

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 12 FSIP 140

DECISION AND ORDER

The National Treasury Employees Union (Union or NTEU) 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 Federal Election Commission, Washington, D.C. (FEC, Employer or Agency).

Following an investigation of the request, which concerns the recommendations of Factfinder Paul Greenberg for settling the remaining issues in the parties' dispute over their successor Labor Management Agreement (LMA), the Panel determined that the matter should be resolved through an *Order to Show Cause (OSC)*. In this regard, the Employer was directed to show cause why the Panel should not impose the Factfinder's June 26, 2012, recommendations on Article 20 - Incentive Awards, Section 3.B. and D. through G. Under this procedure, the Employer was given the opportunity to propose alternative wording for these sections and to submit a statement of position (SOP) on the merits of the issues, and the Union was directed to submit a rebuttal to the Employer's position. The parties were advised further that 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*. Submissions were received from the parties in accordance with the Panel's directive, and it now has considered the entire record.

BACKGROUND

The FEC is an independent regulatory agency whose mission is to administer and enforce the Federal Election Campaign Act of 1971 (FECA). As such, FEC has enforcement responsibilities (e.g., it enforces the limits and prohibitions on contributions outlined in the FECA); public interest obligations (it discloses campaign finance information) and regulatory duties (it oversees the public funding of Presidential elections). The Union represents 211 professional and non-professional bargaining unit employees at the FEC. Although their current LMA expired on May 6, 2010, the parties are following the terms and conditions of their 2007 LMA until its successor is ratified and effectuated.

The parties agreed to ground rules on April 14, 2010, and engaged in 40 full-day bargaining sessions between May 17, 2010, and April 12, 2011. When they could not reach a voluntary settlement, pursuant to their ground rules, the parties sought assistance from a "third party neutral to use a combination of non-binding mediation and arbitration techniques to resolve (their) impasses." During 10 days of mediation between November 7, 2011, and January 31, 2012, they agreed on 45 articles, leaving 5 for the Factfinder to consider. After receiving the parties' final offers and SOPs, the Factfinder issued a 39-page "Analysis and Recommendations" setting forth his recommendations on the disputed issues. The Union accepted all of the Factfinder's recommendations on the remaining articles but the Employer only accepted them for three articles and part of Article 20. It rejected his recommendations for Article 20, Section 3.B. and D. through G. and all of Article 31 - Outside Employment - claiming they were "outside the scope of the duty to bargain and infringe(d) upon management rights."

During the Panel's investigation of the Union's request for assistance, the Employer filed a jurisdictional SOP alleging that the Panel has no authority to decide the merits of the Factfinder's recommendations on Articles 20 and 31, and the Union submitted a response. Guided by the Federal Labor Relations Authority's (FLRA) decision in *Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364*, 31 FLRA 620 (1988) (*Carswell AFB*), which permits the Panel to resolve duty-to-bargain questions raised in the course of its proceedings by applying previous FLRA cases where a "substantively identical" proposal has been found negotiable, the Panel asserted jurisdiction only over the Factfinder's recommendations regarding Article 20, stating that "the FLRA has already found proposals substantively identical to

the wording recommended by the Factfinder [] to be negotiable."^{1/}

Thus, the subject of the Panel's OSC in this case is the Factfinder's recommendations on Article 20, Section 3.B. and D. through G., which are as follows:

B. Performance Awards - Sustained Superior Performance (SSP)

1. A lump-sum cash award based on high quality performance. Such awards must be based on a minimum period of six (6) months of performance in one position (only one such award may be granted in a 1-year period). An SSP award shall be granted when an employee's overall performance rating is at the "Exceeds Requirements" Level or higher.
2. SSP Awards are made during August of each calendar year.
3. Under the SSP awards program, award distributions are based on the mid-point (i.e., Step 5 of the grade) of the employee's salary (including locality pay):

Summary Rating Level/Percentage of Mid-Point Salary

4.0 to 4.24	.75%
4.25 to 4.49	1.00%
4.50 to 4.99	1.75%
5.00	2.75%

The minimum performance award is \$450 or the percentage of midpoint salary, whichever is higher.

If any appraisal contains a rating of "unacceptable" in any element, the employee will not receive a performance award regardless of the total points given on the appraisal.

4. If, in any year, there are insufficient funds to provide bargaining unit SSP awards in the amounts indicated in the LMA because the total amount of all agency performance awards (bargaining unit SSP awards

^{1/} The Panel declined to assert jurisdiction over the Factfinder's recommendations on Article 31 in accordance with the FLRA's guidance in *Carswell AFB*.

and non-bargaining unit performance awards) would exceed the total remaining FEC awards budget, the FEC will reduce the bargaining unit SSP awards by the same reduction ratio used to reduce non-bargaining unit performance awards. The reduction ratio will be the actual remaining awards budget funds divided by the total amount of all agency performance awards. For example, if the total remaining performance awards budget is \$100,000, and the total amount of all agency performance awards is \$125,000, then the FEC will reduce all performance awards to 80% ($100,000/125,000$). Therefore, every performance award amount will be multiplied by 80%. If management determines that there will be no reduction to non-bargaining unit performance awards, then there will be no reduction to bargaining unit SSP.

Prior to such a reduction, the Agency will provide NTEU with advance notice (no later than July 1) and an opportunity to discuss the FEC's decision to reduce the performance awards budget. This discussion(s) will not waive FEC's obligation to bargain changes in conditions of employment to the extent that such obligations are required by contract or law.

FEC shall retain discretion to determine the overall amount of awards funding allocated to SSP and performance awards, compared with the amount of funding allocated to other types of awards.

D. Distinguished Service Award. This award recognizes the outstanding accomplishments of individual employees for superior achievements during the preceding year, which have notable beneficial impact on the mission of FEC. Nominees for this award should have demonstrated superior performance in accomplishing a task or project that significantly promoted the mission of the FEC. The award will consist of an engraved medallion and a cash award of up to one-thousand dollars (\$1,000) to each recipient.

E. On-the-Spot Awards (OTS). On-the-Spot awards are special act or service awards which normally provide immediate recognition for employees and are limited in amount. These awards are informal awards which would range in cash values of up to \$100.00 - \$250.00 maximum.

F. Outstanding Support Staff Award. This award recognizes employees who occupy secretarial, administrative or clerical positions who are high achievers among their peers and who have exhibited outstanding performance in support positions demanding dedication and professional skills. Nominees for this award should have consistently provided outstanding support services, including responsiveness to program needs, willingness to assume responsibility, and initiative in improving work methods or operations. The award will consist of a certificate of appreciation and a cash award of up to five-hundred dollars (\$500) to each recipient.

G. Newcomer Award. This award recognizes our newest employees whose untiring efforts have significantly contributed to the success and mission of the FEC. Nominees for this award should have demonstrated a high level of performance and productivity in their regularly assigned duties, showing exceptional teamwork, integrity and leadership that results in an important contribution to the work of their office and to the mission of the FEC. Any current employee (full-time or part-time) who has been at the FEC for at least six months but no more than two years is eligible to receive this award. The award will consist of an engraved plaque of appreciation and a cash award of up to one-hundred and fifty dollars (\$150) to each recipient.

ISSUES AT IMPASSE

The parties disagree over whether the Factfinder's recommendations for SSP, Distinguished Service, On-the-Spot, Outstanding Support Staff and Newcomer Awards, addressed in Article 20, Section 3.B. and D. through G, respectively, should be imposed to resolve the parties' impasse.

POSITIONS OF THE PARTIES

1. The Employer's Position

As it contended during the investigation of the Union's request for assistance, the Panel is prohibited from imposing the Factfinder's recommendations on the remaining issues in Article 20 because they interfere with FEC's right to determine its budget, under § 7106(a)(1) of the Statute, and conflict with

Government-wide regulations at 5 C.F.R. Part 451.^{2/} By providing that all employees with an "Exceeds Requirements" rating of 4.0 be granted an SSP award, establishing a system whereby award amounts are determined by a set percentage of an employee's mid-point salary, and setting a minimum performance award of \$450, the Factfinder's recommendations "would require that SSP awards always be included in the Agency's budget, directly restricting the FEC's right to determine what should be included in the Agency's budget, and how it will reward exceptional performance." Moreover, his recommendations would require the establishment of a mandatory awards program, contrary to 5 C.F.R. § 451.104(a), which allows, but does not require, agencies to grant performance-based awards. In addition, although 5 C.F.R. § 451.103 mandates awards programs, it gives agencies "discretion as to what those programs will be."^{3/} The Factfinder's recommendations for Section 3.D. through G. are similarly defective because, in each case, recipients are guaranteed a certain dollar amount (i.e., Distinguished Service recipients would receive up to \$1,000; On-the-Spot recipients would receive up to \$100-\$250; Outstanding Support Staff recipients would receive up to \$500, and Newcomer Award recipients would receive up to \$150). The Factfinder's recommendation to "reduce the bargaining unit SSP awards by the same reduction ratio used to reduce non-bargaining unit awards" in years where there are insufficient resources to fund the awards program also is outside the duty to bargain, and cannot

2/ To support its overall position, the Employer cites *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 606, 608 (1980) (*Wright-Patterson AFB*), where the FLRA held that if a proposal "affects the authority of an agency to determine the programs and operations which will be included in the estimate of its proposed expenditures (budget) and the determination of the amounts required to fund them," it violates management's right to determine its budget.

3/ The Employer relies on *National Treasury Employees Union, Financial Management Service*, 45 FLRA 696 (1992) (*FMS*) and *Department of the Air Force v. Federal Labor Relations Authority*, 878 F.2d 1430 (1989) (*Department of the Air Force*) for this position.

be imposed by the Panel, because it "directly affects the working conditions of non-unit employees."^{4/}

In addition to the Employer's jurisdictional arguments, the Panel should not adopt the Factfinder's recommendations on their merits because, historically, it has been "reluctant to impose mandatory incentive awards where the parties have not done so voluntarily."^{5/} The Employer is unwilling to agree to them because they mandate "set percentage salary payouts, with a minimum award requirement of \$450" for SSP awards, and cash amounts that can reach \$1,000, \$250, \$500 and \$150 for the other awards, respectively, without allowing a "decrease for budgetary reasons or otherwise." The recommendations also permit unit employees to obtain contractual award benefits unavailable to non-unit employees because they "leave[] little, if any, room in the budget for non-unit performance awards." For example, in FY 2012, 91 percent of the bargaining unit received ratings of 4.0 or higher when FEC's total awards budget was \$349,076. If the Factfinder's recommendations had been implemented, unit employees "would have received \$267,571.83 in SSP awards," leaving "a mere \$81,558.17" for non-unit employees. His recommendation to roll over the current LMA provision requiring SSPs to be awarded no later than August 31 each year "will result in continuous breaches of the contract." This is because SSP awards are based on an annual appraisal period that coincides with the employee's anniversary date. Although most do, a few employee anniversaries do not precede the August cut-off, thereby either jeopardizing an employee from receiving an SSP or subjecting the Employer to a grievance over the untimely receipt of an award.

Instead of imposing the Factfinder's recommendations, the Panel should adopt the Employer's alternative approach to

^{4/} According to the Employer, the Union's reliance on *American Federation of Government Employees, Local 3836 and Federal Emergency Management Agency, Washington, D. C.*, 31 FLRA 921 (1988) (*FEMA*) to support the Panel's jurisdiction is misplaced because the union's proposal therein was specifically limited to the bargaining unit and had no direct effect on non-unit employees.

^{5/} See *Department of Defense, Defense Logistics Agency, Defense Distribution Depot, Susquehanna, New Cumberland, Pennsylvania and Local 2004, American Federation of Government Employees, AFL-CIO*, Case No. 02 FSIP 89 (August 23, 2002) (*DLA*).

resolve the dispute. In essence, it proposes that: (1) SSP awards be granted to employees whose overall performance rating is at 4.25 or above; (2) SSP awards be made once during the calendar year; (3) the percentage of mid-point salary for an Outstanding (5.0) rating be up to 3 percent, up to 2 percent for an Exceeds Requirements (4.51-4.99) rating, and up to 1 percent for an Exceeds Requirements (4.25-4.5) rating, with no minimum SSP award amount; and (4) the last sentence of each of his award recommendations in Section 3.D. through G. (*i.e.*, requiring recipients to receive up to a certain dollar amount) be withdrawn. Unlike the Factfinder's recommendation, the Employer's proposal "is balanced." By providing that employees may receive "up to" the percentages of mid-point salary it specifies, with no minimum amount for any award, the proposal would ensure that the FEC will have the "unfettered flexibility" it needs to deal with either internal budgetary limitations or reductions imposed by other governmental authorities.^{6/} Moreover, because its percentages are higher than those recommended by the Factfinder (*e.g.*, up to 2 percent, rather than 1.75 percent, for those in the mid-to-high level 4's, and up to 3 percent, rather than 2.75 percent, for those at level 5), the proposal incentivizes employees in a way that is not possible if awards are allocated at set percentage amounts and a minimum award is guaranteed. Finally, permitting the FEC to distribute SSPs "once during the calendar year" would eliminate continuous breaches of the LMA concerning those employees whose anniversary dates do not precede the annual August cut-off.

2. The Union's Position

The Panel rejected the Employer's duty-to-bargain claims when it asserted jurisdiction with respect to the parties' dispute over Article 20. Therefore, FEC's "resurrection of those jurisdictional arguments" in response to the OSC also should be rejected. Contrary to the Employer's position, the mandatory awards program recommended by the Factfinder is not inconsistent with 5 C.F.R. Part 451. In this regard, 5 C.F.R. § 451.103(a) states: "Agencies shall develop one or more award programs for employees." The fact that agencies "may," pursuant

^{6/} The Employer refers to a memorandum issued by the Office of Personnel Management (OPM) on June 10, 2011, to the heads of Executive Departments and agencies. Titled "Guidance on Awards for Fiscal Years 2011 and 2012," the memo states that for the next 2 fiscal years, agencies should "reduce award spending for non SES/SL/ST performance awards . . . to no more than one percent of their aggregate salaries."

to 5 C.F.R. § 451.104(a), "grant a cash, honorary, or informal recognition award," means that awards may be "given without violating federal regulation," not "that awards programs [are] discretionary" to the Employer and, therefore, outside its duty to bargain. The legal decisions it relies on (*FMS and Department of the Air Force, supra*) were based on a requirement in 5 C.F.R. § 430.504(d) subjecting awards to higher level review that no longer exists. The Panel should also reject the FEC's claim that the Factfinder's recommendations violate § 7106(a)(1) of the Statute. The Union has identified several cases where the FLRA found wording "substantively identical" to that recommended by the Factfinder to be fully consistent with management's right to determine its budget, in accordance with *Wright-Patterson AFB*.^{7/} Additionally, his recommendation requiring the same reduction ratio for unit and non-unit employee awards in lean budget years, and precluding a reduction of unit employee awards unless non-unit employee awards also are reduced, neither seeks to negotiate over, nor directly affects, the working conditions of non-unit employees. Rather, the FLRA concluded in *FEMA* that a proposal specifying that the bargaining unit award "amount shall not be less than the highest percentage allocated to any other pool" does not directly affect the working conditions of non-bargaining unit employees because it simply concerned the relative proportion of the total resources the agency would allocate to unit employees. According to the Union, the proposal found negotiable in *FEMA* is substantively identical to the Factfinder's recommendation that if cuts are necessary, they will be made by applying the same "reduction ratio" (not amounts) to bargaining and non-bargaining unit

^{7/} To support its position, the Union cites *National Treasury Employees Union, Chapter 245 and Department of Commerce, Patent and Trademark Office*, 30 FLRA 1219 (1988) (*NTEU Chapter 245*), where the FLRA concluded that a proposal requiring mandatory awards linking particular performance ratings to specific percentage amounts did not "prescribe a particular program or operation, or an amount of funds to be included in the Agency's budget"; *American Federation of Government Employees, AFL-CIO, and Commodity Futures Trading Commission, Washington, D.C.*, 27 FLRA 440 (1987), where the FLRA concluded that a proposal setting a mandatory minimum performance award is negotiable; and *National Treasury Employees Union and Internal Revenue Service*, 27 FLRA 132 (1987), where the FLRA found a proposal that "incentive money is paid at the rate \$.09 per one-tenth of an efficiency point over 100 percent" does not interfere with an agency's right to determine its budget.

employees. Thus, based on the FLRA cases cited, the Panel is not legally prohibited from imposing the Factfinder's recommendations to resolve the parties' impasse over Article 20.

On the merits, the Factfinder's recommendations should be adopted because they would distribute awards more fairly than the current LMA requirement that the unit employee awards budget be "no less than 20 percent of the total awards budget." In practice, the Employer caps the bargaining unit awards budget at that percentage. Since the total FY 2012 awards budget of \$349,076 was distributed on that basis, the Employer's contention that non-unit employees would be treated unfairly under the Factfinder's recommendation is misguided given that the average non-unit employee award in FY 2012 was \$1,979 while the highest possible award a unit employee could achieve at a rating of 4.0 or better was \$316. The Factfinder's recommendation is also far more equitable than the Employer's alternative approach which, by permitting SSP awards to be granted "up to" a certain percentage amount at any given rating level, infuses subjectivity into the process and would result in supervisors granting employees different award amounts at the same rating level. As the FEC concedes that raising the cut-off for SSP awards from 4.0 to 4.25 would only reduce the overall percentage of unit employee awards by 9 percent (from 91 to 82 percent), it has not demonstrated that its proposal would result in a significant cost savings to the Agency.

Nor has the Employer shown, for instance, that employees at the 5.0 level would feel more incentivized under the Employer's proposal, where they could receive anywhere from zero "up to" a 3 percent SSP award, than under the Factfinder's recommendation, where a 5.0 rating would automatically ensure that they receive a 2.75 percent SSP award. The fact that 91 percent of the employees in the unit received SSPs in 2012 confirms the Employer's concession that it suffers from over-rating or "grade-inflation." If that is true, the most responsible and equitable way to save money would be encourage supervisors to perform fair and objective evaluations - bringing down the ratings of employees who do not deserve to be at the highest level without punishing those who do. The Employer's concern that it could find itself in dire financial straits unless given "unfettered flexibility" to adjust the awards budget also is unfounded. The parties have already agreed in Article 20, Section 1.C., that "[t]here is no entitlement to awards, rather these awards are subject to budget limitations." Moreover, in Section 3.B.4., the Factfinder emphasizes again that "FEC shall retain discretion to determine the overall amount of awards

funding allocated to SSP and performance awards compared with the funding allocated to other types of awards." In addition, there is no reason to subject awards to OPM memoranda or Executive Orders that offer "guidance" to agencies and, in any event, do not have the force of law or Government-wide regulations. In any event, Article 49, to which the parties have already agreed, addresses the effect of government-wide regulations enacted during the contract term. Finally, with regard to the Employer's proposal to move the date SSP awards are due, an "existing waiver process" allows the performance appraisals of affected employees to be completed in a manner that does not negatively impact their timely receipt of awards. Since no grievances have ever been filed over the Employer's failure to comply with this current contractual requirement, it has failed to demonstrate a need to change the Factfinder's recommendation on this point, which merely maintains the *status quo*.

CONCLUSIONS

Having carefully considered the Employer's response to the OSC, and the Union's rebuttal, we conclude that the Employer has not shown cause as to why the recommendations of the Factfinder on Article 20 should not be imposed to resolve the parties' dispute. Preliminarily, as our use of the OSC suggests, the Panel begins with the presumption that a party objecting to the imposition of a factfinder's recommendations bears the initial burden of demonstrating why they should not be adopted. As a general matter, where parties select a private factfinder to assist in the resolution of a bargaining impasse, the Panel will normally defer to the factfinder's recommendations, particularly if they are supported by clear and convincing rationale and do not appear to be illegal. To do otherwise would undercut the effectiveness of the procedure the parties have mutually agreed to adopt by encouraging them to view the factfinding process merely as a stepping stone on their way to the Panel.

Before turning to the merits of the Factfinder's recommendations, however, it is necessary to address the Employer's legal claims that various sections interfere with management's right to determine its budget, are inconsistent with Government-wide regulations, and "directly affect[] the working conditions of non-unit employees."^{8/} As noted previously,

^{8/} With respect to the latter claim, in its response to the OSC, the Employer contends that the proposal found negotiable in *FEMA* is not "substantively identical" to the

when faced with such claims, the Panel is guided by the FLRA's decision in *Carswell AFB*, whereby the Panel may resolve duty-to-bargain questions raised in the course of its proceedings by applying previous FLRA cases where a "substantively identical" proposal has been found negotiable.^{9/} With respect to the duty-to-bargain questions raised by the Employer in this case, we reiterate that, on the basis of the decisions cited by the Union, the FLRA has already found proposals substantively identical to the wording recommended by the Factfinder on Article 20 to be negotiable. In particular, we respectfully disagree with the Employer's allegation that the proposal found negotiable in *FEMA* is not substantively identical to the Factfinder's recommendation on Section 3.B.4. In this regard, the underlying intent of both is to ensure that the percentage of incentive award money allocated to bargaining unit employees is not less than the amount allocated to any other award pool. Therefore, consistent with the guidance provided by the FLRA in *Carswell AFB* and *Yuma*, the Employer's contention that the

Factfinder's recommendation on Section 3.B.4. In its view, whereas the proposal in *FEMA* was negotiable because its scope was limited to "PMS employees in the bargaining unit," his recommendation on Section 3.B.4. "explicitly requires identical reductions between unit and non-unit performance awards" and, therefore, is "clearly outside of the duty to bargain" because it directly affects the working conditions of non-unit employees.

^{9/} The FLRA's decision in *U.S. Department of the Interior, Bureau of Reclamation, Lower Colorado Region, Yuma Arizona and National Federation of Federal Employees, Local 1487*, 41 FLRA 3 (1991) (*Yuma*), where it extended the guidance it provided in *Carswell AFB*, is also instructive. In essence, the FLRA ruled that the Panel may apply the results of previous FLRA decisions finding substantively identical proposals negotiable to resolve duty-to-bargain issues even in circumstances where an employer raises a new legal argument before the Panel that was not previously considered by the FLRA when it rendered its negotiability decision. Thus, in *Yuma*, the FLRA stated: "The fact that an agency's arguments differ from those previously considered [by the FLRA] will not, standing alone, compel a conclusion that [the Panel] improperly resolved a negotiability dispute." Otherwise, "agencies could be encouraged to raise novel, even frivolous, negotiability arguments so as to impede impasse resolution."

Factfinder's recommendations are outside its duty to bargain is hereby rejected.

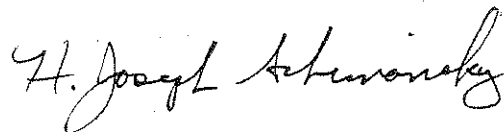
Moving to the merits of the Factfinder's recommendations, it is clear from the record that he spent considerable time assessing the evidence and arguments presented by the parties in support of their respective positions. In the end, his recommendations represent a "modified awards scheme" that, among other things, deviates from the final offer presented to him by the Union in that they increase the percentage of mid-point salary for SSP awards linked to performance ratings and lower the amount of the minimum SSP awards. Overall, however, his recommendations are far closer to the Union's approach to the issues than the Employer's, and he appears to have agreed with the Union that there is a need for greater equity in the treatment of bargaining unit vs. non-bargaining unit employees at the FEC that the Employer's proposal simply would not address. In our view, the Factfinder supported his recommendations for resolving the parties' remaining disputes over Article 20 through clear and convincing rationale. Accordingly, we shall order the adoption of the Factfinder's recommendations in their entirety to resolve the parties' dispute.

ORDER

Pursuant to the authority vested 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 impasse during the course of proceedings instituted pursuant to the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the Factfinder's recommendations in their entirety.

By direction of the Panel.



H. Joseph Schimansky
Executive Director

January 16, 2013
Washington, D.C.