United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

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| In the Matter of<br><br>UNITED STATES DEPARTMENT OF DEFENSE,<br>DEFENSE LOGISTICS AGENCY<br><br>And<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,<br>DEFENSE LOGISTICS AGENCY COUNCIL OF AFGE LOCALS | Case No. 18 FSIP 080 |

## DECISION AND ORDER

## BACKGROUND

This request for assistance concerning the implementation of Department of Defense (DoD) travel regulations was filed by the American Federation of Government Employees (AFGE), Defense Logistics Agency (DLA) Council of AFGE Locals (Union) on August 23, 2018. The U.S. Department of Defense, Defense Logistics Agency (Agency or Management) manages the global supply chain – from raw materials to end-user to disposition – for the Army, Navy, Air Force, Marine Corps, Coast Guard, 10 combatant commands, other Federal agencies, and partner and allied nations. The Agency also supplies 86% of the military's spare parts and nearly 100% of fuel and troop support consumables, manages the reutilization of military equipment, provides catalogs and other logistics information products, and offers document automation and production services to a host of military and Federal agencies. The Union represents approximately 17,000 bargaining unit employees throughout the country. The parties are governed by a collective bargaining agreement (CBA) that expires in May 2019. As of the issuance of this decision, the parties are currently bargaining over ground rules for negotiating a successor CBA.

Four years ago, the DoD decided to alter its Joint Travel Regulations (Travel Regulations) to disallow certain incidental expenses for civilian employees on official travel. The decision was to go into effect on October 1, 2014. However, the Agency decided not to implement it for bargaining unit employees. Thus, there was no alteration for the years to follow until January 2018. It was at this point that the Agency informed the Union that it intended to negotiate over these changes. There were email exchanges over the next several months but no substantial activity until the summer of 2018.

In early June 2018, the Agency provided notice that it was seeking to implement the aforementioned changes. The parties met for 6 hours on June 14, 2018, to bargain but could not reach agreement. Accordingly, on June 21, the Agency informed the Union that it intended to implement its final offer on September 1, 2018. Based on this, the Union filed its request for Panel assistance on August 23. The parties received mediation assistance from the Federal Mediation and Conciliation Services (FMCS) on October 24, 2018, in Case No. 201911350001. The Mediator referred the parties to the Panel because they could not reach agreement after 3 hours of mediation. On November 14, 2018, the Panel asserted jurisdiction over the Union's request for assistance and ordered the parties to submit Written Submissions to the Panel on all remaining issues. The parties did so.

## PROPOSALS AND POSITION OF THE PARTIES

### A. Union Proposals and Initial Argument

The Union requests the following:

- ATM service/advance fees will be allowed and claimed under "Other Expenses." Or the Employer will provide advance funds so that an employee going TDY will not have to spend their own funds on incidentals such as ATM fees.

- When daily incidental expenses exceed $5.00 per day for, taxi tips, baggage tips, (regardless of location), and transportation tips the Authorizing Official shall approve those expenses for those dates.

- The employer will provide a list of ATM locations that provide for no or low fee cash advances and service charges for the area employees TDY is to occur.

- Laundry/dry cleaning service fees for employees that are TDY for 4 days or more will be allowed and claimed under "Other Expenses." When .temporary living accommodations do not have laundry facilities, the Authorizing Official shall approve those expenses.

- Personal phone calls by employees while in a travel status of up to 20 minutes per day are considered in the Government's best interest and are authorized for reimbursement when a Government Calling Call or mobile device is not provided to the employee. The Authorizing Official shall approve those expenses.

- In the event that a question arises about a claimed employee expense, the employee will be allowed to self-certify the expense. Such self-certification will contain the amount of the expense and the purpose for the expense, as well as

the identification of the vendor if known to the employee. Authorizing Official shall approve those self-certify expenses.

In its initial submission to the Panel, the Union argues that the parties have an established past practice allowing employees to recoup the above expenses. On the topic of past practices, Article 2, Section 5 of the parties' CBA states:

> Any prior benefits, practices and/or memoranda of understanding which were in effect on the effective date of this Agreement at any level (national, council, and/or local), shall remain in effect unless the language conflicts with the new Master Labor Agreement or in accordance with 5 U.S.C. Chapter 71. Local Agreements must have been approved by the parties at the national level in accordance with Article 38 of this agreement.

It is the position of the Union that the above language establishes that the Agency is prohibited from attempting to alter any existing past practices until the parties negotiate a new CBA. The Union was interested in negotiating in 2014 when Management initially suggested implementing changes in the DoD travel regulations, but the Agency declined to negotiate until 2018. And, even then, the Union maintains that the Agency refused to bargain substantively. The existing "past practice" has worked effectively for a number of years; there is no pending urgency to change it now.

Additionally, the Union notes that the CBA requires the parties to be bound by all applicable laws and Government wide regulations. The travel regulations in dispute are not such regulations, however. The Union further notes that the CBA requires all travel expenses to be in accordance with the CBA (the Union did not, however, provide this language).

## B. Agency Proposals and Argument

In contrast to the Union, the Agency offers only two proposals:

- The Agency will implement the provisions of the DoD Joint Travel Regulation on September 1, 2018.

- The agency will develop a communication plan so that employees and managers know the requirements of the initiative. The communication plan will start on July 30, 2018.

The Agency is obligated to follow DoD's travel regulations. With respect to DoD employees on official travel, the General Services Administration establishes per diem rates for continental employees and DoD sets such rates for non-foreign territory under the coverage of the United States. Per diem is separate from incidental expenses. The latter category covers items such as tips, laundry, credit card fees, etc.

On May 12, 2012, the Office of Management and Budget (OMB) issued Memorandum 12-12, "Promoting Efficient Spending to Support Agency Operations" (OMB Memo). The memo instructed Federal Agencies to reduce overall travel costs. The OMB Memo also specifically directed DoD to review its travel regulations to ensure employees received per diem reimbursements "only to the extent costs were incurred and not reimbursed by another party."

Relying upon the above guidance, DoD made several changes in 2014 to per diem rates, establishing different rates based upon the lengths of an employee's travel. DoD subsumed incidental expenses into these altered rates. Subsequently, Congress eliminated these staggered per diem rates in 2018 through the John S. McCain National Defense Authorization Act for Fiscal Year 2019. However, it did not eliminate DoD's decision to absorb incidental expenses into per diem rates. This practice continues. Accordingly, it is the position of the Agency that per diem rates largely account for the incidental expenses in dispute.

Based on the foregoing, the Agency maintains its proposal should be adopted. The proposal is effective and efficient, and it will result in savings to both DoD and the Agency because it does not create separate categories of incidental expenses as the Union requests. Such a course of action is consistent with the OMB Memo. Management also intends to create a communication plan to communicate the effects of the change to employees. The Agency offers specific objections to each of the Union's proposals:

- The ATM fee proposal should be disallowed because the Travel and Transportation Reform Act of 1998 (Reform Act) mandates use of Government Travel Cards for official travel, thereby eliminating the need for travelers to use ATMs. Additionally, less than 14% of DoD travelers claim, on average, ATM fees of 76 cents per day.

- Taxi tips are covered in per diem rates, and amount to less than 86 cents per day for .04% of DoD travelers. Per diem rates should also cover baggage tips, which are a "personal choice."

- With respect to the Union's request concerning a list of ATM locations, Management maintains it has no control over the location of ATMs. Travelers may always contact the credit card company that issued their travel card for such a list.

- On the topic of laundry expenses, 41 C.F.R. §301-11.31 clarifies that laundry and dry cleaning expenses have not been removed from DoD per diem rates. The regulation also prohibits separate requests for such expenses. Current per diem rate establishes $5 per day for these expenses alone, and Management believes that figure is sufficient to meet an employee's needs.

- The Agency rejects the Union's proposal permitting reimbursement for up to 20 minutes of personal phone calls when they are on travel status. 41 C.F.R. §301-12.1 clarifies that government resources should be used for government purposes. Accordingly, personal calls are not a part of travel expenses. Moreover, given the prevalence of personal cell phones, the Union's proposal is unnecessary.

- Finally, Management cannot agree to the Union's proposal permitting an employee to "self-certify" claimed expenses.[1] Under 41 C.F.R. §301-11.25, an employees must provide receipts or a reasonable explanation for expenses over $75; there is no authority to "self-certify." And even setting aside this regulation, an employee is not required to provide receipts for expenses under $75.

## C. Rebuttal Arguments and Potential Jurisdictional Issues

After the parties provided their initial written submissions, the Panel contacted the parties and informed them that some of the arguments discussed above appeared to set forth legal arguments that the Panel lacked jurisdiction to resolve. The parties were reminded that they were informed during the Panel's investigation of this dispute that the Panel is without authority to resolve such controversies. Accordingly, the Panel informed the parties that they should address, in their rebuttal statements, whether these arguments impacted the Panel's ability to resolve this matter. Alternatively, the Panel informed the parties that they could withdraw those arguments to focus on the merits of their respective positions. The parties submitted their rebuttal statements and addressed these issues as well as the opposing parties' initial arguments.

### I. Union Rebuttal

In response to the Agency's initial arguments, the Union maintains that the Agency's reliance on the OMB Memo is disingenuous because it is silent on the topic of incidental travel expenses. Moreover, the memo called for compliance long ago. If compliance was truly pressing, the Agency should have resolved this dispute years ago. Further, employees have claimed incidental expenses for the past 4 to 6 years with no seeming impact on the Agency's budget. The Agency's claims, therefore, are overstated.

Additionally, in its rebuttal statement, the Union cites language in the parties' CBA from "Section 3," that addresses "Bargaining on Matters Included in the Agreement." According to the Union, this section further explains why the Agency should wait for future bargaining opportunities. The Union claims this language states:

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[1] The Agency also challenged another Union proposal concerning per diem rates that the Union initially raised during the bargaining process. However, the Union has since withdrawn that proposal.

> If a future law mandates a change to this Agreement, the Employer will promptly notify the Council President or his/her designee in writing of the proposed specific change. The Council shall, if it desires to negotiate any negotiable aspects of the mandatory subjects of bargaining affected by the change, notify the Employer in writing within 10 work days of receipt of the notification from the Employer. Upon request from the President of the Council to negotiate, the parties shall initiate negotiations using the procedures in Section 1 above. Neither the Employer nor the Council will be permitted to propose changes unrelated to the mandate of the law.
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> However, for purposes of carrying out the intent of this Section, the Employer and the Council mutually recognize and agree that their respective proposals be modified during the course of the negotiations to permit realistic good faith bargaining of all aspects of the negotiable subject matter, including aspects not anticipated when the written proposals were exchanged. The parties recognize that this Section may necessitate additional bargaining in Local Agreements.
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> The Employer will not implement or enforce any discretionary aspect of such changes that are mandatory subjects of bargaining until bargaining has been completed (including a decision by the Federal Service Impasses Panel or Federal Labor Relations Authority, as appropriate).

On the topic of the Panel's concerns about jurisdiction, the Union maintains that the Panel has the authority to resolve this dispute over the parties' CBA. Although the Panel cannot resolve duty to bargain issues, it can rely upon prior decisions involving "substantively identical" proposals. According to the Union, the FLRA has long held that parties are not required to bargain over matters that are covered by an existing agreement. The parties' CBA does not require negotiations over existing past practices, and the parties have such a practice for recovering the Union's proposed costs. Thus, there is no barrier to the Panel resolving the Union's claim that "there is no obligation to negotiate something in the [CBA] if the [CBA] has not expired." The Agency can, and should, wait until the CBA has expired before it requests to bargain this topic.

II. Agency Rebuttal

As to the Union's CBA claims, the Agency asserts that the Union's reliance on Article 2, Section 5 of the CBA is misplaced. Even if the Union's proposals do cover a past practice, the CBA requires that Management provide only notice and an opportunity to bargain before it seeks to change that practice. The Agency is unaware of any precedent requiring parties to adhere to a past practice until a CBA expires. To the contrary, FLRA precedent states that conditions of employment fashioned by a past practice "may not be altered by either party in the absence of agreement or impasse

following good faith negotiations."[2] Further, precedent requires only that an Agency fulfill its bargaining obligations before it changes a past practice.[3] The Agency provided the Union with sufficient notice and an opportunity to bargain when it sought to alter a past practice, and these actions are all that are required under Authority precedent. There is ample authority to permit the Panel to proceed with resolving the merits of this dispute. And, the Union's claim that the Agency never substantively bargained is specious. Management has consistently taken the position that the alterations to the travel regulations should be adopted in full.

In regards to the Panel's concerns about the various legal authorities cited in the Agency's initial submission, Management contends that these authorities were not offered in an attempt to deprive the Panel of jurisdiction. The Agency's citation to the Reform Act was done to demonstrate that, as a practical matter, the Union's requested ATM fee proposal is unnecessary. And, the Agency's citations to various portions of the CFR were similarly offered to demonstrate the redundancy of the Union's proposals. Stated differently, the Agency cited legal authorities for practical purposes rather than negotiability purposes. Thus, the Panel should consider these arguments.

## D. CONCLUSION

The Panel will dismiss jurisdiction over this dispute because the Union has raised colorable questions concerning its obligation to bargain over the Agency's proposed changes. Despite filing this case, and requesting the Panel take jurisdiction over it, the Union now argues primarily to the Panel that its proposals should be adopted because the Agency's proposed course of action is inconsistent with Article 2, Section 5 of the parties' CBA.[4] As noted above, the relevant language is as follows:

> Any prior benefits, practices and/or memoranda of understanding which were in effect on the effective date of this Agreement at any level (national, council, and/or local), shall remain in effect unless the language conflicts with the new Master Labor Agreement or in accordance with 5 U.S.C. Chapter 71.

The Union interprets this language to mean that the Agency has *no* contractual authority to change an existing past practice until the parties re-open their CBA for successor negotiations. And, the Union maintains that, for years, there has been a past practice to grant employees the incidental expenses it now formally requests through its proposals. Accordingly, the Agency has no contractual basis to put forward its proffered proposals and, as such, the Panel should adopt the Union's offers to resolve this

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[2] Citing *DHS, Bureau of Customs and Border Protection and NTEU*, 59 FLRA 910 (2004).

[3] Citing *U.S. Dep't of Agriculture, food Safety and Inspection Service and AFGE, National Joint Council of Food Inspection Locals*, 62 FLRA 364 (2002).

[4] As alluded to above, the Union did not raise these arguments during the Panel's initial investigation.

dispute. These arguments are premised on the Panel accepting the Union's interpretation of the aforementioned contract language. However, the Panel does not believe that the language is so clear as to make the Union's position an obvious one. Section 5 states "practices" remain in effect unless there is a conflict with a new CBA or "in accordance" with the Statute.[5] This dispute obviously does not involve a new agreement, and it is not clear what the phrase "in accordance" permits under these circumstances. The foregoing ambiguity does not lend itself to a clear Panel resolution. Delving further into this language would require the Panel to interpret the CBA's language, but the Panel lacks the authority to take that action.

In response to this impediment, the Union argues that the Panel has the authority to apply existing precedent involving "substantively identical" proposals. And, the Union claims ample FLRA decisions establish that a party is not required to negotiate over a matter that is covered by a contract. Although the Union's assessment of FLRA precedent could be accurate, the Union did not provide any decisions involving the CBA language in dispute here, i.e., "substantively identical proposals." Rather, the Union relies upon decisions that discuss general principals of law. Such authority does not rise to what is required under *Commander, Carswell, Carswell AFB, Tx. and AFGE, Local 1364*, 31 FLRA 620 (1988). In these circumstances, then, it would not be appropriate for the Panel to opine on the meaning of Article 2, Section 5.[6]

The Agency's arguments concerning the CBA do not alter the Panel's decision to decline jurisdiction. Management contends that the language requires only that the Agency provide notice and an opportunity to bargain prior to changing a past practice. However, the language does not appear clear on this point and, as such, the Panel would once again be called upon to make an impermissible contract interpretation. The Agency also offers FLRA authority holding that past practices can be altered by agreement or the parties reaching impasse after good faith negotiations. However, none of the Agency's offered precedent discusses the unique situation in which one party claims that there is existing contract language that prohibits alteration of a past practice until term negotiations arise. Accordingly, the Agency's arguments do not overcome the potential contractual bar to retention of Panel jurisdiction.

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5 The Panel also notes that the Union's claim of the existence of a past practice raises another issue because, under FLRA precedent, it is the role of the FLRA and arbitrators to assess whether a past practice exists by examining all the facts and evidence in the record. *See, e.g., Passport Services and NFFE, Local 1998*, 70 FLRA 918, 920 (2018). This precedent adds yet another wrinkle to the Panel's retention of jurisdiction.

6 Given this conclusion, the Panel does not believe it is necessary to review the Union's reliance upon its cited "Section 3."

## ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby dismisses jurisdiction over this dispute.

Mark A. Carter
FSIP Chairman

April 10, 2019
Washington, D.C.