United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPPARTMENT OF DEFENSE EDUCATION ACTIVITY And FEDERAL EDUCATION ASSOCIATION	Case No. 19 FSIP 001

DECISION AND ORDER

This case, filed by the Department of Defense Education Activity (Agency, Management, or DoDEA) on October 1, 2018, concerns a dispute over ground rules for negotiating a successor collective-bargaining agreement (CBA) between it and the Federal Education Association (Union or FEA) pursuant to the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119. It is the third request for assistance filed within the past 2.5 years on the topic of ground rules for the parties' CBA.[1] On November 27, 2018, the Panel voted to assert jurisdiction over the Agency's request for assistance and to resolve the dispute through a Written Submissions procedure with an opportunity for rebuttal statements. The parties timely filed their submissions.

BARGAINING AND PROCEDURAL HISTORY

The Agency's mission is to educate the dependents of U.S. military personnel and Federally-employed civilians stationed overseas. The Union represents a bargaining unit consisting of approximately 6,000 professional employees who work at elementary and secondary schools in Europe (excluding the Mediterranean) and the Pacific Region. Typical bargaining-unit positions are classroom teacher, guidance counselor, psychologist, education technologist, librarian, media specialist, nurse, and substitute teacher. The parties are covered by a CBA that was implemented in 1989 and rolls over annually.

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[1] *See* 16 FSIP 076 (filed May 16, 2016) and 17 FSIP 040 (filed March 7, 2018). The previous cases are discussed in greater detail below.

The Agency notified the Union on July 15, 2013, that it was opening the CBA for renegotiation. The parties entered into negotiations over ground rules. They met with a Federal Mediation and Conciliation Services (FMCS) Mediator in March and April 2016 to receive training on pre-decisional involvement. At the conclusion of the training, the Agency informed the Union of its intent to implement ground rules. To prevent implementation, the Union filed a request for Panel assistance in 16 FSIP 076, but asked the Panel to dismiss that dispute. The Union also filed a grievance. On August 18, 2016, the Panel dismissed 16 FSIP 076 on the grounds that it was unclear whether the parties had exhausted bargaining efforts and because it was unclear whether the grievance results would foreclose further bargaining efforts.

Following the Panel's dismissal, the parties resumed bargaining efforts and also received extensive assistance from FMCS in Case No. 2016N1800136.[2] They bargained and mediated from August 2017 to January 2018. The Mediator released the parties from mediation on February 20, 2018, because she believed no further movement was possible. The Union filed another request for assistance on March 7, after Management indicated that it intended to implement its last best offer on March 9, 2018 (18 FSIP 040). Eventually, the Union withdrew its request for assistance on June 26, 2018, because it believed the parties needed to bargain for an additional "reasonable amount of time."

After this withdrawal, the parties met with the Mediator on 3 more occasions in August and September 2018. They could not make further movement, so, on September 5, 2018, the Mediator once again released the parties. The next day, the Union submitted an unsolicited proposal to the Agency by email and requested further bargaining. On September 17, the Agency rejected this proposal, also by email, and stated it would proceed to the Panel. Thus, it filed this request for assistance, to which the Union objected to for numerous reasons. After giving the parties an opportunity to respond to these issues, on November 27, 2018, the Panel voted to assert jurisdiction over the Agency's request for assistance and to resolve the dispute through a Written Submissions procedure with an opportunity for rebuttal statements.

REMAINING 12 ISSUES

1. Section 4 - Size of Negotiation Teams

2. Section 9 - Travel Duty Authorization and Travel Expenses

3. Section 11- Release Time for Bargaining Unit Team Members

4. Section 12 – Compensation for Bargaining Unit Team Members

5. Section 14 - Location

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[2] During this period, the parties litigated the aforementioned grievance and the Agency prevailed. The Union did not file exceptions to that award.

6. Section 16 – Exchange of Initial Proposals

7. Section 20 – Negotiation Sessions and Times

8. Section 21 – Timelines for Negotiations

9. Section 28 – Negotiability

10. Section 29 – Impasse

11. Section 30 – Ratification

12. Section 31 – Agency Head Review

PROPOSALS AND POSITION OF THE PARTIES

1. Section 4 – Size of Negotiation Teams

A. Management Proposal

The parties will determine the size of their respective bargaining teams. DoDEA and FEA will identify a point-of-contact (POC) to answer questions and address administrative or logistical matters by no later than thirty (30) days prior to the first day of the Section 21 bargaining schedule. In the event that either party must change their designated POC during any part of the negotiations, the other party must be notified in writing. DoDEA will approve official time for up to six (6) bargaining unit team members to participate in accordance with the specific grants of official time provided in sections 15 and 21 below.

The parties will exchange the names of their respective bargaining teams no later than thirty (30) days prior to the first day of the section 21 bargaining schedule.

Neither party is required to have a specific number of representatives present at any given bargaining session, if one party has more people present than the other on any given day, this does not require that the other party have an equal number of representative present that day.

Each party may change members of its negotiating team. For bargaining unit members designated as Association bargaining team members, the Association will give DoDEA's designated POC at least two weeks advance notice to allow for arrangements to be made for substitute teachers by management and the development of lesson plans by the bargaining unit employee designated to the negotiating team.

B. Union Proposal

The parties will determine the size of their respective bargaining teams. DoDEA and FEA will identify a point-of-contact (POC) to answer questions and address administrative and logistical matters by no later than thirty (30) days prior to the first day of bargaining. In the event that either party must change their designated POC during any part of the negotiations, the other party must be notified in writing. DoDEA will approve official time for five (5) bargaining unit team members to participate in negotiations.

The parties will exchange the names of their respective bargaining teams no later than thirty (30) days prior to the first day of bargaining. Neither party is required to have a specific number of representatives present at any given bargaining session. If one party has more people present that the other on any given day, this does not require that the other party have an equal number of representatives present that day.

Each party may change members of its negotiating team. For bargaining unit members designated as Association bargaining team members, the Association will give DoDEA's designated POC at least two weeks advance notice to allow for arrangements to be made for substitute teachers by management and the development of lesson plans by the bargaining unit employee designated to the negotiating team.

C. Management's Position

The Agency views its proposal as promoting effective and efficient collective bargaining because it exercises fiscal responsibility by limiting the use of official time for "up to six" bargaining team members. The Agency does not intend to have more than 6 members for its team, but its proposal will allow flexibility to reduce the size of its team as necessary. The proposal requires 30 days' notice for the parties to provide the identities of team members and point of contacts; this timeframe will grant Management flexibility to secure substitute coverage, if necessary. The Agency notes that the Union had fewer than 5 bargaining members when the parties negotiated the initial CBA in 1989. Moreover, conditions of employment do not vary significantly from country to country. So, the Union's concern about needing broad representation rings hollow. Finally, Management is willing to grant 10 days of preparation official time prior to the commencement of negotiations. The Agency views this grant as generous, particularly in light of the fact that the parties have spent "years" working on this matter.

D. Union's Position

Much of the Union's proposal tracks the Agency's proposal, but there are two major differences. The first is that the Union proposes a *guarantee* of official time for 5 team members; one party will not be required to reduce the number of team members if the other side has fewer members at the table. This position is based on the Union's

view of 5 U.S.C. §7131(a), which guarantees official time for collective bargaining matters. It also states that the "number of employees for whom official time is authorized . . . shall not exceed the number of individuals designated as representing the agency for such purposes."[3] However, examining this language, the FLRA has held that unions may bargain in excess of what is permitted under §7131(a).[4] Thus, the Union believes its proposal is permissible. Moreover, given that the Agency is proposing to have "up to" 6 members, the Union is entitled by law to at least that number of individuals. Indeed, it has only 5 members, which will cost Management less than 6 members. Moreover, the Union maintains that the proposal is necessary because the Agency has duty stations in 7 different countries; thus, the Union needs to ensure various viewpoints are represented at the bargaining table.

The other key difference between the proposals of the Management and Union is that the Union's proposal omits any reference to preparation time. That is, the Union does not agree to the 10-day limitation suggested by Management.

E. Conclusion

The Panel will adopt Management's proposal. We believe that this proposal balances Management's fiscal responsibilities and the Union's need for statutory official time. Nothing in the record indicates that conditions of employment vary significantly enough between locales to warrant adoption of the Union's position. Moreover, given the length of time the parties have already devoted to this matter, the Agency's offered amount of official time for preparation purposes is sufficient.

2. Section 9-Travel Duty Authorization and Travel Expenses

A. Management Proposal

DoDEA agrees to provide up to six (6) Association bargaining unit team members who are authorized to travel to participate in bargaining activities established under section 21 of these ground rules with official travel orders. These costs to the Agency will be limited to one round trip flight for the duration of the section 21 negotiation timelines below.

However, in no case will the total amount of travel and per diem costs to the Agency exceed $98,400.00 for the negotiation of the successor NA. If there is a determination by a third party (e.g., arbitrator, fact finder, FLRA, FSIP) that FEA or any of its bargaining team members failed to bargain in good faith during a period when bargaining team members were receiving or eligible to receive travel and per diem costs from the Agency, all monies

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[3] 5 U.S.C. §7131(a).

[4] Citing *AFGE, Council 214 and Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson, AFB*, 21 FLRA 575 (1986).

paid/reimbursed for travel and per diem to FEA bargaining unit team members by the Agency for these negotiations, will be reimbursed to the Agency by FEA.

In the event that a bargaining unit member selected to perform as a member of the bargaining team is unable to continue, and must be replaced, FEA may select a new bargaining unit member of its own choosing. Management will provide that replacement bargaining unit member privileges accorded to other bargaining unit team members under these ground rules, as appropriate. However, the Agency will not pay travel and per diem for more than one replacement bargaining unit team member for the duration of the Section 21 negotiation timelines.

This section does not apply to the Association President or Association non-bargaining unit members.

B. Union Proposal

DoDDS will provide five (5) Association bargaining unit team members with official travel (TDY) orders and per diem, in accordance with the current Negotiated Agreement, the JTR and FTR in order to perform as a member of the bargaining team, as well as for any subsequent mediation or impasse resolution proceedings, including any facilitated bargaining, factfinding, med-arb, or arbitration as may be directed by the Federal Service Impasse Panel (Panel or FSIP) or agreed to by the parties.

Travel to and from bargaining for the Association's six bargaining unit team members on official time and on official travel (TDY) orders shall take place on unit employee workdays preceding and following negotiations/mediation/impasse resolution sessions.

In the event that a bargaining unit member selected to perform as a member of the bargaining team on official time is unable to continue and must be replaced, the Association will select a new bargaining unit member of its own choosing. Management will provide that replacement bargaining unit member with the same privileges accorded to other bargaining unit team members under these ground rules. However, the Agency will not pay travel and per diem for more than one replacement bargaining unit team member during the negotiations.

This section does not apply to the Association President or non-bargaining unit members.

C. Agency Position

The Agency's proposal has two key features, both of which the Union has not embraced. Perhaps the most significant distinction is a cap on travel expenses. Specifically, the Agency proposes granting travel for "up to" six members but authorizing travel for one round trip and capping costs at $98,400. Management arrived at this figure by estimating how much it would cost to cover travel expenses for 1 round trip to complete bargaining. The Agency believes that the taxpayer should not be responsible for subsidizing in full the Union's bargaining costs, and that it is entirely appropriate to allow for Union travel on the weekends. Indeed, the Union's 2017 LM-2 reports shows that the Union and its five local affiliates have a financial surplus of $3,766,457.00. So, the Union is hardly at a financial disadvantage.

The other key facet of the Agency's proposal is a requirement that the Union must reimburse Management should an independent forum, e.g., an arbitrator, the FLRA, etc., conclude that the Union's bargaining conduct during term negotiations constitutes bad faith. Given how long the parties have spent on this matter, Management has little faith that the Union will engage in timely and productive bargaining. The Agency's proposal is meant to therefore incentivize the Union into fully engaging in the process. Contrary to the Union's accusation of bad faith, the Agency views this language as similar to fee shifting provisions for arbitration found in other contracts.

D. Union Position

The Union's proposal omits any language concerning caps for travel costs. The Agency's website states that it has an annual budget of $2.4 billion.[5] Examining this budget, the Union discovered that the Agency cancelled a program for Agency educators seeking to relocate to new jobs within the Agency. Funding for this defunct program amounted to $4.5 million, money that could easily be used to cover the Union's travel costs. And, in the past 2 fiscal years, the Agency has spent nearly $400,000 a year on training conferences. The bottom line is that the Agency has money available. The Agency's offered figure is not supported by any empirical data (or at least any data that Management has provided). Moreover, it is unclear what figures the Agency relied upon to reach this number as they have said on separate occasions that this figure assumes a Union bargaining team of 3 and 6 members. Further, the Agency's figure is 2 years old.

The Statute recognizes that collective bargaining is in the public interest,[6] and DoD's own travel regulations authorize granting travel allowances to labor organization representatives. These authorities demonstrate the importance of facilitating collective bargaining efforts, and that facilitation can be ensured by providing the Union with full

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5 *See* https://www.dodea.edu/aboutDoDEA/budget.cfm.

6 *See* 5 U.S.C. §7101(a); DoD Joint Travel Regulations, Chapter 3, Section 0317, page 3A-27.

travel costs. It is also unfair to expect the Union to pay for members located around the world when almost the entirety of Management will be located in the Washington, D.C. area.

The Union also rejects the Agency's suggested language that the Union should pay for costs in the event a later adjudicator makes a decision concerning bad faith bargaining. The Agency is engaging in pure speculation and is attempting to pre-litigate a hypothetical ULP that may never come to pass. The Union was unable to discover any FLRA decisions finding negotiable a proposal that imposed a pre-ULP penalty. The Agency's proposal should be rejected as an attempt to usurp the FLRA's authority.

Finally, the Union also includes language stating that travel time for bargaining "shall" take place on employee workdays. This language is consistent with other Panel decisions.[7] It is also fair given that Union members will be engaged in much more extensive travel.

E. Conclusion

The Panel adopts the Agency's proposal. The offered cap on travel is reasonable and consistent with Management's various financial obligations. It is not sufficient to claim that the Agency can simply rearrange its finances to accommodate the Union's travel needs. Moreover, as we have adopted Management's proposal concerning official time above, it is appropriate to adopt this proposal's take on official time in this proposal as well. We also agree with Management that its bad faith reimbursement language will offer incentives to ensure that the parties remain focused on completing negotiations in a timely manner.

3. Section 11-Release Time for Bargaining Unit Team Members

A. Management Proposal

DoDEA agrees to provide up to six (6) bargaining unit members of the Association's bargaining team designated under Section 4 above with release time from their official duties to perform as members of the bargaining team in accordance with these ground rules. This release time is separate from and will not be counted against any Release Time provided under the NA.

B. Union Proposal

DoDDS agrees to provide five (5) bargaining unit members of the Association's bargaining team designated in accordance with these ground rules with official time from their official duties to perform as

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[7] Citing *Dep't of the Army, U.S. Army Corps of Engineers, Portland, Or. and UPTO*, 08 FSIP 106.

members of the bargaining team in accordance with these ground rules. This official time is separate from and will not be counted against any Official Time provided under the Negotiated Agreement.

C. Management Proposal

The Agency's proposal distinguishes between "official time" and "release time" for bargaining. Official time is statutory grants of duty time for Union activity under 5 U.S.C. §7131; release time is similar but is established by contract and can include a mixture of compensated and non-compensated time. The Agency's proposal covers preparation time and time at the bargaining table. As to the former category, the parties have reached tentative agreement in Article 15 that members will have 10 days of preparation time on "official time." As to the latter, the parties are in disagreement over Article 21 (discussed below). The Agency's proposed Article 21 allows for an employee to be released from duty "without charge to leave," but it does not specifically address "official time."

Management contends the foregoing distinction is necessary to help it marshal its resources. Granting release time requires the Agency to secure substitute arrangements, so limiting it to up to 5 members makes good financial sense. Moreover, the Agency's proposal does not count use of release time for these purposes against other grants of release time. Thus, the language is fair to the Union.

D. Union Proposal

The Union rejects all language concerning release time and, instead, asks for grants of statutory official time. The Statute mandates granting official time to Union members who are at the bargaining table.[8] Management's argument does not properly address this topic and, as such, it should be rejected.

E. Conclusion

The Panel will order a modified version of the Agency's proposal. As the Union accurately notes, the Union has a statutory right to official time when engaging in collective bargaining activities as defined under §7131(a) of the Statute. And, it is not clear from Management's position how "release time" may act as a substitute for "official time." Thus, all references to "release time" in Management's proposal shall be changed to "official time." Moreover, the second sentence will be stricken in its entirety. The rest of Management's proposed language shall stand, however.

4. Section 12-Compensation for Bargaining Team Members

A. Management Proposal

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[8] Citing 5 U.S.C. §7131(a) and (d).

DoDEA agrees to pay the Association's bargaining unit team members who have been released from their official duties by DoDEA their daily rate, only for periods of official time authorized in sections 15 and 21 below that occurs during their regular workdays as if they had performed their normal duties, in accordance with applicable salary schedules, laws and regulations.

The parties understand that Association bargaining unit members on official time authorized by these ground rules are not eligible for compensation in excess of their normal pay.

Therefore, they will not receive premium pay, straight time, overtime, holiday pay, or any other pay in addition to their normal pay for their participation in the bargaining process. Official time under this section is separate from and will not be counted against all official time granted under mandatory provisions of the current NA, MOUs, and past practices.

B. Union Proposal

DoDDS agrees to pay bargaining unit members of the Association's bargaining term team on official time at their scheduled daily rate for all bargaining sessions or release time that takes place during their regularly scheduled work days. Bargaining will not take place on days on which bargaining unit members are not regularly scheduled to work.

C. Management Position

The Agency's proposal authorizes compensation for bargaining team members while they are on statutory official time. However, it prohibits compensation for various forms of premium pay. The Agency's proposal grants official time compensation for preparation time and time at the bargaining table and, as such, is generous. Moreover, Management is legally prohibited from providing premium pay for official time activities. Thus, the Agency's language merely captures existing legal framework.[9] Management also rejects the Union's claim, discussed below, that Union bargaining team members cannot bargain on non duty days unless they receive compensation. Management is not dictating how the Union fashions its bargaining team; the Union is free to solicit whomever they wish to be a part of negotiations.

D. Union Position

The Union's proposal is intended to ensure that Union bargaining team members receive proper compensation while they are on duty time during regularly scheduled

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[9] Citing *Dep't of Transportation*, 60 FLRA 20 (2004); *Social Security Admin., New York Region*, 52 FLRA 328 (1996); *Warner Robbins Air Logistics Center*, 23 FLRA 270 (1986).

work days. However, it prohibits bargaining from occurring on non-scheduled work days, e.g., weekends, Federal holidays. The Union claims that employees *must* be in pay status when they engage in negotiations. Because Management's proposal could deprive them of pay, the Union contends that the proposal would violate the Anti-Deficiency Act, 31 U.S.C. §1341, et. seq. (the Act). In this regard, the Union claims this act prohibits the Federal government from "accepting volunteer work." Requiring employees to bargain in non-paid status is tantamount to such work; as such, the Act would be violated if the Panel were to accept Management's proposal. Further, the Union argues that the Agency has confusingly taken the position that official time for bargaining sessions is not mandatory, which is an inaccurate statement of law. The Agency has also misstated how foreign station employees are paid.

E. Conclusion

The Panel orders adoption of the Agency's proposal. The proposal is largely a recitation of existing law for compensation of employees who are on official time. As Management correctly notes, premium pay is not available to employees who engages in official time activities. The Union attempts to circumvent this position by relying upon the Anti-Deficiency Act to claim, essentially, that employees *must* be in pay status when they bargain. To conclude otherwise would mean that employees are volunteering their time when they bargain in a non pay status, and such a status would violate the Act. The Act itself states, in relevant part:

> **(a)(1)** An officer or employee of the United States Government or of the District of Columbia government may not—
>
> **(A)** make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> **(B)** involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
>
> **(C)** make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or
>
> **(D)** involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

The Union does not cite which portion of the above language it is relying upon to support its position. Nor does the Union provide any legal authority supporting its interpretation of the Act. Thus, the Panel believes there is no current legal support to buttress the Union's theory. Indeed, arguably, if the Union's argument were correct, than the premium pay decisions cited by the Agency would be invalid. However, the

Union has not suggested that to be the case. Based on all the foregoing, then, the Panel will impose Management's language.

5. Article 14-Location

A. Management Proposal

The negotiations will be held at DoDEA headquarters in Alexandria, VA. The Association will be provided with a private, secure room whose use will be restricted to Association bargaining team members.

B. Union Proposal

The parties will alternate between the Mark Center (DoDEA headquarters) and the National Education Association headquarters (the Association's offices) on a weekly basis throughout bargaining. When at the NEA, management will be provided with a private, secure room the use of which shall be restricted to management bargaining team members, which will be called the "Management caucus room." When at the Mark Center, the Association will be provided with a private, secure room the use of which shall be restricted to the Association's bargaining team members, which will be called the "Association caucus room."

C. Management Position

The Agency proposes that bargaining occur entirely at its facilities in Alexandria, Virginia. They provide secured premises that the parties may use to store their work product during ongoing bargaining. This feature is critical since Management is proposing 45 days of consecutive bargaining. Management's facility also provides no cost parking. The Union has utilized the Agency's facilities in the past with no problem, so there is no reason why they cannot be utilized now.

D. Union Position

The Union proposes that bargaining alternate between headquarters for Management and the Union. Access to the Agency's facilities requires a daily screening process that requires security to issue new badges to visitors and to screen all outside materials. Further, access to facility dining and restrooms require Agency escorts. The Union's facility has secured storage and does not require the time consuming screening procedures described above. Additionally, the Union's facility has access to public transportation and food options.

E. Conclusion

The Panel orders adoption of the Union's proposal. The Agency's primary argument for adopting its proposal is that it believes its facilities provide more secure

overnight storage. However, the Agency has not demonstrated how or why the Union's facilities are inefficient to meet the parties' needs in this respect. Moreover, adopting the Union's proposal would encourage fairness in the process as it requires alternating between each respective location.

6. Section 16-Exchange of Initial Proposals

A. Management Proposal

Each party's initial proposals will be exchanged, both in writing and in electronic form, no later than thirty (30) days after these ground rules become effective.

Initial proposals may be amended, modified, or withdrawn during bargaining. Absent mutual written consent by the parties, no new proposals may be submitted by either party after the deadline established in this section unless circumstances beyond the control of the parties exist (e.g., changes required by law, changes to Government-wide regulation).

B. Union Proposal

Each party's initial proposals will be exchanged, both in writing and in electronic form, no later than thirty (30) days after these ground rules become effective- (excluding any holidays or school recess (summer, winter, spring) periods, which shall extend the time for exchanging initial proposals).

At the end of the first month of bargaining, each party will have the right to submit new bargaining proposals that were not included in the initial exchange of proposals. After the end of the first month, only the initial proposals and the subsequent proposals submitted during the first month of bargaining in accordance with this section will be negotiated, unless the parties mutually agree otherwise.

C. Management Position

The Agency proposes exchanging proposals 30 days after the parties' ground rules agreement goes into effect, which includes Agency head review. And, although the parties may amend *these* proposals, there can be no submissions of *new* proposals absent mutual agreement unless external changes to law mandates changes. The Agency believes the 30-day window is sufficient given that the parties have already devoted years to this overall matter. Additionally, using calendar days rather than business days is appropriate because it is consistent with how days are calculated under the current CBA. The Agency is proposing limiting the exchange of new proposals because, as described in Section 21 below, Management is proposing a 45-

day bargaining window. Allowing new proposals would hamper this shortened bargaining window. Management once again rejects the Union's reliance on the Act.

D. Union Position

The Union agrees to Management's 30-day window. However, the Union seeks to exclude holidays or school recess periods from this calculation. Because employees would not receive compensation for these days, requiring them to work on proposals on these days would run afoul of the Act as described above. The Union next proposes that new proposals may be submitted after the first month of bargaining. However, that will be the extent of the submission of new proposals absent mutual agreement. The Union's language allows the parties an opportunity to address new information that arises during the course of initial bargaining. But, it also limits the parties to this "one time" event to ensure that bargaining will remain ongoing. The Union maintains that the Agency's limitation on new proposals is inconsistent because it allows for new proposals anyways when there is a new government-wide law or regulation.

E. Conclusion

The Panel will order adoption of Management's proposal. The Union's chief argument in opposition to Management's proposed 30-day timeframe is premised on accepting its Act argument. But, as discussed above, that argument does not appear to have merit. Thus, it is appropriate to accept the timeframe. We also agree with Management's assertion that limiting future exchanges of new proposals will facilitate resolution in an effective and efficient manner. Given the parties already extensive bargaining history on ground rules alone, additional continued proposals may only bog proceedings further.

7. Section 20-Negotiation Session and Times

A. Management Proposal

Each daily negotiation session will begin at 9:00 AM and conclude for the day at 4:00 PM, with a one (1) hour, duty-free lunch period, unless the parties jointly agree to extend or shorten the bargaining session for that day only. The remainder of the bargaining day not devoted to face-to-face bargaining will be treated as caucus time. The negotiations will take place on Monday, Tuesday, Wednesday, Thursday, and Friday of each week in which bargaining is scheduled to take place, with the weekend just before and the weekend just after the section 21 bargaining/mediation period being travel days. This schedule may be jointly modified in the event that holidays, completion of bargaining, or for other reasons that may prevent the parties from meeting during scheduled bargaining periods.

B. Union Proposal

Each daily negotiation session will begin at 9 AM and conclude for the day at 5 PM, with a one (1) hour duty-free lunch period, unless the parties jointly agree to extend the bargaining session for that day only. The negotiations will take place on Monday through Friday of each week in which bargaining is to take place (excluding any holidays or school recess periods (summer, winter, spring) during which negotiations will not take place).

C. Management Argument

The Agency proposes bargaining Monday to Friday from 9 a.m. to 4 p.m. (with 1 hour for lunch) for the entirety of its proposed 45-day window. Travel to and from bargaining will occur on weekends around this window. The parties may, however, jointly agree to modify for events such as holidays, unforeseen circumstances, etc. The Agency's proposal is meant to ensure the parties remain focused on completing bargaining. Management is particularly concerned that the Union may engage in dilatory tactics if there is no language in the ground rules defining tight conditions for negotiations. It also disputes the Union's reliance upon the Act.

D. Union Argument

The Union's proposal is similar to Management's, but it differs in three key respects. First, it proposes bargaining occur from 9 a.m. to 5 p.m. Second, it excludes language about travelling occurring on weekends. Third and most significantly, the Union includes language stating that bargaining sessions will not include holidays or recess periods. All of the foregoing language is meant to allow the parties to negotiate on a "set timeline" until mediation assistance becomes necessary. Additionally, the Union focuses on omitting holidays and recess time because requiring bargaining on these days "may" run afoul of the Act.

E. Conclusion

The Panel adopts a modified version of Management's proposal. In this regard, Management's 4 p.m. ending time should be altered to 5 p.m. The rest of its language will remain . The biggest difference between the parties' competing proposals is the Union's insistence that bargaining on non-duty days "may" be a violation of the Act. But, once again, the Union has not provided compelling argument to establish that this would be the case. Thus, there is no basis for accepting the Union's proposal. But we will accept the Union's suggested daily end time of 5 p.m. in order to provide the parties with more time at the bargaining table.

8. Section 21-Timelines for Negotiations

A. Management Proposal

Consistent with Article 53 of the parties' NA, bargaining shall begin within sixty (60) days after written proposals are received by the Agency or FEA.

A forty-five (45) day face-to-face bargaining period will begin from the first day of the bargaining period. Bargaining will conclude at the end of the 45th day. The Association is authorized to have up to six (6) bargaining unit negotiation team members, designated by the Association under Section 4 above, released from duty without charge to leave for up to forty-five (45) calendar days of official time, starting the first day of the bargaining period and ending after the 45th day.

If a complete successor NA has not been reached within forty-five (45) days after the bargaining period commences, the Federal Mediation and Conciliation Service (FMCS) will provide mediation assistance over the seven (7) day period beginning with the first workday after the conclusion of the forty-five (45) day direct bargaining period. FMCS assistance will be scheduled within seven (7) days after the effective date of these ground rules.

The Association is authorized to have up to six (6) bargaining unit negotiation team members, designated by the Association under Section 4 above, released from duty without charge to leave for up to seven (7) calendar days of official time, starting the first day of FMCS mediation assistance and ending after the 7th day.

The Parties' designated POC may mutually agree to modify the times and dates established under this section. All such changes must be agreed to in writing.

When the word "days" is used anywhere in these ground rules, it shall be interpreted as meaning calendar days, unless otherwise specified.

B. Union Proposal

Bargaining shall begin within sixty (60) days after the initial exchange of proposals by each party in accordance with section 16 (excluding any holidays or school recess periods (summer, winter, spring) which shall extend the time for beginning bargaining).

If an agreement is not reached after six (6) weeks of face-to-face bargaining, the parties will jointly request the assistance of the FMCS to meet with the parties to ascertain whether the parties are likely to continue to make progress towards reaching an agreement on their own, or whether they will require mediation. The negotiations will recess for two weeks at that time to allow the negotiators who are on official TDY orders to return home for a break at government expense, and then return to

continue bargaining on official TDY orders at government expense. The parties will jointly request assistance from the FMCS for similar purposes after each subsequent four weeks of bargaining.

C. Management Position

The Agency proposes a bargaining timeline that is "consistent" with Article 53, "Duration and Successor Agreement," of the current agreement. Section 5 of this Article states that bargaining "under Article 7 [negotiations over Agency and Union proposed changes to work policies] or Article 53 shall begin within sixty (60) days after written proposals are received by the Employer or the [Union] at the appropriate level." The Agency's proposal also suggests a 60-day window: 45 days of consecutive bargaining followed by 7 days for Federal Mediation and Conciliation Services (FMCS) assistance. The parties would schedule mediation at the outset of bargaining efforts in order to avoid potential delays in scheduling mediation assistance. The "days" language used in its proposal refers to "calendar days."

The Agency's proposal is more effective and efficient because it proposes a timeframe of consecutive days for bargaining. This timeframe would cut down on travel expenses as employees on the bargaining team would not have to travel back and forth for bargaining. Instead, they would be focused solely on accomplishing the task of negotiations. The Agency prefers its definition of days because it would permit negotiations to end in a timely fashion. Finally, although the Agency argues its language is "consistent" with Article 53 of the existing CBA, the Agency disclaims any and all "covered by" arguments. That is, the Agency is *not* alleging that the Union's proposal is outside its duty to bargain because it is covered by the CBA. Indeed, the Agency maintains that the Panel rejected that argument as unpersuasive when it asserted jurisdiction over this dispute.

D. Union Position

As an initial matter, the Union raises several jurisdictional challenges to the Agency's proposal. First, the Union claims that the issue of Management relying upon Article 53 is the subject of a pending grievance arbitration because the Union contends that section does not apply to term bargaining. As the Agency's proposal mimics language in Article 53, the Union believes the Agency is raising a "de facto" covered by argument. Thus, the Union argues that the Panel should defer this issue to the arbitration process. Second, the Union maintains that the Agency declined to bargain after the Union submitted a revised proposal on this topic at the end of FMCS mediation. As a result, the Union has filed a ULP charge that the FLRA is currently investigating. Third and last, the Union alleges that there is no existing FLRA decision which holds that a ground rule that establishes a timeline based on an existing CBA is

negotiable. Thus, the Agency's proposal is inconsistent with the FLRA's decision in *Commander, Carswell AFB and AFGE, Local 1364*, 32 FLRA 620 (1988) (*Carswell*).

On the merits, the Union claims the Agency's proposal is "defective on numerous grounds." Because Management is relying upon "calendar days," the Union once again contends employees would have to "volunteer" their time to potentially engage in bargaining. Thus, the Union again alleges a violation of the Anti-Deficiency Act. Additionally, by imposing a limitation on the amount of time spent at FMCS, the Agency is impermissibly attempting to interfere with FMCS's broad statutory authority under 5 U.S.C. §7119(a). The Union also notes that the FLRA has concluded that proposals requiring truncated bargaining in the face of a large number of issues to bargain is an indication of bad faith bargaining.[10] In the Union's view, the Agency is simply attempting to avoid agreement in the hopes of proceeding quickly to the Panel for a decision. Finally, because Management's proposal touches upon the topic of "release time," the Union contends it runs afoul of 5 U.S.C. §7131(a). The Union's proposal is consistent with other Panel decisions imposing lengthier bargaining timeframes for large agreements and, as such, it should be adopted.[11]

E. Conclusion

The Panel will order a modified version of the Agency's proposal. Addressing first the Union's jurisdictional arguments, none of them carry weight. The Panel will drop the reference to the CBA from the Agency's proposal, thus making the contractual dispute moot. But even if it were not, the Agency has expressly disclaimed any covered by argument. Thus, there is no contractual argument present, notwithstanding the Union's decision to pursue a grievance. As to the Union's claim that the parties never met to bargain the Union's revised proposal, the record reveals that *after* the Mediator released the parties the Union presented an unsolicited proposal.[12] In a September 17, 2018-email, the Agency "reject[ed] the [Union's] proposal in favor of Management's last proposal." Thus, contrary to the Union's suggestion to the contrary, the parties did bargain over the Union's proposal, albeit by email. The Union provided no authority prohibiting such bargaining. Finally, the Union claims that there are no decisions concerning the negotiability of Management's proposal as required by the FLRA's decision in *Carswell*. This decision requires a party to provide case law involving "substantively identical proposals" when a duty to bargain claim arises. The only duty to bargain claims that the Union has raised have been rejected. Thus, *Carswell* is inapplicable.

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10 Citing *Dep't of the Treasury, IRS, Washington, D.C. and NTEU*, 64 FLRA 426 (2010).

11 Citing *Dep't of Labor and AFGE, Local 12*, 03 FSIP 059; *DHHS and NTEU*, 16 FSIP 113.

12 The Union never explained why it waited until after mediation concluded to submit a new proposal. Nor did the Union claim that it informed the Mediator and the Agency that a new proposal was forthcoming.

Turning to the issue of a timeframe for bargaining, neither party has provided the Panel with a clear basis for adopting their respective timeframes. The Agency proposes 45 days followed by 7 for mediation. However, throughout the Panel process, the Agency has not provided any indication of how many Articles/proposals it intends to place on the bargaining table. Further, the Agency's position seemingly does not account for the fact that the Union may also have an interest in bargaining over Articles that differs from those put forward by Management. Thus, the Agency's suggested timeframe may not provide time to sufficiently address the issues put forward by the parties.

For its part, the Union offers little in the way of guidance. Indeed, unlike Management, *the Union offers no timeframe whatsoever.* The Union maintains that the Panel should look to past Panel decisions establishing a more robust timeline for bargaining voluminous agreements. However, those decisions actually offer a timeline; the Union's proposal does not. And, the Union's briefing offers no suggested timeline. Thus, it appears that the Union is content with an open-ended bargaining process with no defined conclusion. Given that the parties have spent nearly 5 years in bargaining and litigation over their ground rules alone, the Panel cannot agree with such an approach.

Based on the foregoing, the Panel imposes an initial 6-week face-to-face bargaining session. This number is derived from the 45 days offered by Management and the 6 weeks offered by the Union. After this period, the Panel imposes the following timeframe: four additional weeks if the parties open a combined 20 articles or fewer (or 10 weeks total); eight additional weeks if the parties open 30 or fewer combined articles (or 14 weeks total); and 12 additional weeks if the parties open 31 or more articles (18 total weeks). These figures are derived from another case concerning ground rules recently issued by the Panel, *Dep't of Housing and Urban Development and AFGE, Local 222*, 18 FSIP 075 *(HUD)*. After these dates are exhausted, the parties may mutually agree to further negotiations.

With respect to mediation, the Panel modifies the Agency's language so that either party may contact FMCS after the bargaining period ends. However, they may also request assistance during negotiations if they believe mediation assistance would be beneficial. In any event, the Panel imposes a 30-day period for mediation, which is patterned after the amount of time the Panel has given for Panel ordered FMCS mediation in several other cases, including *HUD*. But, we will also include language that recognizes FMCS's authority to continue beyond 30 days if FMCS believes such an action is warranted.

The above approach is meant to keep the parties focused on bargaining efforts. Because the Agency has provided no indication how many articles will be opened, the Panel cannot agree that 45 days total will be sufficient for bargaining the entire agreement given that there are 54 articles in the existing CBA. But, the Panel cannot also agree to the Union's "blank check" approach to bargaining given the already extensive bargaining history in this dispute. Additionally, and for reasons described

above, the Panel rejects the Union's Anti-Deficiency Act argument but agrees with its official time argument. The Panel also rejects the Union's theory that imposing a limit on time spent on FMCS somehow intrudes upon FMCS's statutory authority. The timeline concerns the parties' conduct, not that of a hypothetical Mediator. Moreover, as noted above, we have included modified language recognizing a Mediator's authority to continue with mediation efforts.

Based on all of the foregoing, the Panel imposes the following language, with modified language in bold:

> Bargaining shall begin within sixty (60) days after written proposals are received by the Agency or FEA. **Up to ten (10) weeks of negotiations will occur if, combined, twenty (20) articles or fewer are opened for renegotiation; up to fourteen (14) weeks of bargaining will occur if, combined, thirty (30) or fewer articles are opened; up to eighteen (18) weeks of bargaining will occur if thirty-one (31) or more articles are opened. At the conclusion of the applicable timeframe, either party may extend negotiations by up to one week. Further extensions are permitted by mutual agreement.**
>
> **Regardless of the number of Articles opened, six weeks of** face-to-face bargaining period will begin from the first day of the bargaining period. The Association is authorized to have **five (5)** bargaining unit negotiation team members, designated by the Association under Section 4 above, **on official time. If the parties require further negotiations after the initial six weeks, they shall meet to negotiate at a minimum every other week. These additional bargaining sessions may be face to face, or by teleconference or video teleconference.**
>
> If a complete successor NA has not been reached **after the conclusion of the above bargaining period, either party may contact** the Federal Mediation and Conciliation Service (FMCS) **to secure future dates for mediation services following the completion of the bargaining periods discussed above. However, nothing prohibits either party from soliciting FMCS assistance during bargaining. In the event mediation is necessary after bargaining concludes, such mediation will not extend for more than 30 days unless otherwise directed by FMCS.**
>
> The Association is authorized to have **five (5)** bargaining unit negotiation team members, designated by the Association under Section 4 above, on **official time during mediation efforts. The first two (2) weeks of mediation shall be in person. Then any subsequent mediation, if necessary, may be by face to face, teleconference, or video teleconference.**

The Parties' designated POC may mutually agree to modify the times and dates established under this section. All such changes must be agreed to in writing.

When the word "days" is used anywhere in these ground rules, it shall be interpreted as meaning calendar days, unless otherwise specified.

9. Section 28-Negotiability

A. Management Proposal

If DoDEA declares a proposal/counterproposal, or any part thereof, non-negotiable, DoDEA will provide an explanation as to why the proposal/counterproposal is considered non-negotiable. The parties will attempt to resolve the negotiability of a proposal/counterproposal, or any part thereof, and both sides may submit laws, rules, executive orders, government-wide regulations, or case law to attempt to resolve this determination of non-negotiability.

If the dispute cannot be resolved after reasonable efforts (e.g., at least two rounds of discussion), either party may table the matter, and if so, the parties will continue bargaining on the remaining issues in the interest of efficient and effective bargaining. They may revisit the matter by mutual agreement. However, if FEA choses to pursue resolution via an appeal to the FLRA, that matter will be severed from these negotiations and will proceed on a separate track for resolution by the FLRA as provided in the rules and regulations of the FLRA. Concurrently, the remaining matters will continue in the bargaining process through resolution and/or ratification as appropriate.

Within 14 days of receipt of a determination by the FLRA that a matter proposed for negotiations is within the duty to bargain, either party may initiate negotiations on the matter, except when either party indicates its intent to pursue judicial review of the FLRA's decision in accordance with the Statute.

B. Union Proposal

The parties will attempt to resolve negotiability disputes informally during the bargaining sessions. In the event there is a negotiability dispute related to a particular proposal with respect to an article and an agreement cannot be reached informally, the parties will table that article until conclusion of negotiations on all other Articles. DoDDS will present a formal declaration of non-negotiability to the Association upon request. The Association may appeal the declaration of non-negotiability to the FLRA. Negotiations on that Article will not be considered as having been

concluded until a final decision is rendered on the negotiability appeal and any subsequent negotiations on that Article are complete.

C. Management Position

The Agency's proposal provides a process should Management declare a Union proposal non-negotiable. There will first be informal attempts to resolve that dispute, but the Union may file a negotiability appeal. In order to keep bargaining moving, that proposal will be severed while bargaining on all other issues continue. Again, the Agency is concerned with the Union engaging in dilatory tactics to prolong bargaining. Management also rejects the Union's proposal because it does not address matters that are not subject to negotiability disputes, and it does not address the negotiation of negotiability disputes once resolved by the FLRA.

D. Union Position

The Union's proposal is similar to Management's proposal, but the former differs in one key area. Specifically, the Union proposes that negotiations on an entire Article will not conclude until any negotiability issues associated with that Article have concluded. Because the parties could be ordered to resume negotiations if the proposal is found negotiable, the Union wants to ensure that confusion will not arise if the parties suddenly have to negotiate over a proposal that might clash with other agreed to language. Thus, the Union's language will mitigate the dangers of confusion. The Agency's approach disadvantages the Union because it would be solely the Union's proposals that would be declared non negotiable, and it would also create a "fragmented" bargaining process.

E. Conclusion

The Panel orders adoption of Management's proposal. The biggest point of contention between the parties is how to treat matters that raise negotiability concerns within the context of other matters that are being negotiated. The Agency believes only negotiability matters should be segregated; the Union argues the entire Article that raises the matter should be severed, even if other portions of that Article do not raise negotiability concerns. The Union's theory is premised on the idea that separating an entire Article may reduce future confusion should the parties be ordered to resume negotiations over a particular matter. However, the Union's assertion is one that is premised on speculation. It could be the case that a negotiability dispute over one matter may have *no effect* on the Article that contains the disputed language. Thus, adopting the Union's position is unnecessary.

10. Section 29-Impasse

A. Management Proposal

If the parties do not reach full agreement through section 21 FMCS mediation the parties will request the assistance of the Federal Service Impasses Panel.

B. Union Proposal

Should the Federal Service Impasse Panel (FSIP or Panel) determine that an impasse exists and takes jurisdiction, the parties shall jointly request approval of private binding arbitration. In the event that the Panel does not approve this request for binding private arbitration, the parties shall recommend and request that the Panel direct the parties to private factfinding and recommendations (which may include facilitated bargaining).

Should the Panel approve either of these requests, the parties shall request a panel of seven (7) arbitrators from the FMCS from the Washington DC metropolitan area who are attorneys and members of the National Academy of Arbitrators. No later than ten (10) days following receipt of this list from the FMCS, the parties will establish a rank order by alternatively striking names. The Agency will strike first. The rank order will be in reverse order of the striking with the one remaining unstruck holding the highest rank. The parties shall conduct, in order, the three (3) highest ranked arbitrators to determine whether they are available and can comply with any deadline for issuing a decision or recommendations imposed by the panel. If none of the three highest ranked arbitrators are available, the parties shall request another list from the FMCS and follow the same process, unless they agree to an alternative process. The Agency will pay all costs and fees of the arbitrator/factfinder.

C. Management Position

This provision simply requires the parties to jointly seek Panel assistance after the completion of bargaining and mediation should any issues remain unresolved. The request would be joint because that is what is required under the parties' CBA. The Agency does not believe this language is illegal because one party could still proceed to the Panel under the Statute if the other party refuses to also seek Panel assistance.

D. Union Position

The Union proposes that any requested for Panel assistance would be a joint request for external arbitration or an external factfinding process. The Panel would have final say over approving either process, so the Panel is not shut out of its role as ultimate decision maker. The parties also used a factfinder during negotiations on the existing CBA. The Union also insists that the Agency's proposal is inconsistent with law because it requires a joint request to the Panel; the Statute permits either party to file, however.

E. Conclusion

The Panel imposes Management's language but removes the "joint request" language . The Union believes external arbitration or fact finding is appropriate because they are Panel processes and have worked well in other matters. However, the Union offers little explanation for why the parties *must* request either process. Thus, the Union's language is unnecessary. The Union's suggestion that the Agency's "joint" language is improper is well taken, however. Accordingly, we will alter the Agency's language as follows:

> If the parties do not reach full agreement through section 21 FMCS mediation **either party may** request the assistance of the Federal Service Impasses Panel.

11. Section 30-Ratification

A. Management Proposal

If FEA elects to submit the tentative successor NA for ratification, the ratification process shall be completed and the results reported to the DoDEA designated POC by email within fifteen (15) days after reaching tentative agreement on the successor NA. If FEA does not notify DoDEA of the results of the ratification process within fifteen (15) days after reaching tentative agreement, the tentative agreement shall be considered ratified. If the agreement is ratified or considered ratified, it shall be signed by the parties within twenty (20) days after reaching tentative agreement on the successor NA and thereafter submitted for Agency Head Review.

If FEA notifies DoDEA that the tentative successor NA failed ratification, the parties will enter into and complete all renegotiations within thirty (30) calendar days after non- ratification. If agreement is reached, it will be signed by the parties within five (5) days and thereafter submitted for Agency Head Review. If agreement is not reached, no later than five (5) days after the close of the renegotiations period, the parties will either jointly or individually petition the FMCS or FLRA as appropriate to resolve any remaining dispute(s).

Provisions included in the agreement by Order of the FSIP are not subject to ratification by Association members.

B. Union Proposal

Once the parties have reached a tentative agreement on all articles of the new Negotiated Agreement, the agreement will be submitted to the Association's membership for a ratification vote prior to the Agency Head Review. The Agency will provide the Association with an electronic copy

of the negotiated agreement for editorial review, which will be completed within ten (10) days.

Following the conclusion of the editorial review and agreement on any disputed text, management will present a final draft of the agreement to the Association in PDF form and the Association shall submit the agreement to a ratification vote of its membership.

The Association will conduct the ratification vote electronically within thirty (30) days after completion of the editorial review and presentation of a final draft agreement. The Association will notify management of the results within seven (7) days after the completion of the ratification vote- (excluding any holidays or school recess periods (summer, winter, spring) which shall extend the time for ratification and/or notice to management).

If the agreement is ratified by the Association's membership, the parties will execute it within fourteen (14) days from the date of notice by the Association to management of the results of the ratification vote.

If the agreement is not ratified by the Association's membership, the parties will enter into negotiations within thirty (30) calendar days from the date of notice by the Association to management of the results of the ratification vote. Should the 30-day period occur during a holiday or school recess period (summer, winter, spring), negotiations will commence upon resumption of the school year. The bargaining will be in accordance with these ground rules.

C. Management Position

Management's proposal allows for ratification but requires it to be completed, and for Management to be notified, within 15 days after the parties reach tentative agreement on a successor CBA. The parties will then have 30 days to bargain if anything is rejected in the ratification process and, if any disagreement continues to remain, the parties will seek assistance from the Panel within 5 days. Finally, the Agency proposes that any language imposed by the Panel will not be the subject of a ratification vote. The Agency's proposals are designed to ensure that the ratification process proceeds in a timely and orderly fashion. Otherwise, Management believes that the Union will delay completion of the bargaining process. The Agency's proposal prohibiting ratification for Panel imposed language is "consistent" with "established interpretation" of the Statute on this topic.[13] The Union's proposed language establishing a longer period for member ratification voting should be rejected as lengthy and cumbersome. And, adopting the Union's proposal would allow for numerous

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[13] Citing *Dep't of the Air Force and AFGE, Council 214*, 1998 WL 840917 (unpublished FLRA Administrative Law Judge decision) (*Air Force*).

bargaining opportunities following a failure to ratify; such a scenario could needlessly delay completion of negotiations.

D. Union Position

The Union argues that its proposal provides an efficient and common sense approach to ratification that should be adopted. Its proposal builds in a 10-day editorial review process so that the parties can ensure that the tentative agreement is accurate before it is sent to members for voting purposes. Because members are located overseas, they will have to procure a secure electronic voting system. Such procurement, which is necessary to protect privacy, may take some time. And, although the Union is willing to engage in negotiations within 30 days should ratification fail, it is not willing to agree to a 30-day limitation on negotiations. This number is "random" and does not appear to be supported by facts or evidence. Finally, all recess periods and holidays are excluded from the Union's time windows in order to ensure maximum availability.

E. Conclusion

The Panel orders adoption of a modified version of the Agency's proposal. The main area of disagreement is the amount of review time that will be afforded to employees to engage in the ratification process. The Union maintains it needs 30 days, excluding holidays and recess periods, in order to review the agreement and to establish an electronic voting system. However, the Union offers little in the way of explanation as to how the establishment of such a system correlates to a 30-day plus period. Nor, does the Union explain why it must wait until bargaining is complete to establish the voting system. The Agency offers 15 days following tentative agreement, which is twice the time imposed in other decisions by this Panel for employees located entirely within the continental United States.[14] Thus, this timeframe is reasonable.

The Panel notes that the Agency omits reference to the Panel process. Thus, we shall include such language. Finally, the Agency's language concerning non-ratification of Panel imposed language is rejected. The Agency claims that this language enshrines established FLRA precedent. However, the only authority it offers is a non-published FLRA ALJ decision that was ultimately dismissed by the Authority because the parties reached a settlement. Thus, its precedential value is questionable. Indeed, the Panel is unaware of any binding FLRA decisions that actually capture Management's position. Thus, the Agency's language on this topic should be dropped. Accordingly, the following language should be imposed:

> If FEA elects to submit the tentative successor NA for ratification, the ratification process shall be completed and the results reported to the DoDEA designated POC by email within fifteen (15) days after reaching

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[14] *See OPM and AFGE, Local 12*, 18 FSIP 036 (August 2018) (imposing ratification language that granted employees 7 days to review).

tentative agreement on the successor NA. If FEA does not notify DoDEA of the results of the ratification process within fifteen (15) days after reaching tentative agreement, the tentative agreement shall be considered ratified. If the agreement is ratified or considered ratified, it shall be signed by the parties within twenty (20) days after reaching tentative agreement on the successor NA and thereafter submitted for Agency Head Review.

If FEA notifies DoDEA that the tentative successor NA failed ratification, the parties will enter into and complete all renegotiations within thirty (30) calendar days after non- ratification. If agreement is reached, it will be signed by the parties within five (5) days and thereafter submitted for Agency Head Review. If agreement is not reached, no later than five (5) days after the close of the renegotiations period, the parties will either jointly or individually petition the FMCS, **FSIP,** or FLRA as appropriate to resolve any remaining dispute(s).

12. Section 31-Agency Head Review

A. Management Proposal

The agency head will have thirty (30) days, in accordance with 5 U.S.C. 7114(c), from the date the parties sign and execute the successor NA in which to review the proposed agreement. In the event that any portion of the agreement is disapproved through the Agency Head Review process, the Association retains all rights provided by law and may elect to renegotiate or file an appropriate petition with the FLRA.

If bargaining is chosen, FEA must notify the DODEA designated POC by email within fifteen (15) days after the receipt of the results of the Agency Head Review. The parties will enter into and complete all renegotiations within forty-five (45) days after notification of disapproval through the Agency Head Review process. If complete agreement is reached, it will be signed by the parties within five (5) days and thereafter submitted for Agency Head Review.

If a complete successor NA has not been reached within forty-five (45) days after notification of disapproval of Agency Head Review, the FMCS will provide mediation assistance over a seven (7) day period beginning with the first workday after the conclusion of the forty-five (45) day renegotiation period.

If FEA elects to pursue any negotiability issues to the FLRA, those will be severed and dealt with in accordance with section 28 above.

B. Union Proposal

The agency head will have thirty (30) days, in accordance with 5 U.S.C. 7114(c), from the date the parties sign and execute the successor negotiated agreement in which to review the agreement. In the event that

any portion of the agreement is disapproved through the Agency Head Review process, the Association retains all rights provided by law and may elect to renegotiate or file an appropriate petition with the FLRA.

If bargaining is chosen, the Association must notify the DoDEA POC by email within fifteen (15) days after receipt of the results of the Agency Head Review. The bargaining will be in accordance with these ground rules.

If complete agreement is reached, it will be subject to ratification in accordance with these ground rules, and if ratified, signed by the parties within fourteen (14) days and thereafter submitted for Agency Head Review.

C. Management Position

The Agency's proposal reiterates the statutory language for Agency head review described in 5 U.S.C. §7114(c),[15] but it also establishes a window of under 60 days to complete bargaining and mediation should the Agency reject any portion of the parties' CBA. It also requires the parties to resubmit to Agency review within 5 days should the parties reach an agreement. Further, the parties must rely upon Management's proposal for the negotiability process described in Section 28 above. The intent of Management's proposal is to ensure that bargaining occurs in an expeditious fashion. By contrast, the Union's proposal allows negotiations to begin from the ground level following Agency head review. Such a course of action would needlessly delay completion of negotiations. Finally, contrary to the Union's claims, nothing in the Agency's proposal alters the framework of the FMCS or the Panel.

D. Union Position

The Union's proposal is similar to Management's but it offers fewer timeframes. Additionally, the Union objects to Management's proposed timeframe for mediation as it believes that it runs afoul of FMCS's authority under 5 U.S.C. §7119(a). The Union also objects to the extent that the Agency's language can be read as prohibiting parties from utilizing the Panel process. Either party has the right to seek Panel assistance, so Management cannot propose taking this right away. The Union complains that the Agency's proposal has "too many" steps and improperly relies upon Article 53 of the CBA without any "direct" reference to it.

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[15] This language grants the head of Federal agencies the authority to reject agreed to contract language if, within a 30-day review period, the head concludes that it is consistent with the Statute and "any other applicable law, rule or regulation." 5 U.S.C. §7114(c)(2).

E. Conclusion

The Panel will impose a modified version of Management's proposal. The Agency's proposal offers more roadmaps for a defined process that will ensure negotiations are completed in a timely manner. Thus, its language is more appropriate. The Agency's language concerning FMCS governs the parties' conduct at mediation rather than FMCS's authority. However, the Union is correct to note that the Agency's language does not reference the Panel process. Thus, language should be added to the end of the Agency's proposal that states as follows: "**Nothing in the language of this Section impacts the ability of either party to seek assistance from the Federal Service Impasses Panel.**"

ORDER

Pursuant to the authority vested in 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 parties to adopt the following to resolve the impasse:

Section 4-Agency proposal.

Section 9-Agency proposal.

Section 11-Modified Agency proposal.

Section 12-Agency proposal.

Section 14-Union proposal.

Section 16-Agency proposal.

Section 20-Modified Agency proposal.

Section 21-Modified Agency proposal.

Section 28-Agency proposal.

Section 29-Modified Agency proposal.

Section 30-Modified Agency proposal.

Section 31-Modified Agency proposal.

By direction of the Panel.

Mark A. Carter
FSIP Chairman

February 19, 2019
Washington, D.C.