United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of U.S. NUCLEAR REGULATORY COMMISSION And NATIONAL TREASURY EMPLOYEES UNION	Case No. 20 FSIP 035

DECISION AND ORDER

BACKGROUND

This case, filed by the U.S. Nuclear Regulatory Commission (Agency or Management) on February 25, 2020, concerns the ground rules for bargaining the parties' successor collective bargaining agreement. The Agency is an independent agency of the United States government tasked with protecting public health and safety related to nuclear energy. The National Treasury Employees Union (Union) represents nearly 2,000 bargaining-unit employees in professional and non-professional employees located at the Agency's headquarters in Washington, D.C. and at four field offices located throughout the United States. The parties are governed by a collective-bargaining agreement (CBA) that expired on November 9, 2019, but is in a year-to-year rollover status.

BARGAINING HISTORY

On August 28, 2019, the Agency notified the Union that it wished to reopen the CBA to renegotiate it. On October 1st, the Union submitted its initial ground-rules proposals. The parties exchanged multiple emails and had 2 in-person bargaining sessions between October 1st and November 21st. On the 21st, and over the objection of the Union, the Agency requested assistance from the Federal Mediation and Conciliation Services (FMCS). The FMCS agreed to provide assistance.

The parties had face-to-face mediation sessions on January 24, 2020, and February 3rd. They also exchanged proposals by emails. They had a face-to-face bargaining session, without the presence of the Mediator, on February 21st. During this session, the Agency informed the Union that it would seek a release from mediation if the session ended without any substantive movement. The session ended and, on the same day, the Agency contacted the Mediator to ask for a release. On the morning of February 24th, the Mediator formally released the parties from mediation in Case No. 20212070016. Hours later, the Union provided unsolicited revised counter proposals. The Agency quickly responded with what it claims were non-substantive changes only. The next day, the 25th, the Agency filed its request for Panel assistance. On May 22, 2020, the Panel asserted jurisdiction over all issues in dispute and ordered the parties to provide initial submissions by June 8, 2020, and rebuttal statements by June 17, 2020. The parties timely submitted their briefing.

PROCEDURAL ISSUES

The Union raises two procedural challenges to the Panel's retention of jurisdiction over this matter.

1. Lack of Jurisdiction

The Union renews jurisdictional arguments that it raised during the Panel's investigation that the Panel ultimately rejected when it asserted jurisdiction over this dispute. In addition, the Union, in its rebuttal statement, stated that it filed a new FLRA negotiability appeal in response to statements made by the Agency in the Agency's June 8th-Panel submission. The Agency, in its own rebuttal statement, disavowed any declaration of non-negotiability. In response to the Agency's clarification, on June 26th, the Union filed an unfair labor practice (ULP) charge against Management for allegedly engaging in bad-faith bargaining and informed the Panel that it was withdrawing the new negotiability appeal. The Agency requests that the Panel reject the Union's renewed jurisdictional challenges.

To the extent the Union's arguments do nothing more than raise previously rejected claims, they are rejected again. Similarly, the Panel will reject the Union's reliance upon its newly filed ULP.

2. Stay Request

Recently, the FLRA stayed the Panel's decision in *U.S. Social Sec. Admin., Office of Hearings Operations and Association of Admin. Law Judges Int'l Fed. Of Prof. and Technical Engineers*, 20 FSIP 001 (April 2020) that resolved the parties' dispute over their successor CBA. Specifically, in *Social Security Admin. and AALJ, IFPTE*, 71 FLRA 763 (2020)(*IFPTE*), the FLRA granted the AALJ's request to stay the foregoing Panel decision after previously denying it. After the FLRA denied the AALJ's first stay request, the AALJ filed a Federal lawsuit challenging the constitutionality of the President's appointment of the Panel's current members. The FLRA concluded that it was appropriate in that case to stay the decision "due to the pendency of parallel proceedings in federal district court."[1]

Citing the above, the Union in this dispute argues that the Panel should "suspend" these proceedings. The Union claims that the "same circumstances and jurisdictional issue" present in *IFPTE* apply to this dispute.

Because this case does not present the same circumstances and jurisdictional issues as *IFPTE*, the Union's request is denied. The Union has not alleged that it has filed its own Federal lawsuit; instead, it appears to be simply relying upon the AALJ's ongoing litigation. The FLRA did not say *any* party could rely upon *any* litigation *anywhere* to halt Panel jurisdiction. More importantly, the Union has not claimed that it has actually asked the FLRA to stay this dispute. The Union's argument, then, is more than misplaced.

MERIT ISSUES

The parties disagree over several ground-rule proposals. As an initial matter, the Panel asserted jurisdiction over five other proposals, Sections III.F, III.H, V.B, V.F, and VI. In its rebuttal statement, the Union concedes that the parties are "no longer at impasse" over these proposals.[2] The parties, however, have not provided any signed agreement for these five proposals. Accordingly, in an excess of caution, the Panel will impose the language for these proposals that is presented by Management in its submissions.

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[1] *IFPTE*, 71 FLRA at 763.

[2] *See* Union Rebuttal at 7-9.

I. Section 1.B

Agency Proposal	**Union Proposal**
If the proposal which is the subject of NTEU's negotiability appeal is found to be within NRC's duty to bargain, the NRC agrees to reimburse travel expenses for one (1) regional NRC employee to be present in negotiations at the table to serve as an NTEU representative.	In the event NTEU files any negotiability appeals with the Federal Labor Relations Authority (Authority) and the Authority, or a final appeal of an Authority decision, determines that NTEU's proposals are within NRC's duty to bargain, NTEU reserves the right to negotiate over such proposals. Negotiations over this Agreement will have concluded once the parties have reached a voluntary or imposed agreement on all negotiable proposals. Once negotiations have concluded, the parties will execute this Agreement. Nothing in this Agreement prevent the parties from mutually agreeing to a different effective date or to reopen this Agreement by mutual agreement.

A. Agency Argument

The Agency is willing to pay for one employee's travel should the Union prevail on its negotiability appeal. Otherwise, Management does not believe it should have to pay for these costs because technology permits meaningful participation. The Agency is unwilling to include language authorizing the ability to reopen the agreement by mutual agreement at a later date. During negotiations, the Agency formally declared that this proposal was legally non-negotiable because it was inconsistent with Executive Order 13,387, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (May 2018) (Official Time Order). As relevant, this Order generally prohibits Federal agencies from reimbursing unions for various expenses.

B. Union Argument

The Union's proposal calls for the parties to resume negotiations should it prevail on its negotiability appeal. The Union believes this position accurately captures the law on negotiations. The Union has "no interest" in remote negotiations and it was not something that the parties had negotiated.[3] The Union's proposal also allows for the reopening of the agreement, but only if done mutually. As a result of the Agency's declaration of non-negotiability, the Union has filed a negotiability appeal with the FLRA.

C. Conclusion

The Panel will impose a modified version of the Agency's proposal. Management's language tacitly acknowledges that the ongoing negotiability appeal could result in a conclusion that Management may be responsible for the costs of the relevant Union bargaining team member. Thus, Management's language balances the Agency's interest of ensuring that negotiations over the master agreement proceed in a timely manner with the Union's interest in a potential reimbursement. In recognition of the ongoing related negotiability appeal, however, the Panel will add language that acknowledges that process. The following language should be added to Management's proposal:

The Union does not waive its ability to initiate any proceedings permitted under applicable law.

II. Section 1.D

Agency Proposal	**Union Proposal**
The 2015 CBA remains in full force and effect until a complete successor agreement is signed and effective unless a provision is terminated in accordance with Article 57 of the 2015 CBA.	All provisions of the 2015 Collective Bargaining Agreement (CBA or Term Agreement) remain in full force and effect until a complete successor agreement is signed and effective. Since the 2015 CBA has expired, its mandatory subjects continue in full force and effect. Both Parties reserve the right to terminate permissibly negotiated

[3] Union Rebuttal at 5.

	provisions upon expiration by providing appropriate notice under the law.

A. Agency Position

According to the Agency, Article 57 states that "[a]ny provision of the [CBA] that conflicts with a government-wide regulation that took effect during the term of this [CBA] will be brought into compliance with that regulation, subject to any bargaining obligations regarding that change."[4] Thus, Management wants to preserve its contractual ability to alter the CBA should the situation arise. Additionally, Article 57 permits either party to terminate a contract provision that covers a permissive topic of bargaining should the CBA expire.

B. Union Position

The Union believes that it is inappropriate to discuss Article 57 in the context of this proposal. Instead, it should be raised as a part of Section V.D, discussed below. That section contains an extensive discussion of the parties' rights and obligations under Article 57 and other applicable laws. The Union also accuses the Agency of being less than forthcoming with its rationale for its proposal. In this regard, the Union maintains that the Agency based its proposal on President Trump's 2018 labor Executive Orders rather than any other legitimate reason.

C. Conclusion

The Panel will impose a modified version of the Agency's proposal. The parties generally agree that the existing agreement remains in effect until a new agreement is signed and effective. The main dispute is whether to incorporate Article 57 and its discussion about how to address contract provisions that become illegal after the contract expires, i.e., permissive topics of bargaining. Some of this dispute appears to turn on the parties' differing interpretation of what is required under Article 57. Indeed, in its rebuttal statement, the Agency insists that the Union does not have the authority to deviate from what the parties bargained for when they accepted Article

[4] Agency Position at 3.

57.[5] Moreover, as the Union correctly notes, Section V.B – discussed below – goes into Article 57 in greater detail. Rather than resolving the parties' potentially differing interpretations of Article 57, the Panel accepts Management's proposal but imposes the below changed language (in bold):

> The 2015 CBA remains in full force and effect until a complete successor agreement is signed and effective unless a provision is terminated in accordance with **applicable law**.

III. Section 3.B

Agency Proposal	**Union Proposal**
The cost of required travel to and/or from negotiations shall be paid for by each party for the members of their team, including alternate members, and their note takers. However, as an exception to this general rule, if the Union's proposal in 0-NG-3462 is found to be within the Agency's duty to bargain, the NRC agrees to assume the travel and per diem expenses for one (1) regional NRC employee to be present in person at the negotiations at the table to serve as an NTEU representative.	The cost of required travel to and/or from negotiations shall be paid for by each party for the members of their team, including alternate members, and their note takers. However, as an exception to this general rule, if the Union's proposal in 0-NG-3462 is found to be within the Agency's duty to bargain, the NRC agrees to assume the travel and per diem expenses for one (1) regional NRC employee to be present in person at the negotiations at the table to serve as an NTEU representative. If a final decision has not been rendered concerning the Union's proposal in 0-NG-3462 by the time term negotiations begin, the NRC will pay the travel and per diem expenses for the NRC Regional employee. NTEU will reimburse the NRC for such expenses if NTEU's proposal is found to be non-negotiable. In the event a regional NRC employee is not able to participate remotely

[5] *See* Agency Rebuttal at 2-3.

	as an NTEU representative because of malfunctions in electronic equipment that provides video and audio capability (i.e. Skype), the NRC agrees to immediately remedy this situation so that the NRC employees can participate remotely in negotiations.

A. Agency Position

This proposal mirror's Management's Proposal 1.B discussed above, and it reinforces Management's contention that travel is foreclosed by the Official Time Order. But, Management also has an interest in progressing this matter forward, so it proposes a scenario in which the Union could recover costs.

B. Union Position

The Union's proposal is similar to that offered by Management. But, the Union adds that the Agency will pay for travel costs if bargaining commences and the FLRA has not yet ruled on the Union's negotiability appeal. The Union would reimburse the Agency should it lose the appeal. The Union also includes language that places a duty upon the Agency to provide equipment for remote bargaining if in the equipment in place malfunctions.

C. Conclusion

The Panel will impose a modified version of the Agency's proposal. The parties agree that the Agency will reimburse the Union at a later date should the Union's negotiability appeal succeed, but the Union requests *immediate* payment with the understanding that the Union will later reimburse the Agency should the Union lose its appeal. The Union has not explained why it *must* have payment at this immediate juncture. Indeed, if the Union is willing to reimburse Management at a later date, it stands to reason that the Union currently has the resources to pay travel expenses.

Regarding equipment to be used during negotiations, as discussed below, the Panel is imposing language that would require the parties to alternate bargaining locations by bargaining sessions. As such, the parties would sometimes

bargain at the Union's headquarters. Given this scenario, it is not clear why the Agency should *always* be responsible for bargaining technology. It does, however, make sense to make Management responsible when bargaining occurs at Management's facilities. Accordingly, Management's proposal should be modified to include the following bolded language:

> **In the event a regional NRC employee is not able to participate remotely as an NTEU representative because of malfunctions in electronic equipment that provides video and audio capability (i.e. Skype), and bargaining is at NRC facilities, the NRC agrees to seek to remedy this situation so that the NRC employees can participate remotely in negotiations.**

IV. Section IV.A

Agency Proposal	**Union Proposal**
For each three-day block of negotiations, the first day of negotiations will be held at the NRC's headquarters in Rockville, Maryland, the second day of negotiations will be held at the NTEU's National Headquarters in Washington, D.C., and the third day of negotiations will be held at the NRC's headquarters in Rockville, MD.	Each three-day block of term negotiations will be held at either the NRC's headquarters in Rockville, Maryland or the Union's headquarters in Washington, D.C. on a weekly rotating basis. The location of the first block session will be determined by a coin flip.

A. Agency Position

The **Agency** proposes that, for each day of negotiations, the parties will alternate negotiation sites between the Union's headquarters and the Agency's headquarters. Most of both parties' bargaining teams are stationed at the Agency's headquarters in Rockville, Maryland. Additionally, the Union has an office in this building. Further, the Agency is preparing safety measures to address the impact of COVID19 when employees finally return to the office.

B. Union Position

The **Union** counter-proposes that alternating location will take place by block sessions as opposed to individual days. The Union does not believe that the Agency has demonstrated an

"operational" need for its "discriminatory" proposal.[6] The parties rotated locations for ground rules negotiations. This is simply a case of Agency negotiators being unwilling to bargain at the Union's facilities.

C. Conclusion

The Panel will impose the Union's proposal. The Agency does not dispute the Union's claim that the parties alternated locations by block sessions, rather than individual days, during ground rules negotiations. Given the foregoing fact, the Agency could and should have produced data to demonstrate what savings would accrue under its newly proposed arrangement. Management did not. Given the lack of data, coupled with most recent past practice, the Panel believes it is more reasonable to allow the parties to rotate face-to-face locations by block session.

V. Section IV.E

Agency Proposal	**Union Proposal**
Each Parties' proposals may include amendment to current articles and/or new articles, up to a maximum of 30 articles absent the Parties' mutual agreement to do otherwise.	Each Parties' proposals may include amendment to current articles and/or new articles, up to a maximum of 18 articles absent the Parties' mutual agreement to do otherwise.

A. Agency Position

The existing CBA has 57 articles, and only 11 articles were opened during the last round of negotiations. The contract needs an overhaul to bring it into compliance with modern practice and law. Thus, Management proposes allowing for an opening of a maximum of 30 articles.

B. Union Position

Management's proposed bargaining schedule, discussed below, calls for only 15 days of substantive bargaining before either party may turn to FMCS assistance. If the parties are bargaining under Management's proposed scheme, the foregoing time is insufficient for "legitimate" bargaining.[7] Thus, the Union proposes opening 18 articles only.

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[6] Union Position at 5.

[7] Union Position at 7.

C. Conclusion

The Panel will impose Management's proposal. As noted by the Agency, the contract is nearly 60 articles in length. And, it appears to have been in effect for several years. Obviously, the universe for Federal sector bargaining has evolved quite a bit in the preceding years. Thus, it makes sense that the parties should have maximum flexibility to address issues in their agreement. The Union's concerns about the length of bargaining will be addressed in the below section.

VI. Section IV.F, IV.G, IV.H

Agency Proposal IV.F	**Union Proposal IV.F**
Absent mutual agreement to do otherwise, the parties will meet for negotiations for no less than 5 weekly block sessions, one block session per month, with the particular weeks determined by mutual agreement. The first block session will begin no later than 60 days after FSIP decision on these ground rules is issued. The next four block sessions will be held monthly or more frequently determined by mutual agreement. The parties recognize that the health and safety of our staff is of paramount importance. Accordingly, negotiations will occur face-to-face unless concerns over the Covid-19 pandemic dictate that negotiations are held via Microsoft Teams / WebEx or similar tool.	Absent mutual agreement to do otherwise, the parties will meet for face-to face negotiations for no less than 9 monthly block sessions. Bargaining will take place during May, June, July, August, September, October and November 2020 and January and February 2021 with the particular weeks determined by mutual agreement.
Agency Proposal IV.G	**Union Proposal IV.G**
Negotiations will be held on Tuesday, Wednesday, and Thursday of each week of negotiations. By mutual agreement, the Parties may decide in a given month to meet during a time other than	Negotiations will be held on Tuesday, Wednesday, and Thursday of each week of negotiations. By mutual agreement, the Parties may decide in a given month to meet during a time other than

as established above until the Parties have met for at least 5 blocks of face to face bargaining.	as established above until the Parties have met for at least 9 weeks of face to face bargaining, or until they have reached an agreement on a complete successor agreement, whichever comes first.
Agency Proposal IV.H	**Union Proposal IV.H**
If agreement is not reached at the end of these 5 bargaining sessions the Parties may continue to bargain by mutual agreement with subsequent dates of negotiations determined by the Parties or the Parties may follow the process set forth in Section VI [of the ground rules].	If agreement is not reached at the end of these 9 bargaining sessions the Parties may continue to bargain by mutual agreement with subsequent dates of negotiations determined by the Parties. Once the parties have met for at least 9 bargaining sessions, either party may seek the services of the Federal Mediation and Conciliation Service (FMCS) consistent with law, rule, and regulation and the terms of this Agreement and as long as all Articles have been subject to good faith negotiations. Either party may maintain that the involvement of the FMCS in the Parties' negotiations is premature.

A. Agency Positions

The Agency's proposals cover the timeframe for bargaining before the parties seek the assistance of FMCS. The main dispute is whether the parties should first engage in 5 block sessions of negotiations – 15 days – over 5 months or 9 block bargaining sessions – 27 days – over 9 months. The Agency proposes the former because it maintains that bargaining should move as expeditiously as possible. Schedule 5(a) of Executive Order 13,836, "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining," (Bargaining Order) states that a bargaining period of 4 to 6 months should ordinarily be considered "reasonable." Management's proposed schedule is consistent with the foregoing.[8]

[8] Agency Position at 8.

And, in any event, the Agency proposes that the parties may mutually agree to extend that time period.

As to steps after the bargaining period, the Agency proposes that the parties will follow the procedures for mediation outlined in its proposed Section VI of the ground rules agreement.

B. Union Position

The Union proposes 9 block sessions of negotiations over 9 months prior to mediation efforts. The Union believes that its schedule permits for true substantive bargaining. The Union's proposals also emphasize that the parties must be at an actual good-faith bargaining impasse before they seek the assistance of FMCS. The Union further claims that the parties have "already agreed" to face-to-face negotiations and, as such, virtual negotiations as a default position is unacceptable.[9]

C. Conclusion

The dispute concerns two issues: (1) amount of time spent in negotiations before mediation (Proposals IV.F and IV.G); and (2) procedures to follow afterwards (Proposal IV.H). The Panel imposes a compromise position that adopts a modified version of the Union's proposal for the first issue and a modified version of the Agency's proposal for the second.

i. Time in Negotiations

As to the first issue, the Agency has made it clear that its proposed schedule is based primarily upon the Bargaining Order. Section 5(a) of the Order states:

> For collective bargaining negotiations, a negotiating period of 6 weeks or less to achieve ground rules, and a negotiating period of between 4 and 6 months for a term CBA under those ground rules, should *ordinarily be considered reasonable*. [emphasis added].[10]

This language is clear that parties should ordinarily strive for a bargaining period of 4 to 6 months. However,

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[9] Union Rebuttal at 8.

[10] Executive Order 13,836, Section 5(a).

bargaining 30 (or potentially 60)[11] articles in 5 block sessions – or 15 days – should not be considered "ordinary" business. The Agency argues that the parties could go beyond 5 sessions by mutual agreement, but the Agency's language is not a mandate. The Union's language in its proposed Sections IV.F and IV.G would allow for more robust bargaining prior to the invocation of mediation assistance, so its proposals for these two sections should be adopted with some modification.

In the Union's Section IV.F, the Union references a 9 block-session approach to bargaining with one block occurring per month. Although the Panel believes in more bargaining opportunities than less, the Panel also recognizes the utility of prohibiting unnecessary elongated bargaining and its expense to the taxpayer. Therefore, the Panel will require the parties to meet *every other week instead of once a month.* Thus, the following bolded changes will be made:

> **The parties will engage in negotiations** for no less than 9 block sessions. **These sessions will occur every other week with the particular weeks determined by mutual agreement. However, the first block session will begin no later than 60 days after FSIP decision on these ground rules is issued.**

As a part of the parties' dispute in Proposal IV.F, the Agency has also suggested common sense language to address concerns related to face-to-face bargaining in the age of Covid-19. Pandemics do not come with built-in expiration dates. Thus, there is no way of knowing when in-person negotiations can resume with aplomb.

The Union opposes this language because the parties "agreed" to face-to-face negotiations and because the parties did not bargain over the Agency's request. If there was an actual agreement, the Union failed to provide it. Instead, the Union appears to be relying upon the fact that the Agency's

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[11] As noted above, the parties' language for Section IV.E states that "[e]ach Parties' proposals may include amendment to current articles and/or new articles, up to a maximum of 30[or 18] articles absent the Parties' mutual agreement to do otherwise." From this language, it is unclear whether the parties are requesting to each bargain a maximum number of proposals or a total maximum number of proposals. But, for purposes of this decision's analysis, it is unnecessary to resolve this distinction.

proposal provided to the Panel for Section IV.F in its initial Panel filing -- prior to the emergence of Covid-19 -- refers only to face-to-face negotiations. Yet, the Agency's new suggested language was officially presented *after* the Panel asserted jurisdiction over the impasse in Section IV.F. The Panel has inherent authority to resolve an impasse by "whatever methods and procedures . . . it may consider appropriate."[12] Thus, the Panel is free to add new language on its own accord even had the Agency not offered it. Indeed, the Panel has recently done that in other disputes.[13] Accordingly, the below language from Management's proposal will be added to the end of the Union's Proposal Section IV.F (no modification is necessary to Section IV.G):

> **The parties recognize that the health and safety of our staff is of paramount importance. Accordingly, negotiations will occur face-to-face unless either party expresses concerns over the Covid-19 pandemic and requests that negotiations be held via Microsoft Teams / WebEx or similar tool.**

ii. Mediation Procedures

As to the second issue, mediation procedures, the Agency proposes general language in Proposal Section IV.H requiring the parties to follow mediation procedures outlined later in the parties' ground rules agreement. The Union offers more specific language about good faith negotiations and the nature of impasse. The Union's language, however, is unnecessary because nothing in Management's language suggests that the Union would waive any of its statutory rights or abilities to raise any legal objections. But, in an excess of caution – and to bring language in conformance with the Panel's conclusion on proposed bargaining blocks – the Panel will impose the following modified version of Management's Section IV.H (new language in bold):

> If agreement is not reached at the end of these **9** bargaining sessions the Parties may continue to bargain by mutual agreement with subsequent dates of negotiations determined by the Parties or the Parties may follow the process set forth in Section VI **of this agreement in accordance with applicable law**.

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[12] 5 U.S.C. §7119(c)(5)(A)(ii).

[13] *See EPA and NTEU*, 20 FSIP 009 at 4 (2020)(Panel "amend[ed]" language to address Covid-19 pandemic).

VII. Section V.D

Only the language bolded at the end of the Union's proposal is in dispute:

Agency Proposal	**Union Proposal**
In accordance with Article 57.1.2. and the Federal Service Labor-Management Relations Statute (5 USC Chapter 71), either party may terminate an Agreement provision that is permissively negotiable. Further, in accordance with Article 57.1.2 and 5 USC Chapter 71, the parties will bring into compliance any provisions of the 2015 CBA that are inconsistent with any Federal law or any Government-wide rule or regulation, even if no other changes, modifications, or deletions are proposed for that article. Changes resulting from these terminations and/or proposals to bring them into compliance shall be effective upon conclusion of any required negotiations over impact and implementation. Those provisions which are not terminated or brought into compliance remain in effect until a successor agreement is effective. Nothing in this provision waives either party's right to challenge such terminations and or compliance matters in a negotiability appeal or other legal filing.	In accordance with Article 57.1.2. and the Federal Service Labor-Management Relations Statute (5 USC Chapter 71), either party may terminate an Agreement provision that is permissively negotiable. Further, in accordance with Article 57.1.2 and 5 USC Chapter 71, the parties will bring into compliance any provisions of the 2015 CBA that are inconsistent with any Federal law or any Government-wide rule or regulation, even if no other changes, modifications, or deletions are proposed for that article. Changes resulting from these terminations and/or proposals to bring them into compliance shall be effective upon conclusion of any required negotiations over impact and implementation. Those provisions which are not terminated or brought into compliance remain in effect until a successor agreement is effective. Nothing in this provision waives either party's right to challenge such terminations and or compliance matters in a negotiability appeal or other legal filing. **By mutual agreement, some or all bargaining pursuant to Article 57.1.2 will be addressed in**

	negotiations over the new term agreement.

A. Agency Position

This language concerns the parties' ability to terminate contract language after the contract expires because the language concerns illegal topics and/or language that the parties are not required to bargain, i.e., permissive topics of bargaining. The Agency's concern with the Union's language is that it will prohibit the Agency from altering an expired agreement to bring it into compliance with Federal law. Management believes that the Union's language will force the Agency to postpone negotiations over expired illegal contract language unless those negotiations are also a part of term negotiations. Management argues that, under existing FLRA case law, it is not required to wait until term negotiations to bargain over expired illegal contract language.[14] That is, a party may negotiate over non-mandatory topics of bargaining separate and apart from term negotiations.

B. Union Position

The Union argues that its language should be adopted because it reinforces Article 57.1.2 of the existing CBA, which concerns government-wide regulations that went into effect during the term of the expired agreement.[15] The Union wants adoption of its language in order to leave open the possibility that the parties could combine successor term negotiations with negotiations over expired contract language. The Agency's opposition to this approach is inconsistent with notions of effective and efficient bargaining as envisioned by President Trump's Executive Orders. It does nothing more than reiterate what is contractually required of the parties.

C. Conclusion

The Panel will impose Management's proposal. This dispute turns on the requirements of Article 57.1.2 of the existing agreement. This language states:

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[14] *See* Agency Rebuttal at 5-6 (citations omitted).

[15] *See* Union Position at 10.

> When the agreement is reopened in accordance with this Article, either party may terminate an Agreement provision that is permissively negotiable. Any provision of this Agreement that conflicts with government-wide regulation that took effect during the term of this Agreement will be brought into compliance with that regulation, subject to any bargaining obligations regarding that change. Such changes shall be effective upon conclusion of any required negotiations over impact and implementation.

Nothing in this quoted language appears to address the Union's suggested approach, i.e., combining negotiations over expired illegal topics with negotiations over term agreements. To be sure, there could be situations where it would make sense to merge the two areas. The opposite, however, is also true. Management may have an interest in moving immediately on certain topics, but the Union's proposal creates an arguable blanket approach that may not be warranted depending upon the circumstances. The parties may need flexibility depending on changes in the law. Moreover, the first portion of both parties' proposals state that they will agree to adhere to Article 57.1.2. As such, it is not clear why the Union needs *another* reference to 57.1.2. in its proposal. Based on all the foregoing, Management's proposal is the most appropriate resolution to this particular dispute.

VIII. Section V.G

Agency Proposal	**Union Proposal**
The new CBA shall not be completed and finalized until all proposals have been disposed of and the parties have mutually agreed on contract language or, if either party seeks assistance from the Federal Services Impasses Panel (FSIP), until FSIP has completed its proceedings.	The new CBA shall not be completed and finalized until all proposals have been disposed of by mutual consent, including the final resolution of all negotiability appeals, grievance/arbitration, Unfair Labor Practice (ULP) proceedings or other legal filings related to the negotiations over the new term agreement have concluded. Absent mutual agreement, no part of the CBA will be severed from the entire agreement and implemented or moved to the FSIP prior to the resolution of

	any outstanding negotiability petitions or other legal proceedings related to negotiations over a new term agreement to include completing negotiations over proposals found to be within the Agency's duty to bargain. Accordingly, where proposals are found to be negotiable, the Parties will negotiate over them pursuant to these ground rules. Nothing in this provision prevents the Parties' by mutual agreement from agreeing to alternate language that will achieve the purpose of the proposal and render the proposal negotiable.

A. Union Position

Under the Union's approach, "certain preconditions" must be satisfied before the parties implement the CBA.[16] The Union is of the belief that, under the Statute, FLRA precedent, and National Labor Relations Act (NLRA) law, the Union has a firm basis to demand to bargain one "complete" agreement.[17] The Agency cannot force: a dispute to impasse when the parties have not completed bargaining; proposals to impasse when they contain potentially illegal language; the Union to limit negotiations solely to those contract provisions that are rejected following Agency head review. Consequently, the Union's language reflects these ideas and require the Agency to complete all negotiations and third-party proceedings before implementing a CBA *or* proceeding to the Panel for assistance.

B. Agency Position

The Agency argues that the Union's position is antithetical to effective and efficient bargaining. Under the Union's approach, the CBA could not go into effect until *every single third-party proceeding* is resolved. Such an approach is inappropriate; the Union could always challenge the implementation of the CBA at a later date.

[16] Union Position at 13.

[17] *See id.* at 12 (citations omitted).

C. Conclusion

The Panel will order the parties to withdraw their proposals. Both parties use their proposals to essentially ask the Panel the same question: what is the scope of our bargaining obligations in relationship to the impasse process? Should the agreement be finalized once the Panel process is complete, as Management suggests? Or, as the Union requests, are the parties legally obligated to first resolve all third-party disputes? The Panel declines to answer. Indeed, it could not define the scope of the parties' legal obligations even if it wanted to do so. If the parties have concerns about what is required of them under applicable law, they should look to that law for resolution. Accordingly, the parties' language should be withdrawn.

IX. Section VI.G

Agency Proposal	**Union Proposal**
The parties will hold at least one (1) block session per month for five (5) months. The parties may by mutual agreement hold additional sessions within those five months. After the conclusion of the five-month period, either party may request mediation from FMCS. The parties may jointly agree to use a private mediator in lieu of the FMCS. If a joint agreement is not reached using a private mediator, within one week of notice, mediation assistance will be requested from the FMCS. Subsequent to participation in mediation, the parties, individually or jointly, may request that the FSIP resolve any outstanding issues at impasse. If the request to FSIP is made by one party, the other party will be notified at the time the assistance is sought. The utilization of mediation and	Either party, after notice to the other party, may request that the FMCS release the bargaining dispute to the FSIP after bargaining with mediation assistance that has been conducted in good faith and that complies with this Agreement. The non-requesting party will have at least three work days to reply. Before impasse has been declared, the FMCS mediator shall ensure that all proposals and open articles have been thoroughly discussed and the parties are unable to reach agreement on all outstanding issues. After the conclusion of at least 9 block sessions, either party may request mediation from the FMCS. The parties may jointly agree to use a private mediator in lieu of the FMCS. If a joint agreement is not reached using a private mediator, within one week of notice, mediation assistance

the involvement of the FSIP does not preclude the parties from engaging in direct negotiations at any time to attempt to resolve the disputes at issue. If the parties agree to use a private mediator, the cost will be shared equally by the parties.	will be requested from the FMCS. Subsequent to participation in mediation, the parties, individually or jointly, may request that the FSIP resolve any outstanding issues at impasse as long as there are no outstanding negotiability petitions or other legal proceedings related to negotiations over a new term agreement and as long as negotiations have been completed over proposals found to be within the Agency's duty to bargain. If the request to FSIP is made by one party, the other party will be notified at the time the assistance is sought. The non-requesting party will have at least seven work days to reply. The utilization of mediation and the involvement of the FSIP does not preclude the parties from engaging in direct negotiations at any time to attempt to resolve the disputes at issue. If the parties agree to use a private mediator, the cost will be shared equally by the parties.

A. Agency Position

The Agency's proposal reiterates Management's proposed 5-block bargaining session discussed elsewhere in this decision. Management's proposal is intended to conform with the "reasonableness" requirements of negotiations under the Bargaining Order as to not delay negotiations.

B. Union Position

The Union's proposal features five aspects:

- it references the Union's proposed 9-block bargaining structure;

- a party may request release from FMCS *only* after good faith negotiations that comply with the ground rules agreement *and only after* the requesting party gives the non-requesting party 3 work days to reply to a proposed request;

- the Mediator must ensure that all proposals are fully negotiated prior to his or her release of the parties from mediation;

- a party may request FSIP assistance only after all other third-party proceedings are completed; and

- a party who requests Panel assistance must simultaneously inform the non-filing party, and the non-filing party will have 7 days to respond.

The Union's proposal is designed to protect its rights and prohibit Management from keeping the Union "in the dark." The Union feels that Management rushed this dispute to the Panel prematurely, so the Union is seeking to avoid a similar set of circumstances from arising again.

C. Conclusion

The Panel will impose a modified version of the Agency's proposal. The Union's proposal is premised largely upon speculation of what the Agency *might* do in the future. Additionally, the Union's proposal references its now rejected scheme for the required resolution of third-party proceedings prior to the use of mediation. The proposal also places duties upon a mediator, but FMCS and its mediators are capable of independently assessing the situation.[18] The Union's language, overall, is unnecessary.

Management's language does reference its proposed 5-block bargaining schedule. Consistent with the Panel's earlier modification, **Management's language in the first sentence will be changed to reference the 9-block schedule as follows: The parties will hold block sessions for five (5) months as described in Section IV of this agreement.**

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[18] *See* 5 U.S.C. §7119(a)(stating that FMCS "shall determine under what circumstances and in what manner it shall provide services and assistance").

The Panel also believes that the Union's suggestion that a party filing a request for Panel assistance should also inform the other party at the time of filing is a good one. That approach will allow the Panel process to move forward expeditiously. Accordingly, the following language will be added to Management's proposal:

> **If the request to FSIP is made by one party, that request will be filed via e-filing and the filing party will provide the other party with simultaneous electronic notice at the time of the filing.**

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.

Mark A. Carter
FSIP Chairman

July 22, 2020
Washington, D.C.