decision and Order* by the Panel in *Department of the Interior, National Park Service, Washington Administrative Service Organization, Washington, D.C. and National Treasury Employees Union*, Case No. 05 FSIP 95 (December 12, 2005) on a few issues concerning the Hours of Work article that was never implemented; (2) a ruling by a grievance arbitrator that the parties never reached a "meeting of the minds" on all of the other contract articles the Union alleged had been agreed upon in negotiations that ended in 2005; and (3) their subsequent

During the investigation of the request for assistance, given the size of the dispute, the Employer agreed to identify those articles tentatively agreed to in 2005 that it could accept as written or with minimal changes, and those articles where it was proposing major changes. On the basis of the Employer's division of the articles into these separate categories, the Panel subsequently determined that the dispute should be resolved by: (1) Issuing an *Order to Show Cause* (*OSC*) why the Union's July 1, 2010, LBOs regarding the Preamble, and Articles 6, 7, 10, 13, 14, 17, 18, 20, 25, 28, 29, 30, 33, 34, 36, 37, 40, 42, 43, 47, 54, 55, 59 and 61 (*i.e.*, articles the Employer could accept as written or with minimal changes), should not be imposed by the Panel; the parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the articles subject to the *OSC*, which may include the issuance of a *Decision and Order*; and (2) Directing the parties to resume bargaining with the assistance of a private Facilitator/Factfinder over the Union's July 1, 2010, LBOs regarding Articles 1, 2, 3, 4, 5, 8, 9, 11, 12, 15, 16, 19, 21, 22, 23, 24, 26, 27, 31, 32, 35, 38, 39, 41, 44, 45, 46, 48, 49, 50, 51, 52, 53, 56, 57, 58, and 60 (*i.e.*, articles where the Employer was proposing major changes). The parties were informed that if any issues remained unresolved at the conclusion of facilitated bargaining, the Factfinder would submit a written report with recommendations for settling the issues, including supporting rationale, to the parties and the Panel. Any party objecting to the Factfinder's recommendations for resolution of the issues would notify the Panel and the other party, in writing, of the objection. Thereafter, the Panel would take whatever action it deemed appropriate to resolve the issues.

Subsequent to the issuance of the Panel's *OSC*, the Employer accepted the Union's July 1, 2010, LBOs on the Preamble, and Articles 10 (including Appendixes 10-1, 10-2, 10-3 and 10-4),

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failure to reach any agreements after their negotiations resumed in January 2010 prior to the Union's filing of this request for assistance on July 20, 2010. The Union's request included its last best offers (LBOs) on the entire CBA, referred to herein as the Union's July 1, 2010, LBOs. With the exception of the issues involved in Case No. 05 FSIP 95, its July 1, 2010, LBOs are substantively identical to the provisions the parties tentatively agreed to in 2005.

14, 18, 20,[2/] 25, 29, 34, 37, 43, 47, 54, 59, and 61. In its response to the changes proposed by the Employer, the Union has accepted the Employer's last best offer on Article 6.[3/] On October 27, 2010, however, the Union also proposed to change its July 1, 2010, LBOs on Articles 7, 10 (including Appendix 10-4), 13, 17, 30, 36, 59 and 61. Thus, the parties' remaining disputes under this portion of the Panel's procedure (the *OSC*) involve Articles 7, 10 (including Appendix 10-4), 13, 17, 28, 30, 33, 36, 40, 42, 55, 59 and 61.

With regard to the articles that were sent to the Factfinder, the parties reported that they had nine meetings between November 4, 2010, and May 31, 2011, during which complete agreements were reached on 18 articles,[4/] but that the Factfinder's recommendations for settlement were unacceptable on 11 issues involving Articles 1, 4, 24, 31, 35, 44, 48, and 52. The Employer also contends that, contrary to the statement in the Factfinder's Report and Recommendations, the parties did not reach agreement on Article 2, Section 1, or Article 24, Section 2.B. The Union disputes the Employer's contention that no agreement was reached on Article 2, Section 1, but agrees that no agreement was reached on Article 24, Section 2.B. Because a complete settlement was not reached during the facilitated bargaining, the Panel subsequently issued a second *OSC*, directing the parties to show cause why the Factfinder's recommendations should not be imposed to resolve the remaining issues, after which the Panel would issue a binding decision to

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2/ The Employer indicated in its October 27, 2010, submission to the Panel that it had agreed to the Union's July 1, 2010, LBO on Article 20 but nevertheless provided modifications to the Union's LBO in its November 29, 2010, response to the *OSC*. Thereafter, the Employer confirmed its acceptance of the Union's July 1, 2010, LBO on Article 20.

3/ It should be noted that the Employer's initial submission also erroneously addressed Article 31, Contracting Out, and Article 57, Parking, which the Panel directed be taken up in the facilitation/factfinding portion of its procedural determination. In its response to the *OSC*, the Union nevertheless indicated that it had accepted the Employer's revisions to Article 31.

4/ The 18 articles include Article 62, which the Factfinder indicated was added by the parties during the facilitation portion of the proceedings.

resolve them. As part of this procedure, each side was permitted to submit alternative wording, if any, to replace the Factfinder's recommended wording identified as unacceptable in their earlier responses.

In reaching this decision and bringing resolution to this lengthy impasse, the Panel has now considered the entire record, including the parties' responses to both *OSCs*.

BACKGROUND

WASO is an organizational sub-division within the National Park Service (NPS) that provides guidance, service, and advice to a variety of customers, but primarily the 388 parks within the NPS. It also provides technical guidance to customers outside the NPS. The NPS has approximately 24,000 employees and is divided into seven geographical regions. WASO is considered the eighth region within NPS. NTEU represents 850 employees, about 700 of whom are located mainly in the Washington, D.C. metropolitan area, or in Lakewood and Ft. Collins, Colorado. A small percentage is WG employees in crafts such as carpentry and painting, but most are professionals, GS-2 through -15. The previous CBA between NPS and NFFE was to have expired in 1994, but has an automatic rollover provision. The parties are required to abide by its terms until their own CBA is implemented.

ISSUES AT IMPASSE

The parties remain in disagreement over numerous issues in the following articles: (1) Article 1 - Coverage and Definitions, Section 6; (2) Article 2 - Effect of Law and Regulation, Section 1; (3) Article 4 - Union Rights, Section 2.A.3.; (4) Article 7 - Hours of Work (numerous sections); (5) Article 10 - Telecommuting (numerous sections); (6) Article 13 - Sick Leave, Sections 3.A., 3.C.2., 5.E.; (7) Article 17 - Absence for Family Care, Sections 2 and 3; (8) Article 24 - Details and Special Assignments, Section 1.A.; (9) Article 24 - Details and Special Assignments, Section 2.B.; (10) Article 28 - Training/Learning and Development, Sections 4.E. and 6.A.; (11) Article 30 - Reductions in Force, Sections 2.B. and 2.C.; (12) Article 31 - Contracting Out, Section 3.A; and (13) Article 33 - Communication, Section 1.B.3.; (14) Article 35 - Performance Evaluation, Section 3.B.3.; (15) Article 36 - Rewards and Recognition (numerous sections); (16) Article 40 - Waiver of Overpayments; (17) Article 42 - Health and Safety, Sections 10, 13, and 14.A.; (18) Article 44 - Travel and *Per Diem* for Union

Representatives, Sections 3 & 4; (19) Article 48 - Employee Grievance Procedure, Section 4.B.; (20) Article 52 - Midterm Bargaining, Section 1.B.; (21) Article 55 - Child Care Subsidies (numerous sections); (22) Article 59 - Credit Union Facilities; and (23) Article 61 - Duration and Termination, Sections 2 and 3.

1. Article 1, Coverage and Definitions, Section 6

a. The Union's Position

The Panel should impose the Factfinder's recommendation to resolve the parties' impasse over this article, which states as follows:

> The parties agree that the only covered-by defense that may be asserted by either party under this Agreement is one based on the 'express language' of the Agreement. The 'inseparably bound up with' defense will not be available to either party. Additionally, neither party may in any way rely upon bargaining history of the express language to argue that there is a covered-by defense. The 'express language' defense may only be raised while this Agreement is in effect.

The Factfinder's recommendation is consistent with the FLRA's decision in *National Treasury Employees Union and U.S. Customs Service*, 64 FLRA 156 (2009), which encourages parties to determine through negotiations whether and how the "covered by" doctrine will apply. Its adoption would provide both sides with assurance that "what governs employees' conditions of employment will be the express language in the Agreement rather than a neutral's interpretation of the parties' bargaining history." It also would "substantially reduce litigation regarding whether matters are 'inseparably bound up with' existing contract language."

b. The Employer's Position

The Panel should strike the Factfinder's recommendation from the CBA. In this regard, his supporting rationale that the recommendation is consistent with current FLRA case law "is no longer current or valid" because of a recent decision by the D.C. Circuit[5/] which affirmed its earlier ruling that the

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5/ *Federal Bureau of Prisons v. FLRA*, ---F.3d.---, *2011 WL 2652437* (D.C. Cir. July 8, 2011).

covered-by doctrine, including the "inseparably bound up with" defense, is "appropriate."

CONCLUSIONS

After full consideration of the parties' responses to the *OSC* on this matter, we shall order the adoption of the Factfinder's recommendation to resolve the dispute. The sole reason provided by the Employer for striking the recommended wording from the article is its alleged inconsistency with *Federal Bureau of Prisons v. FLRA*. It appears, however, that *Federal Bureau of Prisons v. FLRA* involved the misapplication of the covered-by test but did not address the elements of the test itself. Moreover, even if the Employer's interpretation of the Court's decision is arguable, it is well settled that the Panel is bound by the decisions of the FLRA, or the Supreme Court if it reverses a previous FLRA decision, but not by decisions of Circuit Courts of Appeal.

2. Article 2, Effect of Law and Regulation

a. The Union's Position

The Union proposes that the following wording be imposed to resolve the parties' dispute over this article:

> Section 1. In the administration of all matters covered by this Agreement, the parties are governed by the following: existing or future laws; Government-wide rules or regulations in effect upon the effective date of this Agreement; and Government-wide rules or regulations issued after the effective date of this Agreement that do not conflict with this Agreement. For all Government-wide rules and regulations impacting conditions of employment of bargaining unit employees promulgated after the effective date of this Agreement, the Employer shall provide notice to, and bargain with, the Union, in accordance with Article 52.
>
> Section 2. To the extent that provisions of the Employer's policies, procedures, rules and regulations specifically conflict with this Agreement, the provisions of this Agreement will govern.
>
> Section 3. The Employer will make available to all employees, an electronic link from the NPS intranet

site to the United States Code, Code of Federal Regulations, Office of Personnel Management directives, General Services Administration Federal Travel Regulations, Department of the Interior regulations, Departmental Manual and regulations, and the Department of labor Office of Workers' Compensation Programs.

Contrary to the Employer's position, as indicated by the Factfinder, the parties reached agreement on this article on November 4, 2010. This is confirmed by the initialed agreement that the Union provided to the Panel. Even if the Union had not provided evidence of a signed agreement, the wording should be adopted on its merits. Section 2 would prevent the Employer from issuing policies, rules and regulations after the CBA is executed that eliminate contract provisions obtained over years of negotiations, bringing stability and finality to the collective bargaining process. In addition, the Section 3 requirement that the Employer provide hyperlinks to a number of Government websites would be of benefit to employees seeking easy access to relevant information.

b. The Employer's Position

The Employer proposes the following wording:

In the administration of all matters covered by this Agreement, the parties are governed by:

1. Existing or future laws;

2. The Employer's rules and regulations in effect upon the effective date of this Agreement, unless contrary to the terms of this Agreement or Government-wide rules or regulations applicable to the Employer;

3. Government-wide rules or regulations applicable to the Employer that are in effect upon the effective date of this Agreement;

4. Government-wide rules or regulations applicable to the Employer that are issued after the effective date of this Agreement and that are not in conflict with this Agreement; and

5. For all Government-wide rules or regulations impacting conditions of employment of bargaining unit

> employees promulgated after the effective date of this Agreement, the Employer shall provide notice to, and bargain with, the Union, in accordance with Article 52.

Although the parties "previously reached tentative agreement on this matter," it was not addressed by the Factfinder. Its proposal, particularly the wording in number 2, should be adopted. During bargaining, the Union simultaneously alleged that Agency rules and regulations "were unnecessary and were matters that the Union could not agree to" but that it could nevertheless use such rules and regulations as the basis of a grievance. Adoption of its final offer, therefore, would ensure that the parties are governed by Agency rules and regulations that do not conflict with CBA provisions. More importantly, "the exact language proposed" can be found in the Office of the Comptroller of the Currency (OCC)/NTEU CBA even though the Union argued during negotiations that "language addressing agency regulations was not part of any existing NTEU [CBA]."

CONCLUSIONS

On this issue, we shall order the adoption of the Union's final offer to resolve the parties' dispute. The record confirms that the parties reached a tentative agreement on this article on November 4, 2010. In our view, the Employer's response to the *OSC* fails to provide a sufficient basis for altering the terms of their tentative agreement.

3. Article 4, Union Rights, Section 2.A.3

a. The Union's Position

The following wording should be imposed in lieu of the Factfinder's recommendation:

> The Union is also entitled to attend 'last chance' meetings, settlement discussions to resolve employee problems, and discrimination complaint settlement meetings. Where the Union does not attend a settlement meeting, and the settlement agreement impacts bargaining unit working conditions (e.g., grants, promises, or gives priority consideration for a promotion, reassignment, training, etc.) the settlement agreement will contain the following statement: 'This settlement agreement is subject to approval for compliance with negotiated agreements

> between the National Park Service and the National Treasury Employees Union. Accordingly, it will be forwarded to the appropriate NTEU Chapter President and Chief Steward, with a copy to the appropriate servicing personnel office, for a ten (10) day period of consideration. If the Union alleges the settlement conflicts with any negotiated agreements between the National Park Service and the National Treasury Employees Union, or other non-discretionary requirements, you will be notified.' Any challenges by the Union to settlement agreements will be filed with the NPS, Assistant Director of Human Resources.

Unlike the wording recommended by the Factfinder, its proposal preserves the Union's statutory right to attend 'last chance' and discrimination complaint settlement meetings. Its adoption would "ensure the Agency does not enter into a settlement agreement with a particular employee that may violate the parties' Agreement or the rights of other bargaining unit employees." The Factfinder's recommendation, on the other hand, "fails to clearly establish and delineate the Agency's statutory obligation to provide advance notice to NTEU of all formal meetings, and afford the Union the right to attend such meetings." Further, its adoption is likely to encourage the Employer to conduct such meetings without NTEU "and then inform the Union they have already occurred."

b. The Employer's Position

While the Employer did not propose wording specific to formal settlement meetings "as the matter is addressed in tentatively agreed language concerning all formal meetings," the wording recommended by the Factfinder to resolve the parties' impasse over this issue is as follows:

> The Union is also entitled to attend "last chance" meetings, settlement discussions to resolve employee problems, and discrimination complaint settlement meetings. In the absence of notice to the Union and the opportunity to participate in such a meeting which results in a settlement agreement that would arguably affect bargaining unit employees or the Agreement, the Employer shall provide notice of the settlement to the Union within five working days after the settlement has been executed.

The intent behind the recommendation "was [that] the Union should meet [its] obligation and attend [formal] meetings" and, "if the Agency fails to provide notice of the meeting, the Union then has the opportunity to bargain over the terms or the effect of the agreement." Unlike the Union's approach, its adoption would prevent the Union from having "the opportunity to attend the meeting and a subsequent opportunity to renegotiate over the settlement agreement." Moreover, the Union has not demonstrated the need for its proposal because management has never denied requests for official time to attend settlement meetings or requests to reschedule such meetings to a mutually acceptable time. Simply put, the Union needs to meet its representational responsibilities and attend settlement meetings, and it would be unfair for a bargaining unit employee to enter into a settlement agreement and have the agreement subject to further negotiation because a Union representative "has declined or failed to attend a meeting."

CONCLUSIONS

Upon thorough examination of the Factfinder's recommendation, and the interests presented by the parties in their responses to the *OSC*, we conclude that the issue should be resolved on the basis of a modified version of the Union's final offer. In agreement with the Union, the wording recommended by the Factfinder does not appear to clearly set forth the Employer's obligation to provide it with advance notice of all formal meetings and afford it the right to attend such meetings. In agreement with the Employer, the recommendation also appears to unfairly provide the Union with the right to renegotiate a settlement agreement between management officials and a bargaining unit employee even where the Union was provided with advance notice of the meeting but either declined or failed to attend. Accordingly, in our Order we shall modify the Union's final offer to ensure that both of the parties' legitimate concerns are addressed.

4. Article 7 - Hours of Work

a. The Union's Position

In addition to reorganizing its July 1, 2010, LBO on this article, the Union proposes to: (1) Change its title to "Hours of Work and Alternative Work Schedules" (AWS) instead of "Hours of Work"; (2) Move wording concerning core hours to the Flexible Work Schedule section of the article and set core hours for employees on flexible work schedules, Monday through Friday,

from 10:30 a.m. to 2:30 p.m.; (3) Add Section 2.C.1., "Flexitour with Credit Hours," permitting employees to earn credit hours "at a duty station, Telework site, or any other location" from 5 a.m. to 10 p.m. Sunday through Saturday; (4) Remove reference to the Basic Eight-Hour Schedule having "an established start time at 7:45 a.m. and end time at 4:15 p.m."; (5) Remove Section 1.D.1.f.v. from its July 1, 2010, LBO, which states: "Compensatory time and overtime will not be paid to an employee working in excess of 8 hours in a day under this work schedule because the employee is eligible to accrue this time as credit hours"; (6) Add the following as Section 3 - "First Forty" Schedule:

> A 'First Forty" schedule is authorized and may be approved for employees to whom it is impracticable to prescribe a regular schedule of definite hours of duty for each workday. A 'First Forty' work schedule requires employees to work forty (40) [hours] on not more than six (6) days per administrative workweek without the requirement [of] specific days and/or hours. These hours are all considered regularly scheduled work for hours of duty purposes and the employee is not eligible for premium pay for such hours. Any additional hours of officially ordered or approved work within the administrative workweek, in excess of forty (40), are considered overtime for premium pay purposes.

(7) Change the "Approval Process" section in the July 1, 2010, LBO to the following:

> A. All employees may request and be considered for all work schedules established by this article. Requests for any schedule other than the Basic Work Week must be made to an employee's immediate supervisor in writing at least one pay period in advance. Employee requests to change or adjust their alternative work schedules may be submitted at any time. Requested work schedules will be granted absent a severe workload disruption. The employee's election to work at a telework site consistent with Article 10 shall not be a factor in the employee's eligibility for an alternative work schedule. B. Denials of work schedule request[s] will be provided to the employee in writing, stating the reasons for such denial. C. Employees will be informed of unilateral management cancellation or revisions to approved work schedules

> in writing no less than one (1) pay period in advance of the change. D. Employees may grieve the denial of a work schedule request.

Finally, (8) Change Section 6, "Accounting and Recordkeeping" of the Union's July 1, 2010, LBO, to the following:

> A. An employee working an approved alternative schedule will personally sign-in when reporting for work and sign-out when leaving work each day. The Employer may maintain and retain sign-in/sign-out records for each individual organization. The record will be a single written listing for each office with all employees signing in/out chronologically upon arrival and departure. The written sign-in/sign-out sheet shall be the only required record for recording arrival and departure times for employees on an alternative work schedule. B. An employee who teleworks while working an approved alternative work schedule will sign in by sending an electronic message to his/her supervisor at the start of the workday and will sign out by sending an electronic message to the supervisor at the end of the workday stating the time the employee completed work. These messages shall be the only required record for recording arrival and departure times for employees who telework while working an alternative work schedule. C. Excused Absence and Schedule Adjustment. In accordance with 5 C.F.R. 630.206, if an employee is unavoidably or necessarily absent for less than one hour, or tardy, the Employer, may excuse him without charge to leave. If an employee is tardy and the agency does not excuse the time, the employee may be allowed to make up the time by working through break times or lunch or staying late at the employee's discretion.

The Union submitted a "slightly modified" LBO on October 27, 2010, "to improve the article's organization and more clearly set forth the work schedules available to bargaining unit employees." It proposes to rename the article to make employees' AWS options clearer and more readily identifiable. In accordance with 5 U.S.C. § 6122 and OPM guidance, "core hours" only apply to flexible work schedules, so moving reference to that term to the Flexible Work Schedule section of the article is appropriate. Permitting employees to work flexitour with credit hours at a duty station, Telework site, or any other location from 5 a.m. to 10 p.m., Sunday through

Saturday, would provide greater flexibility to meet NPS mission needs and personal obligations. In addition, because the vast majority of bargaining unit employees work in the Washington, D.C. metro area, the option would allow employees to avoid lengthy commute times and attend to family matters such as child care. The removal of the section titled "Basic Eight-Hour Schedule" is warranted because it establishes starting and ending times that "do not reflect current practice," and because the Agency has no written policy specifying the days and hours within the administrative workweek that constitute the basic workweek, as required by Government-wide regulations.

A new section introducing a "First Forty" work schedule should be adopted because it would provide employees for whom it is impractical to prescribe a regular work schedule of definite hours of duty for each workday, such as Criminal Investigators, with increased flexibility. The Union's proposed changes to the approval process, requiring that requests for any schedule other than the basic work week must be submitted at least one pay period in advance, and stating that an election to telework has no impact on an employee's ability to work AWS, is necessary to avoid employee and supervisor confusion. Finally, a new subsection B. to Section 6, regarding accounting and recordkeeping for employees on an AWS who telework, should be added to the article to address current inconsistencies in the application of such practices among employees and supervisors. It also should be adopted because it includes important guidance "that would otherwise be omitted regarding employees who telework and have an [AWS]."

b. The Employer's Position

The Employer proposes the following changes to the Union's LBO of July 1, 2010:

> Section 1.A.1. Prior to implementing a change in the basic work week, the Employer will notify the Union as far in advance as ~~possible~~ **feasible**.
>
> ~~Section 1.A.2.: Rest Periods. Employees are entitled to take one 15 minute rest period during every 4 hours worked. These may not be taken to extend the lunch period, or at the beginning or end of the workday.~~
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> Section 1.B. Core Hours. Employees will be at work during core hours. Absence from work during these hours will be approved by the supervisor as indicated

> by an approved leave request~~, an approved leave slip, supervisory approval on the Maxi-Flex Time Accounting Record,~~ **in writing or electronic form**, or an approved AWS or Flexiplace agreement. Core hours are: . . .
>
> Section 1.B.1. For employees located in the Washington, D.C. metropolitan area [core hours are]: Monday through Friday from ~~10:30~~ **9:30 a.m.** to 2:30 p.m.
>
> Section 1.D.1. Available Schedules. The alternative schedules described below are subject to approval by an employee's supervisor~~, and will be granted upon request absent a severe workload disruption~~. All alternative work schedules will be worked within the hours of ~~5 a.m. until 10 p.m. Sunday through Saturday~~ **6 a.m. and 7 p.m. Monday through Friday**. Hours worked cannot exceed 12 hours per day or 80 hours per Pay Period unless granted a specific exemption by the ~~Division Chief~~ **Employer**."

In Section 1.D.1.a. & e., the Employer would change the flexible work band from "5 a.m. and 10 p.m. Sunday through Saturday" to "6 a.m. and 7 p.m. Monday through Friday," and administer the Maxiflex Flexible Schedule "consistent with existing agency policies concerning Maxiflex."

> Section 1.D.1.f.iii. Once earned, an employee may use credit hours in ~~15~~ 30-minute increments to shorten a work day or work week.

The Employer also would add Section 1.D.1.g.:

> Requests for AWS. Any employee may request to be placed on an alternative schedule. An employee request for an alternative schedule must be in writing and received by his/her immediate supervisor at least three weeks prior to the effective date. The Employer will respond to the employee's request within two weeks of receipt of the request. An employee wishing to change a previously approved schedule must follow this same procedure.

Finally, it would modify Section 1.E.1., 3. & 4., "Approval Process," as follows:

1. All NPS employees may request and be considered for any of the described work schedules. The request should be made in writing to the supervisor at least one pay period in advance. A personnel action is required to change an employee's work schedule. ~~Approval of work schedules will be granted absent a severe workload disruption.~~ 3. ~~An employee will be informed of a unilateral management cancellation or revision of their approved work schedule in writing no less than one pay period in advance of cancellation or revision.~~ **The Employer may remove any employee from participation in alternative work schedules because of employee abuse or irresponsibility. 4. Nothing in this Agreement may (1) cause reduced productivity, (2) diminish in any way the level of services furnished to the public, or (3) increase the cost of operations. If the Employer determines that any of these situations have resulted from alternative work schedules, the Employer may terminate the schedule.**

The word "feasible" is better than "possible" because it does not suggest "notice as far in advance as could be contemplated," which would be an impossible standard to meet. Its proposal also meets the interests of the Union and employees by providing sufficient notice. The subsection on rest periods should be eliminated from the article because providing 15-minute breaks every 4 hours is appropriate in a manufacturing or manual labor environment but not at WASO where almost all of the employees work in a traditional office environment and are not required to remain at their workstations and are free to converse with their coworkers. Moreover, there is no demonstrated need for the subsection because there is no history of employees being denied breaks. The Employer-proposed change in Section 1.B. acknowledges that supervisors may approve absence from duty during core hours by "electronic form," the method that most or all employees use when requesting leave. In addition, core hours should start at 9:30 a.m. rather than 10:30 a.m. because this is more consistent with Agency operations in a conventional office setting, *i.e.*, much of the work is initiated at or before 9:30 a.m., and an earlier start for core hours provides greater flexibility in scheduling meetings and activities in which most employees are present. Supervisors also would be more likely to approve requests for flexible work schedules with a 5-hour timeframe for core hours because it would increase the possibility of interactions between employees. Its proposed changes to Section 1.E.3. & 4. would provide management with a significantly greater degree of

control over the initial approval of requests for agreed-upon work schedule options and subsequent removal of employees from previously approved options and should be adopted to ensure that the Agency's mission is accomplished.

As to the Union's revisions to its July 1, 2010, LBO in this and seven other articles, the Employer asserts that the Panel is legally prohibited from imposing them. In this regard, the parties have never negotiated over the Union's revised proposals. Thus, consistent with the Court's decision in *Patent Office Professional Association v. FLRA*, 26 F.3d 1148 (D.C. Cir. 1994), the Panel is without authority to impose contract terms that have never been the subject of bargaining.[6/]

CONCLUSIONS

Having carefully considered the parties' responses to the *OSC* on this article, we shall order the adoption of a modified version of the Union's July 1, 2010, LBO, to settle their dispute. Preliminarily, in agreement with the Employer, the Panel has no authority to impose the revisions the Union proposed on October 27, 2010, because they were never the subject of negotiations between the parties. Overall, however, in our view the Employer has not shown cause why the portions of the Union's July 1, 2010, LBO that the parties tentatively agreed to in 2005 should not be imposed to resolve their impasse over this article. The two exceptions are in Section 1.B., where supervisory approval of absence from work during core hours will be indicated by an approved leave request in writing or electronic form, as that is the method most employees use when requesting leave; and in Section 1.D.1., where, to avoid

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6/ In addition to its contention that the Panel has no authority to impose any of the Union's October 27, 2010, revised proposals, in its response to the Panel's first *OSC*, the Employer repeats a claim that it expressed during the initial investigation of this case that "it does not believe the parties are at impasse" over the Union's July 1, 2010, LBOs. It is clear from the record, however, that the Union's July 1, 2010, LBOs are substantively identical to the provisions the parties negotiated and tentatively agreed upon in 2005, with the exception of those matters that were presented to the Panel in Case No. 05 FSIP 95. Thus, they were the subject of extensive bargaining at that time. In our view, therefore, the Employer's claim that the parties are not at impasse over the Union's July 1, 2010, LBOs is hereby rejected.

assigning work to a specific management official, the provision will be modified so that the Employer, rather than the Division Chief, would grant specific exemptions to the requirement that hours worked under an AWS cannot exceed 12 hours per day or 80 hours per pay period. Finally, with respect to the daily flexband and basic workweek issues that were the subject of the Panel's previous *Decision and Order* in Case No. 05 FSIP 95, we shall modify Sections 1.D.1., 1.D.1.a. and 1.D.1.e. of the Union's July 1, 2010, LBO, by adopting the recommendation made by the parties' private mediator/arbitrator in 2005. In this regard, neither party has demonstrated why a daily flexible band from 5:30 a.m. to 8:30 p.m., Monday through Friday, should not be imposed.

5. Article 10 - Telecommuting

a. The Union's Position

The Union proposes that the title of the article be "Telework" instead of "Telecommuting." In addition, among other things, it proposes to change its July 1, 2010, LBO by: (1) Adding definitions of "core" and "situational" telework to Section 1; (2) Including a Section 2 outlining the eligibility requirements for participation in the telework program; (3) Clarifying the obligations of employees and managers under Section 3, "Initiating a Telework Agreement"; (4) Addressing office closures under Section 4, "Impact on Work Schedules" and permitting intermittent telework in the event of an emergency situation; (5) Expanding Section 5, "Intermittent Telecommuting"; (6) Adding Section 6.B. to allow review of telework to be conducted on an annual rather than semi-annual basis after the first year of an employee's telework agreement; (7) Revising Section 7, "Equipment and Information Technology," to allow employees to use non-government computers at telework sites where a government-issued computer is not required; (8) Removing the requirement in Section 8, "Childcare/Eldercare," regarding child care plans, to hold parents of children under the age of 10 to a higher standard; and (9) Modifying the titles and text of Appendixes 10-1, 10-2, 10-3, and 10-4 so, among other things, they refer to "Telework" rather than "Telecommuting."

The Union contends that adding definitions of "core" and "situational" telework to Section 1 of the article would decrease the likelihood of ambiguity and subsequent grievances over telework, and providing clear statements of the criteria for employees' eligibility to telework in Section 2 would

facilitate a more successful telework program. Its modification to Section 3 corrects a defect in the Union's July 1, 2010, LBO by including standards for supervisors to apply when changing employees' telework agreements. This would prevent "unnecessary, time-consuming and costly litigation." In Section 4, the proposed changes to its July 1, 2010, LBO would cure a current problem whereby some supervisors require employees who take approved leave on a day they would otherwise be scheduled to report to the traditional worksite to make up the day at the traditional worksite by cancelling future telework days. The changes also "strike a balance" by requiring management to consider allowing teleworking employees to attend less-important meetings by telephone, rather than at the traditional worksite, and providing reasonable notice and additional alternative telework days when possible if the Employer directs them to attend training, meetings, etc., at the traditional worksite. Its newly-proposed wording in Section 5 is consistent with the Telework Enhancement Act of 2010 because it expands the use of intermittent telework by permitting approval remotely and quickly in emergency situations, a change that could save NPS "thousands of dollars" in the event of extreme weather conditions. The Union's proposal for annual, rather than semi-annual, review of telework after the first year of an employee's telework agreement (Section 6.B.) would eliminate an unnecessary requirement. Its proposal in Section 7 to permit the use of non-government computers at telework sites where a government-issued computer is not required would reduce barriers to telework and decrease the costs of operating telework programs. The change the Union proposes in Section 8 that removes the requirement holding parents of children under the age of 10 to a higher telework standard reflects "current OPM regulations." Finally, its modifications to Appendix 10-3, which primarily concern telework employees on flexible work schedules, would benefit employees by no longer requiring them to inform their supervisors of their starting and stopping times and permitting them to earn credit hours.

b. The Employer's Position

The Panel should impose the Union's LBO of July 1, 2010, to resolve the parties' dispute over this article. In addition, the Employer asserts that the Union's proposed revisions were never the subject of negotiations between the parties, so the Panel is without authority to impose them.

CONCLUSIONS

With respect to this article, we shall order the adoption of the Union's July 1, 2010, LBO to resolve the parties' impasse. The revisions proposed by the Union were never the subject of negotiations between the parties. If the changes it proposes have as much merit as it asserts, the Union can reopen the article under the parties' mid-term reopener provision.

6. Article 13 - Sick Leave

a. The Union's Position

The Union proposes to add the following section to its July 1, 2010, LBO, titled "Bereavement," which states that:

> Section 3. Employees are also entitled to sick leave due to emotional bereavement caused by the death of a close relative or equivalent. Normally, absence due to bereavement is charged to sick leave; an employee may not be charged Leave Without Pay (LWOP) or have any leave charged against his or her Family Medical Leave Act (FMLA) entitlement, unless specifically requested by the employee and approved by the Employer.

Its proposed wording is in accordance with the Family Friendly Leave Act, Article 17: Family Leave, and applicable law, rule and regulation. The Union does not oppose the modification in Section 3.A. proposed by the Employer. As to its other proposed changes to the July 1, 2010, LBO, providing medical information only to Employer representatives who are medically certified is "vital" to protect employee privacy and confidentiality, and is consistent with the requirements of the Privacy Act of 1974, the Rehabilitation Act of 1973, and the position of the Equal Employment Opportunity Commission (EEOC) that a sick leave policy that requires employees to reveal the specific nature of their medical illness to be granted sick leave violates the Americans with Disabilities Act of 1990. Moreover, the Employer's proposal to remove wording that limits sick leave restrictions to no more than 6 months should be rejected because it could encourage their "punitive use."

b. The Employer's Position

The Employer proposes the following changes to the Union's July 1, 2010, LBO regarding this article:

Section 3.A. Employees may be required to furnish reasonably acceptable evidence to substantiate a request for approval of sick leave if sick leave exceeds three (3) consecutive workdays. **Medical certificates must: (1) include a statement that the employee [is] under the care of a physician; (2) include a statement that the employee was incapacitated for duty and the days the employee was incapacitated; (3) include information concerning the expected duration of the incapacitation; and (4) must be signed by or contain the stamped signature of the health care provider.**

Section 3.C.1. Where the Employer has reasonable grounds to question whether an employee is properly using sick leave (for example, when sick leave is used frequently or in unusual patterns or circumstances), the Employer may inquire further into the matter and ask the employee to explain. ~~If further inquiry is made by the Employer regarding diagnosis/prognosis, the employee may choose to provide this information only to Employer representatives who are medically certified.~~ Absent a reasonably acceptable explanation, the employee will be orally counseled that continued frequent use of sick leave, or use in unusual patterns or circumstances, may result in a written requirement to furnish acceptable documentation for each subsequent absence due to illness or incapacitation for duty, regardless of duration.

Section 3.C.2. If reasonable grounds continue to exist for questioning an employee's use of sick leave, the Employer may request that the employee provide reasonably acceptable evidence from the employee's caregiver. This evidence will indicate that the employee is under medical care, is incapacitated for duty, and the expected duration of such incapacitation. ~~If specific medical information such as diagnosis and prognosis is requested as part of such explanation, the employee may choose to provide this information only to Employer representatives who are medically certified.~~

Section 3.C.3. If reasonable grounds continue to exist for questioning an employee's use of sick leave, the employee may be notified in writing that for a stated period ~~(not to exceed six (6) months)~~ no

request for sick leave, or other leave in lieu of sick leave, will be approved unless supported by reasonably acceptable evidence. Any such written notice will describe the frequency, patterns, or circumstances which led to its issuance.

Section 5. An employee will be given advanced sick leave when all of the following conditions are met: **E.** ~~The employee has a serious disability or ailment (consideration of this factor should not be interpreted as restrictive as "serious health condition" under the Family and Medical Leave Act; 5 CFR 630.1202 and Article 33), or for purposes relating to the adoption of a child.~~ **The employee is adopting a child or the employee or family member has a serious health condition.**

Its proposed change to Section 3.A. would provide specific direction to employees regarding the information necessary to justify the use of sick leave for extended absences from work. The elimination of wording in Section 3.C.1. & 2., permitting an employee to provide medical information only to Employer representatives who are "medically certified," is "reasonable, concise and meets the threshold for reasonably requesting that an employee providing information necessary to consider a sick leave request." That modification also is consistent with the latitude management is granted under government-wide regulations to determine whether information provided by an employee to justify sick leave use is administratively acceptable. Finally, unlike the Union's proposal, its modification in Section 5.E. would not limit the definition of a "serious health condition" and "allows for the definition found in the Family and Medical Leave Act or other applicable laws, rules or regulations that may define" the term.

CONCLUSIONS

After careful consideration of the parties' responses to the *OSC* concerning this article, we are not persuaded that either side has demonstrated the need for significant changes to the Union's July 1, 2010, LBO. In this connection, because the Union has indicated its acceptance of the Employer's proposed modification in Section 3.A., we shall order its adoption. On the issue in Section 3.C.1. & 2., concerning whether employees should be permitted to provide information only to Employer representatives who are medically certified, in our view, requiring the Employer to take reasonable action to preserve an

employee's privacy would equitably balance the parties' interests. Accordingly, the two provisions in question under that section shall be modified to reflect this conclusion.

7. Article 17 - Absence for Family Care

a. The Union's Position

The Union essentially proposes to revise its July 1, 2010, LBO on the article by naming it "Family Leave," and "to reflect the current version" of the Family Medical Leave Act (FMLA, 29 U.S.C. § 2601, *et seq.*) and "include relevant portions" of the Federal Employees Family Friendly Leave Act (Public Law 103-388). By adding new Sections 1 and 2, employees would be given comprehensive information concerning their statutory entitlements. Under the Employer's proposal, "employees would have to read the entire FMLA [] to learn their entitlements." Section 1.F. through I., which sets forth what type of medical certification/documentation the Employer may request and the extent to which it can question the validity of the employee's diagnosis, are consistent with the wording in NTEU's contract with the Internal Revenue Service (IRS), and would ensure employees "that the Employer is administering their entitlements in an even-handed manner." Sections 3.A. and 4 of its proposal clarify the types of leave for which new mothers and fathers, respectively, may be eligible and should be adopted because they are clearer than the Employer's corresponding wording in Sections 1.A. and 2.

b. The Employer's Position

The Employer proposes the following revisions to Sections 2 and 3.B. of the Union's July 1, 2010, LBO on this article:

> Section 2. A male employee who has provided the Employer with reasonable advance notice may be absent on part-time or full time annual leave or leave without pay for a reasonable period of time for the purpose of assisting or caring for his minor children or the mother of his newborn child while she is incapacitated for maternity reasons~~, unless his absence causes a severe workload interruption~~. **The Employer will make a reasonable effort to accommodate an employee's request for paternity leave, consistent with workload and staffing needs.**
>
> Section 3. Absent just cause, and to the extent

provided by law, the Employer ~~will~~ **may** provide part-time or job sharing opportunities for employees who have children under six (6) years of age and pursuant to this Article, ~~will~~ **may** provide such opportunities for employees to care for their spouses, children, or parents with serious health conditions. **The Employer will make a reasonable effort to accommodate an employee's request for part time or job sharing opportunities, consistent with workload and staffing needs.**[7/]

The Employer's modification in Section 2, where requests for paternity leave would be evaluated under a "consistent with workload and staffing needs" standard, should be adopted by the Panel instead of the Union's "unless his absence causes a severe workload interruption" standard. Its proposal "takes a more reasoned approach to approval of leave requests" because there "simply is no definition of a severe workload disruption." In addition, unlike the Union's July 1, 2010, LBO, the Employer's proposal in Section 3 affords management latitude to determine what is practical for the operation's accomplishment of work. Moreover, the Union's proposal "requires the creation of part time jobs and thus is inconsistent with the Agency's statutory right to assign work."

CONCLUSIONS

Upon thorough review of the parties' responses to the *OSC* concerning the issues in this article, we shall order the parties to adopt the Union's July 1, 2010, LBO to settle the impasse. On the one hand, the Union's proposal was never the subject of bargaining between the parties and, on the other, the Employer has not demonstrated the need to change what the parties tentatively agreed to in 2005.

7/ There are discrepancies between what the Employer submitted as its Section 3 LBO on October 27, 2010, and how it describes the section in its November 29, 2010, response to the *OSC*. The proposal provided above is taken from the earlier submission.

8. Article 24, Details and Special Assignments, Section 1.A. (Referred to as Section 1.D. in the Factfinder's Report and Recommendations)

a. The Union's Position

The Union favors the adoption of the Factfinder's recommendation on Section 1.A., which reads as follows:

> 1. If an employee is not detailed to a position of higher grade, but performs higher graded duties for 25% or more of his or her direct time during the preceding four (4) months, the Employer will temporarily promote the employee retroactive to the first full pay period if the employee meets the criteria below:
>
> (a) The employee performed such higher graded duties at least at a level of skill and responsibility properly expected;
>
> (b) The employee meets minimum OPM qualifications for the promotion to the next higher grade; and
>
> (c) The employee meets time-in-grade requirements for promotion to the next higher grade.

The parties are in agreement regarding these provisions, but do not agree on whether this section of the article also should include the Employer's proposal that employees be given the burden of establishing that they performed higher graded duties for 25 percent of their direct time during the preceding 4 months. In recommending that the Employer's proposed wording be excluded from the section, the Factfinder stated that "questions of fact concerning the employee's performance of such duties are resolved through discussions between the employee and supervision without regard to burdens of proof." In the Union's view, "the notion that an employee is required to prove to the Employer that he or she performed higher graded work is absurd." The proposal is an "obvious attempt to wholly prevent all higher graded duty grievances by establishing an evidentiary bar." Given that management is receiving the benefit of having higher graded work performed and paying employees less for that work, "there should be no evidentiary burden."

b. The Employer's Position

In addition to adopting the Factfinder's recommendation on this section, the Panel also should impose the Employer's proposed wording that "the employee has the burden of proof to establish that he or she has performed higher graded duties for 25% of his or her direct time during the [pre]ceding [4] months." The Factfinder's suggestion that an employee's performance of higher graded duties, and the amount of time spent working higher graded duties, can be resolved in discussions between employees and their supervisors is unrealistic. By eliminating the requirement that an employee "establish that she or he has performed such duties upon request for retroactive promotion" there would be no "threshold" to meet for promotion "and the determination of when promotion is warranted, either prospectively or retroactively, is left open and unanswered."

CONCLUSIONS

After reviewing the parties' responses to the *OSC* on this issue, we shall order the adoption of the Factfinder's recommendation to resolve their dispute. Contrary to the Employer's stated position, the recommended wording clearly establishes a threshold for determining whether an employee should be temporarily promoted, or promoted retroactively, for performing higher level duties. In our view, the Employer has not met its burden of demonstrating that the section also should impose a burden of proof on employees as to whether the threshold has been met.

9. Details and Special Assignments, Section 2.B.

a. The Union's Position

The Union proposes the following wording to resolve the parties' impasse on Section 2.B. of this article:

> Details of non-bargaining unit employees or employees from another bargaining unit into bargaining unit positions shall require the Union's express permission. Requests for non-bargaining unit employees to be detailed to into bargaining unit positions must be made in writing and submitted to the Chapter President or designee. Requests must include a statement as to whether or not the Employer intends to fill the position on a permanent basis within the next

> twelve (12) months. The Union shall respond to the Employer's request within fourteen (14) calendar days.

This proposal would protect the ability of bargaining unit employees to secure details to other bargaining unit positions by permitting the Union to ascertain whether any qualified bargaining unit employees are interested in the detail opportunity. It "strikes the appropriate balance" between allowing non-bargaining unit employees to be temporarily detailed into bargaining unit positions, and the right of bargaining unit employees to obtain such details "which increases the potential of [bargaining unit] employees to be promoted." The Employer's proposal, on the other hand, grants management "unfettered discretion to detail" non-bargaining unit employees into bargaining unit positions, potentially denying employees who have waited their entire careers the opportunity to be detailed into a position. It also would disadvantage bargaining unit employees who may wish to be selected for a detail into a non-bargaining unit position, as only the interested bargaining unit employees would be subject to the provisions of the parties' CBA and not non-bargaining unit employees. Finally, the Employer "has provided no justification as to why a process, negotiated by the parties to apply to employees occupying bargaining unit positions, should apply to [non-bargaining unit] positions."

b. The Employer's Position

The Employer proposes the following wording on this issue:

> The Employer may establish programs to detail non-bargaining unit employees to bargaining unit positions to provide such non-bargaining unit employees (those at parks, regions, and offices within the National Park Service) with the opportunity to gain experience working in the Washington Office. Similarly, the Employer may provide opportunities for employees to be detailed to non-bargaining unit positions outside the Washington Office, typically at parks, regions, and offices throughout the National Park Service [] to gain experience working in parks and other NPS field and regional offices. In the instance of the detail of an employee to a non-bargaining unit position, the provisions of this Agreement will apply. The Employer will provide notice to the Chapter President of the detail of non-bargaining unit employees into bargaining unit positions.

Its proposal would allow interested NPS employees who work in parks to apply for details to positions at headquarters in Washington, D.C., and NPS employees located in Washington, D.C., to apply for details to positions in the parks. This would permit employees in both locations to "gain valuable knowledge and experience" at a different work location and to "build important relationships with their peers at parks or headquarters." For the approximately 55 bargaining units at NPS not represented by NTEU "there have been no issues with the detail of employees from headquarters to parks and vice versa." Under the Union's proposal, the Agency could detail park employees into headquarters bargaining unit positions "only with the permission of the Union." The Union could essentially end any program to detail employees from outside the unit without further discussion or providing any reasons. In addition, since there are no provisions for the detail of headquarters employees to parks, "bargaining unit employees are denied the valuable opportunity to work in other locations."

CONCLUSIONS

Having carefully considered the parties' positions on this issue, which was not addressed in the Factfinder's Report and Recommendations, we conclude that the Union's proposal provides the more reasonable basis for resolving the dispute. The last sentence of the Union's final offer shall be modified, however, to read as follows: "The Union shall respond to the Employer's request within fourteen (14) calendar days or the request is considered granted." On balance, we are persuaded that the Union's interest in protecting the ability of the employees it represents to be detailed into unit positions that may increase their chances of promotion outweighs the Employer's interest in ensuring that both bargaining unit and non-bargaining unit employees gain knowledge and experience in either park/field level work or at headquarters. While its proposal would deny bargaining unit employees the opportunity to be detailed to bargaining unit positions in other locations, the Panel is unwilling to second-guess the Union in how it chooses to fulfill its representational functions. Accordingly, we shall order the parties to adopt a modified version of the Union's proposal.

10. Article 28 - Training/Learning and Development

a. The Union's Position

The Union has no objections to the modifications submitted by the Employer to its July 1, 2010, LBO, with the exception of

the Employer's proposal to change the title of the article from "Training" to "Learning and Development." While it does not "object to this revision in principle," the word "training" should be retained in the title "as it is a key term for employees," the Employer agreed to it during the 2005 negotiations, and the 1991 NPS-NFFE Agreement also contains an article titled "Training."

b. The Employer's Position

In addition to proposing that the title of the article be "Learning and Development"[8/] and that the term "learning" be used instead of "training" in several places, the Employer proposes the following changes to Sections 4 and 6.A. of the Union's July 1, 2010, LBO:

> Section 4. For training courses/conferences not specifically related to employee needs, but furthering an agency goal, when one or more employees in a unit will be allowed to attend because the course is considered to provide beneficial training, the Employer will consider such factors in selection of attendees:
>
> **4.E. The extent to which the employee can share/disseminate materials and information from the conference/course upon returning to the duty station, through formal and informal channels.**
>
> Section 6.A. All training and related expenses should be submitted, approved and authorized at least ten (10) working days in advance of the starting date of the training. Additional unanticipated appropriate and necessary costs related to training expenses may be submitted to the Employer **for consideration** for approval (e.g. tuition, books, appropriate fees, etc.).

The title should be changed, and "learning" should replace "training" in several places, because the "organizational entity within the Agency is the Learning and Development Division and is more identifiable with a consistent title." The Employer's proposal in Section 4.E. to add an additional factor regarding

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8/ While the Employer claims that the Union's proposed title for the article is "Training and Development," the term it used in its July 1, 2010, LBO is "Training."

the selection of employees to attend courses would "better utilize funding" and "further the learning of employees as a whole." Finally, unlike the Union's misleading proposal in Section 6.A., the Employer's wording would make it clear that payment for unanticipated costs related to training are reimbursable only if they are appropriate and necessary.

CONCLUSIONS

Given the Union's acceptance of the Employer's proposed changes in Sections 4.E. and 6.A., we shall order the parties to adopt the Employer's proposed modifications to the Union's July 1, 2010, LBO, with the exception of the title of the article. In our view, the Employer has not demonstrated the need to change the title to "Learning and Development."

11. Article 30 - Reductions in Force

a. The Union's Position

The Union proposes that Section 2.C. of its July 1, 2010, LBO on this article be changed as follows: "Bargaining over ~~the impact of~~ **any decision by the Employer to conduct** a RIF will ~~follow~~ **be conducted pursuant to** the procedures ~~outlined~~ **set forth** in Article 52 (~~m~~**M**id-~~c~~Contract ~~n~~**N**egotiations) **and this article**." Its adoption is needed to clarify "the scope of negotiations and the interrelationship between the mid-term bargaining obligations set forth in Article 52 and the individual RIF actions that may be initiated pursuant to Article 30." In this regard, "it is paramount that the parties agree upon the scope of negotiations regarding a RIF during term bargaining." The Panel should reject the Employer's counter-proposal in Section 2.B. because it would only require NPS to give the Union written notification of a RIF sometime before informing employees "when possible," rather than at least 90 days prior to the issuance of the informational notice to employees. Essentially, this "would eliminate the role of NTEU as the exclusive representative of bargaining unit employees."

b. The Employer's Position

The following change to Section 2.B. of the Union's July 1, 2010, LBO, concerning notification to the Union of a RIF, is proposed by the Employer: "**When possible**, ~~T~~the written notification will be served on the Union ~~at least ninety (90) days~~ prior to issuance of the informational notice to employees described below (**in Section 3**)." Together with what the parties

have agreed upon in Section 3, where employees will be given at least 90 days informational notice prior to its effective date, the Union's July 1, 2010, LBO would require the Employer to provide 6 months advance notice of a RIF. This would "substantially impact the Agency's ability to run a RIF" and "is excessive and unwarranted." In many situations, "such as programmatic or general budget cuts," management "simply does not have much advance notice." Instead, the Panel should adopt the Employer's compromise, which goes beyond the 60 calendar days' specific written notice to both the Union and employees prescribed by Government-wide regulations.

CONCLUSIONS

After considering the parties' responses to the *OSC* on the RIF article, we conclude that the parties should adopt the Union's July 1, 2010, LBO to resolve their dispute. The modification proposed by the Union was never the subject of bargaining between the parties and, therefore, is not within our purview. In addition, the Employer has failed to show cause why the provisions the parties tentatively agreed to in 2005 should not be imposed.

12. Article 31, Contracting Out, Section 3.A.

a. The Union's Position

The Factfinder's recommendation should be imposed regarding this article, which states as follows:

> The Employer will notify the Union of any proposed contracting out of bargaining unit work, as defined in this Article, prior to making a final decision regarding the contracting activity. The Employer will simultaneously provide the Union with a copy of the proposed statement of work (SOW). The Union will have seven (7) calendar days to provide written or oral comments concerning the proposed SOW. Absent exigent circumstances, the Employer will not issue its request for proposals (RFP) until the expiration of the seven (7) calendar day period.

The Factfinder recommended the adoption of the Union's final offer on this issue because, "consistent with the Union's responsibility to administer the Agreement in the interests of the bargaining unit," the wording would permit it "to monitor all contracting out actions to ensure that they adhere to

procedural requirements," regardless of whether competitive procedures under OMB Circular A-76 apply.[9/] The FLRA has held that, absent a clear showing of a mutual intention during bargaining to limit a contracting out article to A-76 situations, "some obligations apply to contracting out that is performed outside the A-76 process."[10/] In the Union's view, the Employer "has not provided any rationale for its position beyond its desire to completely circumvent the Union in contracting matters." In fact, under the Employer's proposal, management could "immediately issue a request for proposals and contract out bargaining unit work *without even notifying the Union,*" even though such a decision "could have a significant impact on [bargaining unit] employees' retention of employment at the NPS."

b. The Employer's Position

The following wording should be imposed by the Panel to resolve the parties' dispute:

> When competitive procedures for selection of a private sector provider are required by law, rule or government-wide regulation, the Employer will notify the Union of any proposed contracting out of bargaining unit work, as defined in this Article, prior to making a final decision regarding the contracting activity.

The parties have reached tentative agreement "on the totality of the remainder of the article on contracting out." Their dispute concerns the first sentence of Section 3.A., where the term "bargaining unit work" in the Factfinder's recommendation could be interpreted "to mean any work that is or has ever been performed" by bargaining unit members "under any circumstances." As such, the recommended wording "excessively interferes with management's right to assign work and is inconsistent with section 7106(a)(2)(B) of the Statute." Moreover, the suggestion that the article would apply to matters other than A-76 is "simply misleading" and "misstated," as the rest of the contracting out article is limited only to instances that

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9/ OMB Circular A-76 does not apply for actions having an impact on 10 or fewer Full Time Equivalents.

10/ The Union cites *DHHS, National Institutes of Health and AFGE, Local 2419*, 64 FLRA 266 (2009), in support of its position.

involve OMB Circular A-76 competitive procedures. The Employer's proposal should be adopted, therefore, because it is more consistent with the rest of the article.

CONCLUSIONS

Having thoroughly examined the parties' responses to the *OSC*, we are not persuaded that the Employer has shown cause why management should not be required to notify the Union of all proposed contracting out that would have an affect on the bargaining unit, prior to making a final decision, including instances where competitive procedures do not apply. To avoid confusion, however, we shall clarify the wording recommended by the Factfinder to account for the fact that RFPs are unnecessary unless the contracting out involves competitive procedures. Moreover, even though the Employer's proposal also uses the phrase "bargaining unit work" without providing a definition, we also shall address its contention that the wording infringes on management's right to assign work by modifying that portion of the recommendation to specify that the requirement only applies to work that is being performed by bargaining unit employees. In our view, these modifications should ensure that the Union meets its responsibility to administer the CBA in the interests of the bargaining unit, consistent with the Factfinder's recommendation.

13. Article 33 - Communication

a. The Union's Position

The Panel should impose the Union's LBO of July 1, 2010, on Section 1.B.3. of this article, which reads as follows:

> 3. Meetings on an "as needed" basis may be called by employees to discuss office matters of pertinence to all employees or segments of the larger staff in an effort to facilitate, communicate or solve problems, absent a severe workload disruption.

While it does not object to the adoption of the Employer's proposed wording, a standard "as to when the NPS will not approve" employee requests to discuss office matters "also should be included." Moreover, the Employer initialed off on the Union's LBO on this article in 2005 "and did not raise any objection to this article at any point in subsequent communications."

b. The Employer's Position

The Employer proposes to change Section 1.B.3. of the Union's July 1, 2010, LBO as follows:

> **Upon approval of the Employer,** ~~M~~meetings on an 'as needed' basis may be called by employees to discuss office matters of pertinence to all employees or segments of the larger staff in an effort to facilitate, communicate or solve problems~~, absent a severe workload disruption~~.

Each party recognizes "the utility of meetings called by the employee to facilitate teamwork, communicate with each other or solve problems." Conditioning employee-initiated meetings upon management approval, however, would ensure that meetings are consistent with management's right to establish work priorities and assign work. The Union's wording, on the other hand, would permit an employee to call a meeting at any time unless the meeting would result "in a severe workload interruption," and should not be imposed because that phrase "is ambiguous and difficult to administer."

CONCLUSIONS

Having carefully considered the parties' dispute over this article, we are persuaded that the Employer has shown cause as to why the Union's July 1, 2010, LBO should be modified. In ordering its adoption, however, we shall add the requirement that "approval shall not be unreasonably denied." In our view, this modified version of the Employer's proposal better balances the parties' interests.

14. Article 35, Performance Evaluation, Section 3.B.3

a. The Union's Position

The Union proposes that rating officials be responsible for "augmenting each of the benchmark standards with specific standards that describe the results expected at the various levels of performance for each element. These will be described in writing at all performance levels." Contrary to the Employer's position, its proposal is negotiable[11/] and, if

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11/ In support of its contention, among other cases, the Union cites *NAGE, Local R1-100 and DOD, Navy, Naval Submarine Support Facility, Groton, CT*, 56 FLRA 268 (2000).

adopted, would change the Employer's current practice of providing written explanations only at the Fully Successful level. The change is warranted to better enable employees to know what their performance expectations are and how their performance will result in a higher or lower rating at the end of the year. Its adoption would also "encourage employee participation in establishing performance standards," as required by 5 U.S.C. § 4302(a)(2). The Employer's assertion before the Factfinder that "it would be hard for managers to know the difference between the levels . . . is ludicrous." Each year, managers rate their employees on a 5-tier scale and determine their levels of performance. If managers know the differences between levels at the end of the evaluation year "there is absolutely no compelling reason that this information should not be shared with employees at the beginning of the appraisal year."

b. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the Union's proposed wording be deleted from the parties' CBA. In this regard, "there was no evidence presented at bargaining that augmenting performance standards was necessary, would improve communications between supervisors and employees, would improve employee performance, make the standards clearer, or would otherwise improve the performance management system." Besides that, the Union's proposal directly interferes with section 7106(a)(2)(a) and (B) of the Statute by restricting the Agency's rights to determine the content of performance standards and critical elements.[12/]

CONCLUSIONS

On this issue, after thorough review of the parties' responses to the *OSC*, we shall order the adoption of the Factfinder's recommendation to resolve the impasse. While the Union's proposal appears to be negotiable, it has failed to provide evidence to contradict the Factfinder's conclusion that performance standards for all levels could not be effectively fashioned for many positions.

12/ The Employer cites *NTEU and DHHS, Social Security Administration, Office of Hearings and Appeals, Baltimore, Maryland*, 39 FLRA 346, 350-54 (1991), in support of this claim.

15. Article 36 - Rewards and Recognition

a. The Union's Position

Among other things, the Union proposes to: (1) Change the title of the article to "Awards"; (2) Modify Section 1 of its July 1, 2010, LBO to establish defined awards pools based on 1.75 percent of total annual bargaining unit salary; require 90 percent of awards funds to be distributed as performance awards and 10 percent as other discretionary awards; require the Employer to negotiate over any changes in the budget for the unit employee awards pool to be negotiated as an exception to the reopener provision in the Duration and Termination article; (3) Add Section 2, which would establish the NPS/WASO-NTEU Agreement Awards Program addressing a wide variety of items including a minimum performance award of $500 and a maximum of $4,000, a minimum summary evaluation rating of 3.4 for receipt of a performance award, a target QSI award rate of 10 percent for each fiscal year and applicable criteria for receipt of QSIs, and that no employee with an overall rating of Minimally Successful or lower is eligible for a performance award; (4) Change the portion of Section 3 titled "Suggestion Awards" to "Productivity Improvement Awards," and adopt a set of procedures for implementing the program including a requirement that, generally, the award will equal 10 percent of the tangible benefits up to $10,000; (5) in Section 4 (misidentified in the Union's October 27, 2010, LBO as Section 5), establish a set of procedures for a Time-Off Awards program; and (6) in Section 5 (misidentified in the Union's October 27, 2010, LBO as Section 3), provide an extensive list of definitions of existing Special Act Awards that employees may receive, as well as procedures that would apply to them.

Section 1 of its October 27, 2010, LBO should be imposed because it is comparable to other agreements the Union has with federal agencies of similar size, *i.e.*, Financial Management Service and the Food and Nutrition Service. Similar jointly-administered award programs with defined performance award pools also operate in NTEU-represented bargaining units at the Security and Exchange Commission, the Department of Health and Human Services, and IRS. Its proposal in Section 2 "sets forth a straight-forward, unambiguous performance awards program with defined terms" that, for the first time, "would provide for equitable and guaranteed distribution of award monies to bargaining unit employees." The wording it proposes in Section 3 on Productivity Improvement Awards should be adopted "because it establishes an evaluation process for ideas and explains the

details of the award." Its newly-proposed Section 4 concerning time off awards (TOAs) would provide "managers and employees with significantly more guidance regarding the use of TOAs, including pertinent limitations." Its proposal in Section 5 is warranted because, in addition to setting forth the types and criteria for special act awards, it "also provides for how the awards are funded."

The Employer's proposal on this article, if implemented, would establish an awards program that is "wholly discretionary, in direct conflict with the controlling circuit court's decision in *McClatchy v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997)," which bars private sector employers from unilaterally implementing "standardless" proposals as part of its impasse-breaking strategy. In the federal sector, the "parallel to employer implementation" is "the execution of any Panel decision adopting a standardless proposal," such as the Employer's on this article. Thus, the Panel "should not adopt the Employer's proposal as it conflicts with the *McClatchy* concept."

b. The Employer's Position

The Employer proposes numerous changes to the Union's July 1, 2010, LBO on this article, the most significant of which are: (1) in Section 1, it would provide a description of the Incentive Awards Program; eliminate wording requiring the Employer to grant incentive awards "in a fair, equitable, and objective manner in accordance with this Agreement and applicable rules and regulations" and replace it with "the Employer will administer the awards program consistent with applicable policy, law, rule, and regulation"[13/]; and make the establishment of the WASO Incentive Awards Committee a matter within the Employer's discretion rather than mandatory; (2) Modify Section 2.A. as follows: "The Incentive Awards program covers ~~superior accomplishment awards for special acts or service, length of service recognition, and a variety of non-cash honor awards~~ **'Performance, Honor, Monetary, Non-Monetary, and Outside Awards'**"; eliminate wording whereby the Employer agrees that "it will establish no quotas or predetermined distribution rates for the size and number of incentive awards"; employees would be notified of the approval of any incentive

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13/ The Employer indicates a willingness to accept the following wording as the second sentence in Section 1.B.: "The Employer will administer the awards program in a fair and objective manner consistent with applicable policy, law, rule, and regulation."

award "in an appropriate manner" rather than through a certificate issued within 30 days of approval; change the date of the Union's annual notification of employees receiving incentive awards from October 1 to January 15; eliminate the requirement that the Union's annual notification include, "when they exist and are known to the Employer, either a brief explanation of the criteria involved or, when appropriate, a reference to the written instructions containing such criteria"; (3) in Section 3, change wording that employees who receive "Exceptional" or "Superior" summary ratings *will* be granted a performance award to *may* be granted a performance award; eliminate wording that employees who receive a "Fully Successful" summary rating may be granted a Performance Award and the requirement that any employee who receives a "Fully Successful" summary rating but does not receive an award will receive a written explanation, upon request; eliminate subsections B. (permitting employees with "Fully Successful" summary ratings who do not receive performance awards to grieve), C., F, G. and H.; (4) in Section 4, eliminate subsections B. through G., except for wording that confirms that "a time off award may not be converted to a cash payment under any circumstances"; (5) in Section 5, change the title of the section from "Suggestion Awards" to "Productivity Improvement Award," and eliminate all of the subsections and replace them with the following:

> Productivity Improvement Awards are recognition for process improvement, cost-saving suggestions, streamlining, or the elimination of non-value added processes. The award shares some portion of actual savings resulting from cost reduction or productivity gains with the employee(s) who recommends or achieves the savings.

Finally, (6) it would modify Section 6 as follows:

> ~~Quality step increases may be given in the case of exceptional performance when the following criteria are met: A. The employee's accomplishments are above and beyond what is considered part of their regular duties and those accomplishments can be documented by measurable standards such as recognition by peers, professional organizations, awards, performance in excess of others in the same position, or when performing additional duties. B. The employee has at least two years of performance standards and ratings in place at the "Fully Successful" level. If the~~

~~employee does not have two years of ratings on file, she/he will be given credit for two years of Performance Appraisals at the "Fully Successful" level. C. Other employees of equal position and accomplishment are also made eligible~~ Quality Step Increase. A Quality Step Increase (QSI) is a pay increase that provides faster than normal progression within grade steps for permanent General Schedule employees. To be eligible, the employee must achieve an overall rating of Exceptional (Level 5) on their Employee Performance Appraisal Plan and display exceptional performance that is expected to continue.

The changes it proposes in Section 1 would benefit employees by providing a clearer description of the Incentive Awards Program, and eliminating the requirement that awards be granted in an "equitable manner" is warranted because an awards program "by its nature does not treat employees equally." Unlike the Union's proposal, the Employer's wording in Section 2.A. is consistent with the provisions of the most recent DOI manual, which includes performance awards and awards by outside organizations. The elimination of reference to quotas or predetermined distribution rates on the size and number of performance awards is justified because "there is no historical or other evidence" of their use by the Agency. In Section 2.F., notifying employees of the approval of an award "in an appropriate manner" is practical and would allow employees to be recognized at award recognition ceremonies that may occur beyond the 30 days required to notify employees in the Union's proposal.

Annual Union notification of awards (Section 3) received by employees should be on January 15, rather than October 1, because it comports better with the Employer's annual appraisal cycle, which runs from October 1 to September 30. Stating that employees who receive "Exceptional" or "Superior" summary ratings *may*, rather than *will*, receive performance awards is necessary to ensure that management has the discretion to deny an award to an employee whose performance is rated "Exceptional" but is pending removal for a serious disciplinary matter. Removing the ability of employees who have received a "Fully Successful" rating, but no performance award, from filing a grievance would avoid the implication that a "Fully Successful" rating merits a performance award. Moreover, the right to file a grievance is implied throughout the CBA, so there is no need to refer to the right specifically in connection with employees rated "Fully Successful." The Union's proposed Section 3.C.

should be eliminated because it is based on the false premise that there is an implementation plan that is updated annually and that establishes award ranges and/or amounts. In any event, the Union's rights would be protected because the Employer is required to provide notice and bargain if it decides to change the awards system.

It is unnecessary to impose Section 4.B. of the Union's July 1, 2010, LBO because there is no history of management applying different criteria for TOAs depending on grade or assignment. The Union's wording in Section 4C. and D. appear to contradict each other and delegate assignments of work to management officials, a matter that is not an appropriate subject of bargaining. Further, the Union's Section 4.F. proposal is redundant because the substitution of sick leave for annual leave is already covered in Article 12 of the CBA. Finally, Union Sections 5 and 6, which cover Productivity Improvement Awards and QSIs, "appear to be based on older, outdated versions" of the DOI Incentive Awards regulation. In Section 1 of the July 1, 2010, LBO, the Union has agreed that the article will be in conformance with the most recent DOI manual. Therefore, the Employer's proposals on Section 5, "Suggestion Awards," and Section 6, "Quality Step Increase," which are in conformance with the manual, "should be adopted by the parties."

CONCLUSIONS

Upon thorough consideration of the parties' responses to the *OSC*, we conclude that neither side has shown cause why the Union's July 1, 2010, LBO should not be imposed to resolve their impasse. In reaching this conclusion, we recognize that, perhaps more than any other, the "Rewards and Recognition" article is in need of revision. Rather than order the extensive revisions put forward by both parties, in our view it is preferable that they live with the terms that were fully negotiated in 2005 until they have the opportunity to reopen the contract and engage in renewed bargaining that addresses their mutual interests. Accordingly, we shall order the adoption of the Union's July 1, 2010, LBO on this article.

16. Article 40 - Waiver of Overpayments

a. The Union's Position

The Union proposes that its July 1, 2010, LBO on this issue should be imposed by the Panel, whereby the Employer essentially

"will" recommend waiving an employee's obligation to repay pay or allowances, or an erroneous payment involving travel, transportation or relocation expenses, in whole or in part, if the overpayment occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. The Employer signed off on the wording in 2005 and never raised any objections to it in any subsequent communication, so it "should be adopted by the Panel."

b. The Employer's Position

The Employer proposes the following change to the Union's July 1, 2010, LBO:

> An employee may request a waiver of an erroneous payment of pay or allowances or an erroneous payment involving travel, transportation or relocation expenses in whole or in part. The Employer ~~will~~ **may** recommend waiver of the obligation to repay such overpayment, if that overpayment occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee and is otherwise in accordance with 5 U.S.C. § 5584 and applicable regulations. The Employer has determined that it will suspend collection of the overpayment in question pending final decision of the waiver request.

Its modification acknowledges that there may be circumstances where employees have full knowledge that an administrative error has occurred that caused an overpayment but wait to see if the Agency finds the error first. In such cases, Employer should have the discretion to deny an employee's waiver request even though the employee had no part in causing the administrative error.

CONCLUSIONS

In our view, the Employer has failed to show cause why the Union's July 1, 2010, LBO, should not be imposed. Accordingly, we shall order its adoption to resolve the parties' impasse over this article.

17. Article 42 - Health and Safety

a. The Union's Position

The only Employer-proposed modifications to its LBO of July 1, 2010, that the Union objects to concerns Section 14.A., where it removes wording which allows either party to propose changes to the underlying Employee Assistance Program policy during the life of the CBA. This wording confers equal rights upon both parties, provides for bargaining consistent with Article 52 (Mid-Contract Negotiations), was signed off on by both parties in 2005, and the Employer "did not raise any objections to this language in any subsequent communications with the Union." Therefore, the Union's proposal should be adopted by the Panel.

b. The Employer's Position

The Employer proposes to modify Sections 10, 13, and 14.A. as follows:

> Section 10. When the Employer is informed that an employee has incurred an on-the job injury, the Employer will inform the employee of the benefits of the Federal Employees' Compensation Act. The employee will report the injury within 24 hours. It will be the responsibility of the Employer to issue to the employee all necessary forms to adjudicate her/his claim. If because of her/his injury the employee is not able to complete the necessary forms, the Employer will provide appropriate assistance for completion of the forms. **The employee or the supervisor will initiate workers compensation claims (if appropriate) through the Department of Interior's Safety Management Information System (SMIS). The employee or employer will complete all required fields in SMIS.**
>
> Section 13. Upon request, the Employer will provide equipment that minimizes eyestrain, back and muscle strain, and **repetitive motion injuries such as** carpal tunnel syndrome for employees working on personal computers.
>
> Section 14.A. Employee Assistance Program. The Parties recognize alcoholism, drug abuse, and emotional problems as illnesses, which are treatable. In addition, the Parties recognize that other problems such as financial and other personal difficulties can

manifest themselves in problems which can adversely affect an employee's performance or conduct. This Article shall be interpreted and applied in a manner consistent with law, rule, and regulation. ~~During the life of the Agreement either party may propose changes to the underlying EAP policy. Such proposed changes will be negotiated to the fullest extent permitted by law. Where the proposed change is inconsistent with, or in conflict with the terms of this Article, such change will only be subject to negotiation if mutually agreed to by the parties.~~

The Employer's additional wording in Section 10 affirms that it is in the interest of both parties to process workers compensation claims electronically because the SMIS is paperless, quicker and has fewer errors. By including the phrase "repetitive motion injuries such as" in Section 13, the Employer's proposed wording is more comprehensive than the Union's. Finally, the Panel should impose its proposed removal of the last three sentences of the Union's proposal in Section 14.A. because the subject of mid-term bargaining is already addressed in Article 52 and "the statutory obligation to negotiate over changes in working conditions."

CONCLUSIONS

After full review of the parties' responses to the *OSC* concerning this article, we shall order the adoption of the Union's July 1, 2010, LBO, with the exception of Sections 10 and 13, where the Union has accepted the modifications proposed by the Employer. With respect Section 14.A., in our view the Employer has not demonstrated a need to change the wording tentatively agreed upon by the parties in 2005.

18. Article 44, Travel and *Per Diem* for Union Representatives, Sections 3 & 4

a. The Union's Position

The Panel should add the following sections to Article 44:

Section 3. Each year of this Agreement, the Employer shall pay reasonable and customary travel and *per diem* expenses for up to four (4) Union representatives to attend National NTEU training only where such training is not being held at a location within the employees' commuting area.

> Section 4. In addition to the above, the Employer shall also pay reasonable and customary travel and *per diem* expenses incurred by employees serving as Union representatives authorized to engage in those activities for which official time is authorized pursuant to Article 45, Section 1.D subject to a limit of $12,000 over the four (4) year term of this Agreement (with an additional $3,000 per year in any renewal year).

The Factfinder "failed to provide any rationale" to support his recommendation that these sections be deleted from the article. Its proposal in Section 3 would permit those few Union stewards at duty stations outside the Washington, D.C. metro area to attend NTEU's annual spring training held in Arlington, Virginia. The proposal should be adopted because "the education and preparation received at the training would benefit both parties," and it is comparable to what the Union's current CBAs with FDIC, the Bureau of Customs and Border Protection, and IRS require. Since most of its officers and stewards are located in the Washington, D.C., area but the unit is nationwide, adoption of the Union's Section 4 proposal would facilitate its representatives' ability to travel to fulfill their statutory and contractual duties. Further, the Employer's contention that payment of travel expenses is not authorized for union representatives of other bargaining units within DOI and NPS is irrelevant. Particularly within NPS, most of these unions cover only a single park, limited geographic area or regional office where travel is not required to fulfill their representational duties.

b. The Employer's Position

The Panel should agree with the Factfinder's recommendation and order that the Union's proposed wording be deleted from the parties' CBA. Neither DOI nor NPS, with approximately 205 bargaining units between them, have many CBAs requiring them to pay any of a union's travel and *per diem* expenses. Moreover, NPS is required to report to Congress on its use of travel funds and "has an imposed 'ceiling' that limits travel by Agency employees." Nevertheless, the Employer accepted the Factfinder's recommendations on Sections 1 and 2 of the article, which require it to pay travel and *per diem* expenses for a Union representative to attend negotiations and labor-management committee meetings. Additional requirements that the Employer annually pay travel and *per diem* expenses for up to four Union representatives to attend National NTEU training, and up to

$3,000 for general representational activity, are "simply not warranted." The Union has, or should have, representatives in all of the geographical areas where unit employees are located and should not require "undesignated funding" for additional travel. With respect to the Union's annual training, it currently has only one representative who is not duty stationed in the Washington, D.C., metro area where the training is held. Therefore, "there is simply no need for travel on the size and scale requested by the Union as they have no representatives to use the travel funds."

CONCLUSIONS

After fully examining the parties' responses to the *OSC* concerning the two remaining sections in this article, we shall order the adoption of the Factfinder's recommendation to settle the dispute. Although he did not provide specific rationale in support of his recommendation to delete the Union's proposals, in our view, neither has the Union shown cause for imposing them.

19. Article 48, Employee Grievance Procedure, Section 4.B

a. The Union's Position

The Union proposes that, "for grievances alleging discrimination, the time limits for filing grievances shall be forty-five (45) calendar days." If adopted, the proposal would allow allegations of discrimination to be pursued, and possibly resolved, through the informal EEO process without requiring the employee to determine whether the statutory or negotiated grievance procedure is better suited for resolution of the claim. Thus, it would encourage the use of a trained EEO counselor during the 45-day period for filing grievances alleging discrimination, which is likely to decrease litigation and protracted proceedings between the parties. The Factfinder's recommendation to delete the proposal, on the other hand, alters "the timeframe for election of remedy established by EEOC regulations and the [FLRA]."

b. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the Union's proposed wording should be deleted from the CBA. In this regard, the Factfinder found "no convincing basis for establishing longer timeframes" for EEO complaints under the negotiated grievance procedure because "the element of fairness

does not come into play where the Union elects to file under the negotiated grievance procedure as opposed to another alternative dispute resolution procedure." The sole reason provided by the Union for proposing an extended period of time for filing a grievance that alleges discrimination "is that it mirrors the time frame established by the [EEOC] for complaint processing." Complaints filed under the statutory EEO process, however, are distinct from grievances involving alleged discrimination and provide different procedures with different timeframes. In addition, "the establishment of separate grievance timeframes for matters that do and don't allege discrimination would establish a separate grievance procedure and be confusing and duplicative."

CONCLUSIONS

In our view, the Union's response to the *OSC* on this issue fails to support the inclusion of its proposal in the article. Accordingly, we shall order the adoption of the Factfinder's recommendation to resolve the parties' impasse.

20. Article 52, Midterm Bargaining, Section 1.B.

a. The Union's Position

The Union urges the Panel to agree with the Factfinder that the Employer's proposed wording on this article should not be included in the parties' CBA. Its proposal, at least in part, waives the Union's statutory right to initiate mid-term negotiations, and is contrary to Panel decisions that have consistently refused to impose contract provisions that require either party to waive a statutory right. Most importantly, the Employer has taken the position that the Union "may not initiate negotiations regarding any matter that is the subject of any existing rule or regulation of the Employer." Its proposed wording, however, contains no limitation on when such existing rules or regulations must be in existence in order to preclude the Union from initiating bargaining, and would permit management to promulgate a rule "*after NTEU has given the Agency notice* of a proposed change and if the NPS promulgated a policy before negotiations commenced, the Union would be foreclosed from bargaining the topic." For these reasons, the Factfinder's recommendation on this article should be adopted by the Panel.

b. The Employer's Position

The Employer's proposal on Section 1.B. of this article is

the following:

> To the extent permitted by law, the Union may initiate mid-term bargaining by proposing changes in conditions of employment provided that such changes do not relate to matters addressed in this or any other agreement between the parties, the matters are not the subject of any existing rule or regulation of the Employer and provided further that such changes do not relate to matters over which the Union has waived its rights to bargain during the term of this Agreement. Notice of changes in conditions of employment proposed by the Union will be served on the Employer. The Union's submission shall be limited [to] three issues per contract year.

Its proposal is taken "verbatim" from the contract between NTEU and OCC, effective October 2010. Both bargaining units are "similarly situated and similarly sized." After frequently citing, during bargaining, provisions in CBAs between NTEU and other agencies to support the adoption of its proposals, it is unclear why the Union cannot agree to wording from another one of its contracts that was implemented so recently. While the Union claims that the proposal would force it to waive bargaining over Agency regulations that it is unaware of, the Union requested and received access to all of the Agency's regulations during bargaining. Since the parties have been negotiating over their initial CBA since 2004, and the Union has been the exclusive representative for 10 years, "it is difficult to determine what issues exist that warrant virtually open ended or unlimited bargaining, as proposed by the Union, in mid-term bargaining." Finally, the Employer's proposal "provides an equitable approach" because it addresses the issues presented in mid-term bargaining, provides the Union with the opportunity to present matters, and enables management to initiate bargaining over new initiatives, particularly those of the President and the Secretary of the Interior, in a timely manner.

CONCLUSIONS

Upon careful analysis of the parties' responses to the *OSC*, in our view the Employer has not shown cause as to why its proposed wording should be included in the article. Among other things, the proposal appears to waive the Union's statutory right to initiate mid-term bargaining. The fact that the Union may recently have agreed to an identical provision with a different agency provides no basis for the Panel to impose it

here. Therefore, the parties shall be ordered to adopt the Factfinder's recommendation to resolve their impasse over this matter.

21. Article 55 - Child Care Subsidies

a. The Union's Position

The Panel should impose the Union's July 1, 2010, LBO to resolve the parties' impasse on this article as the Employer's modifications are unacceptable. In this regard, the Employer proposes to raise the Family Adjusted Gross Income (AGI) from $55,001 to $60,001, "thereby decreasing the number of employees eligible for the child care subsidy program." It also lowered the age for eligible children from 13 years to 6 years, even though the National SAFEKIDS Campaign states that no child under the age of 12 should be left home alone.[14/] Where the Union would base the annual subsidy amount solely upon the employee's AGI, the Employer proposes to use a "complex formula" requiring management to pay a percentage of the difference between the employee's AGI and the actual cost of the child care, and caps the subsidy at $5,000 per year. In addition to being less beneficial to employees, the Employer has also "truncated Section 4.C. and eliminated Sections 4.D. and E., making the child care subsidy program more difficult to fund and track each year."

b. The Employer's Position

The Employer proposes to make the following changes to Sections 1 through 4 of the Union's July 1, 2010, LBO:

> Section 1. The Employer will establish a Child Care Subsidy Program in accordance with **this Article,** applicable rules and regulations, and subject to budgetary considerations. The intent of the Program will be to make child care more affordable for lower income employees whose children are, or will be, enrolled in licensed child care facilities. The Employer will provide employees with information regarding the Program.

14/ The Union does not, however, oppose the Employer's additional wording in Section 2.B. requiring physicians or licensed or certified psychologists to determine eligibility of children age 18 or younger.

Section 2. A full-time or part-time permanent employee who meets the following criteria will be eligible for a subsidy: **A.** Family Adjusted Gross Income (AGI) is less than ~~$55,001~~ $60,001; **B.** Has a child or children age ~~13~~ 6 or younger or ~~a disabled child~~ age 18 or younger **and physically or mentally disabled as determined by a physician or by a licensed or certified psychologist.**

Section 3. ~~The Employer will use the employee's family AGI in determining the amount of the employee's child care subsidy.~~ **If the eligible employee's child care expenses exceed the percentage of the Family Adjusted Gross Income described below, the Employer may pay up to 100% of the difference between the percentage of family adjusted gross income listed below and the actual cost of child care, but no more than $5,000 to an employee in a Plan year.** The Employer will use the employee's family AGI in determining the amount of the employee's child care subsidy. Family AGI is defined as the amount reported as Adjusted Gross Income on IRS Tax Form 1040 or 1040A. For individuals who are married, filing separately, it is the sum of both spouses' AGI. For each child, the subsidy will be reduced by the amount of any other child care subsidy received for that child. When more than one parent works for the federal government, child care subsidy cannot be awarded by more than one federal agency. The annual subsidy amount for an employee is determined as follows:

Family AGI ($)	% of ~~Total Child Care Costs Paid by the Employer~~ **Family Adjusted Gross Income**
~~20,000 and below~~	~~100~~
60,001 - 50,000	20%
~~20,001 - 30,000~~	~~75~~
50,001 - 40,000	17%
~~30,001 - 40,000~~	~~50~~
40,001 - 35,000	14%
~~40,001 - 55,000~~	~~25~~
35,001 - 30,000	12%
~~55,001 and over~~	~~0~~
29,999 and less	10%

~~The foregoing total family income will be adjusted each year by a percentage equal to the percentage~~

~~increase to Agency base salaries for that year; if, in any given year, base salary increases are not uniform throughout the Agency, then these total family income levels will be adjusted by a percentage equal to the average base salary increase for employees whose Agency salaries are $55,000 or less (as increased by any base salary adjustments occurring after the effective date of this Agreement). If, due to budgetary limitations, there are insufficient funds to continue payments for all employees currently enrolled in the program, funds will be allocated based on the provisions of Section 4, below.~~ **Example: An employee has a Family AGI of $30,000 and actual child care expenses of $5,000 per year. The employee is expected to pay a minimum of 12% of his/her AGI in child care expenses, or $3,600 (%30,000 x 12%) The difference between the actual costs and what the employee is expected to pay is $1,400. The Employee is eligible for a subsidy of $1,400.**

Section 4. ~~C. The initial deadline for submission of applications will be 60 calendar days after the effective date of this Agreement. The Employer will provide child care subsidies to employees using the allocation table set forth in Section 3, beginning with the qualified applicant with the lowest total family income and working up to those qualified applicants with a total family income of $50,000 (as increased by any base salary adjustments occurring after the effective date of this Agreement), until all available funds are expended. If qualified employees applying for the subsidy have identical total family income, and funding for the program does not allow all such employees to receive the subsidy, the ties will be broken by awarding the child care subsidy to employees in order of earliest to most recent entrance on duty date. D. Applications received after the initial submission deadline will be considered, subject to budgetary availability, on a first come, first served basis. If an employee is eligible for the subsidy and funds are not available, he/she will be placed on a waiting list until such time as funds become available. E.~~ **C. Employees may apply for the Child Care Subsidy at any time.** Employees selected for child care subsidy will be notified in writing by the Employer.

Its proposed changes are based on the model that OPM advises is employed by most federal agencies and is the same model the Agency currently uses under an Interagency Agreement between NPS and the General Services Administration. The DOI also advocates the use of the OPM model in Personnel Bulletin 07-04, "Child Care Subsidy Plan," dated December 18, 2008. The changes would result in more generous benefits for employees than under the Union's proposal because income eligibility would be higher, and the program would be more efficient to administer, as a separate interagency agreement would not be required. Therefore, the Panel should adopt the Employer's proposals.

CONCLUSIONS

Having fully examined the parties' responses to the *OSC* concerning this article, with the exception of its proposed wording in Section 2.B., we conclude that the Employer has not demonstrated a need to change the terms that were tentatively agreed upon in 2005. Accordingly, the parties shall be ordered to adopt a modified version of the Union's July 1, 2010, LBO.

22. Article 59 - Credit Union Facilities

a. The Union's Position

The Union's July 1, 2010, LBO on this article should be changed as follows:

> The Employer recognizes that the banking services provided by the Department of the Interior (DOI) Federal Credit Union (FCU) ~~located in the Main Interior building~~ are not readily accessible to bargaining unit employees ~~located at 1201 Eye Street, NW, Washington, DC~~. ~~Consequently~~ **Accordingly**, the Employer ~~and the Union will work in good faith to explore all viable options regarding the possibility of having a DOI FCU Automatic Teller Machine installed at the 1201 Eye Street location~~ **agrees to maintain all DOI FCU Automatic Teller Machines (ATMs) at existing locations and to explore all viable options to install and maintain a DOI FCU ATM at every duty station with at least thirty (30) NPS employees. Either party may raise the installation of ATMs at other locations consistent with Article 52 (Mid-Contract Negotiations).**

Its modifications should be adopted "to reflect the fact that the [DOI] Federal Credit Union ATM has been installed at 1201 Eye Street NW and to encourage expanded employee access to this benefit."

b. The Employer's Position

In its September 15, 2010, submission to the Panel, the Employer agreed to the Union's July 1, 2010, LBO. Thus, it should be imposed by the Panel to resolve the parties' impasse over this article.

CONCLUSIONS

With respect to the dispute over this article, we shall order the parties to withdraw their proposals. The Union's newly-proposed wording has not been the subject of negotiations and, on the basis of the record presented, it is clear that the tentative agreement reached on this article in 2005 has been superseded by events.

23. Article 61 - Duration and Termination

a. The Union's Position

The Union proposes the following changes to its LBO of July 1, 2010:

> Section 2. This Agreement shall remain in effect for a period of ~~three (3)~~ **four (4)** years from its effective date and shall be automatically renewable for additional one (1) year periods unless either Party notifies the other Party, in writing, at least sixty (60) days, but not more than one hundred five (105) days prior to the expiration date of its intention to reopen, amend, modify, or terminate this Agreement. Such written notice will be accompanied by any proposed amendments or modifications to the Agreement being delivered to the other Party. The Party receiving the written notice may deliver counter-proposals and proposals to the other Party during the next thirty (30) day period. The Parties will begin negotiations no later than thirty (30) calendar days prior to the expiration date of this Agreement. If negotiations are not concluded prior to the expiration date, this Agreement shall continue in full force until a new Agreement has been approved.

> Section 3. During the thirty (30) day period beginning twenty-four (24) months after the effective date of this Agreement, either Party may reopen negotiations on any three (3) existing Articles **and propose one (1) new article.** The request will be in writing and must be accompanied by specific proposals. The Parties will begin negotiations no later than sixty (60) days after receipt of the notice.

The CBA should have a duration of 4 years rather than 3 "in light of the amount of time that the parties have spent negotiating this agreement." In addition, Section 3 would allow each party to propose one new article during the mid-term reopener. The Union's changes "should be adopted in the interest of efficiency."

b. The Employer's Position

The Employer agreed to the Union's July 1, 2010, LBO on this article in its September 15, 2010, submission to the Panel. Therefore, it should be imposed by the Panel to resolve the parties' impasse.

CONCLUSIONS

After reviewing the parties' responses to the *OSC* on this article, we are persuaded that the Union's July 1, 2010, LBO should be imposed to resolve their impasse. Three-year contracts are the typical length in the Federal sector. Moreover, an 18-month mid-term reopener would provide the parties with an earlier opportunity to renegotiate some of the more significant articles in their CBA.

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 1, Coverage and Definitions, Section 6

The parties shall adopt the Factfinder's recommendation.

2. Article 2, Effect of Law and Regulation, Section 1

The parties shall adopt the Union's final offer.

3. Article 4, Union Rights, Section 2.A.3

The parties shall adopt the following modified version of the Union's final offer:

> The Union is also entitled to attend "last chance" meetings, settlement discussions to resolve employee problems, and discrimination complaint settlement meetings. The Employer will give the Union notice of any such meeting. Where the Union does not receive notice, and the settlement agreement impacts bargaining unit working conditions (e.g., grants, promises, or gives priority consideration for a promotion, reassignment, training, etc.) the settlement agreement will contain the following statement: 'This settlement agreement is subject to approval for compliance with negotiated agreements between the National Park Service and the National Treasury Employees Union. Accordingly, it will be forwarded to the appropriate NTEU Chapter President and Chief Steward, with a copy to the appropriate servicing personnel office, for a ten (10) day period of consideration. If the Union alleges the settlement conflicts with any negotiated agreements between the National Park Service and the National Treasury Employees Union, or other non-discretionary requirements, you will be notified.' Any challenges by the Union to settlement agreements will be filed with the NPS, Assistant Director of Human Resources.

4. Article 7 - Hours of Work

The parties shall adopt the Union's July 1, 2010, LBO with the following modifications:

> Section 1.B. Core Hours. Employees will be at work during core hours. Absence from work during these hours will be approved by the supervisor as indicated by an approved leave request in writing or electronic form, or an approved AWS or Flexiplace agreement. Core hours are:…

Section 1.D.1. All alternative work schedules will be worked between the hours of 5:30 a.m. to 8:30 p.m. Monday through Friday. Hours worked cannot exceed 12 hours per day or 80 hours per Pay Period unless granted a specific exemption by the Employer.

Section 1.D.1.a. However, arrival and departure times will be established within the hours of 5:30 a.m. and 8:30 p.m. Monday through Friday.

Section 1.D.1.e. Arrival and departure times may vary from day to day within the hours of 5:30 a.m. and 8:30 p.m. Monday through Friday.

5. Article 10 - Telecommuting

The parties shall adopt the Union's July 1, 2010, LBO.

6. Article 13 - Sick Leave

The parties shall adopt the Union's July 1, 2010, LBO with the following modifications:

Section 3.A. Employees may be required to furnish reasonably acceptable evidence to substantiate a request for approval of sick leave if sick leave exceeds three (3) consecutive workdays. Medical certificates must: (1) include a statement that the employee [is] under the care of a physician; (2) include a statement that the employee was incapacitated for duty and the days the employee was incapacitated; (3) include information concerning the expected duration of the incapacitation; and (4) must be signed by or contain the stamped signature of the health care provider.

Section 3.C.1. Where the Employer has reasonable grounds to question whether an employee is properly using sick leave (for example, when sick leave is used frequently or in unusual patterns or circumstances), the Employer may inquire further into the matter and ask the employee to explain. The Employer shall take reasonable action to preserve the employee's privacy. Absent a reasonably acceptable explanation, the employee will be orally counseled that continued frequent use of sick leave, or use in unusual patterns or circumstances, may result in a written requirement

to furnish acceptable documentation for each subsequent absence due to illness or incapacitation for duty, regardless of duration.

Section 3.C.2. If reasonable grounds continue to exist for questioning an employee's use of sick leave, the Employer may request that the employee provide reasonably acceptable evidence from the employee's caregiver. This evidence will indicate that the employee is under medical care, is incapacitated for duty, and the expected duration of such incapacitation. The Employer shall take reasonable action to preserve the employee's privacy.

7. Article 17 - Absence for Family Care

The parties shall adopt the Union's July 1, 2010, LBO.

8. Article 24, Details and Special Assignments, Section 1.A

The parties shall adopt the Factfinder's recommendation.

9. Article 24, Details and Special Assignments, Section 2.B

The parties shall adopt the Union's final offer, but add the following to the last sentence: "or the request is considered granted."

10. Article 28 - Training

The parties shall adopt the Employer's final offer except for the title of the article, which shall remain "Training."

11. Article 30 - Reductions in Force

The parties shall adopt the Union's July 1, 2010, LBO.

12. Article 31, Contracting Out, Section 3.A

The parties shall adopt the following wording:

The Employer will notify the Union of any proposed contracting out of work being performed by bargaining unit employees prior to making a final decision regarding the contracting activity. The Employer will simultaneously provide the Union with a copy of the proposed statement of work (SOW). The Union will have

seven (7) calendar days to provide written or oral comments concerning the proposed SOW. When competitive procedures under OMB Circular A-76 apply, absent exigent circumstances, the Employer will not issue its request for proposals (RFP) until the expiration of the seven (7) calendar day period.

13. Article 33 - Communication

The parties shall adopt the following wording in Section 1.B. 3.:

Upon approval of the Employer, meetings on an 'as needed' basis may be called by employees to discuss office matters of pertinence to all employees or segments of the larger staff in an effort to facilitate, communicate or solve problems. Approval shall not be unreasonably denied.

14. Article 35, Performance Evaluation, Section 3.B.3

The parties shall adopt the Factfinder's recommendation.

15. Article 36 - Rewards and Recognition

The parties shall adopt the Union's July 1, 2010, LBO.

16. Article 40 - Waiver of Overpayments

The parties shall adopt the Union's July 1, 2010, LBO.

17. Article 42 - Health and Safety

The parties shall adopt the Union's July 1, 2010, LBO, with the exception of Sections 10 and 13, where the Employer's proposed wording shall be included in the article.

18. Article 44, Travel and *Per Diem* for Union Representatives, Sections 3 & 4

The parties shall adopt the Factfinder's recommendations.

19. Article 48, Employee Grievance Procedure, Section 4.B

The parties shall adopt the Factfinder's recommendation.

20. Article 52, Midterm Bargaining, Section 1.B.

The parties shall adopt the Factfinder's recommendation.

21. Article 55 - Child Care Subsidies

The parties shall adopt the Union's July 1, 2010, LBO, with the exception of [on] Section 2.b., which shall read as follows:

> Has a child or children age 13 or younger or a disabled child age 18 or younger and physically or mentally disabled as determined by a physician or by a licensed or certified psychologist; and

22. Article 59 - Credit Union Facilities

The parties shall withdraw their proposals.

23. Article 61 - Duration and Termination

The parties shall adopt the Union's July 1, 2010, LBO.

The parties also shall adopt any tentative agreements they reached during the process leading to the Panel's decision in this case.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

November 30, 2011
Washington, D.C.