United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF LABOR
WASHINGTON, D.C.

and

LOCAL 12, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 12 FSIP 104

DECISION AND ORDER

Local 12, American Federation of Government Employees (AFGE), AFL-CIO (Local 12 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 Labor, Washington, D.C. (DOL, Employer or Agency).

Following investigation of the request for assistance, which arises from negotiations over a successor collective bargaining agreement (CBA), the Panel directed the parties to resume negotiations with the assistance of a private factfinder of their choice. If any issues remained unresolved at the conclusion of facilitated bargaining, the factfinder would submit a written report with recommendations for settling the issues, with clear and convincing rationale, to the parties and the Panel. In the event that a party did not accept the factfinder's recommendations it would notify the Panel and the other party, in writing, and identify the unresolved provisions. Thereafter, the Panel would take whatever action it deemed appropriate to resolve the issues.

Pursuant to the Panel's directive, the parties selected Factfinder Jonathan E. Kaufmann, who conducted 4 days of mediation which resulted in the voluntary resolution of 9 of the 11 articles that were at impasse, and most of the remaining 2 articles. The Factfinder then held a 1-day hearing concerning the remaining sections of Article 5 - Core Hours and Hours of

Work, and Article 45 - Official Time, and subsequently issued a *Factfinder's Report and Recommendations for Settlement* (*FFR&RFS*). The Employer failed to completely accept the Factfinder's recommendation on Article 5, Section 2(b)(2) - Core Hours, and the Union failed to accept his recommendations on Article 5, Section 2(b)(2) - Core Hours and (d) - Flexible Hours of Work, and Article 45, Section 7(a) - Local 12 Union Officials.[1/] After due consideration of the parties' responses to the *FFR&RFS*, the Panel determined that the remaining issues should be resolved through the issuance of an *Order to Show Cause* (*OSC*). In this regard, the parties were directed to show cause why the Panel should not impose the Factfinder's recommendations for settlement to resolve the issues the parties identified as unacceptable. As part of this procedure, each side was permitted to submit alternative wording, if any, to replace the Factfinder's recommendations identified as unacceptable in their earlier responses. After considering the entire record, the Panel would take whatever action it deems appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*. In accordance with the *OSC*, the parties submitted: (1) alternative wording concerning the recommendations they could not accept; and (2) statements of position in response to the *OSC*. In reaching this decision, the Panel has now considered the entire record.

BACKGROUND

The Employer's mission is to foster and promote the welfare of job seekers, wage earners, and retirees of the U.S. by improving their working conditions, advancing their opportunities for profitable employment, protecting their retirement and health care benefits, helping employers find workers, strengthening free collective bargaining, and tracking changes in employment, prices, and other national economic measurements. The Union represents a bargaining unit consisting of approximately 3,300 professional and non-professional employees, both General Schedule and Wage Grade, who are stationed in the Washington, D.C. metropolitan area.[2/] The

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1/ As the parties accepted his recommendations for settlement regarding Article 5, Section 9 - Overtime, and Article 45 - Requesting and Recording Official Time, those matters are no longer at impasse and will not be considered further herein.

2/ AFGE's National Council of Field Labor Locals (NCFLL) represents a nationwide consolidated bargaining unit of

parties' current CBA, which was implemented on March 20, 2005, remains in full force and effect until replaced by a successor.

ISSUES AT IMPASSE

The parties essentially disagree over: (1) the core hours when all employees must be present for work (Article 5, Section 2(b)(2)) and the permissible starting and ending times (flexband) for employees on a flexible work schedule (Article 5, Section 2(d)); and (2) whether the Union should be entitled to an additional representative on 100-percent official time (Article 45, Section 7(a)).

1. Article 5, Section 2(b)(2) - Core Hours and (d) - Flexible Hours of Work

a. The Employer's Position

The Factfinder recommended the following wording to resolve the parties' dispute over this section of the CBA:

> b. Core hours are those designated times and days during the biweekly pay period when all employees must be present for work. Core hours shall be Monday through Friday 9:30 a.m. until 3 p.m. Employees may use credit hours in addition to other types of accrued leave to account for absences during core hours, as well as absences outside of core hours, following established office procedures for obtaining supervisory approval of leave.
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> However, employees who wish to leave work at 2:30 p.m. will let their supervisor know in writing at least one week in advance of an 80 hour bi-weekly pay period. Employees requesting this arrangement could be on a fixed schedule (6 a.m. to 2:30 p.m., five days a week) or a flexible schedule. If they are on a flexible schedule, they will be at work no later than 8 a.m. on those days when they leave at 2:30 p.m. and their aforementioned written requests must include, at a minimum, those days when they will be leaving at 2:30 p.m.

DOL's non-headquarters employees.

> d. Flexible Hours of Work. Except as may be limited by this Article, employees on a flexible work schedule may begin work as early as 6 a.m. and may work as late as 7 p.m., Monday through Friday.

The Employer proposes that the Panel order the adoption of a modified version of the Factfinder's recommendation, where the second paragraph would read as follows:

> **Employees may make a written request and receive supervisory approval to leave work at 2:30 pm.** The written request must be submitted at least one week in advance of an 80 hour bi-weekly pay period and must include, at a minimum, those days when the employee will leave work at 2:30 p.m. Employees requesting this arrangement may be on a fixed schedule (6 a.m. to 2:30 p.m., five days a week) or a flexible schedule. If an employee is on a flexible schedule, the employee must be at work no later than 8 a.m. on those days when the employee leaves work at 2:30 p.m. **Such a schedule is subject to the mission needs of the Agency and all schedules may not be available to all employees.** [Employer modifications highlighted.]

Its modification "stipulates" the Factfinder's recommendation "in acceptable contract language and it adds a sentence" at the end of the second paragraph "clarifying that employees' schedules are subject to Agency needs and that not all work schedules will be available to all employees." In its view, "this modification accurately reflects management's right under 5 U.S.C. 7106(a)(2)(B) to assign work to employees, and as such is properly reflected in the Agency's proposed wording."

Turning to the Union's proposed alternative to the Factfinder's recommendation, as the Employer contended before the Factfinder, it is well established that when parties reach impasse and the matter is presented to the Panel for resolution, the party seeking to change the *status quo* bears the initial burden of demonstrating why the changes are necessary. On this issue, the Union is attempting to change the core hours and permissible daily ending time for employees on a flexible work schedule from the existing contract language which has been in effect since it was imposed on the parties by the Panel in 2005.[3/] Therefore, the Union bears the burden of establishing a

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3/ Department of Labor, Washington, D.C. and Local 12, American Federation of Government Employees, AFL-CIO, Case

basis for changing the *status quo*. While the Union argues that times have changed and more flexibility in core hours is needed, it has ignored other recent developments that impact DOL's mission, such as the freeze on wages and the scarcity of resources. Thus, this is not the time to reduce the number of hours that employees are required to be at work. Maintenance of the *status quo* also is consistent with the contract provisions in a number of other CBAs between federal agencies and unions in the Washington, D.C. area which have core hour bands of 6 hours starting at 9-9:30 a.m. and ending at 3-3:30 p.m. In addition, the Employer's current CBAs with the NCFLL and the National Union of Labor Inspectors (NULI) establish core hours of 9:30 a.m. until 3 p.m., and it has a "significant interest" in having all DOL employees working the same core hours. A 7 p.m. daily flexband ending time also is consistent with the contract provisions in a number of other CBAs between federal agencies and unions in the Washington, D.C. area, none of which have a daily ending time as late as 8 p.m. Moreover, the Employer's current CBAs with the NCFLL and the NULI also establish work hours of 6 a.m. to 7 p.m., and it has a "significant interest" in having all DOL employees work no later than 7 p.m. Finally, unlike the Factfinder's recommendation, the Union's proposal fails to strike an appropriate balance between an employee's interest in a flexible work schedule and DOL's need to have reasonable predictability with respect to the hours employees will be available to co-workers, clients, and the public.

b. The Union's Position

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

> b. Core Hours. All employees are required to be present for duty on all regularly scheduled workdays during the core hours of 9:30 a.m. until 3 p.m., with two exceptions, (excluding the lunch period) Monday through Friday, unless the employee is on approved leave or other excused absence.
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> Employees who report to work after 9:30 a.m. and before 10 a.m. will have to be present at work until 4 p.m. to avoid using leave. Employees leaving at 2:30 p.m. must arrive by at least 8 a.m. to avoid being

charged leave.

Management has the discretion to require all employees to be present for duty during the core hours of 9:30 a.m. to 3:30 p.m. one day a week, each week, in order to conduct workplace business.

d. Flexible Hours of Work - Except as may be limited by this Article, employees on a flexible work schedule may begin work as early as 6 a.m. and may work as late as ***8 p.m.***, Monday through Friday.

The Panel should reject the Factfinder's recommendations with respect to core hours and the daily flexband ending time for a number of reasons. First, "he inappropriately applied the *status quo* test where it was not relevant." In this regard, the Factfinder acknowledged that the Panel "did not offer any guidance or comments as to why it decided to shift the start of core hours from 10 a.m. to 9:30 a.m." in its decision in 2005, so "this is a case of first impression." Therefore, "the burden on the party asking for a change in the *status quo* does not apply." Second, by sustaining a previous decision which did not include a justification for the change in the *status quo*, the Factfinder "is inconsistent in his reasoning." He even went so far as to state that the Employer did not explain why the "unjustified *status quo*" should remain in effect, yet adopted its position on the core hours and the daily flexband anyway. This demonstrates that the Factfinder "is acting arbitrarily and capriciously by allowing one unjustified act in 2005 to justify yet another unjustified act in 2012."

Third, the Factfinder "was clearly biased as he did not provide any logical justification for his decision." In support of his recommendation to keep the 9:30 a.m. starting time he states that arriving early (6 a.m.) and leaving early (2:30 p.m.) "are the best ways to address family issues" and deal with traffic congestion. The Factfinder, however, did not "provide any explanation, evidence, or justification as to why he believes that more than a half dozen issues that the Union raised affects employees only in the afternoon commute and [not] the morning commute."[4/] Thus, "his decision strikes of personal

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4/ According to the Union: (1) the current core hours disproportionately harm bargaining unit employees with disabilities; (2) the current core hours disproportionately harm bargaining unit employees who are either single parents, are in two career families, and/or are raising

bias of his own commuting habits rather than the actual reality of commuting habits of the Local 12 bargaining unit employees." The Factfinder also failed to address the uniqueness of commuting in the Washington, D.C. area. In this connection, by referencing the CBA between the Center for Medicare and Medicaid Services (CMS) and AFGE Local 1923, which contains a 10 a.m. core hours start time for CMS's Baltimore office, and a 10:30 a.m. core hours start time for its Washington, D.C. national office, the Union established that "the CMS recognized that the D.C. commute was worse than the Baltimore commute."[5/] The Factfinder declined to address this "solid documentary evidence." Additionally, he stated that he wanted the Union's CBA to be consistent with that of the NCFLL, even though he noted that the Employer could not explain why this was a "significant interest." Furthermore, "a basic knowledge of time zones refutes" the Factfinder's hypothesis. The Local 12 bargaining unit provides services to individuals in all five time zones, whereas the regional offices serviced by NCFLL's bargaining unit "only provide services to customers in their own respective time zone." Using the Factfinder's logic, therefore, he should have recommended "extended core hours and extended work hours until 8 p.m. to service the NCFLL regional offices in

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school age children while also caring for an elder relative; (3) the DOL ranked 24th out of 30 federal agencies in "work/life balance" in the Partnership for Public Service's latest survey, a rating which is "a direct result of the sense of the betrayal that long-time [DOL] employees have" for the "unilateral extraction" of a 25-year old benefit; (4) employees hired between 1980 and 2005 relied, to their detriment, on the belief that core hours would remain 10 a.m. until 3 p.m.; (5) its proposal would benefit DOL's regional offices, and the customers/citizens the bargaining unit employees serve; and (6) the current core hours adversely harm the DOL's ability to hire and retain Generation "Y" employees.

5/ The Union also cites several other federal agencies with CBAs in the Washington, D.C. metro area with core hours and flexbands similar to, or as flexible as, its proposal, including the Internal Revenue Service, the Forest Service, the Office of the Comptroller of the Currency, the Bureau of Alcohol, Tobacco and Firearms, the Food and Drug Administration, and the Department of Health and Human Services, Administration for Children and Families, which it contends "establish that the federal trend is towards more flexible hours as the Union has requested."

Nevada, California, Washington, Oregon, Arizona, Hawaii and Alaska" for the Union's bargaining unit. The Union also presented evidence showing that CMS's daily flexband ending time in Washington D.C. is 10 p.m., 2 hours later than what it proposed. Thus, the Factfinder's failure to distinguish between the duties of national office bargaining unit employees versus regional field office bargaining unit employees, and his acceptance of the Employer's argument "without any justification demonstrates bias for the Agency."

Furthermore, the Factfinder "did not address the Union's argument with regard to hiring and retention." The fact that federal employee pay has been frozen for 3 years, and may be frozen for an additional time period, "is the very reason that the Local 12 bargaining unit needs a return to the old core hours in order to retain as many qualified workers as possible." In this regard, the Union argued during the factfinding hearing and in its post-hearing brief that the national office of DOL "will be unable to hire or retain members of Generation 'Y', those employees born after 1980, if the core hours starting time of 9:30 a.m. is retained for the next 5 years" (*i.e.*, the duration of the successor CBA). The Factfinder's failure to address "such a critical issue as the future of the [DOL] in hiring and retaining well qualified employees in his recommendations shows the flaws in his analysis of this dispute." Requiring the Union's bargaining unit employees to report to work by 9:30 a.m. "was already antiquated" in 1980 when the parties initially establishing a 10 a.m. core hours start time, and it "remained antiquated" when the parties revisited the issue of core hours in 1989 and mutually determined that the 10 a.m. - 3 p.m. core hours "worked for labor and management." A 9:30 a.m. core hours start time "was utterly archaic in 1992 when the parties mutually agreed a third time" to the 10 a.m. - 3 p.m. core hours, and this was prior to: (1) each bargaining unit employee having a personal computer on their desk; (2) the population explosion in the region; (3) the decline of the public transportation system in the Washington, D.C. metropolitan area; (4) the change of the bargaining unit from mostly clerical workers to mostly professional workers; and (5) Washington, D.C. "having the worst traffic congestion" in the U.S. The concept of core hours from 9:30 a.m. until 3 p.m. "is obsolete in 2012."

The Employer's concerns with the Union's core hours are unwarranted. Its contention that the Union's proposal would not enable supervisors to manage their employees "because they do not know where they are" is false. The CBA already contains

wording that gives supervisors the authority to deny flextime to employees who have coverage functions and requires employees to be present at "essential meetings, when "handling inquiries from the public" and "providing program needs based on business necessity." Moreover, management has the authority to remove employees from flextime schedules because of abuse of the flextime system. Although such actions are grievable, "it takes well over a year to litigate those matters, and the Union cannot stay those actions in the meantime." Consequently, the Employer can maintain control of the workforce and the only option for the bargaining unit employee is to obey now and grieve later. Finally, the Panel should adopt the Union's proposed wording concerning exceptions to the 9:30 a.m. core hours starting time, rather than the Factfinder's recommendation on this matter. If employees want to report to work "after 9:30 a.m. and by 10 a.m." the CBA should state that they will have to stay at work until at least 4 p.m. to avoid being charged with leave. This would ensure that supervisors know how long their employees will be in the office. In addition, the CBA should state that, if employees want to leave at 2:30 p.m. without being charged leave, they must arrive by at least 8 a.m., which would address the Employer's concern that employees be in the office for a specific number of hours.

CONCLUSIONS

Preliminarily, as our use of the *OSC* implies, the Panel begins with the presumption that a party objecting to the imposition of a factfinder's recommendation on a specific issue bears a heavy burden of demonstrating why it should not be adopted. Private factfinders are selected by the parties themselves, have the benefit of working with the parties directly to explore their interests and, where voluntary settlements cannot be reached, spend considerable time assessing the evidence and arguments presented in support of their respective positions. Accordingly, the Panel will normally defer to a factfinder's recommendations, particularly where they are supported by clear and convincing rationale and the recommended wording otherwise appears to be legal.

Having carefully considered the parties' responses to the *OSC* on this issue, we conclude that neither has shown cause as to why its alternative wording should be adopted.[6/] It is clear

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6/ As to the parties' and the Factfinder's statements regarding the effect of the Panel's 2005 decision on this same issue, the Panel makes no judgment about whether the

from the *FFR&RFS* that the Factfinder fully considered the parties' oral presentations and post-hearing briefs. In providing the rationale for his recommendation, he specifically referenced the Union's assertions that its proposal to return to the core hours and flexband that existed from 1980 to 2005 would foster greater flexibility for employees, help headquarters' unit members to service employees and customers on the West Coast, Alaska and Hawaii, and lessen the impact of the ever-increasing congestion in the Washington, D.C. metropolitan area. While he did not address every argument the Union raised, contrary to its position, there is no requirement for him to do so, nor does a failure to do so demonstrate evidence of bias on his part. Thus, we are not persuaded that the Union has met the heavy burden necessary to impose its proposed changes to the Factfinder's recommendation.

Although the Factfinder did not recommend a return to the practices that existed between 1980 and 2005, he was convinced that, under certain conditions, permitting employees to leave at 2:30 p.m., rather than 3 p.m., could offer significant benefits and fashioned wording consistent with this conclusion. The Employer suggests a modification to the Factfinder's recommendation on the grounds that its proposed wording accurately reflects management's right to assign work to employees. While we agree that the Factfinder's recommendation in paragraph 2 requires clarification, in our view it does not appear to interfere with management's right to assign work but instead addresses when assigned work will be performed. For this reason, we are unwilling to impose the Employer's proposed modification. To ensure that this section of the parties' CBA contains unambiguous wording that is consistent with what we believe to be the Factfinder's intent, however, we shall modify paragraph 2. The modification makes clear that employees who wish to leave work at 2:30 p.m. will submit requests to their supervisors in writing at least 1 week in advance of an 80-hour bi-weekly pay period, and that such requests shall not be unreasonably denied. Because neither party has shown cause as to why his recommendation should not be imposed, we also shall order that the other sections be adopted as written.

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burden to justify a change in the *status quo* applies in this case.

2. Article 45, Section 7(a) - Local 12 Union Officials

a. The Employer's Position

The Employer proposes the adoption of the Factfinder's recommendation on this issue, which states as follows:

> The following Local 12 Officials will be on 100% official time: President, Executive Vice President, and Head Steward. These Union Officials shall not be discriminated against in connection with their statutory entitlement to a within-grade increase. In addition, the Union shall be entitled to a total of three years of 100% official time for an additional representative(s). The Union may elect to have three representatives on 100% official time for one year, two representatives on 100% official time for 18 months or one representative on official time for three years. The Union will notify the Agency of its election at the time the collective bargaining agreement is executed.

As it indicated to the Factfinder, the Panel has never implemented a 100-percent official time provision without employer concurrence, and "this is not the case in which to break that long-standing tradition." The Union has not presented facts substantiating the need for more official time for representational duties, such as an increased use of "upon request" official time, an increase in the size of the bargaining unit, or other evidence that its representational workload has increased. In addition, the Union's attempt to compare its situation with that of the NCFLL is unpersuasive. The NCFLL represents approximately 8,500 employees throughout the country, requiring its representatives to spend a large amount of time traveling to different regional, district and area offices to provide assistance. Consequently, DOL and NCFLL agreed that 11 union representatives would be on 100-percent official time. Local 12's bargaining unit employees, on the other hand, are all located within the Washington, D.C. metropolitan area, so the Union does not need additional staff or official time to perform representational duties. Examples of CBAs from five other federal agencies also demonstrate that the amount of official time the Employer grants to Union representatives is comparable to practices elsewhere in the federal government.

The Union's argument that the Bureau of Labor Statistics

(BLS) is such a large sub-agency, containing about 1,300 unit employees, that it warrants one additional 100-percent official time representative, also should be rejected. In this regard, BLS has always had the largest group of bargaining unit employees and there has been no change in the size of the bargaining unit that would justify a change in the *status quo*. Finally, the Union has provided no evidence to establish that the arbitration backlog has substantially increased from previous years. Even if the backlog had increased, however, the parties have already agreed to a number of measures designed to address the matter, including the use of a "Grievance Board" intended to reduce the cases that otherwise would be sent to regular arbitration, and the use of a mediator, at shared expense, to assist in resolving as many pending arbitration cases as possible. Additionally, the parties have granted arbitrators the authority to limit issues and witnesses in an effort to reduce the length of arbitrations. For all these reasons, the Union has not demonstrated a sufficient need to change the *status quo*.

b. The Union's Position

The Union opposes the Factfinder's recommendation and, instead, proposes that the following wording be imposed by the Panel to resolve the parties' impasse over official time:

> The following Local 12 Officials will be on 100% official time: President, Executive Vice President, Head Steward and **Agency Vice President for the Bureau of Labor Statistics.**
>
> These Union Officials shall not be discriminated against in connection with their statutory entitlement to within-grade increase(s). In addition, the Union shall be entitled to a total of three years of 100% official time for an additional representative(s).
>
> The Union may elect to have three representatives 100% official time for one year, two representatives on 100% official time for 18 months or one representative on official time for three years. The Union will notify the Agency of its election at the time the collective bargaining agreement is executed.

In the alternative, the Union proposes: "The Agency Vice President for the [BLS] will be on official time for forty (40) hours of the eighty (80) hour pay period."

The Factfinder's recommendation that the Union not receive an additional full-time representative for the BLS should be rejected by the Panel, among other reasons, because he "completely misconstrued" its argument with regard to proportional representation for bargaining unit members. Its proposal is "a modest plea for parity" with the NCFLL, which represents DOL's regional office employees, on the matter of official time. In rebuffing the Union's argument, the Factfinder specifically stated that "NCFLL represents a far larger and widespread bargaining unit than Local 12." This indicates that he either did not understand the "argument for proportional representation or that he does not understand the concept of proportionality." While the Union recognizes the difference in the size of the respective bargaining units (the NCFLL represents 8,500 bargaining unit employees and Local 12 represents approximately 3,300), the NCFLL has 11 full time representatives and Local 12 has only 3. This means that Local 12 has a full time representative for every 1,100 bargaining unit employees whereas NCFLL has a full time representative for every 773 bargaining unit employees. Accordingly, the Union's proposal would ensure that it has one full-time representative for every 825 bargaining unit employees, roughly equal to the proportion of full-time representatives to bargaining unit employees currently enjoyed by the NFCLL.[7/]

The Factfinder's conclusion that the NCFLL bargaining unit is "widespread" also is unfounded. Unions represent bargaining unit employees, not offices, property or land, and the Factfinder "rejects the very basic concept of proportional democracy known as 'one man, one vote' established by the Supreme Court in *Baker v. Carr, 369 U.S. 186 (1962)*." Additionally, at the hearing and in its post-hearing brief, the Union demonstrated that the NCFLL's representatives have their travel paid by the federal government under its CBA, so the issue of geographical distance regarding its bargaining unit is

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7/ To support its position the Union also cites the number of full-time AFGE Council 236 officials. According to the Union, AFGE Council 236, which represents employees at the General Services Administration, has eight full-time representatives but only 716 dues-paying members. By contrast, AFGE Local 12 has approximately 1,250 dues-paying members. Thus, even though Local 12 is almost twice as large as AFGE Council 236, it is "only asking for half as many full-time Union officials." Its proposal "for just one additional full time official," therefore, "is modest in the extreme."

irrelevant. His failure to address its argument on this issue when he denied the Union an additional full-time representative demonstrates that the Factfinder "did not fairly and judiciously analyze the Union's argument with regard to proportionality." The Union also raised the fact that in addition to 11 full-time representatives, NCFLL has 11 additional Local Presidents. Thus, the NCFLL "has even denser representation of its bargaining unit than one full time official for every 773 bargaining unit employees." The failure of the Factfinder to address and refute that claim further establishes that his recommendation on this issue was "arbitrary and capricious."

The Factfinder also "failed to address the Union's concerns about the additional workload created by contractual changes that occurred" in the 2005 CBA that will continue in the successor CBA. In this regard, the 2005 CBA has created a greater workload for the Union's representatives by: (1) creating a separate hearing for arbitrability/grievability; (2) eliminating provisions regarding certificates of eligibles and Union review of merit staffing actions; and (3) requiring more detail in the Step 1 and Step 2 grievance process. The Factfinder only addressed the issue of arbitration workload in denying the Union's proposal for an additional full-time official and, "even then, his analysis was purely speculative." With respect to the second reason for the Union's increased workload, it is forced to file more Chapter 71 formal information requests and merit staffing grievances "because the Agency has refused to include contract language regarding merit staffing actions and certificates of eligibles." Merit staffing grievances are the most time-consuming cases for Union representatives because of the amount of detail, paperwork and the "byzantine case law" regarding promotions in the federal sector. But the "greatest cause of additional workload" for the Union involves the requirement for more detail in Step 2 of the grievance procedure. The 2005 CBA provision regarding the drafting of Step 2 grievances, which will continue under the 2012 CBA, "requires stewards to draft a grievance with the specificity of a federal court pleading as opposed to a negotiated grievance procedure, which unlike the former provisions, is accessible to a lay person." Yet the Factfinder made no attempt "to address or refute" the latter two claims regarding the Union's increased workload. His failure to do so "establishes that [he] was biased in his deliberation of the issue of the addition of a full time Union representative." In light of these concerns, the Panel should impose the Union's alternative wording to resolve the parties' impasse.

CONCLUSIONS

On this issue, we reiterate that the Factfinder is under no obligation to address every argument raised by either party in his *FFR&RFS*, and that a failure to do so does not demonstrate bias on his part. In our view, his recommendation on the official time issue appears to be supported by clear and convincing rationale and the Union has not met the burden necessary to impose either of its alternative proposals. Consistent with these conclusions, we shall order the adoption of the Factfinder's recommendation to resolve the parties' impasse over this issue.

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 5, Section 2(b)(2) - Core Hours and (d) - Flexible Hours of Work**

The parties shall adopt the Factfinder's recommendation, modified as follows:

> Core hours are those designated times and days during the biweekly pay period when all employees must be present for work. Core hours shall be Monday through Friday 9:30 a.m. until 3:00 p.m. Employees may use credit hours in addition to other types of accrued leave to account for absences during core hours, as well as absences outside of core hours, following established office procedures for obtaining supervisory approval of leave.
>
> However, employees who wish to leave work at 2:30 p.m. will submit their request to do so to their supervisor in writing at least one week in advance of an 80 hour bi-weekly pay period. Employees requesting this arrangement could be on a fixed schedule (6:00 a.m. to 2:30 p.m., five days a week) or a flexible schedule. If they are on a flexible schedule, they will be at work no later than 8:00 a.m. on those days when they

leave at 2:30 p.m. and their aforementioned written requests must include, at a minimum, those days when they will be leaving at 2:30 p.m. Employee requests to supervisors to leave work at 2:30 p.m. shall not be unreasonably denied.

d. Flexible Hours of Work. Except as may be limited by this Article, employees on a flexible work schedule may begin work as early as 6 a.m. and may work as late as 7 p.m., Monday through Friday.

2. Article 45, Section 7(a) - Local 12 Union Officials

The parties shall adopt the Factfinder's recommendation.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

January 8, 2013
Washington, D.C.