

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. ARMY MEDICAL COMMAND,
BROOKE ARMY MEDICAL CENTER

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1004

Case No. 20 FSIP 073

DECISION AND ORDER

BACKGROUND

This case, filed by the Department of Defense, Brooke Army Medical Center, Fort Sam Houston, Houston, Texas (Agency or Management), concerns the successor Collective Bargaining Agreement (CBA) between the Agency and the American Federation of Government Employees, Local 1004 (Union). The Agency provides safe, quality care to military service members, their families, veterans and civilian emergency patients. The Union represents approximately 1734 bargaining unit employees. The parties are governed by a national collective bargaining agreement (CBA) that expired on August 14, 2019, but is in a year-to-year rollover status. The CBA was last negotiated in 1998.

BARGAINING HISTORY

By email, dated June 17, 2019, the Agency requested to reopen the CBA. The current CBA contains 41 articles, and 2 appendices. The parties were able to reach agreement on 12 articles before negotiations even began. The parties exchanged actual proposals beginning on April 10, 2020. The parties began negotiations in May 2020. Negotiations ended on June 12, 2020. The parties mediated with the assistance of an FMCS mediator. The Mediator released the parties on July 23, 2020. On July 23,

2020 and July 28, 2020, after being released by the Mediator, the Agency communicated with the Union regarding the next steps in the bargaining process, including the filing for Panel assistance. On July 28, 2020 and July 31, 2020, the Union filed ULP complaints over bargaining concerns. The Agency filed the request for FSIP assistance on July 30, 2020; the Union received its copy on July 31, 2020.

The Panel determined, in accordance with its regulations, 5 C.F.R. § 2471.6(a) (2), to assert jurisdiction over 5 articles. The Panel, however, in accordance with its regulations, 5 C.F.R. § 2471.6(a) (1), declined jurisdiction over 10 articles where the Union filed a colorable ULP complaint. The Panel also did not assert jurisdiction over 3 articles that had been resolved with the Agency's agreement to the Union's proposals. The Panel asserted jurisdiction over 5 articles and ordered the parties to submit to a Written Submissions procedure. Both parties complied.

5 ARTICLES AT IMPASSE

- Article 3: Employee Rights - sections 3-8(e)
- Article 9: Facilities and Services Provided to the Union - Entire Article
- Article 20: Training - Sections 20-4 and 20-5;
- Article 21: Hours of Work - Sections 21-1, 21-3, and 21-6
- Article 34: Safety and Health - Sections 34-2(a) and 34-3(f)

POSITIONS OF THE PARTIES AND PANEL DETERMINATION

- **Article 3: Employee Rights - sections 3-B(e)**

The Union has proposed the same language as the Agency for this section. The Panel orders the parties to adopt the Union's language.

• **Article 9: Facilities and Services Provided to the Union - Entire Article**

The mission of the hospital is taking care of sick and wounded military and beneficiaries. The current language of Article 9 of the CBA requires the Employer to provide the Union permanent office space with access to bathroom facilities. Additionally, the Employer is also required to provide office equipment and furnishings, including, but not limited to: desks, chairs, typewriters, fax machines, copiers, computers, printers, software, etc. Under the current CBA, the Agency is also required to provide the Union with government telephones, at no cost, and permit the Union Officers and Stewards to use the Employer's telephones, computers, fax machines and copy machines in the performance of representation functions for the bargaining unit employees.

The Agency has proposed to provide the Union space for performing representational duties on a case-by-case basis; just not permanent office space exclusive for their use. The Agency's proposal is premised, in part, upon Executive Order 13837. Section 4 (a) (iii) states, "no employee, when acting on behalf of a Federal labor organization, maybe permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations". The Agency argues that it does not offer free or discounted use of government property to employee's acting on behalf of non-Federal organizations, and therefore, it should not offer that access to the Union. The Agency also argues that BAMC is currently facing a massive shortage of 28,777 square footage of office space that ranges in priorities involving Level 1 Trauma/In-Patient/Behavioral Health Issues to Administrative/Business Process Improvement; all of which are directly related to executing the patient care mission of BAMC. The Agency argues that accepting the Union's proposal would require the Agency to sacrifice the pending list of space requests that support the patient population in order to accommodate the Union's need for office space. Additionally, the Agency argues that with the likely limitation on official time (not an issue currently at impasse before the Panel), the Union will not need permanent office space.

The Union raised a procedural issue. As background, throughout the negotiations, the Union requested the maintenance of status quo; free use of facilities. During the negotiations,

the Union offered to pay some rent to the Agency. Because that proposal was not ultimately accepted by the Agency, the Union's proposal reverted back to its proposal it maintained throughout bargaining - maintenance of status quo. In the Panel's jurisdictional determination, the Panel accepted jurisdiction over the Agency's Article 9 proposal, which differed from its proposal offered during mediation; it too reverted back to its original proposal to not provide the Union office space. On October 5, 2020, the Agency declared the Union's Sections 9-2 and 9-3 (the Union's original proposals) nonnegotiable because the Agency believes they conflict with Executive Order 13837, Section 4(a)(iii). The Union filed a negotiability appeal on October 8, 2020. The Union has taken the position that while their proposal may conflict with the Executive Order, the proposals are not contrary to the Statute. The Union has asked that the Panel not decide the issues in the Agency LBO Sections 9-2, 9-3 and 9-4 because they concern the exact same legal issue which is now pending before the FLRA with these parties.

In terms of the Union's specific proposals for Article 9, the Union argues that their proposal for Section 9-1 and the Agency's Section 9-1 concerning posting materials on bulletin boards are identical and should be ordered. The Panel orders the parties to adopt the identical language in **Section 9-1**.

Section 9-2 and 9-3 concern the provision of certain facilities and services at no cost to the Union, while the Agency's Sections 9-2 and 9-3 concern the same subject matter and the same legal issue now pending before the FLRA in the Union's negotiability appeal. On the substance of the Union's proposal, the Union argues that the Agency has provided no demonstrated need to eliminate the twenty-two (22) year practice of providing the Union a level of discretionary support. The Panel has determined that it will withdraw its jurisdiction over **Sections 9-2 and 9-3** because the Union has raised a colorable legal issue - the negotiability of the provision of services and facilities by the Agency to the Union at no cost.

The Agency's **Section 9-4** and the Union's Section 9-5 address the use of meeting room space. The Agency has proposed that the Union can have access to this non-permanent space by requesting its use through the BAMC website. The Panel orders the parties to adopt a modification to the Agency's **Section 9-4**. This will address the use of space that is not addressed by the pending Sections 9-2 and 9-3.

The Union's Section 9-6 and 9-7 are both carryovers from the current CBA, except for the addition of the reference to the agency website. Section 9-6 provides that the Agency will post the CBA on the BAMC intranet page. Section 9-7 provides that the Agency will post the Union office number on its website. The Agency provided no explanation for its disagreement or explanation of any burden caused by the Union's proposal. The Panel orders the parties to adopt the Union's **Sections 9-6 and 9-7, as modified.**

• **Article 20: Training - Sections 20-4 and 20-5**

The Agency argues that their proposed language makes it clear that management has the right to make determinations regarding directed continuing education and other training for the purpose of the employee's accomplishing their job. The Union confirms that it does not disagree with the Agency's Section 20-4 and 20-5. As there is no disagreement regarding the Agency's Section 20-4 and 20-5, the Panel orders the parties to adopt the Agency's **Sections 20-4 and 20-5.**

The Union's Sections 20-4 and 20-5 are proposals based upon the current CBA Sections 20-6 and 20-7, respectively. Regarding 20-4, the Union proposes that the Agency continue to post on the bulletin boards a listing of available job-related courses that the employee may request to attend. The Agency would only be required to post courses that the Agency has already determined to be approved. The Agency provided no counter. They only offered that such a posting has not been done for years because the practice was discontinued. The Agency offers that the language should be modified to only require the posting of information regarding in-service training and other training that will benefit employees who require licensures and certifications in order to maintain their positions; however, the Agency offered no formal counter. As the language only triggers an obligation when the Agency has already determined funds are available for the training, the Panel orders the parties to adopt the Union's **Section 20-4.**

The Union's Section 20-5 addresses the Union's access to information regarding funding for civilian training and the Union's right to provide input to the Civilian Training Plan when the Directorate of Civilian Personnel provides notification of development. The Panel will not impose this contractual obligation under the Union's **Section 20-5.** The Union's right to

information and consultation will be addressed through the Statute.

- **Article 21: Hours of Work - Sections 21-1, 21-3, and 21-6**

Section 21-1 addresses the definition of the administrative workweek, the regular 8-hr tour, overtime, and changes to tours and shifts. The parties' language is essentially the same except changes from the current CBA in the Agency's last sentence. The Agency proposes that the Union will be notified regarding new shifts and new tours. The Union's proposal reflects that the obligation for notice and bargaining applies to not only new shifts and tours but changes to existing shifts and tours. The Agency provided no explanation for the proposed change. The Panel orders the parties to adopt the language for **Section 21-1** as drafted in the attached, recognizing the Union's right to bargain over changes as well as the establishment of shifts and tours.

Section 21-3 addresses the Agency's commitment to tours of duty to work schedules. The Agency made changes to the CBA language without explanation for the changes proposed. The Agency seems to be trying to bring the language in compliance with the language in 5 CFR § 610.121 - Establishment of work schedules. There were only a few modifications that would be necessary. The rest of the proposed language would expand the Agency's ability to make changes to an employee's posted schedule. The Panel orders a few modifications to the current CBA **Section 21-3** to align with the Act.

Section 21-6 concerns shift work. Under the Union's proposal, and the current CBA, subsections (a), (b) and (c) concern employee shift preferences. These first three subsections provide that an employee can advise their supervisor if there is a shift preference (subsection a); the supervisor will consider "when feasible or practical" the shift preference submitted by an employee when the supervisor develops the schedule (subsection b); and the supervisor will consider information presented by the employee, which could include personal hardships, but only when a supervisor determines that the supervisor will consider employee shift preferences (subsection c). A supervisor can also consider, but is not limited to, other factors such as service computation date, job skills, assignment history, length of service and current position, or any consideration that the supervisor so desires to consider (also subsection c.). The Agency states that it does

not have an issue with receiving an employee's statement of preference, reiterating that the Agency is not required to grant that preference; the Agency reserves the right to make the final decision on shift assignment. The Panel orders the inclusion of subsections (a), (b) and (c) concerning employee shift preferences, with modification to make it clear that the Agency reserves the right to make the final decision on shift assignments.

Under the Union's Section 21-6 (d), the Agency is encouraged to schedule shifts so that employees "normally" have at least 24 hours off when a shift is changed. Under the Agency's proposal, without explanation or justification, the Agency only commits to providing 12-hours between shifts if there is a change in shifts. The Union argues that doesn't provide much time for an employee to make the adjustment to the new shift (i.e., make accommodations in personal life). The Panel orders the parties to maintain the 24-hour between shift changes. The rest of the provisions are essentially the same, with no explanation offered by the Agency of the proposed changes from the current CBA. The Panel orders the parties to adopt **Section 21-6** as written in the attached.

• **Article 34: Safety and Health - Sections 34-2(a) and 34-3(f)**

There are two points under Section 34-2 where the Agency has made change from the current CBA (the Union's proposal). First, the Agency has removed the commitment to engage with a safety official in making hazard evaluations. The Agency provided no explanation on how that commitment over the past 22 years adversely impacted the Agency's decision-making regarding whether work should proceed in the face of an employee's contention that a task exposes the employee to a health or safety hazard. The Union argues the retention of that requirement is good practice, instead of relying on a first or second level supervisor who may not have the expertise or experience to evaluate a health and safety hazard or eminent danger. Secondly, while the Agency agrees that the decision that there is no eminent danger is grievable, the Agency seeks to add language to make it clear that the employee must follow the direction to keep working even while they grieve. The Agency presented no argument or support to its proposed changes. The Panel orders the parties to maintain the current contract language for **Section 34-2(a)**.

Section 34-3(f) addresses Personal Protective Equipment (PPE). The Union proposes a new subsection to the CBA. Under the new Section, the Agency proposes to supplement the parties' MOU reached in December 2013 regarding PPE (attached). In that MOU, the Agency committed to maintaining and providing PPE and, when that PPE becomes unsafe or it is no longer effective, the Agency committed that it would replace it. The Agency's proposal provides that the PPE will be replaced, provided that funds are available.

The Union proposes that when funds are not available to replace the PPE, the employee will not be obligated to perform the work duty until the PPE is replaced. The Union argues that under the circumstances where: 1) the Agency has determined that the PPE is required to perform the task; 2) the Agency agrees that the PPE needs to be replaced in order to be effective; and 3) the Agency has determined that the PPE cannot be replaced in time to perform the task, the employee should not be expected to perform the task. By the Agency's own evaluation, performing the task without the PPE is unsafe.

Concerns over working in a hazardous situation is just the issue contemplated under Section 34-2 (a). When an employee, during the course of performance of official duties, believes they are exposed to a health or safety hazard, the employee has the right to decline to perform the assigned task if they have a reasonable belief that under the circumstances, the task poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to wait for abatement (i.e., no time to wait for funds to be available to replace the PPE). The Panel orders both parties to withdraw their proposals for Section 34-3(f) as it is already covered by the language ordered for Section 34-2 (a).

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 discussed above and reflected in the attachment.



Mark A. Carter
FSIP Chairman

November 13, 2020
Washington, D.C.

PANEL ORDERED LANGUAGE

Article 3, Section 3-8(e)

Employees are encouraged to reach out to their Supervisors if work-related instructions are unclear.

**Article 9: Facilities and Services Provided to the Union -
Entire Article**

Section 9-1. If the Union desires to post material(s) on any bulletin boards maintained by management they may submit a written request to the Agency asking to place the particular materials on a bulletin board(s) and identifying which bulletin board(s). Such requests will include a copy of the material to be posted, why the material should be posted, and for how long. Approval or denial of such requests will be exclusively within the purview of management and not subject to further review.

Section 9-4. The Employer shall provide space, on a case by case basis, to the Union for ~~incidental consultations~~ meetings with ~~employees as part of their representational duties upon request~~. Such request shall be made in advance in order to allow the Employer to secure space.

Section 9-6. The Employer further agrees to post this agreement electronically on the BAMC intranet page, The Union and the Employer agree to publicize the electronic location. Identical to current CBA Section 9-10 (sentences 4 and 5) (with addition of intranet page)

Section 9-7. If provided by the Agency or provided by the Union, the Union office telephone numbers will be published in the BAMC and Post telephone directories and BAMC intranet.

Article 20: Training - Sections 20-4 and 20-5

Agency Section 20-4: Management officials have sole discretion to approve, when funding is available and where appropriate, continuing education or other training for employees to accomplish their job or enhance performance for bargaining unit members. When such training under this section is authorized and directed, employees shall be on duty time to attend continuing education, lectures, and professional meetings directly related to the position of the employee when mission permits.

Agency Section 20-5: The Employer agrees Employees affected by RIF/TOF will be afforded all applicable statutory and regulatory rights and privileges, to include programs designed for the placement of excess Employees, in accordance with current law, government wide regulation, and agency operating guidance.

Union Section 20-4. The Employer will provide a listing of job-related courses to supervisors that employees may request to attend that are funded by Civilian Personnel for posting on official bulletin boards. A copy of the listing will be provided to the Union and a report of utilization of available class seats will be provided, upon request, to the Union. Management will encourage and assist employees in applying for these training opportunities.

Article 21: Hours of Work - Sections 21-1, 21-3, and 21-6

Section 21-1. The administrative workweek starts at 0001 on Sunday and goes through 2400 Saturday. It consists of 40 hours for full time employees. The regular tour of duty is five 8-hour days, Monday through Friday. Work in excess of eight hours in a day or 40 hours in an administrative workweek will be considered overtime. For employees on Alternative Work Schedules (AWS), work in excess of their scheduled daily tour of duty or in excess of 80 hours in a pay period will be considered overtime. The Union will be notified in writing of any proposed change to established shifts or new shift, and the Union will have an opportunity to bargain, prior to the effective date, on the impact and implementation.

Section 21-3. Where work schedules are used, tours of duty or work hours will normally be posted for a minimum of two weeks in advance. Where the head of the Agency or designee determines that changes in assigned tour of duty or work hours are required due to serious infringement on mission requirement or a substantial increase in cost, management will notify employees of these changes at the earliest possible time, but normally at least two weeks in advance. Management officials should contact affected employees about all schedule changes posted during the employee's absence.

Section 21-6:

- a. Where shifts are used, employees are encouraged to notify their supervisors of their shift preferences.
- b. Supervisors and Management officials may consider, when feasible or practical, shift preferences submitted by employees in developing schedules.
- c. When supervisors and Management officials determine that using shift preferences in scheduling is appropriate they should consider the information provided by the employees, to include personal hardships.
- d. Management officials are encouraged to schedule shift employees so that they normally receive at least 24 hours off between changing shifts and will provide a minimum of twelve hours between changing shifts unless at the request of the employee or when precluded by critical mission requirements.
- e. In addition, the following should be given serious consideration by officials when establishing schedules for shift employees:
 - (1) Assignment of employees to tours of duty/shifts for extended periods rather than shorter periods may be more beneficial to the employees and could result in greater productivity. When possible, and when additional costs to management are not incurred, this should be considered.
 - (2) When workload and staffing permit, scheduling of two consecutive days off is encouraged.
 - (3) Weekends off will be scheduled on an impartial basis.
 - (4) Supervisors are encouraged to approve temporary shift swaps between equally qualified employees when they receive reasonable advance notice (normally one week) and in cases of hardship situations.
 - (5) Supervisors are also encouraged to approve written requested shift swaps when mission accomplishment is not affected.

Article 34: Safety and Health - Sections 34-2(a) and 34-3(f)

Section 34-2(a): When an employee, during the course of performance of official duties, believes they are exposed to a health or safety hazard which presents an imminent danger which may cause death or serious physical harm, the employee shall immediately notify the nearest available supervisor and/or the Safety Office. The employee has the right to decline to perform the assigned task if they have a reasonable belief that under the circumstances, the task poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures. Management shall make an evaluation of the situation and after discussions with appropriate safety personnel, make a decision as to whether work may proceed. If the employee disagrees with the determination of Management, the employee may grieve the decision under the negotiated grievance procedure. If it is determined that an imminent danger exists, the employee will not be obligated to return to the assignment until the imminent danger is removed.