

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY

And

FEDERAL EDUCATION ASSOCIATION STATESIDE
REGION

Case No. 18 FSIP 069

DECISION AND ORDER

The Federal Education Association Stateside Region (Union or FEA-SR) filed this request for Panel assistance under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, over an impasse with the U.S. Department of Defense Education Activity (Agency or DoDEA) stemming from mid-term negotiations concerning the Department of Defense Performance Management and Appraisal Program (DPMAP). DoDEA's mission is to plan, direct, coordinate, manage, and provide pre-kindergarten through 12th grade education for the dependents of U.S. military personnel and federally-employed civilians living on federally owned property.

DoDEA has historically operated two distinct elementary and secondary school systems; one system for domestic schools (Domestic Dependent Elementary and Secondary Schools (DDESS)) and the other for overseas schools (Department of Defense Dependent Schools). The instant dispute concerns the DDESS. DDESS is subdivided into the Southeast District, the Mid-Atlantic District (including Puerto Rico), and Guam. The Southeast District consists of 25 schools, the Mid-Atlantic District consists of 30 schools, and Guam has 4 schools.

FEA-SR is the certified exclusive representative of bargaining unit employees located in the Southeast, the Mid-Atlantic (excluding Puerto Rico), and Guam, consisting of approximately 2,200 professional employees who encumber positions such as Classroom Teacher, Guidance Counselor,

Psychologist, Education Technologist, Speech Pathologist, Occupational Therapist, Physical Therapist, Media Specialist, and Nurse.¹ FEA-SR and DoDEA are covered by a 2005-National Collective Bargaining Agreement.

BACKGROUND

Representatives from the Department of Defense, unions, Office of Personnel Management, and other stakeholders worked collaboratively for more than 18 months to plan and develop recommendations for new personnel authorities impacting bargaining unit employees that work in the DoDEA, DDESS. The collaboration resulted in DPMAP on February 4, 2016. The DPMAP established policy and procedures, and provided guidelines regarding civilian personnel management for the employees in the DDESS.

Upon the promulgation of the DPMAP, the Agency provided the Union notice and an opportunity to bargain. The parties met for two 1-hour telephonic bilateral negotiation sessions: February 14 and April 14, 2018. Between February and April 2018, the parties engaged in extensive negotiations by exchanging proposals electronically. The parties were unable reach a resolution. They engaged in mediation on May 25 and June 1, 2018, with Federal Mediation and Conciliation Service Mediator Christy Yoshitomi. The parties reached agreement on ten proposals, but were unable to resolve three proposals. Ms. Yoshitomi released the parties. On June 28, 2018, the Union filed a request for Panel assistance.²

The Panel asserted jurisdiction over the one proposal remaining in dispute and determined that it should be resolved through a Written Submissions procedure, with an opportunity to submit rebuttal statements to the Panel and each other. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which could include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' written submissions, final offers, and rebuttal statements.

¹ The majority of the bargaining unit employees encumber the position of Classroom Teacher.

² After the Union filed the request for assistance, the parties resolved two of the three proposals, leaving one proposal for the Panel to resolve. The remaining proposal is divided into four issues.

PROCEDURAL ISSUES

Written Submissions

The Agency's Written Submission is seven double-spaced pages. In the Procedural Determination Letter, the Panel ordered the parties to limit their written submissions to "no more than six double-spaced pages..." A party has a right to object to another party's nonconformance with the Panel's Order; however, there was no such objection here. Accordingly, the Panel will consider the Agency's written submissions.

Rebuttal Statements

The Agency's rebuttal statement is eight double-spaced pages. The Union argues that the Agency's rebuttal statement should be excluded from the final record because it failed to comply with the Panel's Order. The Union also argues that the Agency introduced new evidence in its rebuttal statement, which should not be considered by the Panel.³

The Procedural Determination Letter clearly states "[t]he parties rebuttal statements shall be no more than five double-spaced pages in length..." The Union did not have an opportunity to supplement its rebuttal statement and include additional pages, as did the Agency. Accordingly, the Panel will not consider the additional pages presented by the Agency in its rebuttal statement.

ISSUES

1. Whether the first performance discussion will normally occur at the beginning of the academic year.

a. Union's Final Offer

The appraisal period will commence on May 1st of each year and run through April 30th of the following year. Employees will normally participate in three (3) Performance Discussions per year. The first Performance Discussion will normally occur within the first 30 days of the school year. The second Performance Discussion will normally occur between

³ The Union asserted that the Agency introduced new evidence in its rebuttal statement; however, the Union did not substantiate how the information provided by the Agency is new.

November 1st and 30 days after employees return from winter recess.

Currently, the academic year in the Southeast District, which covers approximately half of the bargaining unit employees starts in July and ends in May. The academic year for the other half of the bargaining unit in the Mid-Atlantic District and Guam will start in August and end in June. Employees will normally receive their elements and standards during the first performance discussion when they start the academic year, their mid-year review in November or December, and their final appraisal at the end of the academic year. The Union argues that the status quo should be maintained.

The DOD Instruction 1400.25, Section 3.2(b), requires the Agency to appraise employees based on the academic year.⁴ The Union asserts the employees' performance discussions must coincide with the academic calendar since an overwhelming majority of the employees work on a academic year calendar. The Union further states that the first performance discussion is an opportunity for the educator to discuss with the supervisor his or her individual teaching assignments for that particular academic year, the educational needs of his or her class, and receive their elements and standards for the year. Therefore, the Union states that it only makes sense to hold the first performance discussion at the start of the academic year.

Additionally, the Union asserts that the Agency's proposed appraisal cycle will create confusion and additional work for both supervisors and employees because supervisors, if they appraise employees in May, will have to provide the employees a new set of elements and standards when the employees return from the summer recess, to account for their new assignments and classes. The Union understands that circumstances will not always permit the first performance discussion to occur at the start of the academic year and thus, qualifies the timeframe with the word "normally" in its proposal.

⁴ DOD Instruction 1400.25, Volume 431, Section 3.2(b) states, "[t]he appraisal cycle for employees covered by the DoD Performance Management and Appraisal Program is April 1 through March 31 of each calendar year. Components operating academic institutions may elect to apply an appraisal cycle based on their academic year to some or all of the employees of these academic institutions."

b. Agency's Final Offer

The appraisal period will commence on May 1st of each year and end on April 30th of the following year. Employees will normally participate in three (3) Performance Discussions per year. The first Performance Discussion will normally occur between the start of the rating period and no later than 30 days after the start of the next school year. The second Performance Discussion will normally occur between November 1st and 30 days after employees return from winter recess.

The Agency argues that it needs flexibility to either provide the employees their first performance discussion within 30 days from the start of the rating period in accordance with 5 CFR 430.206(b)(2),⁵ or at the start of next academic year. The Agency states that there might be circumstances which require it to extend the first performance discussion until 30 days after the start of the next academic year. For example, half of the bargaining unit employees work in the Southeast District, which ends school in May. Supervisors will only have a few weeks to issue the elements and standards to the employees. Therefore, it could be necessary for the Agency to hold the first performance discussion no later than 30 days after the start of the next academic year.

The Agency further argues that its appraisal cycle will not create additional work for employees and supervisors, since the employees' elements and standards are standardized. Thus, if a teacher is provided their elements and standards during their first performance discussion in May and then is reassigned to a different school or provided different assignments at the start of the next academic year, the teacher will still be appraised on the same elements and standards, accounting for any new assignments.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that a modified solution is the best alternative to resolve the impasse. The parties disagree over when the first performance discussion should occur; the Union argues that it must occur

⁵ 5 CFR 430.206(b)(2) states, "[p]erformance plans shall be provided to employees at the beginning of each appraisal period (normally within 30 days)."

within the first 30 days of the academic year, whereas the Agency argues that it will occur at the start of the rating period, but no later than 30 days after the next academic year.

DoD Instruction 1400.25, Volume 431, Section 3.2(b) requires the Agency to either apply an appraisal cycle from April 1 to March 31, or an appraisal cycle based on the academic year. The parties' dispute is over the latter. Thus, the question is then what does it mean to base an appraisal cycle on the academic year.

For an appraisal cycle to be based on an academic year, and in compliance with the DoD Instruction the appraisal cycle must coincide with the academic year.⁶ This means that the performance discussions must occur at the beginning of the academic year,⁷ the middle of the academic year, and end of the academic year.⁸ Holding the first performance discussion in the subsequent year, as the Agency proposes, could amount to issuing the employee's performance plan 90 days after the start of the appraisal period for schools in the Southeast District (May to July). This does not comply with 5 CFR 430.206(b) (2). Thus, in order to comply with the Instruction 1400.25 and the regulation, the parties must follow a performance discussion calendar that mirrors the academic year. Accordingly, the Panel orders the parties to adopt the following language:

"For the Southeast, Mid-Atlantic, and Guam the appraisal period will commence on May 1st of each year and run through April 30th of the following year. Employees will normally participate in a minimum of three (3) performance discussions per year. The first Performance Discussion will normally occur within thirty (30) days from the start of the appraisal period. Employees that work during the summer will receive their first performance discussion prior the start of their assignments. The second Performance Discussion will normally occur halfway through the appraisal cycle."

⁶ While we interpret Instruction 1400.25, Volume 431, Section 3.2(b) to require an appraisal cycle to follow the academic year, that issue is not before us in this dispute, and, therefore, it is outside of the Panel's jurisdiction.

⁷ 5 CFR 430.206(b) (2) states, "[p]erformance plans shall be provided to employees at the beginning of each appraisal period (normally within 30 days).

⁸ 5 CFR 430.208(a) states that an employee receives his or her performance appraisal "[a]s soon as practicable after the end of the appraisal period..."

2. Whether the final performance discussion will normally occur at the end of the school year.

a. Union's Final Offer

The third Performance Discussion will normally occur between May 1st and the end of the school year.

The Union argues that the employees should receive their final performance discussion between May 1 and the end of the academic year. The Union states that not providing a final evaluation at the end of the academic year can be detrimental to a teacher's career. The Union claims that the Agency, like most public school systems, requires a copy of the employee's final evaluation to be considered for a vacancy. Many of the employees have to relocate in connection with their spouse's permanent change in duty station. The Union asserts that these employees should not be punished when applying for new positions because the Agency was unable to provide a final evaluation in a timely manner.

The Union also argues that under the Agency's proposal an employee could wait up to 120 days to receive a rating of record for the appraisal period ending April 30 if the Agency were to provide the third performance discussion 30 days into the next academic year. Not providing the employee's final appraisal until four months after the rating period ended is contrary to 5 CFR 430.208(a). The Union understands that there are circumstances that will not always permit the last performance discussion to occur within the prescribed timeframe, which is why it uses the qualifying word, "normally" in its proposal.

b. Agency's Final Offer

The third Performance Discussion will normally occur between May 1st and no later than 30 days after the start of the next school year. As far as practicable, supervisors will attempt to close out the final appraisal before the summer break for seasonal employees. Employees who won't be receiving appraisals until next SY, will be given notice before the summer recess period begins.

The Agency proposes that the third performance discussion will occur concurrently with the first performance discussion, i.e., during a period beginning at the start of the rating period (May 1) and ending no later than 30 days after the start

of the next academic year. The Agency asserts that under its proposal, the final appraisal discussion will begin immediately after the end of the appraisal cycle in accordance with 5 CFR 430.208(a). However, the Agency proposes to extend this meeting into the first 30 days of the next academic year to allow for circumstances that will not permit the final performance discussion to occur before the summer recess. For example, the Agency notes again that the Southeast District ends school in May. Due to the school closing in May, it provides for an abbreviated period for supervisors to meet with employees prior to the summer recess and issue their final appraisals. The Agency asserts that its proposal permits supervisors leeway to issue the final appraisals at the start of the new academic year, when it's not possible for the supervisors to schedule and meet with all of the employees prior to the summer recess. Regarding prospective positions, the Agency argues that most teaching vacancies permit employees to use their most current rating of record, even if it's their prior year's rating of record, when applying to a new position.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that a modified solution is the best alternative to resolve the impasse. The Union argues that the Agency should appraise employees between May 1 and the end of the academic year so that employees can receive their final appraisals and use it to apply to a new position. The Union states that not providing a final appraisal until the next academic year is contrary to 5 CFR 430.208(a). The Agency argues that its proposal complies with 5 CFR 430.208(a) by issuing a final performance appraisal within 30 days from the start of its rating period, but no later 30 days after the start of the next academic year when circumstances do not permit the supervisors to appraise the employees prior to the summer recess.

5 CFR 430.208(a) states that an employee receives his or her performance appraisal "[a]s soon as practicable after the end of the appraisal period..." Neither party presents compelling evidence that demonstrates the meaning of "as soon as practicable." Unlike 5 CFR 430.206(b)(2), which gives guidance that the employee's performance plan should normally be provided within 30 days from the beginning of the appraisal period, 5 CFR 430.208(a) gives no such direction. Therefore, to comply with the law, the Panel orders the parties to adopt the following language:

"The third performance discussion will occur as soon as practicable after the end of the appraisal period."

3. Whether supervisors will be required to provide employees individual notices, two weeks prior to a performance discussion.

a. Union's Final Offer

Employees will be provided two (2) weeks' notice to prepare for a Performance Discussion.

The Union argues that it is in the Agency's best interest for the employees to come prepared to performance discussions. As such, the Union states that the Agency should provide each employee an individual notice two-weeks prior to their performance discussion, indicating the date of the discussion so that the employees can prepare for it. The Union asserts that a teacher's time is spent in the classroom with students, planning for instructions, or participating in management directed professional development. As such, a teacher's schedule does not provide for flexibility to allow them to step away from the classroom to prepare for a performance discussion. Therefore, the Union states that a notice with a sufficient amount of time prior to the meeting will allow the employees to prepare for the meeting and make the most efficient use of the performance discussion.

b. Agency's Final Offer

Normally employees will be given at least one week advance notice of the final appraisal meeting.

The Agency states that the employees do not need to prepare for their first performance discussion (employees are only provided their elements and standards) and their mid-year reviews (supervisors only discuss the employee's work up to that point); therefore, the Agency is opposed to providing notification for those discussions. The Agency believes that advance notice is not needed for the final appraisal meeting, as the supervisor will deliver the employee's rating of record after having considered the employee's performance, the employee's voluntary self-assessment, if provided, and other input from stakeholders with first-hand knowledge of the employee's performance during the year. However, in an attempt

to reach agreement with the Union, the Agency proposed one-week advance notice for the final appraisal meeting.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. The Agency presents a compelling argument that the employees do not need advance notification for all of their performance discussions. During the first and second performance discussions, employees are provided their performance plan and engage in a discussion with the supervisor over their performance halfway through the year, respectively. The Union did not present compelling evidence that warrants advance notification for those two meetings. With respect to the final performance discussion, we find that it is beneficial to allow the employees time to gather all of their achievements and documentation in support of their rating of record. Accordingly, the Panel imposes the Agency's proposal.

4. Whether the Agency will provide employees additional time or compensation to complete their DPMAP self-assessment.

a. Union's Final Offer

Employees will be provided a (2) week window to complete a self-assessment in connection with the final Performance Discussion. Employees will be provided four (4) hours compensation at their Earned Hourly Rate to complete the self-assessment outside the duty day unless they are provided the equivalent release time from assigned duties for the purpose of completing the self-assessment.

The Union states that the employee self-assessment is a tool that assists the Agency to improve organizational performance. In order for the tool to be useful, the Agency should provide employees time during their duty-day to complete their self-assessment prior to the final performance discussion, or additional compensation at their earned hourly rate to complete the assessment on their own time. The Union states that a self-assessment plays a critical role in the employees' final appraisal and could significantly impact their performance ratings. The Union argues that employees cannot use their non-instructional time, i.e., planning period, to complete their

self-assessments because that time is largely subsumed to prepare for classes, complete assignments, grade papers, etc.

b. Agency's Final Offer

Employees will be provided at least two weeks' notice to complete the voluntary self-assessment before the final performance discussion.

The Agency states that it will provide the employees at least two weeks' notice to complete the voluntary self-assessment; however, the Agency is opposed to providing the employees additional duty time or compensation to complete a self-assessment since it is voluntary.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. A self-assessment, while voluntary, is critical to an employee's rating, as the employee will detail his or her accomplishments throughout the appraisal period in hopes that the manager will take that into consideration when evaluating the employee. Similarly, a self-assessment significantly assists the manager when determining what rating to provide the employee, serving as a memory jogger of all of the employees' noteworthy accomplishments throughout the year. This can be particularly helpful when a manager supervises several employees and has to recall the accomplishments for all of the employees in order to provide a rating of record. Permitting the employees two weeks' notice will allow the employees a sufficient amount of time to prepare a self-assessment and submit it to their supervisor. Therefore, we find that the Agency's proposal is the best alternative.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their 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 § 2471.11(a) of its regulations, hereby orders the adoption of the following to resolve the impasse:

1. For the Southeast, Mid-Atlantic, and Guam the appraisal period will commence on May 1st of each year and run through April 30th of the following year. Employees will normally participate in a minimum of three (3) performance discussions per year. The first Performance Discussion will normally occur within thirty (30) days from the start of the appraisal period. Employees that work during the summer will receive their first performance discussion prior the start of their assignments. The second Performance Discussion will normally occur halfway through the appraisal cycle.
2. The third Performance Discussion will occur as soon as practicable after the end of the appraisal period.
3. Normally employees will be given at least one week advance notice of the final appraisal meeting.
4. Employees will be provided at least two weeks' notice to complete the voluntary self-assessment before the final performance discussion.

By direction of the Panel.



Mark A. Carter
Chairman

November 16, 2018
Washington, D.C.