In the Matter of

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
CENTER FOR DISEASE CONTROL
AND PREVENTION
ATLANTA, GEORGIA

and

LOCAL 2883, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 27

ARBITRATOR'S OPINION AND DECISION

Local 2883, American Federation of Government Employees, AFL-CIO (AFGE/Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) on December 1, 2012, 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 Health and Human Services, Centers for Disease Control and Prevention, Atlanta, Georgia (CDC/Employer).

After due consideration of the request for assistance, the Panel determined, in accordance with its regulations, 5 C.F.R. § 2471.6(a)(2), that the parties' impasse over three issues in their successor collective bargaining agreement (CBA) negotiations should be resolved by mediation-arbitration via telephone with the undersigned, Panel Member Edward F. Hartfield. The parties were informed that if a settlement was not reached during mediation, I would issue a binding decision to resolve any unresolved issues. Consistent with the Panel's procedural determination, on March 13, 2013, I conducted a mediation-arbitration proceeding by telephone with representatives of the parties.[1/] During the mediation phase, the parties were able to resolve one of the three issues before the Panel resulting in a mediated agreement on that issue, Child and Elder Care. However, the parties were unable to resolve the other two issues in their dispute, thereby causing the need for the undersigned to convene an arbitration proceeding, allowing the parties to provide any additional exhibits, evidence, and testimony. In reaching this decision, I have considered the entire record in this matter, including the parties' final offers and submissions made at the hearing and after the hearing. I provided both parties with the opportunity to prepare and submit statements of position with supporting documentation until close of business (COB) March 20, 2013, at which time they were advised that the record would be closed.

1/ By mutual agreement of the parties, the med-arb proceeding actually was conducted as a videoconference via Go To Meeting, which enabled the parties to see as well as hear each other.

At the outset, I wish to address a procedural matter involving the timeliness of post-hearing submissions. On March 20, 2013, the Union requested that the deadline for receipt of its statement of position be extended by 2 days because of an electrical outage in AFGE's headquarters building. Subsequently, both parties agreed to extend the deadline for post-hearing submissions until the close of business on Friday, March 22, 2013. For reasons that are still not clear, a portion of the Union submission did not arrive until Saturday, March 23, 2013. The Employer has filed an objection to this submission, raising not only the timeliness of the submission but also the fact that the Union submitted "documents," something more than a final statement of position. The Employer has requested that the Arbitrator not consider that material submitted by the Union. In the interest of making an informed decision based on the materials submitted by the parties, I have decided to accept all submissions from both parties.

BACKGROUND

The mission of the CDC is to "focus national attention on developing and applying disease prevention and control (especially infectious diseases and foodborne pathogens and other microbial infections), environmental health, occupational safety and health, health promotion, injury prevention and educational activities designed to improve the health of the people of the United States." The Union represents approximately 2,000 employees in positions that include, among others, Wage Grade (WG) gardeners, mechanics and motor vehicle operators and General Schedule (GS) budget, health communications, computer, financial management and public affairs specialists, as well as administrative assistants and clerks. The parties' current CBA remains in full force and effect until the date of agency approval of the new agreement.

BARGAINING HISTORY

The parties exchanged proposals on April 6, 2010. Starting on April 13, 2010, and lasting over the next 2 years, they engaged in 122 face-to-face bargaining sessions. Initially, a Federal Mediation and Conciliation Service (FMCS) mediator attended every session.[2/] By the time Phase 1 concluded on December 20, 2011, the parties had met 107 times and discussed every article 2 times. Although they had reached agreement on many articles, 119 issues remained unresolved. To tackle them, the parties, during Phase 2, pared their teams to two members consisting of the Chief Negotiator for each and her principal. These sub-teams met 15 times between January 3 and March 13, 2012, and the mediator attended every session. At the end of 6 weeks, the parties had resolved all but 3 of the 119 issues. FMCS referred the matter to the Panel on September 28, 2012.

2/ The parties requested and received a significant amount of assistance from FMCS. The Union was given interest based bargaining (IBB) training that the Employer declined because, along with the Union, it had participated in an IBB program to prepare for membership in CDC's Labor-Management Cooperation Council (LMCC).

ISSUES

Following resolution of the child and elder case issue, the following two issues remain unresolved: (1) Commercial Services Management (A-76) and Federal Procurement Activities (contracting-out); and, (2) Numerical Ratings on Mid Year Performance Reviews. I requested that the parties provide the arbitrator with their last best offers on each of the remaining two issues. The parties' last best offers (LBOs) on each are:

1. ARTICLE X: COMMERCIAL SERVICES MANAGEMENT (A-76) AND FEDERAL PROCUREMENT ACTIVITIES

Section 15 (c): Union's LBO

In the event of a timely-filed contest of an Agency decision to award the work to a private-sector bidder, if implementation of the decision would result in more than *de minimis* changes to one or more bargaining unit employees' terms and conditions of work, the Employer will hold the implementation of the decision in abeyance until a final decision has been reached on the contest.

Section 15 (c): Employer's LBO

The pursuit of a contest by a directly interested party and the resolution of such contest shall be governed by the procedures of FAR subpart 33.103.

2. ARTICLE 20: PERFORMANCE MANAGEMENT

Section 5. Union's LBO

The written mid-year progress reviews and annual appraisals will include both written narratives and numerical ratings for each element in the employee's performance plan on which the review or appraisal is based.

Section 5. Employer's LBO

In essence, the Employer would have the Arbitrator order the Union to withdraw its proposal. As a result, the parties would adopt the previously agreed upon language for this entire article, as documented in the MOU signed by both parties and implemented on January 4, 2012.

THE PARTIES' POSITIONS

1. ARTICLE X: COMMERCIAL SERVICES MANAGEMENT (A-76) AND FEDERAL PROCUREMENT ACTIVITIES

The Agency asserts, and the Union does not contest its statement, that the only time that the Agency has conducted A-76 activities, or competitive sourcing studies, has been when directed to do so under the President Management Agenda (PMA), during the Bush administration. During that process, the Agency studied the minimum number of positions

required by the PMA, and in every study involved Union representatives in preparation of the Agency bid for the work, and the parties consistently worked together towards a shared goal of keeping the studied work in-house. Even in the two such studies lost by the Agency out of a much larger number of studies conducted, no federal employees lost their jobs.

Additionally, management points out that the parties agreed to several pages of new text in their current contract negotiations outlining how they would conduct such competitive studies in the future should they again be required to do so. The new language explicitly addresses the timing and level of involvement of the Union. Management agreed to include language in the contract that the Agency would follow protest procedures outlined in the Federal Acquisition Regulation (FAR) regarding how a protest before contract award is to be handled, despite the lack of any precedent or similar experience in the past.

CDC explains, nevertheless, that its position is that "the Agency shall be governed by the procedures of FAR subpart 33.103," *i.e.*, 48 C.F.R. Subpart 33.103, Protests to the Agency. It is management's belief that the governing regulation sufficiently protects all interested parties as it relates to protests of a decision to award a contract as a result of an A-76 competition. The Employer points to § 33.103(f)(1) which states that if a protest is received before an award is made, the contract "may not be awarded, pending agency resolution of the protest" unless the award is "justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government."[3/] Specifically, the law states:

> Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless the contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

The Union openly acknowledges that it is not aware of any instance in which CDC has contracted out work to a private-sector bidder. Nevertheless, it wants to protect its bargaining unit employees as much as possible due to its concern that the current economic climate makes it more likely that an A-76 movement of the Employer's work to an outside company will take place. The Union underscores that its proposal does not apply unless and until the CDC makes a "decision" to which a "timely-filed contest" is made. The Union also points out that its proposal does not prohibit the Employer from contracting out work to other organizations within CDC or other governmental entities. Therefore, despite the fact that the Employer has not, and will not, claim that the Union's proposal is inconsistent with Government-wide regulation and is, therefore, outside of its duty to bargain, the Union's position is that "a delay in transferring the work of bargaining unit employees to the private-sector (for) performance until a decision (can) be made on a timely-filed protest of the award does not impermissibly interfere with

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3/ Section 33.103(f) (2) – (4) describes the procedures employed when an award is stayed and details the protections provided and actions that must be taken by an agency when a protest is timely-filed after an award is made.

management's right to contract out and is an appropriate arrangement for employees adversely affected" by the exercise of that right.

The Union is also concerned prospectively about the possibility of a public health event or emergency that could potentially occur, that would allow the Agency to take unilateral action to award bargaining unit work to an outside organization without the protection of the FAR. The Agency response is that should that situation present itself, it reserves the right to use the flexibilities afforded by law in order to deliver its public health responsibilities. The Agency further asserts that unless it is forced to do so - which is highly unlikely in the foreseeable future - it will not contract out. In short, the Employer argues that the Union has not established a need for its proposal.

2. ARTICLE 20: PERFORMANCE MANAGEMENT

Historically, prior to 2006, the CDC performance management policy included that numerical ratings be assigned to employees during the required performance progress review at mid-year. In 2006, the Department of Health and Human Services implemented a new policy and performance management system that applied to all DHHS operating divisions that changed the practice of providing numerical ratings during mid-year performance reviews. Instead of negotiating a voluntary agreement resulting in a signed MOU with the Agency, as did some of the other CDC labor groups, Local 2883 elected to file a grievance over the reasonableness of the new policy/system, and the Department ultimately prevailed through arbitration.

Among other changes in the new performance management system was a change in the process for mid-year progress reviews:

> One formal progress review is required and is generally conducted midway through the appraisal period. Ratings are not assigned for progress reviews. There should be continuous feedback between the employee and his/her supervisor. At a minimum, one formal progress review shall be held between the supervisor and the employee, at approximately midpoint in the rating cycle. While only one progress review is required, additional reviews are encouraged to maximize employee feedback. Ratings are not assigned for progress reviews. A written narrative is not required, unless performance is less than Achieved Expected Results. Along with providing an interim assessment of performance, *this provides an opportunity for supervisors to discuss and document evolving priorities or other organizational changes impacting employee work assignments.* [Emphasis in italics added by Arbitrator.]

The Union wants to reinstate the use of numerical ratings at mid-year reviews. It argues that the primary purpose of a midyear review is to let an employee know how she would be rated if an annual evaluation were drafted at the half-way point of the appraisal year so that the employee has time, if necessary, to bring her overall rating up to a higher level. The Union has "observed" that since numerical ratings are no longer provided together with written narratives, mid-year progress reviews do not "give sufficient information to employees who wish to raise their performance above fully successful by the end of the year."

On the other hand, CDC management views progress reviews as an important opportunity for providing feedback to employees and is encouraging them to be conducted at any time during the appraisal period. In an effort to move everyone in the system from viewing performance management as a "required nuisance," CDC is trying to emphasize more dialogue and feedback, versus reliance on a process that focuses on a score with a justification.

CDC further believes that even the terminology is confusing, since "ratings" are part of the employee's official performance record and progress reviews are not. CDC points out that in the past, employees were often confused and concerned that the mid-year "rating" was going to be permanently recorded in some way.

During current contract negotiations, management agreed to require supervisors to provide written supporting narratives for every performance element in an effort to address the Union's concern that some supervisors don't provide what employees feel is adequate feedback to help them improve their performance at the mid-year progress review. Management believes that this requirement was outlined in mutually agreed-upon text for the entire Performance Management Article, and was formally documented as part of a Memorandum of Understanding between the parties, signed and dated on January 4, 2012, and implemented it for the 2012 appraisal year. Management believes that the parties negotiated and agreed to this MOU in good faith.

The Employer, therefore, is extremely frustrated by what it sees as a reneging on the commitment made by the Union in the 2012 MOU.[4/] CDC management asserts that the Union has not provided any evidence to back up its "observations; " moreover, its claim that the only reason it agreed to forego numerical ratings was because it mistakenly believed the Employer did not have a system capable of programming them is not credible. On the merits, CDC argues that implementation of mid-year numerical ratings will confuse employees because they will think they are receiving their annual appraisal when they see numbers on a document. More importantly, assigning numerical ratings takes a significant amount of time and will discourage supervisors from conducting follow-up reviews throughout the appraisal year – something the Employer thinks is far more valuable to an employee than one numerical rating half-way through it.

CONCLUSIONS

Having carefully considered the evidence and arguments presented by the parties, I conclude that on both issues, the Employer has made the more compelling case on the merits. On the first issue, that of Commercial Services Management (A-76) and Federal Procurement Activities, the Union has been unable to provide any precedent or actual occurrence on which to base its proposal for a change in the current contract language. While the Arbitrator recognizes that the Last Best Offer submitted by the Union reflects additional movement from the position from which it started, the Union itself acknowledges that the Agency has given them no actual cause for concern, no pattern or practice of awarding bargaining unit work to outside

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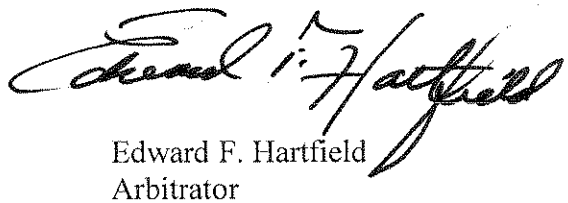
4/ Despite its frustration, Management states that it will not file a ULP charge against the Union.

organizations that has resulted in a layoff or injury to any of its members. Indeed, the Union does not challenge the Agency's assertion that none of its members has ever been supplanted by an A-76 activity.

On the second issue, that of reinstating the practice of providing numerical ratings to employees during mid-year performance reviews, the Union has not provided any evidence to suggest that its members have been damaged by the lack of numerical ratings. There were no examples provided, grievances filed, or statistics which show that employees were negatively impacted by the lack of numerical ratings at mid-year performance reviews and subsequently protested the annual rating which they ultimately received. By contrast, this Arbitrator is persuaded by the Agency's argument that the goal of performance reviews should be good conversation, good dialog, and an excellent opportunity to ask questions. The Arbitrator shares the concern that numerical ratings quickly can become the focus of the conversation during a performance review and result in a reduction in quality conversation.

DECISION

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Federal Service Labor-Management Relations Statute, I hereby find in favor of the Agency's proposals on both issues, and order their adoption.



Edward F. Hartfield
Arbitrator

April 17, 2013
St. Clair Shores, Michigan