

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

ENVIRONMENTAL PROTECTION AGENCY,
REGION 4

And

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-55

Case No. 20 FSIP 028

DECISION AND ORDER

This case, filed by the Environmental Protection Agency (EPA or Agency), concerns negotiations with the National Association of Government Employees Union (NAGE or Union) over the ground rules for the Parties' successor collective bargaining agreement (CBA). The Employer's mission is to promote and protect the environment throughout the nation. The Union represents approximately 200 professional and non-professional employees in Region IV (i.e., Atlanta, GA; Athens, GA; West Palm Beach, FL; and Bay St Louis, MS). The Parties are covered by a collective bargaining agreement that went into effect in 2010 (2010-CBA). By mutual agreement, the terms of that agreement remain in effect until agreement is reached on a new CBA.

BARGAINING AND PROCEDURAL HISTORY

The Agency provided the Union with notice 2 years ago that it wanted to reopen the 2010-CBA. Negotiations never started. Then, in October 2019, the Union provided notice to the Agency that it wanted to reopen the 2010-CBA. The Agency responded with a notice that it would be terminating the permissive subjects in the 2010-CBA during the negotiations. Eventually, the parties mutually agreed to roll over all of the terms of the 2010-CBA until they have completed negotiations of the new CBA. In October 2019, the Agency provided its initial proposals. The Agency provided subsequent proposals in December 2019 and in January 2020 (the January 2020-version included a new proposal regarding the scheduling of bargaining; Provision II.a). In October 2019, the Union provided its initial proposals. The Union provided subsequent proposals in January 2020. In January 2020, the Parties met with a mediator from the Federal Mediation and Conciliation Services (FMCS). After mediation, the Parties remained in dispute over 7 remaining proposals.

In April 2020, the Panel asserted jurisdiction over one issue: scheduling of the bargaining. The Panel declined jurisdiction over a number of severability matters: severability of negotiability; severability of TA'ed provisions; severability of ratification; and severability of Agency Head Review. As for the scheduling provision, the investigation revealed that the Agency provided a revised proposal to the Union after mediation. The Agency advised the Panel that it would like the Panel to consider the Agency's original scheduling proposal. The Panel asserted jurisdiction over the scheduling matter and ordered the parties to resolve the impasse through Written Submissions. Both parties met the requirements of the order.

PROPOSALS AND POSITION OF THE PARTIES

Agency

Agency Proposal (Agency's LBO dated 12/23/2019)

II. Schedule

a. The parties will negotiate on the following schedule in 2020, face to face:

- January 13-17
- January 27-31
- February 3-7
- February 24-28
- March 2-6
- March 16-20
- March 23-27
- April 6-10
- April 13-17
- April 27-May 1
- Negotiations not to exceed May 1, 2020

The Agency's proposal was offered in compliance with Executive Order 13836¹ (EO). The Agency stated that, as is required by the Executive Order, its interest is to provide for efficient, effective, and agency cost-reducing negotiations of the Master CBA. The EO directs agencies to "set reasonable time limits for good-faith negotiations." The EO provides guidance on what a reasonable time limit may be – between 4 and 6 months for a term CBA. The EO provides that should negotiations not be concluded after that reasonable time period, to the extent permitted by law, the matter should be expeditiously advanced to mediation, and as necessary to the Panel.

¹ Executive Order 13836 (May 25, 2018) – Developing Efficient, Effective, and Cost Reducing Approaches to Federal Sector Collective Bargaining.

With this guidance, the Agency proposed a specific 5-month schedule of negotiations. The Agency argued that such a timeframe is reasonable and reinforces the principle that public resources (e.g., fund) have value. The Agency also relies on prior Panel cases, where the Panel ordered a bargaining timeline, to support the Agency's argument that a specific timeline (rather than an unfixed timeline) is in the best interest of the Parties.

The Agency provided no evidence or data to support its argument that a specific 5-month bargaining schedule is appropriate in this case. For example, there was no information provided on how many articles will be opened for negotiations. There are 31 Articles and 8 Appendices (112 pages in the 2010-CBA) that are potentially open for renegotiations in this 10-year-old contract. There is no information provided on how contentious the issues may be between the Parties. Finally, the specific bargaining schedule proposed by the Agency is now obsolete as most of the scheduled days have now past.

Union

Union Proposal

II.a. Schedule

Negotiations will begin on a mutually agreed upon date by the parties within ten (10) business days of the signed ground rules. Negotiations will be conducted face-to-face. Parties shall mutually agree in writing to alter schedule.

The Union proposed that the bargaining begin within 10 days of the execution of the ground rules MOU. Aside from bargaining commencing, the Union offered no additional committed days. The Union proposed that the Parties would negotiate additional bargaining days.

In its Written Submission to the Panel, the Union presented several arguments. First, the Union asserted that the Panel lacks jurisdiction over this scheduling matter because the Agency's proposal was not subject to negotiations and mediation. The Agency's late-submitted proposal (dated 1/16/2020) was withdrawn by the Agency because it was not provided to the Union before the conclusion of mediation. On March 19, 2020, the Agency advised the Panel, and on March 24, 2020 the Panel advised the Union, that the Agency would be relying on its original last best offer (LBO) proposal (dated 12/23/19) in this case before the Panel. In a March 31-email to the Panel and the Union representative, the Agency provided a chart summarizing the remaining issues. In that March 31-email, the Agency offers that their proposal for the scheduling matter is "N/A. This issue of disagreement is inclusion of an end date/defined timeframe for negotiations." This email statement may be the source of the Union's confusion over which Agency proposal is under consideration.

The Panel had already determined that the scheduling matter (Provision II.a., as offered before mediation) was at impasse under 5 C.F.R. §2470.2². To be clear, in this case, the Panel has considered the proposal presented by the Agency prior to mediation: Agency's LBO dated 12/23/2019. The Union has not presented any new argument or evidence that would compel the Panel to reconsider the determination to assert jurisdiction over the scheduling matter, with consideration of the proposal presented by the Agency prior to mediation: Agency's LBO dated 12/23/2019. Therefore, the Union's Jurisdictional argument is denied.

Second, the Union argued that its proposal is the better option because its proposal supports good faith bargaining as envisioned by the Statute. The Union argued that the Agency's proposal (the December 23, 2019-proposal, which includes set dates for negotiations) has no correlation to the bargaining circumstances. This is not a ULP case, and this argument is not compelling in this impasse matter.

Third, the Union argued that the Agency's position, a predetermined end date for bargaining, is in conflict with the Statute. Under the Statute, 5 U.S.C. §7114(b)(3), parties are obligated to bargain in good faith, including the obligation to "meet as frequently as may be necessary" to reach an agreement. The Union relies on *U.S. Dep't of Treasury, Internal Revenue Service and National Treasury Employees Union*, 64 F.L.R.A 426 (2010) (IRS) when it argues that the Agency's proposal that arbitrarily ends bargaining in 5 months is in contrast to the Statute. The Union argues that arbitrarily limiting bargaining would be a waiver of the Union's statutory rights to engage in bargaining, and, therefore, the Panel should decline jurisdiction over the scheduling matter.

In *IRS*, the Authority considered an exception to an arbitration award filed under § 7122(a) of the Statute and part 2425 of the Authority's Regulations. In that case, the Agency proposed an 8-week bargaining schedule to negotiate a complete CBA, where the Agency advised the Union that it intended to bargain "every sentence" of the 190-page, 54-article CBA. The arbitrator found that the combination of the Agency's refusal to furnish sufficient information about the nature, scope, and number of its proposals for term bargaining and its insistence to impasse on a proposed 8-week bargaining schedule would not further the bargaining process. The Arbitrator concluded that this conduct constituted bad-faith bargaining in violation of the Statute. In addition, he concluded that the 8-week bargaining schedule proposal was not a mandatory subject of bargaining. The Authority determined that ground rules must be designed to further, not impede, the bargaining for which the ground rules are proposed. In *IRS*, the Arbitrator determined that the proposed 8-week bargaining schedule was unreasonable and offered by the Agency in bad faith given that every sentence of the entire CBA was the subject of bargaining. The Authority found that the arbitrator's legal conclusion of bad faith bargaining was supported by the facts of that case. And, because the proposal was offered in bad faith, the Authority determined that it was not within the

² §2470.2 Definitions. (e) The term *impasse* means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

duty to bargain. On that point, the Authority denied the exception to the arbitrator's award; the proposed 8-week bargaining scheduled was offered by the Agency in bad faith.

In the instant case, the Union argued that the Panel should decline (or in this case withdraw) jurisdiction over the scheduling matter because the Agency has proposed an arbitrary time frame in bad faith and the Union is not waiving this permissive right. The Panel has determined that it will deny the Union's request to withdraw its jurisdiction over the matter of scheduling. The Panel has already concluded that the Parties are at impasse over the scheduling matter. The Panel has determined that it will resolve the scheduling matter with language that supports the Parties' obligation to bargain in good faith under the Statute; a schedule that is reasonable given the potential scope of the negotiations (the full CBA).

Fourth, the Union argued that the scheduling matter is not controlled by Executive Order 13836. Neither the Courts nor the FLRA have rules that the EO has the force and effect of government-wide rule or regulation; giving it the weight and enforcement of a law. The Union argued that the Panel should not enforce the EO and limit bargaining time frames to an arbitrary period, through imposing the Agency's proposal. In other cases, this Panel has imposed specific timeframes in ground rule disputes, as it deemed was appropriate for specific parties. In those cases, the Panel determined, under its authority, that provisions that promoted efficient and effective negotiations were the better option.

Neither party presented effective arguments in support of its proposal in this case. The Agency presented no evidence to support that a discrete 5-month bargaining schedule for this CBA negotiations is reasonable and appropriate. The Union presented no support to not committing to a bargaining schedule beyond the first engagement. The Panel has advised the Labor Relations community (through other Decision and Orders) that 6 months is generally a reasonable amount of time to bargain a CBA. However, without evidence to support a specific time frame in this case, the Panel orders the Parties to adopt a schedule that meets the Parties' obligation to bargain in good faith under the Statute. The Panel orders the Parties to adopt the following:

Negotiations will be conducted face-to-face³. Negotiations will begin on a mutually agreed upon date by the parties within ten (10) business days of the execution of the ground rules agreement. Consistent with the Statute, the parties will bargain (i.e., exchange proposals and meet) as frequently as necessary to reach agreement or an impasse.

The Panel notes that the parties have agreed in other ground rules provisions under Section II, which are not under this Panel's jurisdiction, to conduct negotiations face-to-face or virtually, by mutual agreement. Given the current pandemic, the Panel

³ The Parties have agreed that negotiations can be modified to virtual bargaining, by mutual agreement. (Section II. d.)

was pleased to see the parties preserved the opportunity to continue to move forward with bargaining, upon agreement.

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 provision as stated above.



Mark A. Carter
FSIP Chairman

May 21, 2020