United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of BROADCASTING BOARD OF GOVERNORS and AMERICAN FEDERATION OF GOVERNMENT LOCAL 1812, AFL-CIO	Case No. 15 FSIP 121

DECISION AND ORDER

The Broadcasting Board of Governors (BBG or Employer) and the American Federation of Government Employees, Local 1812, AFL-CIO (AFGE or Union) filed a joint-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, over the parties' successor collective bargaining agreement (CBA). The Employer's mission is to inform, engage, and connect people around the world in support of freedom and democracy. It performs its mission by broadcasting programs in 60 languages to approximately 171 million people weekly via radio, television, the Internet and other news media. The bargaining unit has just under 1,100 General Schedule and Wage Grade employees who encumber a variety of positions. The parties are governed by an agreement that expired on September 22, 2008, but continues to self-renew annually unless/until the parties reach agreement on a new successor CBA. In 2013, they also agreed to further additions and revisions to their CBA.

Following an investigation of the Union's request for assistance in the above-captioned case, on December 17, 2015, the Panel directed the parties to resume bargaining with the assistance of a private facilitator/factfinder with his or her fees and related expenses shared equally by the parties. At the conclusion of facilitated bargaining, if any issues remained unresolved, the facilitator/factfinder was to issue a report with recommendations and supporting rationale to the Panel and the parties for resolving them. In the event that a party did not accept the factfinder's recommendations, it was to notify the Panel and the other party, in writing, and identify those

unresolved provisions as well as any proposed language. The parties were informed further that, after receiving their responses to his recommendations, the Panel would take whatever action it deemed appropriate to resolve the remaining issues.

The Factfinder held an undetermined number of meetings and mediation sessions with the parties between January 2016 and August 2016. Additionally, during the fact-finding process, the Employer raised negotiability concerns over several of the Union's proposals. Consequently, the parties requested assistance from the FLRA's Collaboration and Alternative Dispute Resolution Office (CADRO). With the assistance of CADRO, the parties executed agreement over: Article 14, Section 5; Article 23; Article 27, Section 1(f); and Article 27, Section 13. Moreover, the parties reached agreement over the entirety of Article 13 on July 29, 2016.

On July 18, 2016, Factfinder M. David Vaugh issued his Factfinding Report and Recommendations concerning the parties' dispute over their successor CBA. Overall, and as relevant, the Factfinder recommended: (1) the rollover of any unopened articles; (2) the imposition of any language that the parties agreed to during the factfinding process; (3) the imposition of the Factfinder's recommendations on unresolved articles/issues; (4) a return to the language of the existing CBA with respect to any dispute the Factfinder did not address or a withdrawal of that dispute if there was no relevant language in the CBA; and (5) that the parties attempt to "work out" issues that the Factfinder found to be "*de minimis*" in nature and return to him should they fail to reach agreement on these issues.

The parties subsequently submitted objections to various portions of the Factfinder's report to the Panel on August 1, 2016. Thereafter, on October 7, 2016, the Panel ordered the parties to show cause why it should not adopt the Factfinder's recommendations on the objected-to-issues. Additionally, as a result of information provided by the parties, the Panel identified several issues that the Factfinder apparently left unresolved. Thus, the Panel also ordered the parties to provide their final offers and supporting arguments on these unresolved issues. In response to the Panel's order, the parties submitted their submissions on October 31, 2016, and then provided rebuttal statements on November 15, 2016.

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

ISSUES AT IMPASSE

In its August 1, 2016, submission, the Employer objected to the following: (1) Article 14, Sections 10 and 11; (2) Article 22, Section 5; (3) Article 24, Section 3(a)(6); (4) Article 23, Section 8(k); and (5) Article 37, Section 18.

In the aforementioned submission, the Union raised objections to the following: (1) Article 5, Section 5(b)(5); (2) Article 5, Section 5(b)(7); (3) Article 7, Section 4; (4) Article 14, Section 3(a); (5) Article 20, Section 1; (6) Article 21, Section 3(9); (7) Article 23, Section 1(d); (8) Article 23, Section 2(h); (9) Union Article 23, Section 2(i)/Employer Article 23, Section 2(h); (10) Article 23, Section 4(c); (11) Union Article 23, Section 8(d)/Employer Article 23, Section 8(e); (12) Article 23, Section 8(f); (13) Article 23, Section 12; (14) Article 26, Section 2(i); (15) Union Article 26, Section 3(g)/Employer Article 26, Section 3(e); (16) Article 33, Section 5; (17) Union Article 33, Section 8/Employer Article 33, Section 8(j); (18) Union Article 37, Section 1, Section 4(a), Section 4(e)(1), Section 4(g), Section 4(j)(2)/Employer Article 37, Section 6(e), Section 9(b); (19) Union Article 37, Section 4(g)(8)/Employer Article 37, Section 6(h); (20) Article 37, Section 5(d); and (21) Article 38.[1/]

Finally, in discussions with the Panel's representative following submission of the August 1st document, the parties identified the following issues that the Factfinder allegedly ordered the parties to resolve on their own: (1) Article 14, Section 7(e); (2) Article 14, Section 8; (3) Article 21, Section 6; (4) Article 23, Section 6; (5) Article 23, Section 13; and (6) Article 23, Section 14.[2/]

These three categories of issues are addressed below.

1/ The Union also objected to Article 27, Section 9 and Article 37, Section 5(e)(1). The parties, however, were able to reach agreement on these issues.

2/ The Union indicated that the Factfinder directed the parties to resolve their disagreements over Article 24, Section 1.h and Article 24, Section 3.c. The parties have also reached agreement on these issues.

I. EMPLOYER OBJECTIONS

1. Article 14, Sections 10 and 11[3]

a. The Employer's Position

The Panel should impose the Employer's suggested language. After discussions with its human resources department, it has learned that Office of Personnel Management (OPM) guidance prohibits the use of ranking panels and, accordingly, HR no longer uses them either. The current language in the CBA for these sections mandates their use, yet the language's current existence is inappropriate in light of the aforementioned guidance. Additionally, the current CBA language also creates other issues, such as clearing security checks within a certain time frame.

b. The Union's Position

The Panel should accept the Factfinder's recommendation. The Employer may still use ranking panels if it wishes. Indeed, the Employer's own proposal permits their use for Wage Grade employees.

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 Employer's primary objection to the Factfinder's recommendation is that it was informed by human resources officials that OPM guidance no longer permits the use of ranking panels. The Factfinder considered and rejected this argument, and the Employer simply reiterates it to the Panel. The Employer has not explained why the Panel should discount the Factfinder's conclusion. Moreover, it does not cite the "guidance" that prohibits the use of panels. Indeed, for at least Wage Grade employees, the Employer still retains the option to use ranking panels. Thus, the Employer's argument is lacking.

2. Article 22, Section 5, Arbitrability

a. The Employer's Position

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

3/ Due to their length, the parties' proposals for Article 14, Sections 10 and 11 are attached as an appendix to this decision.

> Questions that cannot be resolved by the parties as to whether a Grievance is based on a matter subject to the Negotiated Grievance Procedure, including issues of timeliness, will be referred to an arbitrator for decision prior to any presentation on the merits. If the threshold question of arbitrability is answered in the affirmative, normally, the parties will refer the merits of the case to the same arbitrator for decision. By mutual consent, the parties may decide to use a different arbitrator.

The Factfinder imposed language that would require the parties to raise any arbitrability issues *before* any arbitration hearing. The Employer argues this imposition is contrary to FLRA precedent that permits a party to raise arbitrability challenges at any stage of an arbitration proceeding, including during the hearing itself. Consequently, the Factfinder's recommended language should be rejected in favor of the Employer's language as it would permit arbitrability challenges to be raised during a hearing.

b. The Union's position

The Union opposes the Employer's language. It maintains that the Employer can still raise arbitrability issues during the grievance process and can also raise these issues after the award if permitted by law.

CONCLUSIONS

On this issue, we shall order the adoption of the Factfinder's language:

a. A reasonable time before the date of an arbitration hearing, but not later than the conclusion of the final step of the grievance process, the Party challenging the arbitrability of a grievance must notify the other Party of the challenge and reasonably explain the grounds for the challenge.

b. The Arbitrator's decision on any such issue shall be communicated in writing to the respective parties prior to a scheduled arbitration hearing. Unless otherwise mutually agreed to by the parties, no arbitration hearing may proceed unless and until the Arbitrator has rendered a written decision on issues of arbitrability. If the threshold question of arbitrability is answered in the affirmative, the Arbitrator will hear arguments based on the merits of the case.

The Employer relies upon case law that allegedly permits parties to raise challenges to an arbitrator's jurisdiction at any stage of an arbitration proceeding. However, the Employer's cited precedent actually concerns challenges to the *FLRA's jurisdiction*. Moreover, these decisions focus solely on the unique structure of collective bargaining rights for employees of the United States Department of Veterans Affairs (VA) under Title 38 of the United States Code.[4/] Pursuant to Title 38, the Secretary of the VA or a designee may, among other things, contest arbitrability at any juncture. But such a right applies within the context of disputes involving solely VA employees. The Employer cites no comparable legal authority for its employees. Accordingly, we decline to adopt the Employer's proposed language.

3. Article 23, Section 8(k), Overtime Assignments

a. The Employer's Position

The following wording should be added to the Factfinder's imposed language:

> General Schedule (GS) employees and other covered employees are subject to a biweekly premium pay cap, where the total value of all earnings for the pay period (basic pay plus all premium pays earned (i.e. Overtime, Compensatory Time in lieu of Overtime, Sunday Pay, Night Differential Pay, and Holiday Worked)) cannot exceed the greater of two Government-wide salary values: (1) GS-15, step 10 (locality adjusted) or (2) Level V of the Executive Schedule. If the employee's biweekly salary earnings exceed this limit, the excess earnings are forfeited. Travel Compensatory Time earnings are excluded from this process by statute. References: 5 U.S.C. 5547(a) and 5 CFR 550.105.

The parties have agreed to language concerning overtime assignments. But the Employer maintains that the above language should be added to reiterate that certain employees are subject to monetary caps on how much overtime they may earn during pay periods. The Employer's Chief Financial Officer (CFO) insists that it must have this language in order to circumvent confusion and lessen the Employer's workload. As to the latter concern, placing the burden entirely upon the Employer to monitor overtime assignments is unfair and cumbersome.

4/ AFGE, Local 446 v. Nicholson, 475 F.3d 341, 343 (D.C. Cir. 2007); VAMC, Asheville, NC and AFGE, Local 446, 57 FLRA 681, 686 (2002).

b. The Union's position

The Union objects to the Employer's additional language because it is allegedly erroneous. The pay caps do not apply to overtime worked by employees covered by the Fair Labor Standards Act (FLSA). Also, there is an exception for non-FLSA employees in the case of emergency work.

CONCLUSIONS

We decline to adopt the Employer's proposed additional language. It maintains that its language is necessary to avoid confusion and additional work load. But the Factfinder considered these arguments and found them unpersuasive. The Employer has provided no rationale for rejecting this conclusion.

4. Article 24, Section 3(a)(6), Reimbursement for leave-related expenses

a. The Employer's Position

The Employer seeks to strike the following recommended language:

> When the Agency becomes aware of the need to cancel approved leave, the Agency shall promptly notify the affected employee. If the cancellation results in monetary loss to the employee, then the Agency shall reimburse the employee for reasonable non-refundable travel costs for which the employee can provide reasonable documentation.

According to the Employer, this language is inconsistent with FLRA precedent.[5/] Specifically, the FLRA has relied upon guidance from the Comptroller General to conclude that agencies cannot reimburse employees personal-leave related travel expenses when an agency cancels an employee's leave request. Rather than the above language, the Employer offers the following compromise:

> When the Agency becomes aware of the need to cancel already-approved leave, the Agency shall promptly notify the affected employee. If the affected employee can adequately demonstrate that the cancellation results in monetary loss to the employee that cannot be mitigated,

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5/ See Association of Civilian Technicians, Puerto Rico Army Chapter and U.S. Department of Defense National Guard Bureau, Puerto Rico National Guard, San Juan, Puerto Rico, 56 FLRA 807, 808 (2000).

> the Agency shall give due consideration to alternatives that would both allow the employee to take the affected leave and satisfy the work needs that required the leave cancellation.

b. The Union's Position

The Union maintains that the factfinder's language is a proposed appropriate arrangement. As such, it is proper for adoption.

CONCLUSIONS

We shall order the adoption of the Employer's suggested language. As noted by the Employer, existing authority does not permit reimbursement for the leave-related expenses sought by the Union. Although the Union claims such reimbursement is an appropriate arrangement, it offers no precedent to support its claim. To the contrary, existing precedent demonstrates the opposite conclusion. The Employer's language appears to be permissible under existing case law and also attempts to balance an employee's need for leave and the Employer's work needs.

5. Article 37, Section 18, Telework and Government-Delayed Arrivals

a. The Employer's Position

The Employer requests that the Panel impose the following language:

> At the time this successor [CBA] was executed pursuant to final resolution by the Federal Service Impasses Panel (FSIP), the existing status quo was that the Agency had implemented its mid-term bargaining LBO and the Union had pursued the matter via the Parties' negotiated grievance procedure. The FSIP determined that this is the status quo until it is altered by the Parties or otherwise resolved by an authority with appropriate jurisdiction to do so.

While the parties were bargaining over their successor CBA, the Employer provided the Union with notice and an opportunity to bargain over the subject of telework and government-delayed arrivals, government closures, etc. The Employer claims that the Union did not timely pursue its bargaining rights and, as such, the Employer chose to unilaterally impose an agreement concerning the foregoing topics. Although the Union has initiated multiple grievances and arbitrations over this matter, the Employer

requested that the Factfinder include its imposed language in the parties' successor CBA. The Factfinder declined to accept the Employer's invitation instead choosing to defer to the outside ongoing actions. That is, he recommended not including the language in order to allow the arbitrations to conclude.

Notwithstanding the foregoing recommendation, the Employer maintains that Factfinder never disputed that the *status quo* is that the Employer's article currently binds the parties. Therefore, the Employer requests that the Panel should recognize that this language is the *status quo* and binds the parties unless overturned by ongoing external proceedings.

b. The Union's Position

The Union disagrees with the Employer's language. The issue of the imposition of the language found in Article 37, Section 18 is currently under litigation in other forums.

CONCLUSIONS

We decline to adopt the Employer's suggested language. The Employer asks the Panel to recognize that its unilateral imposition of Article 37, Section 18 constitutes the *status quo* because the Factinder made no contrary finding. The Factfinder's failure to make such a finding, however, arose because he recognized that the parties are currently litigating the appropriateness of this imposition in other forums. The Employer offers no rationale for breaking with the Factfinder's conclusion other than its own belief that the Employer properly implemented Article 37, Section 18. Accepting the Employer's recommended language would place the Panel in the position of addressing whether the Employer's imposition was permissible; but this question is currently being litigated in other forums.

II. UNION OBJECTIONS

1. Article 5, Section 5(b)(5)(H) & (I), Union Representation[6]

a. The Union's Position

The Union proposes to add the following language as situations that permit Union representation:

6/ In its October 31st and November 16th submissions, the Employer raised an objection concerning Article 5, Section 5(b)(2), "Union access." This was not a previously identified issue and, as such, the Panel declines to consider it.

H. Filing a workers' compensation claim; I. Meetings following the issuance of performance improvement letters when the discussion is about employee failure to meet the requirements of the performance improvement plan and if requested by the employee.

Although new, this language is necessary because language barriers sometimes prevent employees from receiving accurate information about workers' compensation claims. The performance-improvement plan language is necessary because, depending upon future events, these situations could lead to an employee undergoing an adverse action.

b. The Employer's Position

The Employer opposes the inclusion of the Union's language. As to workers' compensation claims, the Employer maintains the process is largely externally driven and, as such, does not represent a true condition of employment. As to performance-improvement plans, the Employer submits that the Union is impermissibly attempting to transform these types of meetings into formal discussions.

CONCLUSIONS

After careful consideration of the parties' responses to the *OSC* concerning this article, we are not persuaded that the Union has demonstrated a need to adopt its language. The Factfinder considered the Union's expressed interests and nevertheless concluded that it would be inappropriate to include the Union's suggested language. Seeing no reason to disturb this recommendation, we adopt the Factfinder's approach.

2. Article 5, Section 5(b)(7), Designation of Union Representation

a. The Union's Position

The Union proposes the adoption of the following language:

For matters raised under the Negotiated Grievance Procedure (Article 21), employees are entitled to be represented by an outside attorney or other representative only when the representative has been designated in writing by the President of AFGE Local 1812 (or designee). It is understood by the parties that the Union's approval of the outside attorney or other representative does not obligate the Union to pay

the fees for such representation. For other matters such as MSPB or EEOC proceedings, in accordance with law and regulations, an employee may be represented by an attorney or by another representative without having to obtain a designation by the union.

The Factfinder declined to include the above language because it supposedly represented a departure from the *status quo*. But it actually represents a minor modification of the current CBA, so the Union is not seeking anything radically new.

b. The Employer's Position

The Employer opposes the Union's request because the subject of its proposal is purely an internal Union matter. That this language represents the *status quo* is of minimal significance because this language should have never been in the CBA as an initial matter.

CONCLUSIONS

We reject the Factfinder's recommendation and adopt the Union's proposed language. Although he found that the language represented "new language" concerning external representation, it actually appears in the current CBA verbatim at Article 5, Section 2(h). Thus, the premise of the Factfinder's conclusion rests on a faulty premise. Although the Employer complains of its inclusion in the current CBA, it appears that the Employer willingly accepted it in the past without complaint. Thus, the Employer's argument rings hollow.

3. Article 7, Section 4, Effect of Prior Agreements

a. The Union's Position

The Union requests the adoption of the following language:

> No agreement regarding changing policy, practice or conditions of employment reached between the Union and any Management official made at a meeting in which LER was not represented shall become official and binding until LER has signed off on the change. This does not apply to agreements which were reached prior to the adoption of this master agreement and to those agreements commonly referred to as past practice agreements.

The Union's primary concern is the last sentence. It is concerned that, by requiring the signature of an LER, the Employer will use this language to invalidate any existing past practice that came

into effect without such a signature. This approach is overly broad and could unfairly impact employees who have come to rely upon the existence of such agreements.

b. The Employer's Position

The Employer agrees to the first sentence but opposes the inclusion of the second sentence. The Union should not be permitted to rely upon unidentified past practices that came into effect solely because the Union did not involve properly LER or other management officials. The Union's approach is unreasonable and disingenuous.

CONCLUSIONS

After reviewing the parties' responses to the *OSC* on this issue, we shall order the adoption of the Union's proposed language. The Employer had an opportunity to address problematic existing past practices that were not covered as part of the parties' successor CBA renegotiations but did not do so. Adopting the Employer's whole sale approach, therefore, disadvantages employees who have come to rely upon unchallenged agreements.

4. Article 14, Section 3(a), Merit Promotion and Staffing

a. The Union's Position

The Union proposes the following wording to resolve the parties' impasse on this issue:

> For positions in Radio and TV Marti, the [Employer] will use a similar merit scale as that of the competitive service.

This proposal is necessary to protect the mostly excepted-service employees that populate the Radio and Television Marti division. The Employer has not adhered to certain federal regulatory requirements for these employees, so the Union is seeking the application of competitive-service procedures to ensure the satisfaction of these requirements. The Union maintains that the Employer has discretion to adopt competitive-service procedures and it should do so here.

b. The Employer's Position

The Employer maintains that the Union's proposal needlessly complicates the hiring situation for this division because it includes a number of different types of employees. Additionally,

the Union did not substantiate its claim that the Employer is failing to follow federal law.

CONCLUSIONS

Having carefully considered the parties' positions on this issue, we adopt the Factfinder's conclusion to decline to include the Union's suggested language. Its proposal is premised largely on what it believes to be the Employer's alleged violations of applicable federal law with respect to a certain category of employees. The Union's argument, therefore, is one based on perceived legal rights and violations thereof. This argument should be pursued in more appropriate forums, however, than the parties' CBA.

5. Article 20, Section 1, Disciple and Adverse Action

a. The Union's Position

The Union requests the imposition of the following language:

> The parties agree that discipline in the Federal government is meant to correct inappropriate or unacceptable behavior except, for example, in cases of extreme misconduct. The parties agree that the prevention of misconduct is preferred to taking disciplinary action. The Agency shall instruct or counsel employees orally or in writing as to work place rules. Such counseling or instruction may be individual and confidential or for groups of individuals, as appropriate.

The Union maintains that this language is a modification of the *status quo* under the parties' existing CBA. Moreover, it claims that the Employer is not actually adhering to the concept of progressive discipline. Further, the Employer, despite objecting to this language, failed to offer any counter proposal. Thus, this language is necessary to protect employees.

b. The Employer's Position

The Employer supports the adoption of the Factfinder's recommended language:

> The [Employer] and the Union recognize that the public interest requires the maintenance of high standards of conduct. Disciplinary action may be in addition to any penalty prescribed by law.

The Union's proposed language restricts the ability to utilize discipline in extreme situations. Significant action may warrant significant discipline, even if the action is a first offense. That is, it could be necessary to terminate an employee for a first offense if that offense is particularly egregious. The Employer's language does not deny that discipline is intended to be progressive, but it also permits the Employer to act in extreme circumstances.

CONCLUSIONS

The Factfinder found the Union's language prefatory and unnecessary. A review of the language that the parties have already agreed to supports this conclusion. In this regard, the parties provided a document showing that, among other things, the parties have verbally agreed to language in Article 20, Section 4 that recognizes the progressive nature of discipline. Given this agreement, the Union's insistence on including Article 20, Section 1 is unclear. Moreover, as the Employer notes, the Union's language could limit the Employer's ability to discipline an employee in extreme situations. Further, it does not follow that failing to include this language will negate the generally recognized principle that discipline should be progressive in nature. Thus, the Panel declines to include the Union's suggested language.

6. Article 21, Section 3(b)(9), Grievance Exclusions

a. The Union's Position

The Union proposes that the following language be included in the list of subject matters that are to be excluded from the parties' negotiated grievance procedure: "[the] filling of a position outside the bargaining unit where merit systems principles were properly followed and where a BUE was not an applicant." The Factfinder recommended adopting language that prohibits grievances over positions that are outside of the bargaining unit. But the Union maintains that this position has no legal basis and that such grievances should be permitted because bargaining-unit employees could experience real harm if not selected for certain positions. The Union, however, is willing to limit grievances if merit-systems principles are followed and a bargaining-unit employee was not an applicant.

b. The Employer's Position

The Employer supports the adoption of the Factfinder's recommendation to exclude the filling of positions outside of the bargaining unit from the parties' grievance procedure. It believes

that the Union's language would permit grievances over the filling of such positions regardless of whether an independent statutory or contract violation occurred. But the Union could always pursue a statutory action if the Employer allegedly violates a statute. Moreover, as this is new language, the Union has not demonstrated a need to alter the *status quo*.

CONCLUSIONS

After considering the parties' responses to the *OSC*, we order the adoption of the Factfinder's recommended language. As noted by the parties, this language represents a departure from the *status quo*. The Union has not established a need to include it within the successor CBA, nor has it claimed that it would be prohibited from pursing potential statutory violations in the absence of this langauge, particularly if merits system principles are violated.

7. Article 23, Section 1, Monitoring Outside of the Workplace

a. The Union's Position

The Panel should impose the following language:

> Management may monitor the workplace to determine an employee's absence from the workplace and take corrective action, including administrative and/or disciplinary action, when necessary.

The Factfinder recommended the adoption of language that would permit the Employer to monitor employees when they are off duty. Although the Employer claims that it would use this language sparingly and only to monitor leave abuse, the Union believes this language is broad enough to permit virtually unchecked off-duty monitoring. In the past, the Employer unfairly conducted a "sting" of an employee on her off duty hours to ascertain whether she was abusing transit benefits. Employees should not be subject to this sort of abuse of power.

b. The Employer's Position

The Employer supports adoption of the Factfinder's recommended language:

> Management has the right to monitor employees' absence from the workplace during the workday and take corrective action, including administrative and/or disciplinary action, when necessary.

The Employer believes the Union's concerns are overblown and supported by mere isolated incidents. The Employer is seeking merely to monitor potential abuses of leave, approved or otherwise. Management has the right to monitor the workplace, and the Factfinder's recommended language recognizes that approach.

CONCLUSIONS

Having thoroughly examined the parties' responses to the *OSC*, we order the removal of the Factfinder's recommended language and the rejection of the Union's proposed language. As the Employer notes in its Panel submission, it has the legal right to monitor work place absences. Given this right, it is unclear why the Employer feels the need for additional contract language. Further, the Union's suggested language is too broad and arguably places a significant restriction on management's ability to monitor potential leave abuses. This is ultimately a dispute that turns on the parties' legal rights.

8. Article 23, Section 2(h), Scheduling and Public Transportation

a. The Union's Position

The Panel should impose its proposed language:

> Consistent with operational needs and cost considerations, the [Employer], to the maximum extent practicable, shall establish work schedules and/or allow minor variations to work schedules on a case-by-case, basis that allow employees to use public transportation where such transportation is generally available for purposes of commuting to the Agency worksite.

Because of the nature of the Employer's mission, some employees occasionally find themselves working late into the night. But depending on when their shifts end, employees could find themselves without public transportation options when their tour of duty ends. The Union's language, therefore, places a duty upon the Employer to make reasonable efforts to align employee schedules to public transportation availability.

b. The Employer's Position

The Employer supports the Factfinder's recommendation, which is to decline the inclusion of the Union's language. Its mission requires it to meet time-sensitive deadlines, and that would be difficult to accomplish in the face of artificially imposed scheduling time frames. Moreover, the Union's proposal excessively interferes with management's right to assign work.

CONCLUSIONS

Having carefully considered the parties' dispute over this article, we decline to order the adoption of the Union's proposal. As the Factfinder found, the Employer's mission requires constant news monitoring and, as such, limiting work schedules to public transportation availability could hamper that mission. The Union has not demonstrated why this factual conclusion was erroneous. As such, we do not adopt the Union's proffered language.

9. Article 23, Section 2(i), Consecutive Days Off

a. The Union's Position

The Union proposes:

> Consistent with government regulation(s), the [Employer] will provide all full-time employees with at least two (2) consecutive days off between workweeks; for employees working a Compressed 4/10 Work Schedule, at least three (3) consecutive days off between workweeks; for employees working a Compressed 5/4/9 Work Schedule, one consecutive three (3) days off and one consecutive two (2) days off per pay period.

The Union claims that this language is consistent with scheduling requirements under 5 CFR § 610.121 (a)(2). This regulation, the Union argues, establishes a requirement for consecutive days off unless certain regulatory conditions are satisfied.

b. The Employer's Position

The Employer supports the Factfinder's recommended language which is:

> Consistent with work needs and applicable government regulation(s), the Agency will provide all full-time employees with at least two (2) consecutive days off between workweeks; for employees working a Compressed 4/10 Work Schedule, at least three (3) consecutive days off between workweeks; for employees working a Compressed 5/4/9 Work Schedule, one consecutive three (3) days off and one consecutive two (2) days off per pay period.

The key difference between this language and the Union's language is the inclusion of the phrase "[c]onsistent with work needs." This means that consecutive days off are not guaranteed

if "work needs" dictate otherwise. The Employer maintains that this language is consistent with regulatory scheduling requirements and, as such, should be a part of the contract.

CONCLUSIONS

The parties' dispute ultimately turns on the meaning of 5 C.F.R. § 610.121(a)(2). Yet this dispute is ultimately one that focuses on the parties' competing legal rights under existing law. The parties, then, are essentially asking the Panel to enshrine their competing interpretations of the foregoing regulation into their successor CBA. We decline to do so and order that no language shall be adopted on this subject. The parties' disagreement over the meaning of the appropriate regulation can be resolved in other forums as necessary.

10. Article 23, Section 4(c), Work-Area Vicinity

a. The Union's Position

The Union requests the adoption of the following language:

> Due to certain time-sensitive work demands, employees occupying certain positions cannot be excused from duty for a regularly scheduled, unpaid meal period.

The main dispute turns on whether language should be included that requires employees to remain within "close physical proximity" to their work station should they work shifts that have no paid meal options. Employees under this schedule option still have the right to take breaks during the course of the duty day and further have the right to snack during those breaks. But if they are required to remain too close to their work stations, employees would be restricted in their selection of food options. It is entirely feasible that an employee could leave the building and return within their designated break time. The Factfinder's approach ignores this possibility in favor a blanket rule.

b. The Employer's Position

The Employer supports the adoptions of the Factfinder's recommended language:

> Due to certain time-sensitive work demands, employees occupying certain positions cannot be excused from duty for a regularly scheduled, unpaid meal period. Additionally, employees assigned to a straight work schedule must remain in close physical proximity to the

work area(s) unless authorized by their supervisor to leave the work area.

The Employer's main concern is that employees could wander too far from their duty station and not return within the appropriate designated time. In particular, the Employer fears that employees may visit local dining establishments to purchase meals, which could exceed an employee's allotted break times. In the Employer's view, this scenario goes too far.

CONCLUSIONS

Upon thorough consideration of the parties' responses to the *OSC*, we order the adoption of a modified version of the Factfinder's language:

> Due to certain time-sensitive work demands, employees occupying certain positions cannot be excused from duty for a regularly scheduled, unpaid meal period. Additionally, employees assigned to a straight work schedule must remain in proximity to the work area(s) unless authorized by their supervisor to leave the work area.

The parties do not have a shared meaning of the phrase "close physical proximity." As such, leaving it in would only encourage controversy. Moreover, although the Employer's primary concern is employees straying too far outside of the building, it acknowledges they may leave it for smoke breaks. Further, despite this specific concern, the Employer offered no language to address this narrow issue. The foregoing, then, casts some question on the validity of the Employer's claims. The above new language meets the Employer's interests of ensuring that employees remain in proximity to their duty station and the Union's interests of obtain accessible nearby snack options.

11. Article 23, Section 8(d), Fair and Equitable Overtime Assignments

a. The Union's Position

The Union proposes:

> Managers will determine which employees are qualified to do the work necessary and the competence level required to do that work. Overtime work shall be assigned fairly and equitably among such qualified employees. Overtime scheduled in advance or emergency overtime will be offered first to the employee currently assigned to the

> task consistent with the circumstances under which the affected overtime work must be performed. If the supervisor does not require an employee in the work unit to perform the overtime assigned, the supervisor may seek an employee outside the work unit to perform the task, after first offering the overtime to employees within the work unit.

The main quibble is the requirement that overtime work "shall be assigned fairly and equitably." This language is an appropriate arrangement and has been part of the parties' agreement dating to 1982. There is no reason to exclude it now.

b. The Employer's Position

The Employer accepts the Factfinder's recommendation:

> Managers will determine which employees are qualified to do the work necessary and the competence level required to do that work. Overtime scheduled in advance or emergency overtime will be offered first to the employee currently assigned to the task consistent with the circumstances under which the affected overtime work must be performed. If the supervisor does not require an employee in the work unit to perform the overtime assigned, the supervisor may seek an employee outside the work unit to perform the task, after first offering the overtime to employees within the work unit.

The Employer opposes the Union's "fair and equitable" language because the Factfinder's language already addresses the Union's concerns about fair distribution of overtime assignments. This language would serve only to handcuff the Employer's ability to assign overtime and also excessively interferes with management rights.

CONCLUSIONS

We will order the adoption of the Union's proposal. This language already appears in the parties' current CBA and neither the Factfinder nor the Employer has demonstrated why it should be abandoned. The former's opinion was based largely on his belief that the language does not constitute an appropriate arrangement. Yet similar language appears without incident in numerous FLRA decisions.[7/] Thus, we conclude that this language should be a part of the parties' successor CBA.

7/ See, e.g., AFGE, Local 215, 66 FLRA 760 (2012).

12. Article 23, Section 8(f), Non-Emergency Overtime Assignments

a. The Union's Position

The Union requests imposition of the following:

> When the [Employer] determines the need for regular overtime services of employees, the Agency shall, in accordance with 5 CFR 610.121 (a)(1), provide not less than one week written notice, and to the maximum extent practicable and consistent with the work need at issue, up to thirty(30) calendar days advance written notice to all potentially affected employees in an office, of the overtime assignments. The [Employer] shall identify a pool or pools of employees qualified for the overtime work at issue. Positions shall be filled from those determined to be qualified on a voluntary basis by the seventh (7th) calendar day before the assignment. Conflicts between qualified volunteers shall be resolved based on seniority as defined by length of [Employer] service. If, seven (7) calendar days before the assignment, there are insufficient volunteers among all of the employees in the fully qualified pool, overtime shall be assigned fairly and equitably based on overtime hours worked during the previous twelve (12) months.

Among the several issues discussed in this proposal, one of the Union's key interests is ensuring that bargaining-unit employees receive sufficient notice about regularly scheduled overtime. In its view, 5 CFR § 610.121 (a)(1) requires 1 week notice, absent certain circumstances, before an employee is assigned overtime. The Factfinder recommended language that omits this regulatory requirement and could, therefore, disadvantage employees from a scheduling standpoint. This language will assist the employees and provide them much needed information.

b. The Employer's Position

Although it is willing to accept the Factfinder's recommendation, the Employer also offers the following compromise:

> When the [Employer] determines the need to assign non-emergency and/or regular overtime, it will determine (i) the work needing to be done, (ii) the circumstances under which the work will be done, and (iii) the employee qualifications needed to perform this work, and assign that overtime in a manner consistent with applicable law and regulation.

The Employer disagrees with the Union's "ridiculous" claim that the Factfinder's recommendation would violate federal law. Moreover, the Factfinder heard the Union's concerns and rejected them. The above proffered language refers to existing "law and regulation" and requires the Employer to follow it.

CONCLUSIONS

After full review of the parties' responses to the *OSC* concerning this article, we shall order the adoption of the Factfinder's language:

> When the [Employer] determines the need for non-emergency overtime services of employees, the [Employer] shall, consistent with the work need at issue, provide notice prior to the start of the administrative work week in which the non-emergency overtime occurs, or to the maximum extent practicable and consistent with the work need at issue, thirty (30) calendar days, of advance notice in writing to all potentially affected employees in an office. The [Employer] shall identify a pool or pools of employees qualified to perform the overtime work at issue. Positions shall be filled from those determined to be qualified on a voluntary basis up to seven (7) calendar days before the assignment. Conflicts between qualified volunteers shall be resolved based on seniority as defined by length of [Employer] service. The assignments shall be rotated among volunteers in the fully qualified pool, or if no one has volunteered seven (7) calendar days before the assignment, among all of the employees in the fully qualified pool on a fair and equitable basis.

Although the Union argues that the above language is inconsistent with federal law, it provides no authority to support this claim. And the Panel's review likewise reveals no applicable precedent. Nor is the Union's cited regulation clear on its face. Accordingly, in the absence of support for its position, the Panel rejects the Union's proposed language. It also rejects the Employer's newly suggested proposal. It represents a significant shift to management in terms of unilateral discretion to assign regular overtime. The Employer has not explained why such a shift is warranted, however.

13. Article 23, Section 12, Off-Hours Communication

a. The Union's Position

The Panel should adopt the following language:

> Employees will not be required to carry or respond to: beepers, cellular phones, hand-held, or other mobile communication devise (e.g., a 'smart phone' or similar hand-held, computerized communication device) unless they are in a duty and pay status.

A version of the Union's proposal was found to be negotiable by the FLRA and was also subsequently adopted by the Panel.[8/] The Employer seeks to have employees carry devices while they are off duty so they can be contacted on work-related matters. Although it claims they could be eligible for compensation under the Fair Labor Standards Act (FLSA), not all employees are eligible for such compensation. The Union's proposal acknowledges management's right to require the carrying of the aforementioned devices but also ensures that *all* employees will receive pay when applicable.

b. The Employer's Position

The Employer offers the following counter proposal:

> Employees may be required to carry and respond to [Employer]-issued communication devices (e.g., beepers, cellular phones, hand-held, or other mobile communication devices) outside of their regular duty hours. Employees required to carry such devices are subject to applicable FLSA guidelines and requirements regarding if and when the employees are to be compensated for carrying and/or responding to such devices.

This language is meant to strike a compromise between the Employer's interests of ensuring employees will be reachable and the Union's interests of appropriate compensation for employees. It finds the Union's proposal "unrealistic" given the current prevalence of digital communication devices. The Union's concerns stem primarily from disputes over whether an employee is "on call," and it is the Employer's position that simply carrying a device does not put an employee in "on-call" status. Compensating an employee for *all* time spent carrying a phone, *e.g.*, sleeping, would prove costly and burdensome.

8/ See AFGF and U.S. Dep't of the Navy, 39 FLRA 773 (1991); U.S. Dep't of the Navy and AFGE, 93 FSIP 72 (1993).

CONCLUSIONS

After fully examining the parties' responses to the *OSC* we adopt the Factfinder's approach and decline to include any language on this topic. As with several other proposals in this dispute, the parties' disagreement ultimately turns on the parties' differing interpretations of their legal rights. Yet such disagreement can be resolved in other forums, if necessary. Moreover, it is hardly clear from the parties' offered precedent under what circumstances compensation could be warranted. Thus, it would be inappropriate for the Panel to even implicitly speak to the issue covered by this proposal.

14. Article 26, Section 2(i), Kitchen Appliance Location

a. The Union's Position

The Union proposes:

> Shared space will be set aside for approved shared appliances such as a microwave, refrigerator, etc. Employees (through their Union) and the [Employer] shall mutually agree to the location of these appliances.

The key issue in dispute is the disposition of "swing space," which is space that is used to house employees when their normal work areas are unavailable. The Factfinder recommended language that prohibits negotiations over relocating to such areas, but that language effectively absolves the Employer from any and all bargaining obligations it may have with regards to such areas. This blanket approach is not warranted.

b. The Employer's Position

The Employer agrees with the Factfinder's recommendation:

> Shared space will be set aside for approved shared appliances such as a microwave, refrigerator, etc. This provision does not apply to swing space.

The Employer has two objections to the Union's proposed language. First, by stating that the parties will "mutually agree" to appliance location, the Employer believes the Union is requiring the Employer to always bargain over their location even if circumstances excuse the Employer from any further bargaining obligations. Second, by requiring negotiations for swing spaces, the Employer again believes the Union is seeking to have the Employer waive its ability to raise defenses to bargaining.

CONCLUSIONS

In our view, adoption of the Union's proposal is warranted. The Factfinder rejected the Union's proposal because he believed that swing space "may" be subject to non-negotiable fire codes and landlord restrictions. But that this space *may* be subject to such restrictions does not lend itself to the Factfinder's blanket conclusion that it would *always* fall under these restrictions. Thus, the Factfinder's broad approach is misplaced. Moreover, although the Employer raises concerns about the Union's language essentially amounting to a waiver of its ability to raise certain bargaining-obligation defenses, nothing in the Union's language suggests this is the case. Although it does state the parties will "mutually agree" to appliance location, nothing in the language states that the Employer is prohibited from raising an argument that it is not required to bargain depending upon the circumstances. That is, the Union's language appears to apply only when the parties actually engage in bargaining.

15. Article 26, Section 3(g), Hot Desks

a. The Union's Position

The Union requests adoption of the following:

> Bargaining unit employees in a hot-desking arrangement are expected to put away their work when ending their shift so as not to adversely affect the work environment of others sharing the same workspace. At least 15 minutes will be allowed at the end of the work shift in order to accomplish this and during this time other primary duties will be set aside. Additionally, at least 15 minutes will be provided for employees to set up their workspace at the beginning of their work shift and during this time period other primary duties will be set aside.

The practice of using "hot desks" is new for the parties. It essentially involves multiple employees sharing one work station and alternating use based on telework or other flexible schedules. Given the newness of this subject, the Union believes it is appropriate to build in time for employees to arrange their work station at the beginning and the end of each tour of duty.

b. The Employer's Position

The Employer supports adoption of the Factfinder's recommendation:

Employees are expected to put away their work when ending their shift so as to not adversely affect the work environment for others sharing that same workplace.

The Factfinder considered the Union's raised concerns and found them lacking. In the Employer's view, upkeep of a duty station has always been a part of an employee's duty, so there is no need to adopt a formal proposal to enshrine the Union's view. Additionally, some employees will likely "clean as they go," thus rendering the Union's proposal unnecessary.

CONCLUSIONS

Upon careful analysis of the parties' responses to the *OSC*, in our view the Union has not shown cause why the Factfinder's recommendation should be declined. That is, it has not demonstrated that employees will lack sufficient time to arrange their work station in the absence of defined blocks of time. Accordingly, the Factfinder's recommendation shall be adopted.

16. Article 33, Section 5-After-Hours Parking

a. The Union's Position

The Panel should adopt its suggested language:

After-Hours permit holders shall, to the maximum extent practicable, only occupy parking spaces during the hours allowed by their respective permits.

The Union's primary concern is employees who have after-hours parking permits that permit only parking during a certain timeframe. Because of the nature of their work, employees sometimes have to work beyond their parking hours time band. If an employee cannot timely move their vehicle, they could be subject to fines or towing. This proposal provides these employees with some protection by stating they will occupy their assigned parking spots during the appropriate hours "to the maximum extent practicable." Thus, if an employee cannot timely move their vehicle, they would be exempt from related penalties.

b. The Employer's Position

The Employer supports adoption of the Factfinder's recommendation:

After-Hours permit holders shall only occupy parking spaces during the hours allowed by their respective permits.

The Employer opposes the Union's proposal because it has encountered ongoing problems with employees who have parked in spaces assigned to other individuals to avoid alleged time problems. The Union's language would serve to only exacerbate this problem. Moreover, other parking options are available (such as paid parking). Finally, the parties have verbally agreed to language elsewhere in the CBA that provides employees with some flexibility with respect to moving vehicles.

CONCLUSIONS

Having fully examined the parties' responses to the *OSC*, the Panel orders the adoption of the Factfinder's recommendation. As noted by the Employer, the parties have agreed to language that states "[s]ubject to work requirements, bargaining unit employees [with parking permits] shall be provided a reasonable amount of time to move their vehicles in order to comply with parking restrictions." Moreover, similar language appears in the parties' existing CBA under Article 33, Section 5. This language appears to meet the Union's interest of ensuring sufficient time for employees to move their vehicles. The Union claims that its proposal is in "accord" with the foregoing language. Yet its language essentially serves as a blanket exemption from parking-related penalties. Moreover, the Union has not explained why the existing and agreed-to language does not already meet its expressed interests. Accordingly, we reject the Union's proposal.

17. Article 33, Section 8-Termination of Parking Options

a. The Union's Position

The Panel should decline to include the language recommended by the Factfinder:

> If parking spaces at [Employer] facilities are closed, destroyed, or otherwise unavailable due to circumstances beyond the [Employer's] control, permit holders shall make other parking arrangements at their own expense.

The Union claims this language allows the Employer to avoid its barraging obligations in the event one of its parking lots close. The Union has the statutory right to bargain impact and implementation should the Union decide to close one of its lots, and the Union is unwilling to cede that right to the Employer.

b. The Employer's Position

The Employer supports the Factfinder's recommendation. It claims that the Union's assertion that the Employer is seeking to skirt is bargaining obligations is simply inaccurate. In the Employer's view, the Factfinder's recommendation merely reinforces an employee's duty to address his or her parking needs.

CONCLUSIONS

With respect to the dispute over this article, we shall order the adoption of the Factfinder's recommendation. Case law establishes that an employer has an obligation to bargain over a change in conditions of employment only when it initiates that change.[9/] The plain language of the proposal requires employees to make other parking arrangements at their own expense *only* in situations where a lot closes due to circumstances that are beyond the Employer's control. Stated differently, this proposal does not obligate the Employer to bargain when it does not change a condition of employment. The Union would still retain the ability to bargain should the Employer change such a condition, however. The Union's concerns, therefore, are misplaced.

18. Article 37, Section 1; Section 4(a); Section 4(e)(1); Section 4(g) (Union)/Section 6(e) (Employer); Section 4(j)(2) (Union)/Section 9(b) (Employer), Telework and Use of "regular worksite" versus "official worksite."[10]

The parties agree on the language for the above disputed sections with one dispute: the use of the phrase "regular worksite" (as advocated by the Union) versus "official worksite" (as advanced by the Employer and adopted by the Factfinder). As the agreed-upon sections are otherwise lengthy, they have been omitted from this decision.

a. The Union's Position

The Union's approach is consistent with OPM Regulations and guidance on telework. Under OPM guidance, a "regular worksite" is

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9/ See NTEU v. FLRA, 745 F.3d 219 (D.C. Cir. 2014).

10/ In its October 31st submission to the Panel, the Employer raised a late-filed objection to the Factfinder's recommendation on Article 37, Section 3, concerning definitions for telework, in its October and November submissions to the Panel. As this objection was raised after the Panel had already asked the parties to identify their objections to the Panel, we do not consider it.

identified as "the place where the employee would normally work absent a telework agreement." And depending on an employee's situation, their "official worksite" could be the "regular work site" or it could be where they normally telework.[11/] The Employer's language treats these terms interchangeably, which could lead to confusion. For example, their language states that telework is intended to permit work to be accomplished "from an alternative work site other than from his or her official work site." Yet this language is superfluous if the "official work site" is the same as an employee's home. Similarly, the Employer's language prohibits removal of classified information from the "official work site." Taken literally, this would mean that, if an employee had such information at home, it could never be removed from an employee's residence.

b. The Employer's Position

The Factfinder found the phrase "official worksite" clearer and more appropriate, and the Union has no demonstrated why this conclusion should be rejected. The Employer maintains that its language is consistent with OPM Regulations and OPM Guidance.

CONCLUSIONS

After reviewing the parties' responses to the *OSC* on this issue, we order the adoption of the Union's proposal. We find that the Union's offered language does a more suitable job of avoiding confusion for employees with respect to the differences between "official work site" and "regular work site." Moreover, as the Union notes, there appears to be a distinction between these two terms as understood by OPM. The Union's approach acknowledges this distinction and, therefore, is more appropriate.

19. Article 37, Section 4(g)(8) (Union)/Section 6(h) (Employer), Overtime and Credit Hours for Teleworkers

a. The Union's Position

The Union's suggested language is as follows:

> Supervisors may approve-overtime or compensatory time on a telework day. The employee will be compensated for authorized overtime work in accordance with applicable law, regulations, and policies. The existing provisions in Title 5 U.S.C. and in the Fair Labor Standards Act governing overtime apply to telework. Credit time may be earned in accordance to the employee's regular schedule

11/ See 5 C.F.R. § 531.605(d).

type (e.g., Maxiflex schedule). Supervisors may provide advance, conditional written approval for an employee on telework to work overtime.

The Union's main concern is an employee's ability to earn credit hours if they are on maxi-flex schedules and also telework. The Union argues that such employees have "blanket approval" to earn credit hours and, as such, do not need to first seek supervisory permission to work for credit hours. The Union's proposal, therefore, does away with the need for these employees to first gain supervisory approval.

b. The Employer's Position

The Employer requests a modified version of the Factfinder's recommended language:

> Supervisors may approve overtime or compensatory time on a telework day if needed to complete critical work. The employee will be compensated for authorized overtime work in accordance with applicable law, regulations, and policies. The existing provisions in Title 5 U.S.C. and in the Fair Labor Standards Act governing overtime also apply to telework. Overtime and/or compensatory time must be approved by supervisors or designated officials in advance and in writing. An employee on telework who works overtime, or compensatory time without the required approval may be removed from the telework program. Supervisors may provide advance, conditional written approval for an employee on telework to work overtime. Credit time may be earned in accordance to the employee's regular schedule type (e.g., Maxiflex schedule) consistent with established work needs and the affected employee's designated responsibilities.

The Employer claims its language is necessary to clarify that, although employees do not have to specifically request permission to earn credit hours, they must work on appropriate credit-hours eligible assignments. Thus, the Employer's language clarifies that an employee's ability to earn these hours is tied to "established work needs and the affected employee's designated responsibilities."

CONCLUSIONS

We decline to include either party's offered language and instead adopt the Factfinder's recommendation:

> Supervisors may approve overtime or compensatory time on a telework day, if needed to complete critical work. The employee will be compensated for authorized overtime work in accordance with applicable law, regulations, and policies. The existing provisions in Title 5 U.S.C. and in the Fair Labor Standards Act governing overtime apply to telework. Overtime and/or compensatory time must be approved by supervisors or designated officials in advance and in writing. Credit time may be earned in accordance to the employee's regular schedule type (e.g., Maxiflex schedule). An employee on telework who works credit hours, overtime, or compensatory time without the required approval may be removed from the telework program. Supervisors may provide advance, conditional written approval for an employee on telework to work overtime.

The Union's sole argument for rejecting this recommendation is essentially that employees have an unlimited ability to earn credit hours while they telework on maxiflex schedules. Yet the Union did not provide any authority to support this proposition. The Employer's position is that its proffered language provides needed clarity to the situations that do entitle employees to earn credit hours. The Employer, however, does not explain why it failed to offer such language to the Factfinder for his consideration. Accordingly, we decline the Employer's proposal as well.

20. Article 37, Section 5(d), Telework Information

a. The Union's Position

The Union offers the following language:

> On an annual basis, or when the [Employer] changes the designated official, the [Employer] will notify employees which [Employer] official(s) are responsible for providing employees with information about policy guidance regarding the Telework program.

The Union claims its language is necessary to limit confusion in the workplace. Employees often bring questions concerning telework to their supervisors but those supervisors occasionally lack information about the Employer's telework policies and, thus, cannot provide answers. Under the Union's proposal, when the Employer changes the supervisory official who is responsible for telework, it must inform the Union. That way, the Union can inform employees what individual they must speak to in order to obtain clarification and information about telework issues.

b. The Employer's Position

The Employer supports the Factfinder's recommendation, which is to decline to include the Union's proposal in the successor CBA. The Employer already provides employees with sufficient written guidance, making the Union's proposal superfluous. Additionally, because the Union's proposal requires only "annual" notice, it does not cover situations where the telework official changes on a non-annual basis. So the proposal could actually create confusion.

CONCLUSIONS

We decline to include the Union's suggested language. The Factfinder found the Union's language to be "surplasage" and unnecessary. Although the Union makes general claims about employee confusion, it did not provide specific information to overcome the Factfinder's recommendation. Moreover, as noted above, written information is available to employees.

21. Article 38, Non-Citizen Employees[12]

a. The Union's Position

The Union requests adoption of its proposal, which focuses on non-citizen employee terminations under various circumstances. The Union's language offers more protection than the Employer's suggested language as it gives a larger pool of employees the opportunity to make their case to their respective deciding officials in the event of a termination. Moreover, these employees will also have more time to pursue reconsideration actions from their respective supervisors. There are no appeals past the decision-maker stage, so the proposal does not incorporate civil-service protection laws (indeed, the language expressly rejects them). The proposal ensures basic due process for a broader category of employees.

b. The Employer's Position

The Employer supports the Factfinder's recommendation, which was to adopt the Employer's proposal. The Employer hires non-citizen employees pursuant to 21 U.S.C. § 1741, which states that such individuals may be "employ[ed], without regard to the civil service and classification laws." Thus, these employees have no right to the normal civil-service protections afforded to citizen

12/ Because of their length, the parties' proposals have been attached to this decision as an appendix.

employees. The Union's language goes too far by extending such protections, however. The Employer's recommended language nevertheless affords non-citizen employees protection by at least providing them with notice prior to termination/separation. Additionally, at least some employees will have an opportunity to request reconsideration from their respective deciding official in the event of a termination. The Employer's language strikes a balance between the Employer's need for flexibility in hiring and an employee's need for fairness.

CONCLUSIONS

After considering the parties' responses to the *OSC*, the Panel orders the adoption of the Factfinder's recommendation. The Factfinder rejected the Union's proposal largely because he found it too cumbersome. The Union has done little to rebut this conclusion. Although the Union undoubtedly has a significant interest in extending due process protection to its non-citizen members, the Employer's proposal does that as well. Moreover, under the Union's proposal, the Employer must take affirmative steps to ensure that a non-citizen employee's visa remains in place in certain circumstances. The Union has not explained what those steps are nor whether the Employer even has the legal authority to undertake them. Thus, it would be inappropriate to include the Union's language in the successor CBA.

III. UNRESOLVED ISSUES

1. Article 14, Section 7(e), Promotion Procedures

a. The Union's Position

In a list of actions the Employer must take when it promotes an employee, the Union proposes that the Employer must "[o]fficially approve and record all promotion actions." The Union does not understand the Employer's objection to the inclusion of this language as it views this language as non-controversial.

b. The Employer's Position

The Employer did not address this language.[13/]

13/ As part of its October/November submissions, the Employer raised an objection to the Factfinder's recommendation on Article 14, Section 7.9, which concerns the timeframe for releasing an employee from their position of record for a promotion. The Employer did not previously raise this objection or identify it as being one of the issues the Factfinder ordered the parties to resolve of their own

CONCLUSIONS

We decline to include the Union's proposed language. In discussions with the Panel's representative, the Union identified this issue as one of the matters the Factfinder asked the parties to resolve of their own accord. However, a review of the Factfinder's report demonstrates that he simply did not address the issue at all. As mentioned above, the Factfinder's recommendation for unaddressed issues was to revert to the language of the 2005 CBA or, barring the existence of such language, withdrawal of the issue altogether. The Union has not explained why the Panel should ignore these recommendations. Indeed, it did not address them whatsoever. In light of the Factfinder's recommendations, we decline to include the Union's language.

2. Article 14, Section 8, Priority Consideration

The Factfinder ordered the parties to identify existing language on priority consideration in other existing CBA's or OPM guidance, agree upon language, and then to put that language in the successor CBA.

a. The Union's Position

The Union requests adoption of the following:

a. Definition.

For the purposes of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee on account of previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation.

b. Eligibility

The following employees will receive priority consideration in accordance with the procedures set forth.

1. Where the erroneous selection was allowed to stand, those employees who were not properly considered (as identified below) because of the violation will receive priority consideration. An employee is entitled to only one priority consideration for noncompetitive promotion for each instance in which s/he was previously denied proper consideration.

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accord. Accordingly, we will not consider the Employer's objection as it is untimely.

a. Those excluded from a well qualified list.
b. Those on an improperly established well qualified list.

2. If the action taken to correct an erroneous promotion was to require that the position be vacated, employees who were not promoted or given proper consideration because of the violation (that is, employees in the well-qualified group who were not selected or employees who should have been in this group but were not) will be considered for promotion to the vacated position before candidates are considered under a new promotion or other
placement action.

c. Processing
The procedures for processing a priority consideration(s) shall be:

1. Employees will be notified in writing by the authorized management official of entitlement to each priority consideration. Such notice will advise employees that if a vacancy is announced and posted and the employees wish to exercise their priority consideration they should submit the necessary application to the Servicing Personnel Office with written request that they wish priority consideration for the vacancy.

2. Priority consideration is to be exercised by the selecting officer at the option of the employee for an appropriate vacancy(s). An appropriate vacancy is one for which the employee is interested, is eligible, and which leads to the same grade level of the vacancy for which proper consideration was not given, or for which an employee was denied.

3. Prior to the referral of eligible candidates to the assessment panel, the name(s) of the employee(s) requesting to exercise priority consideration will be referred to the selecting officer. The selecting officer will make a determination on the requests prior to the vacancy.

4. The fact that the employee chooses to exercise a priority consideration does not preclude that employee from also filing an application as specified in the vacancy announcement.

d. Union Notification

> In order to assure compliance with this section, the Union will be furnished statistics on priority considerations granted, exercised, and the results. Statistics will be kept and provided to the Union on a quarterly basis. The Union will also be notified in writing of each individual priority consideration completed.

The Union claims that priority consideration is an issue for employees because the Employer routinely ignores this concept. The proposal will establish various procedures the Employer must adhere to in order to ensure the Employer follows priority consideration principals. The Union has not received any feedback from the Employer about this proposal.

b. The Employer's Position

The Employer requests adoption of this language:

> The Parties are directed to identify existing OPM guidance and/or existing collective bargaining agreement for language regarding priority consideration on which they can agree without modification or editorial comment. Once such language is identified by mutual agreement of the Parties, that language will become part of the successor NLMA without modification or editorial comment.

The Employer offers this language in an effort to "tighten up" the Factfinder's recommendation. It is meant to help the parties focus on identifying appropriate language and subsequently including it in a CBA.

CONCLUSIONS

The Panel declines to include either party's proposals. The Factfinder recommended that the parties should make an effort to jointly discover language and agree upon that language. The Union appears to simply rely upon its last best offer and the Employer chose to focus on the process of identifying language rather than language itself. It is clear that the parties need to make additional efforts to explore this issue. As noted below, the Panel has decided that one other issue should be reserved for mid-term bargaining. To the extent that either side wishes to continue exploring the issue of priority consideration, the Panel concludes that this issue should also be reserved for mid-term bargaining. Under such an approach, the parties will have an opportunity to examine and discuss this issue with greater clarity.

3. Article 21, Section 6, Grievances and Arbitrability Challenges

a. The Union's Position

The Union requests adoption of this proposal:

> A reasonable time before the date of an arbitration hearing, but not later than the conclusion of the final step (Step 2) of the grievance process, the Party challenging the grievability and/or arbitrability of a grievance must notify the other Party of the challenge and reasonably explain the grounds for the challenge." The bolded portion is the only portion that differs from the Factfinder's recommendation.

The Union's language is similar to the Factfinder's recommendation except it adds "(Step 2)" after the phrase "final step." The Union's language is intended to clarify when the grievance process concludes and the arbitration process begins.

b. The Employer's Position

The Employer supports the adoption of the Factfinder's recommendation. The Union has not demonstrated why it should be rejected.

CONCLUSIONS

We decline to include the Union's suggested language. As an initial matter, we note that the Union identified this article as being one of the issues the Factfinder ordered the parties to resolve on their own. Yet the Factfinder actually addressed this language and made a recommendation. We find it unnecessary to address this inconsistency, however, as the Union's proposal does not warrant adoption. Although the Union claims its language is needed for clarity, it seems reasonable to conclude that the parties are familiar with the ending period for their negotiated grievance process. Moreover, the Union has not explained why its language *must* be included. Thus, we decline to adopt the language.

4. Article 23, Section 6, Meal Periods

a. The Union's Position

> Employees on a No-Unpaid-Meal-Period option are considered on duty throughout their workday. There is no meal period for employees choosing the No-Unpaid-

Meal-Period option. This provision does not prohibit employees from eating while working.

Employees have the option of selecting work schedules with or without unpaid meals. This proposal is meant to address situations where employees select the unpaid-meal option but choose to snack during their shifts. The Union claims that some employees have encountered problems with supervisors who will not allow them to do snack because the employees have elected not to receive a meal period. Thus, the Union proposes use of the term "No-Unpaid-Meal-Period" to emphasize these employees are not receiving any sort of unpaid meal period and, therefore, have the freedom to eat snacks.

b. The Employer's Position

The Employer would agree to the Union's language but proposes the addition of a subsection stating "[t]he Parties acknowledge that the [Employer] does not offer a paid meal period." The Employer's primary objection to the Union's language is that the use of the phrase "No-Unpaid-Meal-Period" creates an implication that there *could* be a paid meal option. The Employer does not allow such options and it is unwilling to entertain language that creates that illusion.

CONCLUSIONS

After consideration of the parties' proposals and arguments, we adopt a modified version of the Union's proposal. The only difference is that we substitute the phrase "no-meal-option" rather than "no-unpaid-meal-option." The last sentence of the Union's proposal expressly states that the provision "does not prohibit employees from eating while working." Given this protection, it is unclear why the Union's additional suggested language is necessary as a safeguard will already be in place. Thus, we decline to adopt the Union's requested language.

5. Article 23, Section 13, Hours of Work and Waiting Time

a. The Union's Position

The Union requests adoption of this language:

For purposes of this Article, "usual waiting time" is defined as two (2) hours prior to the originally scheduled departure time for domestic flights and three (3) hours prior to the originally scheduled departure time for international flights. Any waiting time beyond this usual waiting time will be considered "extended

waiting time." The crediting of extended waiting time will be in accordance with applicable law, government-wide rule and regulation.

The main dispute is the use of the phrase "extended waiting time" (as the Union proposes) or "extended" time (as the Employer proposes). The Union claims its proposal is consistent with OPM regulations concerning compensation for travel time. In this regard, 5 C.F.R. § 550.1404(b)(2) states "extended waiting time" is not compensable, but that such time occurs only when an employee is "free to rest, sleep, or otherwise use the time for his or her own purpose." In other words, if an employee is not in one of these situations, he or she is not in "extended waiting time" and is arguably, therefore, in compensable travel status. The Union's concern is that using "extended" time rather than "extended waiting time" will permit the Employer to ignore the foregoing limitations and unilaterally declare anything as non-compensable "waiting time."

b. The Employer's Position

The Employer claims this issue is not in dispute because the parties verbally agreed to this issue during term negotiations. Moreover, the Union's position is inconsistent with law.[14/]

CONCLUSIONS

The Panel declines to adopt the Union's proposal and instead orders imposition of the following language:

> For purposes of this Article, "usual waiting time" is defined as two (2) hours prior to the originally scheduled departure time for domestic flights and three (3) hours prior to the originally scheduled departure time for international flights. Eligibility for any extended waiting time beyond the foregoing time frame will be determined in accordance with 5 C.F.R. § 550.1404(b)(2).

The only real area of disagreement between the parties is whether waiting time may be compensated beyond the 2-3 hour window mentioned in the first part of the proposal. Yet that disagreement is based upon the parties' conflicting views of the

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14/ The Employer maintains that the only issue in dispute is the use of "travel cards" under Article 23, Section 13.d. The Employer did not object to this issue prior to its October and November submissions. Accordingly, we will not consider this argument.

relevant federal regulation. Rather than adopt one party's view over the other, the above compromise language simply refers disputes to the language of the regulation itself. The Employer's claim that the parties have agreed to this issue is belied by the Factfinder's recommendation that the parties should make efforts to resolve this issue on their own. Such a recommendation would have been unnecessary had the parties reached agreement as the Employer suggests.

6. Article 23, Section 14, Volunteer Assignments

a. The Union's Position

The Union requests adoption of the following language:

> In order to treat employees fairly and to provide employees the opportunity to demonstrate their skills and abilities beyond the normal routine, the following procedure will be used for filling Special Volunteer Assignments.
>
> All employees in a pool shall have an opportunity to express their interest in participating in special volunteer assignments e.g., remote broadcasts, special event radio and/or TV events, travel, etc. The Agency shall to the maximum extent possible give each interested and qualified employee an opportunity to participate in such assignments. When the Agency plans to conduct a special assignment, as much advance written notice as possible shall be given to all employees in the same pool so that all of the employees can express interest in participating. When more than one qualified employee expresses interest in participating in the volunteer assignment, the assignment shall be offered in rotation. For the first assignment after this Agreement is in effect, the most senior employee (as determined by length of service in the Agency) shall be offered the assignment first. If s/he declines, the assignment shall be offered to the next senior employee in the pool until the assignment is filled. Declining or participating in a special volunteer assignment shall hold no adverse consequences for the employee. If no one in the pool accepts the assignment the least senior person as defined by Agency service will be assigned.

This language gives employees developmental opportunities by providing them with greater chances to volunteer for special assignments. Additionally, this proposal could help increase the possibility that employees would get awards for exemplary

performances on volunteer assignments. Employees have expressed a real interest in receiving such assignments, and this language will enshrine that interest.

b. The Employer's Position

The Factfinder found that this issue should be reserved for mid-term bargaining so the parties would have a greater opportunity to explore it free from the pressure and constraints of term bargaining. The Employer argues the Union has not established why this recommendation should be ignored. Additionally, it claims this proposal is inconsistent with various management rights.

CONCLUSIONS

The Union's proposal raises laudable and worthy goals. Yet as the Factfinder found, these goals warrant further discussion. The Union asks the Panel to ignore this conclusion and simply impose its proposal. Yet to do so ignores the Factfinder's determination that this issue needs further development. Thus, we adopt the Factfinder's recommendation that this issue should be pursued through mid-term bargaining but modify it to clarify that either party may raise the issue during such bargaining.

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:

I. Objected-to-Items: Employer

A. Article 14, Sections 10 and 11, Recruitment and Hiring

Impose the Factfinder's Recommendation.

B. Article 22, Section 5, Arbitrability

Impose the Factfinder's Recommendation.

C. Article 24, Section 3(a)(6), Travel Reimbursement

Impose the Employer's Recommendation.

D. **Article 23, Section 8(k), Notice of Overtime Caps**

Impose the Factfinder's Recommendation.

E. **Article 37, Section 18, Telework and Government-Delayed Arrivals, Early Departures, Closures**

Impose the Factfinder's Recommendation.

II. **Objected-to-Items: Union**

A. **Article 5, Section 5(b)(5) & (b)(7), Union Representation**

Impose the Factfinder's Recommendation.

B. **Article 5, Section 5(b)(7), External Representation**

Impose the Union's Recommendation.

C. **Article 7, Section 4, Agreements and LER representatives**

Impose the Union's Recommendation.

D. **Article 14, Section 3(a), Promotions for Schedules A, B, and C Employees**

Impose the Factfinder's Recommendation.

E. **Article 20, Section 1, Discipline**

Impose the Factfinder's Recommendation.

F. **Article 21, Section 3(b)(9), Grievances Concerning Positions Outside of the Bargaining Unit**

Impose the Factfinder's Recommendation.

G. **Article 23, Section 1, Monitoring Outside of the Workplace**

Remove all language on this issue.

H. **Article 23, Section 2(h), Work Schedule Flexibility and Public Transportation**

Impose the Factfinder's Recommendation.

I. **Article 23, Section 2(i), Consecutive Days Off**

Adopt Compromise Position.

J. **Article 23, Section 4(c), Meal Periods and the Work Area**

Impose the following modified language:

Due to certain time-sensitive work demands, employees occupying certain positions cannot be excused from duty for a regularly scheduled, unpaid meal period. Additionally, employees assigned to a straight work schedule must remain in proximity to the work area(s) unless authorized by their supervisor to leave the work area.

K. **Article 23, Section 8(d), Overtime Assignments**

Impose the Union's Suggested Language.

L. **Article 23, Section 8(f), Notice for Non-Emergency Overtime Assignments**

Impose the Factfinder's Recommendation.

M. **Article 23, Section 12, Off-Duty Communications**

Impose the Factfinder's Recommendation.

N. **Article 26, Section 2(i), Location of Kitchen Appliances**

Impose the Union's Suggested Language.

O. **Article 26, Section 3(g), Hot Desk Maintenance**

Impose the Factfinder's Recommendation.

P. **Article 33, Section 5, After-Hours Parking**

Impose the Factfinder's Recommendation.

Q. **Article 33, Section 8, Termination of Parking Options**

Impose the Factfinder's Recommendation.

R. **Article 37, Section 1, Section 4(a), Section 4(e)(1), Section 4(g), Section 4(j)(2), Telework Issues**

Impose the Union's Recommendation.

S. **Article 37, Section 4(g)(8), Overtime and Telework**

Impose the Factfinder's Recommendation.

T. **Article 37, Section 5(d), Telework Information**

Impose the Factfinder's Recommendation.

U. **Article 38, Non-Citizen Employee Rights**

Impose the Factfinder's Recommendation.

III. Unresolved Items

A. **Article 14, Section 7(e), Promotion Procedures**

Decline to include the Union's Recommendation.

B. **Article 14, Section 8, Priority Consideration**

The parties are directed to withdraw their language on this issue. Either side may choose to pursue it through mid-term negotiations.

C. **Article 21, Section 6, Grievances and Arbitrability Challenges**

Impose the Factfinder's Recommendation.

D. **Article 23, Section 6, Meal Periods**

Impose the following modified language:

Employees on a No-Meal-Period option are considered on duty throughout their workday. There is no meal period for employees choosing the No-Meal-Period option. This provision does not prohibit employees from eating while working.

E. **Article 23, Section 13, Hours of Work and Waiting Time**

Impose the following modified language:

For purposes of this Article, "usual waiting time" is defined as two (2) hours prior to the originally scheduled departure time for domestic flights and three (3) hours prior to the originally scheduled departure time for international flights. Eligibility for any extended waiting time beyond the foregoing time frame will be determined in accordance with 5 C.F.R. § 550.1404(b)(2).

F. Article 23, Section 14, Volunteer Assignments

Adopt the Factfinder's Recommendation with the addition that the issue may be raised by either party during mid-term bargaining.

In addition to the above three sections, the parties shall adopt the following:

- The rollover of any unopened articles/issues;
- The imposition of articles/issues the parties agreed upon during and after the factfinding process, as well as articles/issues agreed upon during the CADRO process;
- Where comparable language exists, adoption of language in the 2005 CBA with respect to any of the parties' disputes the Factfinder did not address, except where different as stated above;
- Withdrawal of disputes the Factfinder did not address where no comparable CBA language currently exists; and
- The Factfinder's recommendations that were not challenged by the parties or were otherwise identified as unresolved.

By direction of the Panel.

Kimberly D. Moseley
Executive Director

January 5, 2017
Washington, D.C.

Appendix One: Union's Proposal for Article 38, Non-Citizen Employee Rights

These provisions apply to non-U.S. citizens employed by the Agency under the provisions of Title 22 U.S.C. 1474(1).

Non U.S.-citizen staff employees serve at the discretion of the Agency under the authority of P.L. 80-402, as amended. The employee will be given at least 30 days' advance notice prior to the effective date of termination unless the termination is based on national security concerns or there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed.

a) The parties recognize that, according to law and Federal regulations, at a minimum, these individuals must maintain a valid visa at all times while employed by the Agency. The Agency will not seek to revoke the employee's visa while that individual is employed by the Agency. An employee under investigation by the Agency shall remain in an employee status until a final determination has been made as to the individual's employment.

b) These non-U.S. citizens shall be placed on a trial period during the first two years of their appointment. During this trial period, the Agency will evaluate the employee and make a determination as to the employee's fitness for successful long-term employment. The parties recognize that the following personnel actions are not adverse actions: (a) the termination of these employees' appointments during their initial trial period, (b) the expiration of these employees' appointments and related decisions not to offer these employees long-term employment, and (c) the termination of these employees' appointments after long-term employment has been offered, but conversion to a competitive service appointment has not been achieved. Instead, the aforementioned actions will be processed as follows:

c) Termination.

The provisions of Title 5 of the Code of Federal Regulations conveying appeal and grievance rights for Adverse Actions do not apply to such terminations.

Employment may be terminated based upon deficiency in performance, unsatisfactory conduct, lack of aptitude or cooperativeness, or undesirable suitability characteristics evidenced by the employee's activities either prior to or during employment, during or outside official working hours. Termination may also be based upon such events as changes in the budget, programming, or

staffing needs of the employing organization or to comply with requirements of the BBG Office of Security, Department of State, Department of Homeland Security, or the Department of Labor.

A non-U.S. citizen employed by the Agency under the authority of 22 U.S.C. § 1474 (Smith- Mundt Act) who (a) is to be terminated during their trial period , (b) is not being offered long- term employment, but rather is on an appointment that will expire at the conclusion of their appointment, or (c) is terminated after being offered long-term employment with the Agency, but prior to converting to a competitive service appointment, will receive advance written notice of at least thirty (30) calendar days prior to the effective date of the termination, unless circumstances are such that retention of the employee in an active duty status during the notice period may be injurious to the employee, his or her fellow workers, or the general public; may result in damage to government property; or because the nature of the employee's offense may reflect unfavorably on the public perception of the Federal service.

The advance notice shall contain the following information:

1. the reason for the action (e.g. deficiency in performance, unprofessional conduct, lack of aptitude or cooperativeness, undesirable suitability or security characteristics, needs of the service, etc.);

2. the name of the official authorized to reconsider the termination decision;

3. the employee's right to request reconsideration of the termination orally and/or in writing and to submit documentation supporting his or her position;

4. the specific nature of the action and its corresponding effective date;

5. an explanation that the employee has 10 working days in which to have the decision reconsidered and to submit any relevant information supporting his or her position in writing or in person;

6. copies of any documentation supporting the termination decision or where such documentation may be reviewed and the amount of official time authorized to do so; and

7. the employee's right to representation.

d) An employee who has received advanced notice that he or she is not being offered long- term employment with the Agency is entitled to at least ten (10) calendar days in which to exercise his or her right to have that decision reconsidered and to submit any relevant information supporting his or her position. If timely requested, the Deciding Official will grant a reasonable one-time extension of the time frame in which the employee may respond. The Deciding Official or his or her designee for the action will receive the employee's oral or written answer.

e) During the entire notification period and reconsideration process, the Agency will take the necessary steps to ensure the employee remains on a valid visa.

f) The employee is entitled to a written Decision at the earliest practicable date, containing the specific reasons for the Decision. In arriving at a decision, the Deciding Official shall consider only the reasons specified in the advance notice and shall consider any response provided by the employee and/or the employee's representative. The Decision Letter must be delivered at or before the time the action will be effective.

g) Termination following Change in Citizenship Status.

Each non-U.S. citizen employee is responsible for immediately informing the Office of Human Resources of any change in his or her visa or citizenship status. Ifat any time a non-U.S. citizen employee becomes a U.S. citizen, the non-U.S. citizen employee will remain in his or her current position until the Agency has opened the position for competition and the selection process for the position is completed. Following this, the employment under Title 22 U.S.C. 1474(1) will be terminated as soon as practicable under procedures of (c) 'Termination' above.

h) Other Appeal Rights

1. Classification of Non-Citizen Positions: Employees assigned to GG positions have the right to appeal the classification of their positions to the Agency.

2. EEO Rights for Non-Citizens: It is the Agency's policy to treat employees equally and to have the terms of employment of non U.S. citizen (GG) employees parallel those of U.S. citizen (GS) employees to the extent practicable unless prohibited by law. Allegations of the unfair treatment of non-U.S. Citizen (GG) employees may be raised as grievances under Article 21, section 5 of this Contract. Additionally, non-U.S. Citizen employees who apply for U.S. based employment from outside the U.S. and those non-U.S. Citizen employees who work within the U.S. for covered employers are covered by EEO statutes and may raise an EEO complaint within 45 days of the alleged incident. However, non-U.S. Citizen employees employed outside the U.S. are not protected by U.S. EEO statutes.

Appendix Two: Employer's Proposed Language for Article 38

NON-U.S. CITIZENS' TERMINATION OF EMPLOYMENT

These provisions apply to non-U.S. citizens employed by the Agency under the provisions of Title 22 U.S.C. 1474(1).

a. Termination During the Trial Period: The initial two-years of employment, whether on a time-limited or non-time-limited appointment, will constitute a formal trial period.

Employment may be terminated at any time during the two-year trial period based upon deficiency in performance, unsatisfactory conduct, lack of aptitude or cooperativeness, or undesirable suitability characteristics evidenced by the employee's activities either prior to or during employment, during or outside official working hours. Termination may also be based upon such events as changes in the budget, programming, or staffing needs of the employing organization or to comply with requirements of the BBG Office of Security, Department of State, Department of Homeland Security, or the Department of Labor.

The employee will be given written notice containing the Agency's conclusions as to the reason(s) for the termination and the effective date of the action.

The provisions of Title 5 of the Code of Federal Regulations conveying appeal and grievance rights do not apply to such terminations.

b. Termination on the Expiration Date of a Time-Limited Appointment. The employee will be given written notice in advance of the termination date. The notice will be provided at least 30 days in advance of the termination, if practicable. Failure to provide 30 days of advance notice will not extend the expiration date of the appointment.

The provisions of Title 5 of the Code of Federal Regulations conveying appeal and grievance rights do not apply to such terminations.

c. Termination of an Employee Serving Under an Appointment Without Time Limit. Employment may be terminated at any time based upon deficiency in performance, unsatisfactory conduct, lack of aptitude or cooperativeness, or undesirable suitability characteristics evidenced by the employee's activities either prior to or during employment, during or outside official working hours. Termination may also be based upon such events as changes in the budget, programming, or staffing needs of the employing organization or to comply with requirements of the BBG Office of Security, Department of State, Department of Homeland Security, or the Department of Labor.

If the employee is still serving under a trial period, termination will follow the procedure for terminating an employee serving under a trial period. If the employee is not serving under a trial period, the employee will be given written notice of the Agency's decision to terminate his or her employment in advance of the termination date. The notice will be provided at least 30 days in advance of the termination, if practicable. The written notice shall state:

1. the reason(s) for the termination;

2. the name of the official authorized to reconsider the termination decision;

3. the employee's right to request reconsideration of the termination orally and/or in writing and

to submit documentation supporting his or her position;

4. the number of days following the written notice, at least 10 days if practicable, within which the employee must make his or her written and/or oral request;

5. copies of any documentation supporting the termination decision or where such documentation may be reviewed and the amount of official time authorized to do so; and

6. the employee's right to representation.

The provisions of Title 5 of the Code of Federal Regulations conveying appeal and grievance rights do not apply to such terminations.

d. Termination of an Employee Serving Under a Rotational Appointment. Rotational appointments are time-limited appointments not-to-exceed a pre-determined period (of between 13-36 months.

Termination before the expiration date of the appointment but during the first two years of employment will be effected using the procedures described above for "Termination During the Trial Period."

Termination on the expiration date of the time-limited appointment will be effected using the procedures described above for "Termination on the Expiration Date of a Time-Limited Appointment."

Termination before the expiration date of the appointment but after the first two years of employment will be effected using the procedures described above for "Termination of an Employee Serving Under an Appointment Without Time Limit"; however, nothing in these procedures will act to extend the expiration date of the appointment.

The provisions of Title 5 of the Code of Federal Regulations conveying appeal and grievance rights do not apply to terminations of employees serving under rotational appointments.

e. Termination following Change in Citizenship Status. Each non-U.S. citizen employee is responsible for immediately informing the Office of Human Resources of any change in his or her visa or citizenship status. If at any time a non-U.S. citizen employee becomes a U.S. citizen, his or her employment under Title 22 U.S.C. 1474(1) will be terminated as soon as practicable.

The employee may be offered an appointment in the competitive service or another appointment appropriate for U.S. citizens if the employee meets all requirements for such an appointment. For example, competitive service appointment requires the employee to compete successfully and be selected under an appropriate U.S. Office of Personnel Management or Delegated Examining competitive authority. If the individual is not selected for a competitive service appointment or other appointment under an authority appropriate for hiring U.S. citizens, his or her employment will be terminated.

The employee will be given written notice in advance of the termination date. The notice will be provided at least 30 days in advance of the termination, if practicable.

The provisions of Title 5 of the Code of Federal Regulations conveying appeal and grievance rights do not apply to terminations of employees serving under rotational appointments.

Other Appeal Rights

1. Classification of Non-Citizen Positions: Employees assigned to GG positions have the right to appeal the classification of their positions to the Agency.

2. EEO Rights for Non-Citizens: It is the Agency's policy to treat employees equally and to have the terms of employment of non U.S. citizen (GG) employees parallel those of U.S. citizen (GS) employees to the extent practicable unless prohibited by law. Allegations of the unfair treatment of non-U.S. Citizen (GG) employees may be raised as grievances under Article 21, section 5 of this Contract. Additionally, non-U.S. Citizen employees who apply for U.S. based employment from outside the U.S. and those non-U.S. Citizen employees who work within the U.S. for covered employers are covered by EEO statutes and may raise an EEO complaint within 45 days of the alleged

incident. However, non-U.S. Citizen employees employed outside the U.S. are not protected by U.S. EEO statutes.

3. It is the Agency's policy to treat employees equally and to have the terms of employment of non-citizen (GG) employees parallel those of U.S. citizen (GS) employees to the extent practicable unless prohibited by law. Allegations of the unfair treatment of non-U.S. Citizen (GG) employees may be raised as grievances under Article 21, section 5 of this Contract. Additionally, non-U.S. Citizen employees who apply for U.S. based employment from outside the U.S. and those non-U.S. Citizen employees who work within the U.S. for covered employers are covered by EEO statutes and may raise an EEO complaint within 45 days of the alleged incident. However, non-Citizen employees employed outside the U.S. are not protected by U.S. EEO statutes.

Appendix Three: Factfinder's Recommended Language for Article 14, Sections 10 and 11

SECTION 10: THE RECRUITING PROCESS

a. A Biweekly Listing of all current vacancies will be distributed to all employees. This listing will include vacancy announcement number and closing date, the title, series, grade, number (if more than one) of the positions to be filled, the telephone number of the Office of Human Resources, and information on how to apply. Special rating factors and their weights, screen out elements (wage positions), amount of travel when required, and qualification requirements including selective factors, will be detailed on the individual vacancy announcements posted on bulletin boards throughout the Agency. Copies of all vacancy announcements will be sent to the Union.

b. Employee Applications. Only those employees who apply for consideration or are recommended by Management (supervisor, Office of Human Resources, etc.) in response to an announcement of a vacancy will be considered under that announcement.

c. Area of Consideration:

1. Is the area in which the Agency makes intensive searches for eligible candidates in a specific promotion action?

2. For positions GS 12 and above, and equivalent Wage System positions, the minimum area of consideration will be Agency wide.

3. For promotion to positions through GS 11 and equivalent Wage System positions, the minimum area of consideration will be to the locality in which the vacancy exists, i.e., Washington, D.C., New York City, Greenville, North Carolina, et al.

4. In instances where elements are undergoing reorganization or under Reduction in Force procedures (Article 30), the area of consideration may be limited to the affected Bureau or equivalent organizational element.

d. Eligibility for Promotion. To be eligible for promotion, except for upward mobility, candidates must meet all qualification requirements as to amount, type, and level of education and/or experience as outlined in the Qualification Standards for General Schedule Positions issued by OPM or other appropriate qualification standard, as well as any other legal or regulatory requirements, e.g., Time-in-Grade and exceptions (5 CFR, Part 300), Time-After-Competitive-Appointment (5 CFR, Part 330), etc.

e. Ranking Panels

1. When more than ten applicants are eligible for a position at an advertised grade level, the Office of Human Resources will convene a ranking panel. Candidates eligible for lateral assignment to a position with no greater promotion potential than the position currently occupied will not be counted in determining when a panel must be convened.

2. When a ranking panel is convened, unless unusual circumstances prevail, such as tie scores, not more than the five best qualified applicants as determined by the panel will be referred by the Office of Human Resources for consideration. If ten or fewer

applicants are eligible for a position at an advertised grade level the Office of Human Resources will refer all of the qualified applicants.

3. Candidates eligible for lateral assignment or voluntary change to a lower grade to a position with no greater promotion potential than the position currently occupied will be referred on a separate certificate.

4. When a ranking panel is convened, all panel members must be at a grade level equal to or above that of the vacancy.

5. The Office of Human Resources will constitute panels from among eligible panelists. The Union may recommend eligible panelists.

6. Employees included on panels will receive appropriate instruction on evaluating candidates under these procedures. Employees selected to serve on promotion panels should be knowledgeable in the occupational field of the vacancy or skilled in evaluating experience, education, and training at the level of the vacancy.

7. Panels normally will consist of three members selected by the Office of Human Resources. Each panel will include representatives from at least two different organizational units of the Agency. A Human Resources staff member will act as advisor to the panel, providing advice and assistance as appropriate.

8. Neither the supervisor of the organizational unit in which the vacancy is located nor the selecting official may serve on the promotion panel.

f. Selection Certificates

1. A selection certificate is a list of qualified applicants to be considered for a particular vacancy. A separate selection certificate (or certificates if laterals are referred) will be issued for each advertised grade level.

2. The Office of Human Resources will prepare and issue selection certificates. Applicants will be

listed alphabetically. Unless unusual circumstances, such as tie scores, prevail, no more than the five highest ranked applicants as determined by a panel will be referred for consideration at an advertised grade level (there is no limit on the number of laterals who may be referred). If ten or fewer applicants are eligible for a position at an advertised grade level, all qualified applicants will be referred. Selection certificates will remain valid for no more than 60 calendar days unless extended for good cause by the Office of Human Resources. Additional vacancies not reflected in the announcement that occur in the element after the opening date of the vacancy announcement for position(s) identical (same grade, series and title) to the original vacancy may be filled from the selection certificate during the validity of the certificate.

3. Interviewing all available Agency employees eligible for promotion whose names appear on selection certificates (unless the selecting official does not interview any candidates for promotion at a particular grade level or no selection is made from the certificate) and making selections on a fair and objective basis. Candidates referred for lateral assignment may be interviewed at the option of the selecting official.

4. Within seven calendar days after final approval of the selection, the selecting official will notify all employees on the certificate(s) of his or her decision.

g. Evaluation Factor. Length of service or length of experience may be used as an evaluation factor only when there is a clear and positive relationship with quality of experience. As a ranking factor, it will be used only to break ties.

h. A Selection List will be prepared at the beginning of each month showing the names of those individuals selected during the previous month. The selection list will be posted on the same Agency bulletin boards as the vacancy announcements. The Agency will make a reasonable effort to indicate on this list where employees are selected from outside the Agency.

SECTION 11: GENERAL SCHEDULE (GS) POSITIONS

a. Common Elements. All common elements listed in Section 10 are incorporated into this plan without further specific reference.

b. Procedures

1. Before a vacancy is announced, the appropriate supervisory officials will review the duties of the position to determine the most important knowledge, skills, and abilities (not to exceed five, hereinafter called "special rating factors"), and assign a numerical value to each special rating factor relative to its importance as a predictor of success in the position, not to exceed a total of 30 points. These factors and their values will appear in the vacancy announcement.

2. All eligible applicants will have equal opportunity to be considered for positions and will be evaluated fairly and uniformly in accordance with predetermined requirements.

c. Evaluation Methods Used by Panel Members

1. The basic documents to be used in the evaluation process are the candidate's current SF 171, current Performance Appraisal Report, and any other material solicited under the announcement.

2. The evaluation method used under Plan I involves an analysis and appraisal of the candidate's previous education, training, performance, and experience as related to the special rating factors. Using the Ranking Panel Rating Sheet, each panel member will assign points to each eligible applicant on each special rating factor not to exceed the numerical value assigned to that factor. Total points assigned will not exceed 30 points for all special rating factors combined. With the advice of the Human Resources advisor, the panel members may agree on and apply criteria to add up to 10 points to applicants' scores for such things as relevant accomplishments as reflected in current or recent performance appraisals, awards, quality increases, or commendations if the

panel determines that these factors are indicators of successful performance in the position to be filled.

Appendix Four: Employer's Suggested Language for Article 14, Sections 10 and 11

SECTION 10: GENERAL SCHEDULE (GS) POSITIONS

a. Before a vacancy is announced, the appropriate supervisory officials will review the duties of the position to determine the most important job-related competencies. These competencies will appear in the vacancy announcement.

b. The evaluation method used in ranking candidates involves a review of the candidate's application and an analysis and appraisal of the candidate's responses, previous education, training, performance, and experience as related to the job-related competencies.

c. The basic documents to be used in the evaluation process are the candidate's submitted OF-612, résumé or application, the responses to job-related questions, and any other material solicited in the vacancy announcement. If applicants are unable to use the electronic staffing system, they may use an approved OPM alternative method as outlined in the specific vacancy announcement.

d. All eligible applicants will have an equal opportunity to be considered for positions and will be evaluated fairly and uniformly in accordance with predetermined requirements.

SECTION 11: FEDERAL WAGE SYSTEM POSITIONS

a. Procedures and Evaluation Methods

1. The Office of Human Resources will develop job element requirements and a crediting plan for the position to be filled. The term "job element" refers to knowledge, skills, abilities, and/or personal characteristics needed to perform the duties of the position. Each job element determined to be pertinent to the position must be stated, and levels of ability for each element must be established. Of the elements selected, certain jobs may have one critical overall element, which is called the "selective placement factor." This element designates a basic

knowledge, skill, or ability that management deems necessary to do the job, which management determines cannot be obtained or acquired within ninety (90) days on the job.

Applicants who clearly fail to meet the lowest acceptable requirements described in the selective placement factor are rated ineligible. Any selective placement factors will be included on the individual vacancy announcement.

2. Questionnaires will be developed jointly by the Office of Human Resources and the supervisory official(s) concerned to obtain from candidates and their supervisors and co-workers information needed to evaluate their ability to perform the duties of the job to be filled. The information provided in this questionnaire will be considered along with the application materials and the current Performance Appraisal Report (PAR) in evaluating candidates.

3. If Ranking Panels are used, they will evaluate the information provided in the questionnaire and the candidate's application, considering all experience, including volunteer and unpaid services, training, education, awards, supervisory appraisals, etc., as they relate to the elements being rated.