United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of UNITED STATES DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 118	Case No. 19 FSIP 008

DECISION AND ORDER

This case, filed by the U.S. Department of Homeland Security, Immigration and Customs Enforcement (Agency) on November 1, 2018, concerns a dispute over ground rules for negotiating a successor collective bargaining agreement (CBA). The dispute was filed pursuant to Section 7119 of the Federal Service Labor-Management Relations Statute (Statute).

BARGAINING AND PROCEDURAL HISTORY

The mission of the Agency is to protect America from cross-border crime and illegal immigration that may threaten national security and public safety. The American Federation of Government Employees, Council 118 (Union) represents a bargaining unit of approximately 6,300 non-professional employees who work at the Agency. The majority of the bargaining unit consists of Law Enforcement Officers. The parties are covered by a CBA that was implemented in 2000 and remains in effect until a new successor agreement is reached.

The parties have been negotiating over a successor CBA since 2007, using various tentatively agreed-upon ground rules agreements. The parties initiated negotiations over the most recent iteration of their ground rules to a successor CBA in

June 2018. The parties met for three all-day negotiation sessions on June 27, June 28, and June 29, 2018. The parties engaged in mediation on September 18, September 19, September 21, October 17, and October 19, 2018, with the assistance of the Federal Mediation and Conciliation Service (FMCS). The parties also exchanged proposals via email throughout this period. The parties were unable to resolve their dispute. On November 1, 2018, the Agency filed the instant request for Panel assistance.

On February 13, 2019, the Panel asserted jurisdiction over the Agency's request for assistance and directed the parties to submit all remaining disputed issues to FMCS, with a Mediator to be appointed by FMCS, for a period of 30 days. The Panel further informed the parties that, should any issues remain unresolved following mediation, the parties would be required to submit written submissions on every remaining disputed issue along with their final offers. FMCS appointed Regional Director Scott Blake to this matter on February 21, 2019. He scheduled four weeks of mediation, starting February 26 and ending March 22, 2019. On March 22, 2019, Mediator Blake referred the matter back to the Panel.

On April 2, 2019, the Panel ordered the parties to submit their final written offers and written positions on all of the remaining issues by April 12, 2019. The Panel advised the parties that it would then resolve the dispute by utilizing an issue-by-issue selection process, selecting one party's full issue without further modification. Based on the parties' submissions, the Panel will exercise its discretion under the Statute by modifying the proposals in dispute.

PRELIMINARY ISSUES

On April 12, 2019, the Agency timely submitted its written position and final offers. The Union, however, submitted its written position and final offers at 1:53 a.m. on April 13. On April 16, the Agency filed a Motion to Strike the Union's submission. The Agency, in its Motion, alleges that the Union's late filing is due to the Union reviewing the Agency's written positions, so it could revise the Union's arguments submitted to the Panel. The Agency alleges that prejudice has occurred because the Union's delay enabled it to revise its submission. The Agency also argues that the Union introduced a new proposal that the Agency had not seen before. Finally, the Agency contends that the Union did not serve the Agency its written submissions.

On April 24, 2019, the Union filed an Opposition to the Agency's Motion to Strike, refuting that it filed its written submissions late in order to review the Agency's proposals and make modifications to its own proposals. The Union argues that its submission was in response to a document provided by the Agency to the Panel and the Union on March 25, which detailed and explained the Agency's proposals. The Union also asserts that it was not aware that it needed to serve the opposing party its submission, or that its submissions were due at 5:00 p.m. eastern standard time.

The Panel's April 2, 2019-Order required the parties to submit their written positions on the remaining issues by April 12, 2019. 5 CFR § 2471.5(2)(b)(2), Filing and service, states in part, "[t]he party submitting the document shall serve a copy of such request upon all counsel of record or other designated representatives of parties." In accordance with the Panel's regulations, the Union was required to submit a copy of its submission to the Agency. However, because the parties were not provided with an opportunity to submit rebuttal statements and a representative of the Panel served a copy of the Union's submission to the Agency on April 15, the Agency was not prejudiced by the Union's failure to abide by the Panel's regulations. Further, because the Procedural Determination letter did not explicitly state that the parties' submissions were due by 5:00 p.m. eastern standard time, the Panel will consider the Union's submission.

The Agency, on March 25, provided the Panel and the Union a copy of both parties' proposals with a narrative of the Agency's position. The Union's April 13-submission addresses that narrative. The Panel did not find evidence that the Union withheld its submission in order to rebut the Agency's statement of position. The Agency also contends that the Union changed its proposals to language that it has never seen. In *Patent Office Professional Ass'n*, the court noted that it was "indisputable that the parties never bargained over several new proposals included in the revised package that the Union submitted to the [Panel-appointed] interest arbitrator..."[1] Because the parties "never bargained" over the proposals in question, the court concluded Panel jurisdiction was inappropriate. Here, the evidence does not suggest that the Union's proposals are substantively different than what the parties negotiated. Instead, the evidence suggests that the Union's final offers arose from proposals that the parties

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[1] 26 F. 3d 1148, 1153 (D.C. Cir. 1994) (*POPA*).

negotiated. Thus, for the aforementioned reasons, the Panel will consider the Union's written submissions and final offers.

PROPOSALS AND POSITIONS OF THE PARTIES

Due to their length and number, the parties' proposals will not be set forth in the body of this Decision and Order. Rather, they are attached to the Order and will be referenced as appropriate. Modifications to the proposals have been made by the Panel to comport with the Panel's orders to the parties.

1. Preamble

a. Agency's Position

The Agency asserts that the Union's language is unworkable because it invites disputes over adherence, and ignores the Union's use of its dues-money and other resources for negotiations. Second, it seeks to govern the work and conditions of non-bargaining-unit employees, inconsistent with the Statute.[2] Finally, the Agency argues that the Union's language mischaracterizes the context of negotiations and articulates the Union's opposition toward the Agency's proposed ground rules, but has no material impact on the process proposed by the Union.

b. Union's Position

The Union has proposed that the Agency is restricted by the same conditions it places on the Union, in an effort to cut costs, save taxpayer dollars, and create a level playing field. The Union argues that a preamble is by definition a preliminary or preparatory statement; an introduction. The Union believes the statements contained in its preamble are not only relevant, but critically important. The Union argues that in keeping with the spirit and intent of the Executive Orders (EO),[3] the ground rules should identify that the parties have spent years negotiating. The Union's preamble establishes a background, setting the table for what follows within the ground rules, to include the reasons why the Union must be provided an equal opportunity to prepare for bargaining as the Agency has allowed itself.

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[2] The Agency asserts that it is not declaring the Union's proposal non-negotiable, but is arguing on the merits of its proposal.

[3] In the Union's submission, while it made the above argument, the Union did not specifically identify the Executive Orders.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. A preamble is an introductory fact or circumstance, one indicating what is to follow.[4] It should not be a recitation of the parties' bargaining history or an attempt to assert one party's position over prior ground rules. The Agency's proposal best captures the intent of a preamble - it characterizes the parties to the ground rules agreement and it indicates the scope of the agreement. Based on this conclusion, it is unnecessary to address the Agency's legal argument.

2. CBA terms effective during negotiations and interpretation of July 2018 MOA

a. Agency's Position

The Agency argues that there are two major differences between the parties' proposals: 1) the status of the current CBA; and 2) the meaning of the parties' July 8, 2018-Memorandum of Agreement (MOA). As to the first, the Agency states that its proposal incorporates existing law. In contrast, the Agency claims that the Union's language would waive the Agency's right to exit from post-term permissive provisions, or ones that become contrary to new regulations. The Agency states that Federal Labor Relations Authority (FLRA) precedent holds that a proposal to partially or fully waive a statutory right is only permissively negotiable.[5] The Agency asserts that the Panel should respect the Agency's wish for no waiver of its right.[6]

The Agency also asserts that the parties agreed "that nothing in this MOU shall set any precedent for any substantive matters in any provision, article, or section of the collective bargaining agreement that is to be negotiated via the process set forth herein." The Agency notes that the Union's language on the continuation of past practices, existing Memoranda of Understanding, and Local Supplemental Agreements would do just that and must be rejected. Regarding the second point, the Agency asserts that the parties agreed in the July 2018-MOA, that Articles 7, 8, and 9 are extended into the successor CBA's term and did not agree to a Union only reopener.

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4 Merriam-Webster Dictionary.

5 *NTEU*, 59 FLRA 217, 220 (1982).

6 DCAA, 02 FSIP 200 (2003) (a party cannot be forced to waive its statutory bargaining rights).

b. Union's Position

The Union argues that the parties disagree about the term of the July 8, 2018-MOU. The Agency proposes that the MOU stay in effect for the term of the successor CBA; however, the Union states that the MOU indicates that it extends Articles 7, 8, and 9 for a three-year term. The Union asserts that Section 3A of the MOU indicates that placing Articles 7, 8, and 9 into the successor CBA will only happen during contract negotiations. The Union further argues that the Agency's language, which states that the parties' current CBA will remain in effect "with certain exceptions that have been identified by the FLRA.," is unclear because the Agency has not identified the exceptions.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Agency's proposal. The language in issue concerns the effect of the existing CBA on the parties and the July 2018-MOU over Articles 7, 8, and 9. The Agency proposes that the current CBA will generally remain in effect until a successor agreement is reached; however, the Agency conditions that on "certain exceptions that have been identified by the FLRA." According to the Agency, those exceptions are that it has the right to terminate permissive provisions upon the expiration of the CBA.[7] The Agency further argues that it has the right to terminate provisions that are contrary to regulations upon the expiration of the current CBA.[8] The Panel orders that the parties add two sentences to the Agency's proposal, as stated in the attachment, indicating that *either* party has a right to terminate permissive matters in the CBA and that upon the expiration of the agreement, government-wide regulations that conflict with provisions contained in the agreement become enforceable. The Panel also orders the parties to remove the following language, "with certain exceptions that have been identified by the FLRA."

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7 Permissive terms of an expired contract remain in effect, but may be unilaterally terminated by either party upon the expiration of the agreement. *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Danbury, Conn.* 55 FLRA 201, 206 (1999).

8 Provisions in a collective bargaining agreement control over conflicting government-wide regulations for the express term of the agreement during which the government-wide regulation was first prescribed. *U.S. Dep't of Commerce, PTO,* 65 FLRA 817, 819 (2001). Once a government-wide regulation that conflicts with a preexisting agreement is implemented, the government-wide regulation becomes enforceable by operation of law when the agreement expires. *Id.*

The parties agreed to address substantive matters during the successor CBA negotiations; therefore, the Union's language, requiring existing past practices, Memoranda of Understanding, and Local Supplemental Agreements should be addressed during those negotiations. It is unclear to the Panel that the July-2018 MOU allows Articles 7, 8, and 9 to be extended for the term of the successor CBA. As such, the Panel removes that language. To the extent that the parties disagree over the interpretation or application of the MOU, they should pursue that dispute in a more appropriate forum, i.e., a grievance or unfair labor practice (ULP) charge. Finally, the Panel removes the last paragraph of the Agency's proposal because it is unclear to the Panel the intent of that language.

3. Bargaining teams

a. Agency's Position

The Agency proposes up to ten members on each bargaining team and up to eleven members at face-to-face bargaining. The Union proposes a six-member limit. The Agency asserts that it called for six team members in its prior proposal, but moved to ten in a response to a Union request during ground rules negotiations. The Agency asserts that it has no preference between six or ten team members, or objection to the Union's proposal.

b. Union's Position

The Union argues that its proposal of six team members establishes a strong team size while reducing manpower and expense dramatically over the Agency's proposal. Having an equal team size is a standard of traditional bargaining. The Union's proposal establishes that only Chief Negotiators or Alternate Chief Negotiators have the authority to negotiate on behalf of their respective parties. This, the Union states, simply identifies for each party who on the other team has authority to enter into an agreement, table items, identify matters at impasse, etc. The Union argues that its language would not prevent the Agency from setting its own internal process.

c. Conclusion

The Panel orders the parties to adopt the Union's proposal. The parties' main dispute is over the number of members on their bargaining teams. The Agency proposes ten members and up to

eleven, while the Union proposes six. The Union's proposal reduces the resources and costs compared to the Agency's larger team size of ten or eleven. The Union's proposal also ensures that the parties communicate effectively during the negotiations by designating a spokesperson for each team, which the Agency is not opposed to including. As such, the Union's proposal should be adopted.

4. Conducting bargaining (Generally)

a. Agency's Position

The Agency asserts that this proposal refers to a number of issues collateral to holding bargaining sessions. The most significant disagreement between the parties is that the Agency's proposal requires face-to-face negotiations in the Washington, D.C. area, while the Union's requires it in Dallas, Texas. The Agency asserts that under Issue 8 of the ground rules, it is agreeing to allow the Union to be the only team to call face-to-face sessions because it is proposing that each party bear its own travel costs. The Agency contends that this will allow the Union to save travel money if it chooses not to elect to engage in face-to-face negotiations. The Agency further asserts that holding bargaining in the D.C. area will be less disruptive to government operations, i.e., Subject Matter Experts and higher-level officials that might need to be involved who work at Agency headquarters. The Agency also asserts that it has more facilities to accommodate the parties in the D.C. area.

The Agency's proposal calls for a negotiating schedule from 9:00 a.m. to 5:30 p.m., adjustable by mutual agreement, including half-hour unpaid lunch breaks. The Union's proposal sets forth a 9:00 a.m. to 5:00 p.m. schedule, with each member able to take unpaid lunch breaks of 30 to 60 minutes. The Agency asserts that the Union's proposal is problematic because it is unclear whether it would require bargaining beyond 5:00 p.m., with or without pay in violation of 5 CFR § 610.121.[9]

The Agency states that in the past, there were many days during the negotiations that the parties did not meet. Therefore, the Agency's proposal requires at least one meeting during each day of bargaining. Finally, the Agency's proposal requires negotiation-confidentiality from the Union, keeping its communication over the negotiations to its Local Presidents.

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[9] The Agency states that it not asserting that the Union's proposal is non-negotiable, but is arguing on the merits of its proposal.

b. Union's Position

The Union argues that the Agency's proposal requires face-to-face negotiations to occur in one of the nation's most expensive cities, Washington, D.C. If that were to occur, the Union asserts that it will be the only ones traveling and the Union will be the only party paying travel expenses. The Agency has its team members, attorneys, labor relations, and support staff in Washington, D.C. The Union argues that it is far less expensive to hold face-to-face negotiations in Dallas, Texas, where there is an Agency training facility, which has been the practice of the parties to use for negotiations. Finally, the Union believes that it has the right to communicate the status of negotiations with its members. The Union argues that the Agency is attempting to dictate internal Union business and perhaps even limit free speech.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Agency's proposal. In order to ensure effective and focused bargaining, the adoption of the Agency's proposed schedule, starting each day at 9:00 a.m. and concluding at 5:30 p.m., with a half-hour unpaid lunch break, absent mutual agreement to the contrary, will keep the parties focused and fully engaged in negotiations. The Panel also requires, as noted in the attachment, the parties to add language that makes it clear bargaining will take place Monday through Friday, unless mutually agreed to otherwise. Permitting the parties to negotiate face-to-face, at the Union's election, will allow the Union to save resources that it would expend if it were required to negotiate face-to-face. Relatedly, the Agency's proposed location of Washington, D.C. will ensure that Agency facilities are available for both parties. Requiring the parties to meet at least once a day during the negotiations will ensure that the parties engage in a meaningful use of their time. Finally, the Panel orders the parties to remove the limiting language from the Agency's proposal that only allows the Union to communicate about the status of the negotiations with its Local Presidents. The parties have been negotiating ground rules for ten months and the Agency has not argued that the Union's communication with its bargaining-unit has hindered negotiation efforts.

5. Conducting bargaining (Process/Framework)

a. Agency's Position

The Agency states that the parties generally agree on a process of up to four concluding proposals on each article being negotiated, up to two by each party, with the final being a tentative last, best offer. This would be followed by an extended, mediated bargaining session to attempt to bridge any remaining disagreements. However, the Agency notes that there are several significant differences between the Agency's and Union's proposal.

The Agency asserts that the Union conditions any request for assistance on release by a mediator, contrary to the Panel's regulations and precedent, which require no such release.[10] The Agency asserts that this is an attempt to force a waiver of the statutory (and regulatory) right to unilaterally seek the assistance of the Panel via the condition of a "mediator release." The Agency does not agree to such waiver. The Agency also argues that the Union's proposal, which calls for the parties to make "the most minimal changes" to prior proposals and have the "minimum discussion required" is unclear, inviting disputes over whether language is "too far" from a prior draft, or discussions are "taking too long."

b. Union's Position

The Union asserts that release by a mediator is required prior to impasse. The Union states that if that is incorrect, and the language creates a violation of the Panel's regulations then the Panel may remove it. The Union states that it added language to its proposal to ensure that bargaining sessions would not be restricted to question and answer sessions, but to allow the exchange of proposals. Finally, the Union asserts that its language simply states the parties are "committed" to keeping changes at a minimum on proposals that have already been negotiated, in the interest of time and expense.

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10 *See* 5 CFR §§ 2460.2(e) & 2471.1; *PBGC*, 08 FSIP 63 (2008) at *6 (Noting "…there is no requirement that the FMCS or other third-party neutrals 'declare an impasse'" because it is the FSIP that determines "whether an impasse exists."). While the Agency has not declared this proposal to be non-negotiable, it also does not consent to any waivers.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Union's proposal. The parties disagree over the timeframes and the number of proposals to complete negotiations. After nearly a decade of bargaining over a successor agreement and ground rules to that agreement, the Panel requires the parties to modify the Union's bargaining timeline to 180 days, with 30 days of intensive bargaining to follow. This will ensure an effective and focused negotiation process in the best interests of the parties, the Federal government, and the taxpayer.

As the Union points out, bargaining sessions should not be limited to question and answer sessions, but instead allow for the exchange of proposals. Similarly, ground rules proposals must be designed to further, not impede, the bargaining for which the ground rules are proposed. As such, the parties should not be limited in the number of proposals exchanged during the negotiations process. The Panel will modify the Union's language to that effect. The Agency correctly notes there is no requirement that the mediator declare an impasse for the Panel to assert jurisdiction over a dispute. As such, the parties will remove this language. Contrary to the Agency's argument, the parties may modify their last, best offers prior to its submission to the Panel, so long as the parties engaged in bargaining over the proposal(s) in question.[11] The Panel orders the parties to implement language to that effect, which is referenced in the attachment. Finally, the Panel requires the parties remove language from the Union's proposal that invites disagreement over interpretation, as indicated in the attachment.

6. Bargaining specifics as to the proposals

a. Agency's Position

The Agency states that its language refers to the specific process for the parties to exchange bargaining proposals during successor CBA negotiations. The Agency asserts that its proposal creates a concrete, comprehensive, and even-handed scheme. The Union's does not provide a start for negotiations; is unclear on what triggers the "90 day" clock after which negotiations begin; ignores the many Agency-proposed articles "currently with the Union," to include Overtime,

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11 *POPA*, 26 F. 3d 1148, 1153 (D.C. Cir. 1994).

Administratively Uncontrollable Overtime (AUO),[12] Details, Medical Records, Escorts, Construction of the Agreement, and Revisions to the Agreement; proposes a "decimal" format for articles, deviating from the format that was used to negotiate Agreement 2000; and allows for "retaliatory" reopeners. The Agency asserts that its proposal maintains fairness by having both parties' reopeners (if any) due at the same time.

b. Union's Position

The Union argues that its ground rules places exactly the same burdens and timelines on both parties throughout. The one exception being Step 1, outlined in Section 2.1, which attempts to provide the Union with somewhat equal preparation time heading into an expedited/condensed bargaining session. The Union argues that it provided the Agency with a completed CBA the first week of July 2018. If bargaining begins May 24, 2019, as proposed by the Agency, the Union claims that the Agency will have had almost a year to prepare for bargaining, at the same time giving the Union no time to prepare prior to the expedited/condensed bargaining session.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Union's proposal. The parties disagree over the timeframes and the number of proposals to complete negotiations. As explained under Issue 5, the Union's bargaining timelines and procedures, with modification, achieves an expedited and efficient bargaining process. There are four bargaining steps where the parties exchange proposals. In order to achieve the 180-day timeframe to complete negotiations, the Panel requires that each step last up to 45 days.

The Panel requires the parties to modify the advance notice requirement to two weeks, so that the timeframe is uniform no matter what type of bargaining will be conducted, i.e., face-to-face or remote. The Panel also orders the parties to remove the language from the Union's proposal that allows the Agency to call for face-to-face negotiations because the Agency agreed under Issue 8 to allow the Union to be the only party to call face-to-face negotiations. The Panel further requires the parties to remove the reference of travel costs for negotiations because the parties address that under Issue 8. To address the

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[12] AUO is a form of overtime that grants Law Enforcement Officers the ability to earn a certain percentage of their pay for performing irregular and occasional unscheduled duties. 5 U.S.C. § 5545(c)(2).

Agency's concern over what triggers the start of negotiations, the negotiations shall start within 45 days after the execution of the ground rules agreement.

As more fully explained under Issue 12, the parties disagree over the universe of articles that they will negotiate during successor CBA bargaining. It is unclear to the Panel what articles have been tentatively agreed to and which have not. Rather than limit either party's right to what can be negotiated, other than what was already agreed to pursuant to the July 2018-MOU, the Panel will allow each party to present the other with their respective proposals on any article, whether tentatively agreed to or not. The Union's proposal, with modification to remove unnecessary language, allows the parties to do that. Finally, the Panel requires the parties remove the language describing the "decimal" formatting style, since the Panel will adopt the Agency's formatting style under Issue 15.

7. Bargaining specifics as to the concluding mediation session

a. Agency's Position

The Agency asserts that the Union's proposal limits both parties' right to seek assistance from the Panel by imposing the additional requirement to obtain "mediator release." Second, the Agency's proposal requires it to reach out to FMCS in advance of final proposals to expedite the scheduling of the final session. It also requires the parties to cooperate with FMCS; this would help avoid delays. Finally, the Agency's proposal does not allow the parties to unilaterally revise their tentative last, best offers at the mediation session, although it permits such revision by mutual agreement. The Union's, on the other hand, permits such unilateral revisions. In doing so, the Union's proposal undermines the scheme to which the parties have generally agreed, and thus, should be rejected.

b. Union's Position

The Union asserts that both parties propose a mandatory mediator for the final bargaining session, and upon conclusion of that final session, all unresolved matters be submitted to the Panel for impasse. Disagreement seems to be about whether there is a requirement for the mediator to release the parties prior to impasse, and how the process of release is initiated. As addressed above in Issue 5, the Union believes that the

process requires the parties to be released by the mediator at the end of the final session based on the mediator's judgement that the parties are at impasse.

c. Conclusion

The Panel requires the parties to adopt a modified version of the Union's proposal. Both parties agree to essentially 30 days of mediation following the exchange of proposals, but the Union's language more clearly and succinctly spells out the parties use of a mediator during the negotiations. The Panel requires the parties to modify the language to indicate that either party may request the use of a mediator, as opposed to a joint request for mediation. This will prevent a party from arguing against the use of mediation because the request was not jointly made. The Agency's argument over revising last, best offers is addressed under Issue 5. Finally, the Panel orders the parties to remove the language that requires the mediator to release the parties because, as indicated under Issue 5, a release is not required in order for the Panel to assert jurisdiction.

8. Travel costs

a. Agency's Position

The Agency argues that its proposal reflects the Agency's position that each party should bear its own travel costs. In contrast, the Union's proposal requires the Agency to pay travel costs for the six members of the Union's bargaining team. It also allows the Union to unilaterally increase the size of its bargaining team, despite the Union agreeing to a limit of six members.

The Agency asserts the parties have already engaged in dozens of negotiation sessions during the ten years of term bargaining. The Agency claims that Union travel costs for the past seven years, fiscal years 2011 through 2018, were determined to be over one million dollars. The Agency states that this calculation does not include the costs of official time, facilities, Agency travel and time, or costs to FMCS. The Agency further argues that the Union collects dues from its members, and it can expend its funds on travel for negotiations if that is its priority. That said, the Agency does not require the Union to spend money on travel. It allows the Union, and only the Union, to call face-to-face bargaining and thus mandate travel costs.

b. Union's Position

The Union argues that it does not have the money to pay for travel. To make matters worse, the Union states that the Agency's proposal mandates that essentially only the Union travels for face-to-face bargaining to Washington, D.C., one of the most expensive cities in the United States. The Union states that remote bargaining simply does not replace the effectiveness of face-to-face negotiations. For the most part, the Union contends that remote bargaining over ground rules, thus far has not been conducive to reaching a successor agreement. For these reasons, the Union proposes a limited number of Agency funded face-to-face sessions in combination with remote bargaining and email.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. As noted by both parties, bargaining over the current set of ground rules has lasted ten months, while the parties have been negotiating over a successor agreement using various sets of ground rules for nearly a decade. In order to ensure effective and focused bargaining, each party should bear their own travel costs. This will keep the parties motivated to bargain in timely and focused manner.

9. Official Time

a. Agency's Position

The Agency asserts that the Union's proposal contains several provisions that are unlawful and thus unreasonable.[13] Specifically, the Union's proposal calls for the Agency to pay overtime to the Union's team members for hours they spend bargaining on behalf of the Union in an amount equal to any overtime paid to the Agency's bargaining team members for their performance of government work. The Union's proposal also calls for the Union's team members to be on 100 percent official time, but not to have AUO premium pay reduced by that percentage.

The Agency states that the Union's proposal appears unlawful because Union activities do not constitute work for

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[13] The Agency is not declaring the proposal non-negotiable, but instead making an argument on the merits of its proposal.

which overtime can be paid.[14] The Agency argues the FLRA has affirmed that under governing regulations: (1) employees on 100 percent official time cannot be certified for the AUO, and (2) the permissible exclusions from AUO computation are limited to temporary assignment to non-AUO duties, advanced training, or duties directly related to a national emergency declared by the President.[15] The Agency contends that the Union's language would place Union officials on 100% official time for over six months, but require the Agency to pay them for irregular overtime via a premium for which they do not qualify, with no reduction in the pay rate to reflect the actual amount of irregular overtime being worked.

The Agency's proposal presumes its AUO policy governs. It assigns the four existing blocks of 100 percent official time to CBA negotiations, adds two more such blocks, and allows ad hoc official time to cover any additional need. It also allows the 100 percent blocks to be split in half (subject to appropriate scheduling).

b. Union's Position

The Union is attempting to staff its bargaining team with only the four blocks of 100 percent official time that it has, and is requesting official time for two additional team members, for a total of six blocks of 100 percent official time. The Union proposes that the Agency's and Union's bargaining team members be compensated equitably for any overtime hours spent in bargaining. The current Agency practice is that management officials are compensated for all hours worked during bargaining beyond eight hours, while Union officials are not. The Union's proposal provides that Union bargaining team members are permitted to work AUO hours in compliance with law, regulation and policy, and modifies the AUO computation period to allow for this.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over whether the Union's

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14 *SSA, 1164*, 19 FLRA 43 (1985) (performance of union duties outside of workday is not government work for which overtime may be paid). *Warner Robins ALC*, 23 FLRA 270 (1986) (the exception is for union activity whose need comes up during a period when the official was already performing scheduled overtime).

15 *DHS, CBP*, 69 FLRA 579, 582-83 (2016) and *DHS, ICE* 70 FLRA 628, 630 (2018).

bargaining team is entitled to overtime while on 100 percent official time during the negotiations. For an employee to be eligible for AUO, he or she is required to perform substantial amounts of irregular or occasional overtime work.[16] A substantial amount of irregular or occasional work is defined as an average of at least three hours a week of that overtime work that is continual, generally averaging more than once a week.[17] For the agency to properly certify employees as AUO-eligible under Section 550.153(b), there must be a "definite basis" for anticipating that their irregular or occasional overtime work will "continue over an appropriate period with a duration and frequency sufficient to meet the minimum requirements," including "at least an average of three hours of AUO per week."[18] Here, it is not clear that the Union members will perform any overtime during the time when the parties are negotiating. Accordingly, because the Union has not demonstrated that the employees will perform overtime work over a continual period in accordance with the statutory requirements, the Panel orders the parties to adopt the Agency's proposal.

10. Facilities for the Union during Term Negotiations

a. Agency's Position

The Agency argues that the Union's proposal would undermine the security of the Agency's information systems. The Agency asserts that this is similar to a prior dispute between the Agency and the Union, relating to blocking of access to web-based email services on the Agency's information system. In that case, the Agency asserts the FLRA ruled that the Federal Information Security Management Act does not grant agencies sole and exclusive discretion over information technology (IT) system security configurations.[19] Nevertheless, the Agency claims the FLRA noted that management's right under 5 U.S.C. § 7106(a) to determine the internal security practices of the agency "undoubtedly includes the right to establish information-security practices."[20] The Agency alleges that the Union's proposal infringes upon that right by allowing the Union to access the government's IT network, but requiring that "no internet restrictions…placed on the use of personal/Union owned laptops." While the Agency is not asserting non-negotiability, it believes that the Union's grant of access to the Agency's IT

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16 5 C.F.R. 550.153(b).
17 5 C.F.R. 550.153(b)(1) and (2).
18 *DHS, CBP*, 69 FLRA 579 (2016).
19 *See DHS, ICE*, 67 FLRA 501, 503-05 (2014).
20 *Id.*

system without being subject to its security protocols, including IT restrictions, shows disregard for the Agency's rights or the associated security risks, and thus, should be rejected.

b. Union's Position

The Agency claims that the Union's proposal raises improper security risks. However, a reading of the Union's proposal shows a clear intent to prevent security violations and comply with Agency security protocols. The language proposed by the Union regarding security protocols has resulted in zero security incidents over the many years the parties have negotiated.

The Union requests that basics such as caucus rooms, bargaining rooms, printers, etc. should be made available to the Union if the parties negotiate remotely. The Union asserts that the Agency cannot propose to bargain remotely, but refuse to provide access to Agency-space and Agency-equipment. Further, the Agency's proposal also requires that Union offices in the area be used for bargaining space, while ignoring the fact that the Union bargaining team, and indeed National Council, are not governing bodies and cannot enter into agreements nationally that override agreements bargained locally over office space.

c. Conclusion

The Panel requires the parties to adopt the Agency's proposal. The Agency's primary objection is that the Union's proposal could cause a security breach of the Agency by providing the Union access to the network without any internet restrictions on the use of personal/Union-owned laptops. The Agency's concern over a breach in its system is understood, since the use of firewalls and other restrictions are put in place to protect against that very reason. The Union has not demonstrated the need for its bargaining members to have unfettered use of personal laptops and unconvincingly argued against the Agency's security measures. Further, the language in the Agency's proposal provides the Union's team, consistent with Article 8 of the current CBA, Facilities and Services, with basically every accommodation that the Union requests if the parties negotiate face-to-face. The Agency's proposal does not require the Union to only use the space and equipment that is provided for other local unions, but indicates that this space and equipment may be used by the Union for bargaining. Therefore, the Panel requires the parties to adopt the Agency's proposal.

11. Delays to term bargaining (and other delay provisions)

a. Agency's Position

The Agency contends that the Union expressed concern over the impact of any national mid-term negotiations on successor CBA negotiations. The Agency asserts that its proposal addresses that concern by allowing the Union to delay all term bargaining deadlines by one-week, or delay all mid-term deadlines associated with the notice (to include any associated grievance) until, at its election, either after the CBA process has been concluded or after it submits its first proposals. Further, the Agency's proposal commits the Agency to being as accommodating as possible by providing official time in addition to that granted for the CBA negotiations.

In contrast, the Agency alleges that the Union's proposal commands the Agency to make all efforts to avoid mid-term changes during the successor CBA negotiations. The Agency claims that this only invites disputes about what is or is not "every reasonable effort" or "exigent circumstances." The Union also requires the Agency to certify that there will be no potential changes prior to starting negotiations, inviting disputes if matters change. The Union's language provides for a delay to CBA negotiations for 3 months or more. The Agency also asserts that the Union's proposal tolls the deadlines for national grievances until after the conclusion of term bargaining. The Agency contends that grievances often need prompt processing to avoid loss of evidence or witnesses; delay can also cause potential liability to the taxpayer to substantially increase.

b. Union's Position

The Union asserts that in the past, as a bargaining tactic, the Agency has concealed planned policy implementation from the Union, implementing in the middle of bargaining sessions. It is a real problem for the Union. That problem becomes far more significant in an expedited bargaining process. The Union proposes that the Agency simply confirm it has no polices it plans to implement during the negotiations. Additionally, the Union concedes management's right to implement policies if it deems necessary, but proposes only to toll negotiation time to ensure the parties have the agreed-upon time to bargain. The Union's proposal does not extend the days the parities will actually spend in contract bargaining, but instead allows the

Agency to implement policies as needed while simultaneously maintaining the limited contract bargaining time.

The Union contends that the Agency requires all Union official time be used toward contract bargaining, leaving no one at the national level to conduct mid-term bargaining. Regarding Agency objections that Union deadlines be tolled for national level grievances until after bargaining is complete, the Union is unable to understand the Agency's objections, as this assures that bargaining continues without delay. The Union is also unable to understand Agency's objections to tolling federal holidays, natural disasters national emergency or government shutdown, as the parties clearly could not work during these time periods, and matters such as a shutdown can last for 30 days or more.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over how they will handle delays to bargaining. The Agency's proposal addresses the Union's concerns regarding the tolling of bargaining due to federal holidays, government closures, and natural disasters. The Agency's proposal also indicates that it may grant additional official time for the Union in order to negotiate mid-term changes. The Union's language that requires the Agency to make "every reasonable effort" and only implement changes under "exigent circumstances," invites disagreement over whether the Agency did in fact make a reasonable effort and whether the circumstance is exigent. Similarly, the language that calls for the Agency to "thoroughly research" whether it intends to implement changes during the negotiations, invites the potential for disagreement over whether the Agency did in fact do that research. The Agency's proposal effectuates the purpose of the Statute.

12. Universe of articles

a. Agency's Position

The Agency asserts that its language takes the articles that have been in negotiations prior to the June/July 2018-session and adjusts that list for: (1) the July 8, 2018-MOA extending Articles 7, 8 and 9; (2) the articles proposed by the Union during that session, and (3) striking the EO 13522-based Labor Management Forums article that was rescinded by EO 13812, Revocation of Executive Order Creating Labor-Management Forums.

The Agency's proposal also contains an Agency offer to withdraw an article that the Union disliked ("Prevention of Fraud, Waste and Abuse") and replace it with an article on assigning employees to duties within their position descriptions, an issue that was once part of the Union's proposals on Seniority.

In contrast, the Agency argues that the Union's language chooses not to define the universe of articles, instead calling for more negotiations over that issue, without timeframe or structure. The Agency argues that the Union's proposal would prejudice the Agency by commanding it to withdraw its proposed article on "Construction of the Agreement" - a waiver of the Agency's right to bargain over a mandatory subject.[21] Similarly, the Agency contends that the Union's language requires several issues be negotiated in separate agreements, after the CBA. This effectively calls for "piecemeal" bargaining, an unfair labor practice.[22]

b. Union's Position

The Agency contends that the Union's proposal, which withdraws from bargaining an Agency article titled, "Construction of Agreement," is an attempt by the Union to dictate Agency proposals. However, the Union asserts that it is simply countering the Agency's proposal in the normal course of bargaining. The Union contends the Agency introduced the article unilaterally late in term negotiations, even though adding new articles that late in the process was only previously done by mutual consent. Because the article was not included in the list of articles agreed to between the parties as inclusive to the CBA in 2014, and because it was not a mutually agreed upon amendment to the original list of 2014, it is not a part of the "universe of articles" agreed-upon by the parties and should not be included in upcoming negotiations between the parties or the contract.

The Union proposes to negotiate a small number of articles after the contract is completed. For example, the Union contends that it does not make sense to negotiate the AUO article now when the matter is before the D.C. Circuit Court,

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21 That article identifies specific principles that must be followed, such as the "covered by" doctrine, "permissive bargaining" and "excessive interference with management rights," as well as others.

22 *IRS*, 64 FLRA 934, 937-38 (2010) (insisting on bargaining over changes to local agreements at the national level, outside the context of term bargaining is piecemeal bargaining and violates the duty to bargain in good faith).

the parties would clearly be better served to wait until there is clarity on the law. The official time article is closely connected to the AUO article, so closely that the two articles are generally negotiated together. Other articles in the Union's list will require interaction with field supervisors and employees, IT specialists, etc., and again the Agency and its employees would be better served by negotiating those articles when time and resources are available.

c. Conclusion

The Panel requires the parties to adopt the Agency's proposal with modification. The parties disagree over the universe of articles that they will bargain during successor CBA negotiations. The Agency argues that the parties have established a list of articles. The Agency asserts that this list accurately portrays the total number articles to be negotiated: the tentatively agreed to articles (27) by the parties that may be reopened; articles last proposed by the Agency (10); articles last proposed by the Union (37); articles the parties remain at impasse over (1); and agreed-upon articles (3). The Union, however, claims that the Agency's list is inaccurate. The Union contends that the parties tentatively reached agreement over 33 articles and the Union last made proposals over 40 articles.

Consistent with the Panel's order under Issue 6, Section 2.0 and 2.1 of the Union's proposal, the Panel requires the parties to identify, during the negotiations, the list of articles the parties agree to without further negotiations, the list of articles the parties wish to negotiate, and counter-proposals for all remaining articles not tentatively agreed to. The Panel requires the parties to remove language from the Agency's proposal where it is inconsistent with other language that the Panel ordered, i.e., application of the July 2018-MOU, which is addressed under Issue 2. Finally, the Panel requires the removal of the "note" under subsection B of the Agency's proposal because the meaning of the language is not clear. Since the Panel is not limiting either parties right to bargain during the successor negotiations, it is unnecessary to address the Agency's legal arguments. Similarly, the Union may address its concerns over what should or should not be bargained during the CBA negotiations.

13. Reopening articles that were once tentatively agreed during prior years' negotiations

a. Agency's Position

The Agency asserts that the question of how to deal with any need to reopen matters that were tentatively agreed to must be resolved to have a workable process. The parties can anticipate a need for some reopeners because: (1) all tentatively agreed to articles were agreed to three or more years ago; (2) the July 8, 2018-MOA extended certain articles and prohibited inconsistent provisions in the successor CBA (and some tentative agreements contain such inconsistencies); (3) some tentative agreements rely upon the rescinded EO 13522, inconsistent with EO 13812, or are otherwise inconsistent with intervening legal or regulatory developments; and (4) tentative agreements may include provisions reflecting past conditions and understandings that are inconsistent with current circumstances, i.e., intervening operational developments.

While there is a need to address the procedural aspects of reopening tentative agreements, that does not justify the waiver of either party's bargaining rights (including withdrawal from TAs). The Agency argues that the Union's proposal limits reopeners; the Agency does not agree to any such waiver of its rights.[23] The Agency also asserts that the Union's proposal expands tentative agreements to unsigned sections of articles that were still actively being negotiated.

In contrast, the Agency states that its language allows both parties to review tentative agreements and reopen any that they deem fit by the same deadline, and with explanation(s) as well as subject to legal challenge. The Agency asserts that it does attempt to accommodate the Union's request that the Agency not reopen a tentative agreement solely because it may reflect permissive bargaining; it delays the Agency's right to withdraw from § 7106(b)(1) items until a "management ratification" period articulated under Issue 18.

b. Union's Position

The Agency's assertion that the Union is attempting to extend tentative agreements, constrain the Agency's ability to reopen articles, and contravene EO 13812 is misstated and misplaced. The Union argues that the Agency's stated reason of

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[23] *ACT, Kentucky*, 70 FLRA 968, 969-970 (2018) (Management may withdraw from § 7106(b)(1) bargaining at any time prior to execution).

reopening tentatively agreed to articles for "good cause" is not consistent with law or regulation. The Union states that the parties' previous agreements must be honored in the spirit of the Statute. While the Union recognizes that under some circumstances changes may be made to tentatively agreed to articles, it should be done by mutual agreement. For the Agency to attempt to unilaterally open tentatively agreed articles, whether permissive or not, the Union argues, demonstrates bad faith bargaining. The Union has stated in its proposal, that articles can be reopened to address changes in law and regulation. The Union has also included language which allows for changes to address "housekeeping" issues.

c. Conclusion

The Panel orders the parties to adopt the Union's proposal with modification. The parties' dispute is over reopening tentatively agreed-upon articles, with the Agency requesting to reopen tentative agreements for good cause and the Union limiting the reopening of tentative agreements made unless by mutual consent and only for specified reasons. Although evidence of bad faith bargaining may be found in the withdrawal of a tentative or previous agreement, that action does not necessarily establish the absence of good faith.[24] Accordingly, where the Union attempts to restrict the Agency's right to reopen tentative agreements made, the Panel requires the parties to remove that language. If the Union is concerned that the Agency is negotiating in bad faith, it is permitted to file an ULP charge. Finally, the Panel requires the parties to remove language from the Union's proposal that invites disagreement, as indicated in the attachment.

14. Scheduling/calling bargaining sessions

a. Agency's Position

The Agency asserts that its language requires some space between bargaining sessions, particularly those involving travel, which avoids the conversion of one- or two- week long sessions to a four-week long session. This reduces the toll on team members, particularly if bargaining requires travel (where both teams have members across the country). Second, the Agency's proposal sets a consistent two-week advanced notice requirement, rather than the Union's one-week notice for remote bargaining and two weeks' notice for face-to-face bargaining.

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[24] *Dept. of Treasury, IRS*, 15 FLRA 829, 845 (1984) (ALJ Decision).

The Agency contends that two weeks better ensures access to telecommunications and operational facilities.

Third, the Agency asserts that the Union's language is internally inconsistent - it states that only the Union can call face-to-face bargaining, but suggests that the Agency can call such sessions. Fourth, the Union's language provides for "question and answer sessions" without defining what such sessions are and how they differ from a bargaining session. Fifth, the Agency's proposal makes it clear that the party calling a bargaining session sets the agenda for it, preempting disputes. Sixth, the Agency's proposal makes provisions for Union unavailability.

b. Union's Position

The Union asserts that it is unable to identify any areas of disagreement between the parties.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal with modification. The Union asserts that it thinks the parties agree over the language in this section; however, the Agency's proposal calls for two weeks' advanced notice prior to any bargaining session, whether face-to-face or remote. The Agency's proposal provides for consistency with respect to the notice requirement by requiring two weeks' advance notice for any session. The Agency's proposal limits negotiations to one- or two-week sessions, which will keep the parties alert and focused on the bargaining process. The Panel, however, requires the parties to add language that permits the extension of the negotiation sessions by mutual agreement, as indicated in the attachment. The Panel also requires the removal of the Agency's language that prescribes how the parties should conduct their bargaining sessions.

15. Formatting of proposals

a. Agency's Position

The Agency asserts that its proposal sets out a relatively simple formatting process, tailored to expedite bargaining. The Agency believes that the Union's extensive and complex formatting system would be a significant impediment to the success of expedited bargaining. More extensive formatting

rules mean more time spent formatting, rather than bargaining or at least drafting.
The Agency argues that the complex formatting conventions of the past played some part in the inefficiency of the parties' bargaining. The Agency's team would determine the substance of what it wanted in a proposal and then spend hours on formatting. The time lost to doing that (as well as to deciphering heavily formatted documents) increased frustration and decreased productivity.

b. Union's Position

The Union proposes using the "decimal outline style," which is generally accepted as not only intuitive but user friendly. The Union argues that the formatting in Agreement 2000 has proven confusing and difficult for both employees and supervisors. In short, the Union contends that using the Agreement 2000 formatting saves no time and uses a formatting style that has already proven itself complicated to its intended audience. While the Agency proposal may be quick and easy, the Union asserts that the technology does not allow for the functionality required for a proper bargaining history, or general use. For example, the Microsoft comment boxes can often only be read in their entirety on a computer and after opening each comment with use of a mouse. Printed documents will not contain all of the comments. Therefore, a "hard copy" of the bargaining history cannot be kept that contains all bargaining notes and history. The Union's proposal provides helpful information and structure that the Agency has not voiced disagreement with, but simply didn't put in its ground rules proposal.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties disagree over the format used to submit their proposals during successor CBA negotiations. The Agency's proposal provides for a formatting style familiar to the parties. The Union has not presented compelling evidence to alter the formatting style that the parties have used for years of negotiations. Should the parties present additional proposals during the negotiations, they will follow the same formatting style as indicated in the attachment under Section IV. Accordingly, the Panel requires the parties to maintain the formatting style of the Agreement 2000 during the successor negotiations.

16. Subject Matter Experts

a. Agency's Position

The Agency asserts that the parties are aligned on how to accommodate either party's perceived need for Subject Matter Experts (SME). The Agency states that this proposal grants either party the ability to request a SME to take time out of their schedules to answer questions and provide information and expertise to either party. The Agency's SME proposal is intertwined with having face-to-face bargaining session occur around Washington, D.C. The Agency asserts that SMEs could participate remotely, but the Agency prefers they are present in-person.

b. Union's Position

The Union states that the parties agree over the language on SMEs.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal with modification. The language in both parties' proposals indicates that they agree over the use of SMEs to provide specific expertise during negotiations. There is one caveat that the Agency brings up: The Agency would like to have SMEs present for in-person negotiations in Washington, D.C. Whether the bargaining occurs remotely or in-person, either party should be permitted to bring their SME(s) to the negotiations. As such, the Panel requires the parties to adopt language that allows for this, as indicated in the attachment.

17. Negotiability

a. Agency's Position

The Agency believes that its proposal is more internally consistent and better tailored to the context of these negotiations in comparison to the Union's. Under the Agency's proposal, negotiability disputes may not delay bargaining; the parties are to negotiate over language even if there is a pending dispute over whether it is negotiable. While atypical, the Agency argues that the concept is not unusual. Agencies often defer non-negotiability issues to Agency Head review, continuing to bargain over the issues. In the event of a non-negotiability declaration, the Agency states that resolution

would occur afterwards, just as with Agency Head disapproval. Given the expedited process, any bargaining over potentially non-negotiable terms would not result in delay.

b. Union's Position

The Agency proposes that the parties waive their right to bring up questions of jurisdiction with the Panel when there is a negotiability dispute. While the expedited process proposed in these ground rules has been proposed in an effort to conclude negotiations in an efficient manner, the Union believes that it is unreasonable to require a party to waive due process. Instead of delaying bargaining or eliminating due process, the Union has proposed that the parties may revise their proposals in order to overcome duty to bargain questions, and expeditiously complete and finalize the agreement.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal with modification. As the Union points out in its argument, the Agency's proposal requires the Union to waive its right to assert a jurisdictional argument before the Panel. Thus, the Panel requires the parties to remove that language from the proposal. Regarding the remaining language in the Agency's proposal, it encourages bargaining, with the goal of trying to reach a mutually agreed-upon resolution of the issues.

18. Ratification

a. Agency's Position

The Agency asserts that the Union's language allows it to have an unlimited amount of time for ratification. If ratification fails, the Union gets 45 days to provide updated proposals. The Agency then must provide updated proposals within the 3-week period prior to when a (3 week long) bargaining session would occur. If it cannot do so, bargaining is delayed by an unclear amount. There is no defined end to such bargaining. Thus, after ten years of term bargaining, the Union's language would add even more (indefinite) delays.

Agency Head review is conducted by the Department, not Immigrations and Customs Enforcement (ICE). Therefore, the Agency's language permits it to have an "ICE management (b)(1) ratification" process before Agency Head review. It is procedurally parallel to Union ratification, with 21 days for

any potential rejections. The ratification would be limited to 5 U.S.C. § 7106(b)(1) matters or similar issues, i.e., excessive interference if there is a concern that the Department might not understand the impact of provisions in the ICE context. If rejection by either party occurs, the Agency's proposal provides an expedited bargaining process to resolve the dispute.

b. Union's Position

The Union asserts that the main dispute regarding ratification is the Agency's new proposal for a management ratification process (prior to Agency Head review), which has a stated purpose of rejecting permissive provisions even if the parties have already agreed to them. The Union argues that despite years of ground rules proposals being on the table, the Agency proposed this process as a method of bypassing its duty to bargain in good faith.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal with modification. The Agency's proposal provides clearer guidance and benchmarks that will ensure ratifications moves in an expedited fashion. The Agency's proposal contains a management review process prior to Agency Head review. The Union contends that this is bad faith bargaining; however, the Union did not provide the Panel any case law supporting its argument. Rather, the proposed process is an approach that will allow the parties to ensure that the agreement is legally sound before it is send to Agency Head review. If the agreement passes the review by local management and ratification by the Union, then it will proceed to the Department for Agency Head review. The Panel orders the parties to remove language from the proposal that does not parallel the Panel's previous orders, as indicated in the attachment.

The Agency also proposes that whatever is not rejected on Agency Head review will go into effect, as more fully explained under Issue 19. The current agreement will remain in effect over provisions that were disapproved on Agency Head review until the resolution of those issues. Section 7114(c) of the Statute and FLRA precedent requires that if the Agency Head determines one or more of the provisions in the agreement is contrary to law, then he or she will disapprove the entire agreement in writing.[25] However, the parties may agree to

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[25] *Dept. of Army, Watervliet Arsenal*, 34 FLRA 98, 105-06 (1989).

implement all portions of their local agreement not specifically disapproved by the agency head.[26] Thus, there is nothing legally improper about the Agency's proposal. As such, the Panel orders the parties to adopt the Agency's proposal.

19. Agency Head review

a. Agency's Position

The Agency states that the dispositive difference between the parties' proposal is that the Agency's utilizes the expedited re-negotiation process for disapproved articles, referencing the process set forth with respect to matters rejected upon ratification under Issue 18. The Agency has agreed that Agency Head review will be utilized on an article-by-article basis, rather than disapproval of the entire agreement, i.e., rejected provisions will immediately trigger bargaining, while non-rejected provisions may be implemented immediately.

b. Union's Position

The Union argues that the parties' first dispute regarding Agency Head review involves the manner in which provisions rejected during Agency Head review are re-negotiated. The Union proposes that such provisions be re-negotiated using the same expedited bargaining process that is outlined in the rest of its ground rules proposal. The Agency proposes that its process used for ratification rejection be used for Agency head rejection, which according to the Union does not make sense. Secondly, the Union proposes that the contract go into effect after it has been negotiated and disputes have been settled. The Agency proposes a piecemeal process in which terms not rejected by the Agency Head go into effect immediately.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' main disagreement is over whether matters rejected on Agency Head review will go into effect, or whether the agreement will go into effect after all disputes have been resolved. Consistent with the Panel's order under Issue 18, whatever is not rejected on Agency Head review will go into effect. Whatever is rejected will utilize the review process outlined under Issue 18, VI of the Agency's proposals.

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[26] *Id.*

The current agreement will remain in effect over provisions that were disproved on Agency Head review until the resolution of those issues. The Union argues that the Agency's process promotes more confusion and litigation by making portions of an agreement effective. However, the Union does not provide support for its argument. Accordingly, the Panel adopts the Agency's language.

20. Effective date of ground rules

a. Agency's Position

The Agency argues that the Union seeks a waiver from the Agency on its substantive rights to bargain, something to which the Agency does not consent. The Agency understands the Union's language to mean that if an article is taken to impasse, but the Panel orders the parties engage in more bargaining, either party can reopen certain aspects of ground rules, but the Union limits those aspects only to the number of Union team members for whom the Agency will pay travel expenses and the duration and frequency of the sessions. The Agency also states that the Union's language does not allow for Agency Head review of the ground rules agreement.

b. Union's Position

The Union asserts that there appears to only be two substantive disagreements in this section. The first being the wording used to describe when the ground rules agreement terminates. The Agency has proposed that the agreement terminates upon the completion of all processes, while the Union believes that it's clearer to state that the agreement terminates when a new contract goes into effect. The second disagreement concerns the Union's proposal for the possibility of reopening bargaining on the number of Union bargaining team members for which the Agency will pay travel and expenses, should the Panel return the parties to the table for additional bargaining.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal with modification. The Panel agrees with the Union that it is clearer to state that the ground rules agreement will terminate when the new CBA takes effect rather than the Agency's proposed language. Thus, the Panel requires the parties to modify the language, as indicated by the Panel in the attachment. The

Agency's proposal explicitly provides for the Statutory right of Agency Head review. Therefore, the parties are ordered to adopt the Agency's language with modification.

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 provisions as stated above and in the attached document.

By direction of the Panel.

Mark A. Carter
Chairman, FSIP

May 30, 2019
Washington, D.C.

Attachment

PANEL'S ORDER

- **1) Preamble**
  - I Preamble
    - A. This Memorandum of Understanding ("MOU") is entered into, by and between the U.S. Immigration and Customs Enforcement (hereinafter referred to as "the Agency" or "ICE") and AFGE Council 118 ICE, American Federation of Government Employees, AFL-CIO (hereinafter referred to as "AFGE," "the Council" or "the Union"). Together, the Agency and the Union shall be referred to as "the Parties."

    - B. This MOU sets forth the full and complete ground rules for the negotiation of a Master National Collective Bargaining Agreement between the Parties, covering all employees in the bargaining unit certified by the Federal Labor Relations Authority ("FLRA") in Case No. WA-RP-05-0029. Neither Party waives any of its statutory rights by entering into this MOU.

- **2) CBA terms in effect during negotiation and interpretation of the July 8, 2018 MOU extending Articles 7, 8, and 9**
  - C. The Parties recognize that, notwithstanding its prior expiration, the provisions of the predecessor master collective bargaining agreement between the U.S. Immigration and Naturalization Service (INS) and the National Immigration and Naturalization Service Council (NINSC) signed on June 8, 2000, also known as Agreement 2000, shall, as modified by a Memorandum of Understanding in response to Case No. WA- RP-05-0029 ("2006 MOU"), generally remain in full force and effect, as if within term, and be applicable upon the Parties in accordance with relevant law until a new Master Agreement

replaces it. Either party has a right to terminate permissive matters in the Agreement 2000. Upon the expiration of the Agreement 2000, applicable law including, government-wide regulations that conflict with provisions contained in the agreement, become enforceable. Further, on July 8, 2018, the Parties entered into a memorandum of agreement to extend Articles 7, 8 and 9 of Agreement 2000, as modified by the 2006 MOU, for a three (3) year term. See Attachment A, July 8, 2018 MOA. These articles shall be incorporated into the successor master agreement.

- **3) Bargaining teams**
  - 3.1 The Parties agree that only the Chief Negotiators or Alternate Chief Negotiators shall have the authority to negotiate on behalf of their respective Party. The Parties agree that each Negotiating Team may include one (1) Chief Negotiator and five (5) additional members.
  - 3.2 The Chief Negotiators will provide leadership and be responsible for the conduct of their members. Each Chief Negotiator is also responsible for the following, with respect to that Party's team:
  - 3.2.1 Providing notice to the other Party of the Negotiating Team members;
  - 3.2.2 Designating the alternate Chief Negotiator and Alternate members of the Negotiating Team;
  - 3.2.3 Calling caucuses;
  - 3.2.4 Determining travel, accommodations and other housekeeping matters.
  - 3.3 The Chief Negotiators are jointly responsible for the following, by mutual agreement:

- 3.3.1 Determining the dates and starting and quitting times for all bargaining sessions (as consistent with this agreement);

- 3.3.2 Providing up to two (2) points of contact to receive counterproposals, emails and other communication covering all required areas of correspondence established in these ground rules;

- 3.3.3 Signing, Initialing, and dating all articles, on which the Parties have reached tentative agreements.

- **4) Conducting bargaining sessions (generally)**
  - III Conducting Bargaining
    - A. As specified below, bargaining sessions shall occur remotely (e.g. using video teleconference (VTC), telephone or other remote communications equipment) and/or via face-to- face negotiations. E-mail is sufficient for all communications. Further, during weeks where a formal bargaining session is not held, the Parties will still have the opportunity to engage through emailing questions and responses and through phone calls between the Chief Negotiators.
    - F. Sessions shall begin at 9:00 a.m. and end at 5:30 p.m., eastern time, Monday through Friday, with a half hour unpaid lunch break, absent mutual agreement to the contrary.
    - G. Face-to-face bargaining sessions shall occur in Agency facilities in the Washington, D.C. metro area, as designated by the Agency Chief Negotiator at least two weeks prior to the session. The fact that a session is face-to-face does not preclude either party from having team members attend remotely.
    - I. No official electronic recording or verbatim transcripts will be made during the negotiations; however, each Party may

designate a note taker to keep notes and records during the sessions. The Parties further agree that they may jointly assign one person to serve in a knowledge capture role to facilitate and document certain discussions and agreements between the Parties.

- J. The Parties shall meet at least once each day of negotiations, although these meetings may consist of as few people as the two Chief Negotiators and one additional person per Party to take notes. Cellular phones or any mobile device (i.e., incoming or outgoing emails, texting or calling) shall be placed on the silent mode during negotiations. A team requesting a caucus will leave the negotiations room to caucus in its respective caucus room. There is no limit on the number of caucuses that may be held, but each Party will make every effort to restrict the number and will provide a reasonable estimate on the anticipated length of the caucus and provide updates if more time is needed.
- M. Joint announcements of a general nature regarding the status of the ongoing negotiations may be released during negotiations. Additionally, the Union is not precluded from discussing the status of the negotiations with its bargaining unit. Neither party shall be precluded from sharing tentatively agreed Articles with its represented constituencies, so long as the Articles are labeled with a watermark indicating the Article is "not yet operative."

- **5) Conducting bargaining (substantively)**
  - 2.0 Bargaining Timelines and Procedures
  - During the bargaining process, each Party will submit at least two (2) sets of counter proposals

during a 180-day period of bargaining, followed by a 30-day intensive mediated session. All unresolved matters will be submitted for impasse upon conclusion of the mediated session.

- 2.5.3 Following the mediated session, all unresolved matters will be submitted for impasse to the FSIP, in accordance with the Panel's regulations. Either Party may, at its election, submit its most recent proposals to the impasse panel, or make changes to its last proposals, prior to submission to the Panel, so long as the parties engaged in bargaining over the proposals in question.
- 2.7.7 During bargaining sessions, the Parties will engage in good faith bargaining in an effort to reach agreement to include the exchange of proposals. Bargaining sessions will not be restricted to question and answer periods or proposal preparation;
- 4.9 The Parties may, by mutual agreement, mark Articles for impasse, when appropriate.

- **6) Bargaining specifics as to the 4 proposals**
  - 2.1 Step 1: Prior to Bargaining (Agency Counter 1 of 2)
    Within 45 days after execution of this agreement, the Agency will provide the Union with the following:

  - 2.1.1 a list of all articles the Agency agrees to without further negotiation;

  - 2.1.2. a list of all articles the Agency intends to continue bargaining;

  - 2.1.3. counter proposals for all tentatively agreed articles which the Agency intends to reopen in accordance with Section 5.0, Reopening Articles; and

- 2.1.4. counter proposals for all remaining articles the Agency intends to continue bargaining.

- 2.1.6 Absent mutual agreement, tentatively agreed articles not reopened by the Agency during Step 1, and all other articles not countered/updated by the Agency, will be deemed accepted by the Agency and will not be reopened by the Agency.

- 2.2 Step 2: Bargaining (Union Counter 1 of 2)
- 2.2.1. During Step 2 of bargaining, the Union has 45 days to complete and submit all of its initial bargaining counter proposals, and counter proposals for all tentatively agreed articles, which the Union intends to reopen in accordance with Section 5.0, Reopening Articles;

- 2.2.2. At its election, the Union will call for face to face bargaining during the 45 days with two (2) weeks advance notice, or remote bargaining by video teleconference, or question and answer sessions under the same conditions, and will provide the dates the session will take place. There is no limit on the number of bargaining sessions or question and answer sessions, only the constraints of advance notice and the 45-day session;

- 2.2.3 The Parties may exchange an unlimited number of counter proposals on any article during any negotiation sessions held during the 90-day period, with the Union reserving its right to submit its final proposals on all articles on the 90th day.

- 2.2.4. Absent mutual agreement, tentatively agreed articles not reopened by the Union during Step 2, and all other articles not countered/updated by the Union, will be deemed

accepted by the Union and will not be reopened by the Union.

- 2.3 Step 3: Bargaining (Agency Counter 2 of 2)
- 2.3.1 During Step 3 of bargaining, the Agency has 45 days to complete and submit all of its final bargaining counter proposals to the Union;

- 2.3.2 At its election, the Agency will call for bargaining with two (2) weeks advance notice, or remote bargaining by video teleconference, or question and answer sessions under the same conditions, and will provide the dates the session will take place. There is no limit on the number of bargaining sessions or question and answer sessions, only the constraints of advance notice and the 45-day session.

- 2.3.3. The Parties may exchange an unlimited number of counter proposals on open articles during any negotiation sessions held during the 45-day period, with the Agency reserving its right to submit its final proposals on all articles on the 45th day.

- 2.4 Step 4: Bargaining (Union Counter 2 of 2)
- 2.4.1 During Step 4 of bargaining, the Union has 45 days to complete and submit all of its final bargaining counter proposals to the Agency;

- 2.4.2 At its election, the Union will call for face to face bargaining with two (2) weeks advance notice, or remote bargaining by video teleconference, or question and answer sessions under the same conditions, and will provide the dates the session will take place. There is no limit on the number of bargaining sessions or question and answer sessions, only the constraints of advance notice and the 45-day session;

- 2.4.3 The Parties may exchange an unlimited number of counter proposals on open articles during any negotiation sessions held during the 45-day period, with the Union reserving its right to submit its final proposals on all articles on the 45th day;

- 2.4.4 In its final response to the Agency, the Union may elect to submit new counters for some articles and for others notify the Agency it is standing with its initial counter submitted in Step 2.

- **7) Bargaining specifics as to concluding mediation session & mediation during bargaining sessions**
  - 2.5 Step 5: Mediated Intensive Bargaining Session
  - 2.5.1 With final proposals submitted by both Parties, the Parties move to mediated intensive bargaining;
  - 2.5.2 During the mediated intensive bargaining session, the Parties will work for 30 days with the assistance of an FMCS Mediator to resolve disputes and reach agreement;
  - 2.5.3 Following the mediated session, all unresolved matters will be submitted for impasse to the FSIP, in accordance with the Panel's regulations. Either Party may, at its election, submit its most recent proposals to the impasse panel, or make changes to its last proposals, prior to submission to the Panel, so long as the parties engaged in bargaining over the proposals in question.
  - 2.6. Use of Mediators
  - 2.6.1 Mediators may be used at the election of either Party throughout the bargaining process. Scheduling conflicts with the FMCS during Steps 1 through 4 will not forestall, delay or halt scheduled negotiations, however the Parties may, if mutually agreeable, adjust dates in order to have the mediator participate;

- 2.6.2 Use of a Mediator is required during the mediated intensive bargaining session. Mediated intensive bargaining may be delayed until a mediator is made available.
- 2.6.3 Either party will jointly request a mediator for Step 5 at least 21 days prior to the end of Step 4.

- **8) Travel costs**
  - [Sec. III] L. Each Party shall bear the travel costs of its own bargaining team members, including any lodging and per diem for any face-to-face bargaining. However, only the Union shall have the power to require that a bargaining session be held face-to-face, rather than remotely. Further, although the Union shall pay its own costs, it may couple the initiation of face-to-face bargaining with an instruction to the Agency to make all reasonable efforts to reserve hotel rooms for the Union's visiting bargaining team members at the government rate.

- **9) Official time**
  - [Sec. III] D. Union bargaining team members who are ICE employees will be on official time during both remote and face-to-face negotiations; management will make appropriate shift adjustments for the Union bargaining team members so bargaining can be coordinated. The Union assigns the existing grants of 100% block official time under Agreement 2000, as amended by the 2006 MOU, to four (4) of its primary bargaining team members. Further, during the period beginning at the start of negotiations and ending thirty (30) days after all articles are either mutually agreed upon or submitted to the FSIP for third party resolution, the Agency will authorize the Union to place two (2) more bargaining team members on 100% block official time for both negotiations and to prepare for those bargaining sessions. The remaining members

of the bargaining team who are ICE employees, will be granted official time via the procedures of Article 7.C.

- 1. If a bargaining team member on 100% block time per Article 7.B must be absent, the Union may utilize an alternate, who will be temporarily assigned the block time for the period of the primary member's absence, provided that the Union gives the Agency at least one week's notice (though preferably more). The Agency may, at its discretion, allow the temporary reassignment of the block time on lesser notice.
- 2. If a member on 100% block time must utilize his or her block time for another purpose authorized in Article 7.A, an alternate may be activated. The alternate will request official time via Article 7.C to cover the hours in which the primary member is attending to other representational functions. However, if the other functions require more than forty (40) hours of official time in any given month, then after that time, where an alternate is needed, block time will be reassigned to the alternate(s), and the primary team member will request official time for the other representational functions pursuant to Article 7.C.
- 3. The Union may, at its election, divide any of the 100% blocks of official time into blocks of 50%, where Management and the Union Official(s) at issue will work together to develop an operationally acceptable, regular and recurring schedule for the employee to either perform work or use the block official time. Absent mutual agreement to the contrary, the Union must give fourteen (14) days' notice prior to any such division of time in order to provide time to develop the operationally acceptable

schedule. Officials on 50% block official time may request additional official time under Article 7.C when there is no way to temporarily adjust the scheduled block time to accommodate the need at issue.

- **10) Facilities for the Union during term negotiations**
  - [Sec. IIII] E. When bargaining sessions occur remotely, Union officials may request access to meeting space for caucusing or communicating with the Agency consistent with the terms of Article 8.B(1) and other equipment consistent with Article 8.I, K and N. This includes the fact that VTC equipment for video communications shall be provided, upon request, if operationally available (where a VTC, rather than telephonic, bargaining session has been arranged by the Parties). Space and equipment that have been provided to a local union pursuant to Article 8.J may be utilized for these purposes, as well. The Agency shall not deny any reasonable request for office space for negotiations purposes absent significant operational need to the contrary or similar considerations.
  - H. At face-to-face sessions, the Agency shall provide the Union with a suitable and private room in close proximity to the bargaining room for purposes of caucusing and internal deliberations at no cost to the Union, as well as customary and routine office equipment, supplies and services, including but not limited to computers with Internet access, telephones, desks and/or tables and chairs, office supplies, color printer and access to at least one photocopier. Access to the ICE Intranet will be limited to cleared ICE employees and contractors. All Agency equipment and unused supplies must be returned to the Agency at the end of the negotiations. Both Parties agree to abide by established DHS/ICE security protocols in accessing or using government equipment including laptops and the

internet. Any issues arising regarding services and/or facilities will be resolved expeditiously by the Chief Negotiators.

- **11) Delays to term bargaining (and other delay provisions)**
  - N. National Mid-term Bargaining During Term Negotiations:
  - All timelines and deadlines throughout the term negotiation process will be tolled for federal holidays.
  - Matters such as government shutdowns, natural disasters, and national emergencies that impact work or bargaining sessions, likewise will toll all timelines and deadlines throughout the term negotiation process.
  - All deadlines included in this agreement may be extended by mutual consent.
  - If the Agency issues an Article 9.A or 9.F notice on or after the Proposal 1 deadline, the Agency will email an electronic copy of the notice to the Union's Chief Negotiator (and any Union bargaining team members designated to receive formal term negotiation communications) alongside formal service of the notice (i.e. via certified mail or hand-delivery). Upon the service of the email, the Union shall have three business days to elect to either:
    - Delay by one week (seven days) all term-negotiation deadlines set forth below (not including the deadline for Proposal 1 / re-openers), per any such notice, or
    - Toll all deadlines related to the 9.A or 9.F notice (e.g. the deadline to submit a demand to bargain, the deadline to file a grievance related to the notice, etc.) until either: (a) thirty (30) days after all articles in term bargaining are either mutually agreed upon or submitted to the FSIP for third party resolution, or (b) until the Monday after the Union has submitted its Proposals 2. The Union understands that initiating

such tolling will not materially delay the implementation of a proposed change - delayed mid-term bargaining will generally occur on a post-implementation basis, unless the delay at issue would be relatively minimal (e.g. a few weeks delay until the Proposal 2 deadline).

- Additionally, to reduce the burden on the Union's term- negotiation bargaining team, the Agency will be as accommodating as reasonably possible in granting requests for ad-hoc official time pursuant to Article 7.A(7) for the members of the Union's mid-term bargaining team, in addition to the time granted by Article 9.B(1)(f) & (g). This includes use of partial days of official time for pre-negotiation preparation, to reduce the possibility of impact to Administratively Uncontrollable Overtime (AUO). Similarly, the Agency agrees that such members may participate in mid-term negotiations remotely (e.g. via telephone) and only for partial days in order to preserve AUO to the maximum extent possible.

- **12) Universe of articles**
  - The parties will follow the parameters described under Section 2.0 and 2.1 to determine the universe of articles for negotiations.
  - [Sec. IV] The Agency withdraws its proposed Article titled "Prevention of Fraud, Waste and Abuse" and shall replace it with a proposed Article on the subject of Assignment of Work Duties within an Employees Position Description ("Assignment of Position Duties"), a concept which had previously existed as part of a Union proposal on Seniority.
  - B. Consistent with the July 8, 2018 MOA, Articles 7, 8 and 9 of Agreement 2000, as modified by the 2006 MOU, shall be incorporated into the

successor master agreement as Articles 7, 8 and 9, respectively. Further, notwithstanding the other provisions of these ground rules, Articles 7, 8 and 9 may not be substantively revised unless both Parties agree to allow such revisions. The Chief Negotiators shall discuss whether to make any necessary technical modifications to those articles via bargaining sub-committee, the below process for proposal exchange, or by some alternative process. Additionally, the MOA shall be attached to the master agreement as an appendix.

- **13) Reopening articles that were once tentatively agreed upon (TA's) during years of prior negotiations**
  - **5.0 Re-opening Articles**
    - 5.1 The Parties acknowledge that, during negotiations that took place from June 2010 to December 2016, they reached tentative agreement on some proposed master agreement articles that were bargained to completion and tentative agreement on sections of additional proposed master agreement articles. The Parties agree that these tentatively agreed upon completed articles and article sections may be opened for bargaining subject to the following limitations:

      - 5.1.1 Requests to open tentatively agreed upon completed articles for bargaining will be made in accordance with this section and Section 2.1.3, and 2.2.1 above.

      - 5.1.3 The Parties agree that any of the tentatively agreed upon completed articles or tentatively agreed upon article sections may be opened to make technical "housekeeping" corrections that do not change the substantive effect of such articles. Examples of "housekeeping" changes

are updating articles such that references to agencies, sub-agencies, or job titles are accurate.

- 5.1.4 Nothing in this agreement will be construed to prevent the Parties by mutual consent to reopen for bargaining any tentatively agreed upon completed article or tentatively agreed upon article section.

- 5.1.5 All tentatively agreed articles, or tentatively agreed sections of articles, that either Party proposes be reopened will include a brief written explanation for each section to be reopened describing the change needed and how the change is applicable under Section 5.0.

- **14) Scheduling/calling bargaining sessions**
  - Sec.IV.G] 3. The Union may, at its election, call bargaining sessions with the Agency. Specifically:
  - b. The Union shall call each bargaining session by notifying the Agency Chief Negotiator via email that it is exercising this power, specifying whether it shall be for one week or two weeks (or parts thereof) in duration, on which dates the session will take place, and if bargaining shall be remote or face-to-face. The Union must provide at least two weeks of advanced notice for any session. As previously noted, the Parties must bear their own travel costs. If the Agency Chief Negotiator is unavailable, the Agency will utilize an alternate Chief Negotiator.
  - c. All bargaining sessions shall be followed by at least one week of time not spent in a bargaining session. Additionally, no face-to-face sessions may occur within two weeks of each other. Thus, if the Union calls a two- week-long face-to-face bargaining session, a subsequent

remote bargaining session could be called to begin after a one-week–break; however, no face-to- face session could begin until at least two weeks had passed. The parties may mutually agree to extend bargaining sessions.

- [Sec. IV.H] 3. The Agency may, at its election, call bargaining sessions with the Union. Specifically:
  - b. The Agency shall call each bargaining session by notifying the Union Chief Negotiator via email that it is exercising this power, specifying whether it shall be for one week or two weeks (or parts thereof) in duration, and on which dates the session will take place.
  - 3. The Agency must provide at least two weeks of advanced notice for any session, which will be held remotely. If the Union is unavailable, the session may be postponed for one week or cancelled, at the Agency's election.

- **15) Formatting of proposals**
  - [Sec.IV] D. Every proposal shall be submitted as a Microsoft Word document. Transmission shall be by email to the appropriate Chief Negotiator (and any bargaining team members the Chief designates and provides email addresses for), with the senders copying themselves (and any other persons from their own bargaining team whom they wish to be copied) for verification purposes. Proposals will have a header listing the topic and proposal number (e.g. Article XX- EAP - Proposal 1) and a footer with the page number and total (e.g. "1 of 3"). The general formatting and numbering scheme for all articles in the Master Agreement shall be what is used in Agreement 2000 (i.e. Article 1.A(1)(a)(i)), however, any revisions to comport to that formatting do not have to be tracked, colored or marked.

- [E] 2. If the Proposal 1 is in response to a prior proposal by the Union, the prior proposal will first be "cleaned" (with all shadings and coloring removed) and any changes made thereafter will be made with any new Agency proposed language in red text. Deleted language will be "struck through" and the black text will be shaded red. A proposal to revise an article that was previously tentatively agreed will similarly use a "clean" version, with the same color scheme.

- [G] 5. Any Proposal 2 will be transmitted as a Microsoft Word document by email, consistent with the transmission of any Proposal 1. Newly proposed Union language will be in blue colored text. If responding to new Agency language, the Union will leave the coloring in the Proposal 1 untouched, though it may strike-through any language (whether colored red or black) and shade it blue to show a proposed deletion.

- [H] 5. Any Proposal 3 will be transmitted as a Microsoft Word document by email, consistent with the transmission of any Proposal 1 or 2. Any coloring from a Proposal 1 or 2 will be left untouched, though the Agency may strike through any language (regardless of text color), shading that proposed deletion red. Newly proposed Agency language will be in red colored text and also highlighted yellow (as opposed to new Agency language in Proposal 1, which was not highlighted).

- [I] 4. Any Proposal 4 will be transmitted as a Microsoft Word document by email, consistent with the transmission of any Proposal 1, 2 or 3. Any coloring from a Proposal 1, 2, or 3 will be left untouched, though the Union may strike- through any language (regardless of text color), shading that proposed deletion blue. Newly proposed Union

language will be in blue colored text and also highlighted yellow (as opposed to new Union language in Proposal 2, which was not highlighted).

- **16) Subject Matter Experts**
  - K. Either Party may request subject matter experts (SMEs) to present information and provide specific subject matter expertise deemed necessary to resolve technical questions during the negotiations. The Chief Negotiators will work together to tailor agendas for bargaining sessions to accommodate SME schedules.
  - Whether bargaining occurs remotely or in-person, either party is permitted to bring their SME(s) to the negotiations.

- **17) Negotiability**
  - V. Negotiability & Duty to Bargain
    - A. Neither Party waives its right to seek a negotiability determination from the FLRA, or Court review of such a determination. This includes Union appeals of provisions disapproved during Agency Head Review. However, no such negotiability appeals shall serve to delay bargaining or otherwise modify the timeframes set forth above. The Parties shall continue to bargain as if the proposal in dispute were negotiable, to include impasse proceedings, until such time as the FLRA (or a Court of competent jurisdiction) declares otherwise. Similarly, a charge of unfair labor practice or grievance filed by either Party concerning the conduct of these negotiations shall not serve to delay bargaining.
    - B. Upon a decision on a negotiability appeal by the FLRA, or Court of appropriate jurisdiction, the prevailing party may, within fourteen (14) days of the final order, initiate negotiations over the

proposal at issue. Negotiations shall be in accordance with the procedures of these ground rules and supersede any inconsistent provisions either mutually agreed or imposed by the FSIP.

- C. Nothing in this section will preclude the right of judicial appeal. The Parties shall respect a final determination by the FLRA, or Court of appropriate jurisdiction, that a proposal is non-negotiable, invalid or unenforceable. The remaining provisions of the Agreement shall remain in full force and effect, enforceable to the extent permitted by law.

- **18) Ratification**
  - VI. Ratification
  - A. Within seven (7) calendar days of the resolution of all unresolved matters by mutual agreement (i.e. not including matters that remain at dispute and have been submitted to the FSIP or matters pending a negotiability determination), the Union may submit all agreed-upon articles for ratification in accordance with its bylaws. Concurrent with the Union's ratification process, the Agency bargaining team will submit all agreed-upon articles for ratification by the affected ICE principal program managers (i.e. the Executive Associate Director of Enforcement & Removal Operations, the Chief Human Capital Officer, and other such principal program heads). Such review will focus on any permissive commitments under 5 USC § 7106(b)(1) which ICE management may or may not be willing to undertake, or similar issues. If the Union and ICE Management ratify or fail to reject these articles within twenty-one (21) days of the resolution of all unresolved matters, the Chief Negotiators will promptly execute the Agreement and the mutually agreed articles will proceed to the Department of Homeland Security for Agency

Head Review, as set forth below. The Parties note that such mutually agreed provisions, if they are not rejected upon Agency Head Review, will go into effect and supersede any conflicting provisions of Agreement 2000; other provisions of Agreement 2000 will remain in effect while the Parties await the resolution of any outstanding disputes.

- B. If the result of the ratification process is a rejection of the agreement, the Union shall advise the Agency via email within three (3) business days of the rejection. In such circumstances, the Union will submit updated last best offers addressing its concerns no later than thirty (30) days after it provided the notice of rejection. Similarly, if ICE Managers reject the agreement, the Agency will notify the Union via email within three business days, where the notice shall also identify the basis for the rejection(s). The Agency will then provide its updated last best offers addressing its concerns within thirty (30) days after it provided the notice of rejection. No later than fourteen (14) days after provision of a notice of rejection, the Chief Negotiators will request assistance of the FMCS and schedule a three-week long "concluding bargaining session" on the rejected items. The session shall begin no later than the third Monday (or Tuesday, if Monday is a holiday) after transmission of the Parties' last best offers. Any remaining disputes shall be submitted to the FSIP for resolution by the second Friday following that concluding session.

- **19) Agency Head Review**
  - VII. Agency Head Review
  - A. The head of the Agency, Department of Homeland Security, will review the agreement within thirty (30) calendar days of its execution (whether in whole or in part). If the Agency Head approves, or otherwise does not disapprove the Agreement

within thirty (30) calendar days of execution, the Agreement shall take effect to the extent that it is in compliance with applicable law and regulations. 5 USC § 7114(c)(3). The Agency will provide an email announcement to each bargaining unit employee and post the negotiated Agreement on the Agency Intranet within fourteen (14) days of receipt of the Agency Head approval.

- B. If the Agency Head disapproves an article or provision in the Agreement, the Agency Head will notify the Parties in writing. The Chief Negotiators will meet to arrange for resumption of negotiations over the rejected articles in a manner consistent with the negotiation of matters rejected upon ratification, set forth above, but based on the date of the notification of Agency Head rejection. The Union does not waive its right to appeal the rejection to the FLRA.

- C. Consistent with section B, above, the Parties agree that any articles that do not contain provisions rejected upon Agency Head Review will go into effect, immediately. Articles that are returned to negotiation as a result of a rejection upon Agency Head Review shall be assigned a placeholder section in the master agreement that lists only the title of the article and text below it stating: "this Article is pending additional negotiations or other resolution."

- **20) Effective date of ground rules**
  - VIII. Effective Date of Ground Rules
  - A. This MOU shall become effective on the date that it is signed by at least one representative of each Party, or upon the date set forth through impasse procedures over these ground rules, subject to Agency Head Review.
  - B. The Parties may amend any provision of this MOU in writing by mutual consent.

- C. The Parties agree that nothing in this MOU shall set any precedent for any substantive matters in any provision, article, or section of the collective bargaining agreement that is to be negotiated via the process set forth herein.
- D. If any provisions of this MOU are determined to be non- negotiable, invalid or unenforceable pursuant to Federal law or regulation, the remaining provisions will remain in full force and effect, enforceable to the fullest extent of the law.
- E. This MOU shall terminate when the new Collective Bargaining Agreement takes effect.