

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS

And

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES

Case No. 19 FSIP 024

DECISION AND ORDER

This case, filed by the National Federation of Federal Employees (Union) on February 27, 2019, concerns a dispute between it and the United States Department of Veteran Affairs (Agency or Management) over all or parts of 4 articles in the parties' collective-bargaining agreement (CBA). This dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). On May 1, 2019, the Panel asserted jurisdiction over most issues in dispute and directed that those issues be resolved in the manner described below.

BARGAINING AND PROCEDURAL HISTORY

The Agency is responsible for fulfilling President Lincoln's promise "to care for him who shall have borne the battle, and for his widow, and his orphan" by serving America's veterans "with dignity and compassion and to be their principal advocate in ensuring that they receive care, support, and recognition" for their service to the United States. The Union represents approximately 8,000 bargaining unit employees located throughout the United States who are in a variety of professional positions. The parties are governed by a CBA that expired in July 2015 but continues to roll over.

The Union provided the Agency with a request to renegotiate the CBA in May 2015. Sometime thereafter, the parties began negotiations over a ground rules agreement and largely agreed to what language would be included within that agreement. Despite the foregoing, and before the parties could execute the ground rules agreement, the Union rescinded its request to bargain in January 2017. Accordingly, the Agency filed an unfair labor practice (ULP) charge against the Union. In order to resolve the charge, the parties executed a settlement agreement (ULP

settlement) with the assistance of the Federal Labor Relations Authority's (FLRA) Office of the General Counsel. The agreement required the parties to execute their ground rules agreement and begin CBA negotiations.

The parties turned to contract negotiations that lasted from April 2018 to October 2018. Additionally, they had 6 weeks of mediation with the Federal Mediation and Conciliation Services (FMCS) between December 2018 and February 2019. The Mediator released the parties on February 27, 2019, in FMCS Case No. 201911770013. The Union filed its request for Panel assistance on the same day. The Agency subsequently filed its own request for assistance. The latter request was consolidated into the former.

Before the Panel, the Union argued that the Panel should decline jurisdiction over the entirety of this dispute because: (1) the ULP settlement prohibited the Agency from introducing its article on official time (Article XX); and (2) several matters were covered by articles that were unopened and, therefore, agreed to. The Agency disputed each claim. Ultimately, the Panel rejected the Union's arguments and asserted jurisdiction over the full dispute on May 1, 2019. The Panel ordered the parties to provide the Panel with Written Submissions in support of their respective positions; they were also provided with an opportunity to provide rebuttal statements. The parties provided both sets of documents to the Panel.

PROPOSALS AND POSITION OF THE PARTIES

1. Article XX – Official Time

I. Agency Article and Position

The Agency offers a new article that will address solely the topic of official time. From Management's perspective, Article XX is the result of the implementation of its Veterans Affairs Time and Attendance System (VATAS) system. VATAS came about because the Government Accounting Office (GAO) issued a 2017 report in which it lambasted the Agency's inability to accurately track the use of official time. Thus, the Agency's proposed article provides it with what it believes are tools to effectively track such time through VATAS. Accordingly, among other things, the Agency offers the following official-time related proposals:

- Official time for national and local Union use will be established through proposed banks of hours;
- Employees will be prohibited from devoting more than 50% duty time to official time tasks during a year;
- Requests for official time must be made pursuant to VATAS and coordinated with supervisors;

- Categories permitting the use of official time are established.

Management rejects the Union's jurisdictional arguments discussed below in greater detail. In short, the ULP settlement calls for negotiations. Moreover, the Union itself has raised issues involving official time, so Management may properly offer its own proposals on that topic.

II. Union Article and Position

In opposition to the Agency's proposal, the Union renews arguments that it presented to the Panel previously. Namely, it contends that bargaining over this matter is foreclosed by the ULP settlement and that the parties already have agreement on language in unopened portions of the CBA that already address official time. Thus, imposition of the Agency's proposal is inappropriate.

The Union does not offer its own proposal, but it does challenge some of the positions taken by the Agency in support of its language. For example, the GAO report examined five Veteran Affairs facilities, but the report did not clarify whether any of those facilities involved bargaining units represented by the Union. Additionally, Management did not provide evidence to demonstrate that current official-time reporting requirements are problematic. Finally, the Union argues that the Agency's claim that Article XX does not reduce official time is inaccurate because existing language permits local negotiations over official time. Article XX, however, does not.

III. Conclusion

The Panel adopts a modified version of Management's proposal. The Union's primary opposition to the Agency's proposal are arguments that the Panel rejected when it asserted jurisdiction over this dispute on May 1, 2019. By the Union's concession, it has presented no new position. As the Panel previously rejected these contentions, the Panel will reject them once again.

On the merits, only the Agency has provided a proposal for consideration. Given the lack of a Union proposal, it is appropriate to use Management's proposal as a basis for resolving this dispute. Although Management's proposal should serve as the base, there is the issue of the Agency's offered amount of official time. In particular, the Agency offers 6,032 hours to national officers per year in Section 2.A and B. It also offers 624 hours per year to local facilities in Section 3.A. As to the former category, the Agency argues that it is not seeking a reduction of hours from the existing agreement. Rather, Management is merely converting hours from percentage to an actual numerical value in order to make tracking easier. Regarding the latter category, Management proposes this bank in order to establish consistency between national and local official-time usage.

The Panel recently clarified its view on non-guarantees of official time. In *Social Security Administration and AFGE*, 19 FSIP 019 (May 2019) (SSA), the Panel acknowledged that such categories fall under 5 U.S.C. §7131(d), which provides that

such official time will be granted in any amount parties demonstrate to be “reasonable, necessary, and in the public interest.” However, the Panel also noted that it has authority to impose amounts when the parties cannot reach agreement. When imposing such decisions, the Panel clarified that it expects *all* parties to justify their position as “reasonable, necessary, and in the public interest.” That is, parties should have no expectation that the Panel will simply adopt one of their positions in the absence of supporting data.

In light of SSA, the Panel cannot conclude that the Agency has satisfied its burden to demonstrate that the offered hours discussed above satisfy the criteria of §7131(d). The Agency’s arguments in favor of their proffered banks of official time essentially revolve around consistency and the need to track usage of official time. But, the Agency does not offer empirical data establishing that the actual hours offered are necessary in light of the Union’s work load. And, it is not apparent from the record before the Panel how much official time is used by the Union or whether the Union could justify that usage (which is only compounded by the Union’s refusal to offer a counter proposal). In light of this lack of data, the Panel does not believe it is appropriate to accept the Agency’s offers in its Sections 2.A and B or Section 3.A. Accordingly, Sections 2.A and B should be stricken and replaced with the following language: **“National Union representatives may request official time pursuant to 5 U.S.C. §7131(d). Such requests will not be considered automatic grants of official time.”** Further, Section 3.A should be stricken and replaced with the following language: **“Local Union representatives may request official time pursuant to 5 U.S.C. §7131(d). Such requests will not be considered automatic grants of official time.”**

The Union challenges various portions of the Agency’s position on several grounds, including the accuracy of the GAO report and lack of supporting data to justify the Agency’s proposal. The Panel, however, has rejected Management’s position by imposing language that operates independently of the justifications offered by the Agency. Accordingly, the Union’s arguments have no bearing on the disposition of this dispute.

The Panel further believes it is appropriate to strike Section 1.G of Management’s proposal, which states that any “Union Official holding a position listed in 38 USC 7401(1)¹ is not eligible for use of official time under 5 U.S.C. 7131(d) as these are direct patient care positions.” Under 38 U.S.C. §7421, the Secretary for the Department of Veterans of Affairs has the authority to issue regulations for certain Title 38 employees² concerning their conditions of employment. However, pursuant to 38

¹ This statute references “[p]hysicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.” 38 U.S.C. §7401(1).

² “Title 38 employees” refers to a group of medical-based employees that work for the Department of Veteran Affairs and, as such, are largely governed by a framework established by Title 38 of the U.S. Code. See 38 U.S.C. §7421(b).

U.S.C. § 7422(b) and (d), this authority is subject to bargaining obligations under Chapter 71 of Title 5, *i.e.*, the Federal Service Labor Management Relations Statute (Statute), *unless* the Secretary concludes a bargaining topic touches upon a matter of “professional conduct or competence.” The phrase “professional conduct or competence” is defined to include “direct patient care.”³ Stated differently, the Secretary can conclude that a matter is excluded from statutory collective bargaining obligations because it concerns “direct patient care.” Under §7422, only the United States Court of Appeals for the District of Columbia Circuit has the authority to review the merits of the Secretary’s decision to exclude a topic from negotiations.⁴

The Agency’s proposed Article XX, Section 1.G arose because the Agency has concluded that, pursuant to 38 U.S.C. §7422, official time usage for certain categories of Title 38 employees concerned direct patient care and is, therefore, exempt from collective bargaining rights and procedures.⁵ Management’s proposal, therefore, is an attempt to codify this determination. The Panel does not believe it is necessary to include contract language on this topic as it essentially calls for the Panel to define the parties’ legal rights. As discussed above, other forums are appropriate for challenging the Agency’s decision, and it would be prudent to allow any challenge to unfold elsewhere. Additionally, the Agency has not claimed that this language is necessary in order to give effect to the Agency’s determination. **Accordingly, the language will be stricken.**

2. Article 5 – Negotiated Grievance Procedure

I. Agency Article and Position

Management desires to change several aspects of the parties’ existing negotiated grievance procedure. In particular, they seek alterations to three major topics.

The Agency’s first proposed change concerns topics to be excluded from the scope of the grievance procedure. In particular, Management proposes excluding disputes over removals due to misconduct or poor performance, equal employment opportunity (EEO) matters, matters appealable to the Merit System Protection Board (MSPB), and terminations of temporary appointments. With respect to removals, recently enacted legislation concerning Agency employees – 38 U.S.C. §714 (discussed in greater detail below) – governs removals of those employees and provides a more effective template for removal. And, as to all four of these categories, the Union rarely pursues grievances involving any of these topics. Indeed, it has yet to file a single grievance involving the termination of a temporary employee, and there are no such employees currently within the unit. Management’s proposed exclusions will create a more streamlined approach to grievance resolutions.

³ 38 U.S.C. §7422(c)(1).

⁴ 38 U.S.C. §7422(e).

⁵ The Agency formalized this position in a written statement issued on April 26, 2019, after the parties had submitted their dispute to the Panel.

The second topic of proposed alteration involves Union use of time and resources to pursue grievances. Management proposes that the Union will be entitled to *no* official time for purposes of processing a grievance. Additionally, the Union will have no entitlement to the use of Agency resources in the same. And, the Union will receive no reimbursement for expenses or travel involved with pursuing a grievance. Management does not believe that providing the foregoing is in the interest of the taxpayers as they have an expectation that Agency resources will be devoted to Agency business rather than third-party litigation. For similar reasons, the Agency believes that official time to pursue these actions is not “reasonable, necessary, and in the public interest” within the meaning of 5 U.S.C. §7131(d). Indeed, Management believes the Union is seeking “unlimited” official time to pursue these actions.

The final category involves Management opposition to new language that would call for the Agency to pay the travel expenses of Union witnesses in connection with a grievance hearing. Management argues that this language conflicts with language the parties agreed to elsewhere (although Management does not provide a specific citation). Thus, it should be rejected.

II. Union Article and Position

With respect to the first two categories above, the Union seeks to retain the status quo. The last category, however, is new contract language.

On the topic of exclusions, the Union notes that the United States Court of Appeals for the District of Columbia has held that a proponent seeking exclusion of topics from a grievance procedure bears a heavy burden to demonstrate that exclusion is appropriate.⁶ Management has not met this burden for any of its exclusion as it failed to provide empirical data demonstrate a need for any of them. Additionally, the MSPB lacks a quorum and the Equal Employment Opportunity Commission (EEOC) is experiencing a significant backlog. Neither forum, therefore, is an attractive option. Finally, with respect to 38 U.S.C. §714, the Union acknowledges that this statute is new but notes that many concepts contained within are not. Thus, it should not serve as a barrier to grievances.

As to the use of resources to process grievances, the Union opposes Management’s language in its entirety. Contrary to Management’s claim, it is not seeking unlimited official time. Rather, it is requesting only “reasonable” amounts of official time consistent with 5 U.S.C. §7131(d) and recent Panel decisions.⁷ As to the use of Agency resources, the Union is of the position that the parties “agreed” that Article 9 of the CBA would remain in effect, and Section 1 of this article addresses the use of various pieces of Agency equipment for “representational purposes.” It would therefore be inappropriate to accept Management’s proposal. The Union also raises the same argument for Union representation travel and per diem expenses in conjunction

⁶ *AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983) (*AFGE*).

⁷ Initial Union Submission at 6-7 (citing *DHHS and NTEU*, 18 FSIP 077 (April 2019)).

with grievances. Specifically, it claims that Article 9, Section 6 authorizes such expenses for “representational purposes.”

Finally, the Union requests imposition of its witness-travel language. The Union claims it reflects current practice. Moreover, the proposal calls for the parties to explore video and teleconference options to save costs.

III. Conclusion

The Panel will impose a compromise proposal. For the reasons that follow, it will accept most of Management’s language but remove the Agency’s proposed grievance exclusions.

i. Grievance Exclusions

The Panel recently clarified its stance on proposed grievance exclusions. In SSA, the Panel acknowledged that it would be mindful of the holding of *AFGE* when tasked with determining whether exclusion is warranted. More specifically, it acknowledged that *AFGE* requires the Panel to examine whether an exclusion proponent establishes the need for such an exclusion in those “particular” circumstances.⁸ Thus, although an exclusion proponent bears the burden of proof, that burden turns on the particular facts of each individual case.

Although Management proposes multiple exclusions, the primary point of contention appears to be the topic of removals of Agency employees. The Agency’s main concern is consistency with the recently enacted 38 U.S.C. §714 (effective June 23, 2017). This statute permits the Agency Secretary to “remove, demote, or suspend” Agency employees for misconduct or poor performance.⁹ This section further creates abbreviated deadlines for proposing such actions and granting employees an opportunity to respond.¹⁰ Additionally, it establishes an expedited review process to the MSPB, including the ability to ultimately appeal to the United States Court of Appeals for the Federal Circuit.¹¹ Finally, as relevant, this statute permits employees to pursue grievances pursuant to a collective bargaining agreement where available. But, such grievances are subject to the requirements of §714.¹² And, in any event, a proposed Agency action must be upheld if supported by “substantial evidence”¹³

The Agency’s concern about §714 is borne out of alleged real-world incidents. It notes that, since this law’s enactment, the Agency has experienced at least five separate grievances in which an arbitrator applied an erroneous burden of proof.¹⁴ Yet,

⁸ SSA, 19 FSIP 019 at p. 9-10.

⁹ 38 U.S.C. §714(a).

¹⁰ See 38 U.S.C. §714(c).

¹¹ See 38 U.S.C. §714(d).

¹² See 38 U.S.C. §714(d)(10).

¹³ 38 U.S.C. §714(d)(2)(A).

¹⁴ See Initial Agency Submission at 3-4.

Management does not dispute the Union's argument that none of these circumstances involved bargaining unit employees represented by *this* Union. This distinction is important because exclusion under *AFGE* turns on each case's *particular* circumstances. And, in these particular circumstances, the Agency has offered no evidence that these parties' existing grievance process has created any of the foregoing issues it cited.

The only other arguments offered by the Agency on this topic are the lack of overall grievances and the lack of timeframe differences between grievances and MSPB actions. Yet, these arguments undercut the Agency's position because they do not demonstrate that the Agency faces any sort of continued hardship were the existing language to continue.

The other exclusions meet similar fates. The Agency admits there have been few to no grievances for EEO matters, MSPB-related actions, and termination of temporary appointments.¹⁵ Again, given the *lack* of a problem, it is difficult to establish exclusion is justified. The Agency also alleges that exclusion of these categories will create a "consistent system." But, the Agency does not explain how this will be, particularly where actions could continue to be filed in a number of venues depending upon the underlying causes of action and defenses. **Accordingly, the Panel does not believe there is a basis for accepting Management's proposed exclusions and Management's Proposals 1 and 2 for Article 5 should be withdrawn.**

ii. Agency Resources and Grievances

The parties next dispute turns on the allocation of various Agency resources in the pursuit of Union-filed grievances. Broadly, such resources fall into the categories of official time, Agency facilities, and the recuperation of expenses. Each will be addressed in turn.

The first topic is official time, and Management opposes granting *any* such time for the purposes of pursuing a grievance. The Union, by contrast, wishes to retain existing language that allows the Union to request a "reasonable" amount of time. As this Decision and Order discusses the topic of official time within the context of Article XX, the Panel believes that discussion applies equally within this context. Instead of Management's proposal, the Panel will impose the following language: **"Official time for all matters concerning grievances shall be governed by Article XX, Sections 2.A, 2.B, and 3.A."** This language will take the place of Management's Proposal 3.A.

The next area of analysis concerns Union use of Agency facilities and equipment to pursue grievances and also reimbursement of travel and other expenses for Union representatives and witnesses. As an initial matter, the Union argues this topic is foreclosed because the parties reached agreement on these issues in Article 9 of the

¹⁵ Agency Rebuttal at 3.

CBA. The Union raised this precise argument in an effort to persuade the Panel to deny jurisdiction, and the Panel rejected it. As these arguments present nothing new, the Panel will once again deny them.

Turning to the merits, the Panel will impose the entirety of Management's language for Article 5, Proposal 3.B. In support of its language, Management argued to the Panel that taxpayer-funded resources should not be used to support litigation against a taxpayer-funded agency. The Agency's argument is a sensible one. Agency resources should be utilized primarily to support the Agency's mission. Co-opting the foregoing to buttress a Union-sponsored grievance does not further the goals of the Agency's mission, nor is it clear how advancing such litigation provides a benefit to the taxpayer. The Panel adopts the Agency's language without alteration to resolve this dispute.

The final category involves travel and per diem for Union representatives and Union witnesses. Management's position is that each party should be responsible for their own respective costs, and the Union seeks to recuperate various associated costs. This Panel has consistently taken the position that each party should be responsible for their own litigation costs, including travel and per diem.¹⁶ **Consistent with these decisions, the Panel will adopt Management Proposals 3.C and D. The Panel further rejects Union's proposal on travel and per diem (Proposal 4) and orders it withdrawn.**

3. Article 8 – Mid-Term Negotiations

I. Agency Article and Position

The Agency's proposal covers three categories. The first category involves travel costs for mid-term negotiations. Management proposes changing two existing contract provisions to establish that each party will be responsible for their own costs at the national level. And, Management wishes to delete a third existing provision that allows local Union officials to receive travel costs for travelling to another local facility to assist with their negotiations if certain conditions are satisfied. The Agency would not be a good steward of taxpayer dollars if it continued to fund Union activities that do not provide tangible benefits to Agency operations. Additionally, providing such funding is inefficient as evidenced by these negotiations. In this regard, the parties executed ground rules in which Management agreed to pay the Union's time for travel and per diem for 9 months of negotiations and mediation for a *full* contract. The parties bargained *only seven articles* as a result of the ULP settlement but the Union exhausted all agreed-upon time costs. The Union needs to have "skin in the game" or it will simply continue to exhaust Agency resources. As to the third provision concerning the ability of local Union officials to travel elsewhere, Management claims that the Union has abused the provision. Specifically, the Union national President cited this provision as justification to travel to a local facility to assist with negotiations over their local

¹⁶ See, e.g., *DODEA and FEA*, 19 FSIP 001 (Feb. 19, 2019).

supplemental agreement. It would be in the best interest of the taxpayer to remove this language and allow each party to be responsible for their own costs.

The second category, in Agency Proposal 4, addresses primarily the existence of local supplemental agreements (LSAs) and past practices. Namely, the proposal calls for all LSA's and past practices to end upon the enactment of the new contract. But, local memorandum of understandings (MOUs) will continue. There is only one existing LSA, and it was negotiated in 2000, well before any existing master CBA language. It should end so the relevant local facility can come into compliance with modern practices. As to MOUs, the Agency proposes that either party may reopen them within 180 days of the new contract. Some MOUs are decades old. Renegotiation will give an opportunity for parties to bring them into compliance with modern practices as well. Management also wishes to emphasize that national bargaining matters should unfold at the national bargaining level.

Finally, Management is opposed to new Union language that would govern information requests. The Union proposes automatic extensions of bargaining time if information is not turned over to the Union within a certain window of time. The parties have agreed-upon language in Article 8 already stating that requests will be granted only upon "mutual agreement." The Agency does not believe extensions should be automatic because different circumstances warrant different responses.

II. Union Article and Position

The Union wishes to continue existing CBA language that calls for Management to pay Union-related travel expenses and per diem. This language represents the status quo and Management has provided no data to demonstrate the burden it allegedly places upon Agency operations. The President has proposed an Agency budget of \$20.2 billion for Fiscal Year 2020; there is no conceivable way in which the Union's travel expenses would put any significant dent in this figure. In regards to the Agency's ground-rules argument above, the Union notes that Management also contributed to lengthening these negotiations.

On the topic of local LSA's and MOU's, the Union proposes continuing existing language. To begin with, the Union renews its argument that, as part of the ULP settlement, the parties agreed other articles in the CBA would not be reopened for renegotiations. And, some existing CBA articles enshrine the ongoing existence of local agreements. Thus, it is inappropriate for the Agency to attempt to offer language that modifies or terminates existing local agreements. On the merits, the Management's proposal is broad enough that it would allow them to reopen all MOU's. Such language could lead to instability.

As to its information request language, the Union proposes language that would simply call for a 4-day extension for bargaining if the Agency responds to an information request within 2 days or less of bargaining commencing. Existing language calls for an extension equal to the number of delayed days, e.g., 60 days would be added to bargaining if the Agency's data was 60 days late. The Union's proposal, therefore, would lead to more efficient negotiations.

III. Conclusion

The Panel will impose Management's proposal. The first issue involves three Management proposals that cover the topic of Union travel costs. Existing language calls for the Agency to pay some or all of the Union's costs, depending upon the circumstances. And, the Union insists these practices should continue because the Agency has not demonstrated a need to alter existing circumstances. Consistent with our earlier discussion on costs sharing, however, it would be appropriate to adopt Management's proposals so that each party will be responsible for their own respective costs. In addition to ensuring taxpayer funds are devoted primarily to effectuating the mission of the Agency, Management's proposals will keep the parties focused on completing negotiations. **Accordingly, the Panel will accept Management's Proposals 1 and 2. Additionally, Management Proposal 3, which removes existing language from the CBA, should be adopted without alteration.**

The next topic concerns the existence of various local agreements, and the Panel believes that the Agency's proposal for this issue should prevail as well. The Union's initial argument is that the parties have already reached agreement on other portions of the CBA, including portions that reference existing local agreements. This argument was considered, and rejected, by the Panel when it asserted jurisdiction over Article 8. As to the merits of the Agency's proposal, Management offers its language in an effort to thaw practices and local agreements that have become frozen in time. By eliminating LSA's (of which there is only one) and permitting either party to reopen long-standing local MOU's, Management contends that its facilities can catch up to modern practices. The Union counters that preserving existing agreements will promote stability and defer bargaining costs. But, aside from definitively eliminating one LSA, the Agency's proposal allows for only the *option* of renegotiating local MOU's. The parties can engage in a cost-benefit analysis that accounts for various factors under Management's proposal, but there is no requirement to scrap such agreement wholesale. It is entirely possible that the status quo will continue for local facilities. **Management's Proposal 4, therefore, provides a better balance of meeting the parties' interests and should be adopted.**

Finally, as to Proposal 5 concerning information requests, the Panel will order the Union to withdraw its proposal. Existing Article 8, Section 2.F states "[d]ata requests from either party shall automatically extend the time limits equal to the number of days it takes to receive such data." Management also alleges – without rebuttal from the Union – that the parties have reached agreement in Article 8 over language stating "[e]xtensions or reductions of any time periods will be by mutual agreement, in writing, prior to the expiration of the relevant time period." What is unclear from the record, however, is whether the latter language is intended to trump the former. Adding to the potential confusion, the Union does not explain how its proposed language would fit into the foregoing framework. To avoid exacerbating any potential uncertainty, the Panel believes it is appropriate to reject the Union's requested language.

4. Article 10 – Partnership/Collaborative Relationships

I. Agency Article and Position

The Agency proposes striking existing Article 10, “Partnership/Collaborative Relationships.” To begin with, Management contends this article is inconsistent with Executive Order 13,812, “Revocation of Executive Order Creating Labor-Management Forums” (September 29, 2017) (Forum Order). In the Forum Order, the President instructed Federal agencies to take steps to abolish labor forums, councils, committees, etc. Thus, the Agency is obligated to follow this instruction.

On the merits, the Forum Order requires the demonstration of “tangible benefits” to the taxpayer in order to justify the continuation of forums. Yet, during negotiations, the Union failed to provide any documentation or evidence in support thereof. The Union’s proposal also seeks to impose language from a now revoked Executive Order that established labor forums and partnerships. But, the Agency has ended its Partnership Council, making the Union’s proposal redundant. The Union’s proposal also calls for pre-decisional involvement before negotiations. This process results in an inefficient “two-step process” for negotiations that is not an efficient use of Agency resources.

II. Union Article and Position

The Union proposes retaining existing Article 10 in its entirety. The article does not establish the structure or scope of partnerships. Instead, it requires only that the parties jointly decide the foregoing. Contrary to Management’s assertion, the Union *did* provide evidence that these groupings assisted the parties, at least at the local level. And, Management has not provided any evidence that partnership or forums has burdened its operations.

III. Conclusion

The Panel will order the adoption of Management’s proposal. The Union wishes to continue Article 10 in full. This article encourages pre-decisional involvement and also leaves it to the appropriate level of bargaining to determine the particulars of a collaborative/partnership relationship (presumably including whether such a relationship should even exist). The Union claims that it has already provided evidence to the Agency concerning the effectiveness of the foregoing framework. However, the Union did not provide the Panel with any such evidence. Nor is it clear from a review of the parties’ arguments, particularly the Union’s, how continuation of this article would provide a benefit to the Agency’s operations, the employees, or the interests of the taxpayer. Moreover, striking this language does not appear to inhibit the operations of the Union as it would retain its full bargaining rights in accordance with law. **Thus, on balance, it is appropriate to adopt the Agency’s proposal striking Article 10 from the parties’ CBA.**

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.¹⁷



Mark A. Carter
FSIP Chairman

September 4, 2019
Washington, D.C.

¹⁷ The relevant Management proposals for Articles 5, 8, and XX are attached to this Decision and Order.