

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL LABOR RELATIONS BOARD

And

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION

Case No. 20 FSIP 072

DECISION AND ORDER

BACKGROUND¹

This case, filed by the National Labor Relations Board (Agency, Management, or NLRB) on July 29, 2020, concerns all or parts of over 50 articles in the parties' successor collective bargaining agreements. The Agency is charged with enforcing Federal collective-bargaining laws in the private sector. The National Labor Relations Board Professional Association (Union) represents two units consisting of attorneys and professional employees in two components of the Agency: the Agency's headquarters in Washington, D.C. and the Agency's Office of General Counsel that is also in Washington, D.C. In total, the Union represents 126 bargaining-unit employees. Each unit has a separate CBA, and both expired in October 2018. The Agency subsequently terminated both contracts but mandatory subjects of bargaining continue to govern the parties. These negotiations concern two contracts. However, the agreements are largely substantively similar.

BARGAINING HISTORY

The Panel imposed ground rules for negotiations over these agreements in 19 FSIP 045 (Chairman Carter did not participate) on November 29, 2019. After imposition, the parties turned to negotiations. The Agency provided its proposals in January 2020. The parties had 42 bilateral negotiation sessions between

¹ Neither Chairman Carter nor Member Vernuccio participated in any portion of these proceedings.

January and July 2020 of varying lengths. Under the aforementioned ground rules, the timeframe for bargaining before utilizing mediation expired before June 2020. Management, nevertheless, agreed to engage the Union in additional negotiation sessions during June/July. However, Management's acceptance was conditioned upon the Union agreeing to 2 days of mediation with the Federal Mediation Conciliation Services (FMCS) after this agreed-upon extension ended. The Union agreed to this arrangement and the parties completed negotiations in July without full agreement. Accordingly, they held 2 days of mediation on July 16 and 17 that concluded at 4 p.m. on the 17th with many issues left unresolved. Accordingly, the Mediator released the parties from mediation on the 17th in Case No. 202011460050.

The Agency subsequently filed a request for assistance with the Panel. The Union raised several jurisdictional objections. After deliberations, on September 24, 2020, the Panel voted to assert jurisdiction over all disputed issues and to resolve this matter through an Informal Conference to be conducted by Members Osborne and Nelsen. However, the parties' conflicts prohibited prompt scheduling of that proceeding. Accordingly, the Panel reconvened for further deliberations and decided to resolve this matter through a Written Submissions process. On October 13, 2020, the Panel issued an Order imposing a due date for submissions of November 13. The Union subsequently requested an extension, and the Panel granted the parties an additional 3 calendar days, i.e., until November 16. The parties timely filed their submissions with the Panel.

COLLATERAL ISSUES

As an initial matter, the Union raises the now-standard claim that the Panel lacks jurisdiction because its Members were appointed in violation of the Appointments Clause of the United States Constitution. The Panel considered, and rejected, this claim during the Panel's investigation of this dispute. It will do so once again.

In addition, after the parties submitted their November 16th arguments, they each raised several motions/requests. Acting pursuant to the authority delegated to them by the Panel, Members Osborne and Nelsen decided as follows:

- The Union's request to allow the parties to submit rebuttal replies to the parties' November 16th submissions was denied;

- The Agency's request to strike the Union's submission concerning its second FLRA negotiability appeal (discussed below) was denied;
- The Agency's request to close the record was denied; and
- The Agency's "objection" to the Union's method of service of its November 16 statement was denied.

A. Bad-Faith Bargaining and Lack of Impasse

I. Union Position

The Union argues that Management engaged in surface negotiations that were intended to facilitate a quick declaration of impasse rather than an amicable resolution of the parties' disagreements. In January 2020, the Agency provided "draconian" proposals and demonstrated little willingness to alter its position throughout months of bargaining. Instead, it "hid" behind President Trump's 2018 Executive Orders on labor and personnel matters whereas the Union made movement on items such as official time. Moreover, as negotiations shifted to telephonic negotiations due to the ongoing Covid-19 pandemic, the Agency rarely accommodated the schedules of the Union's bargaining team even though its members had Covid-related conflicts and challenges.

The parties attempted to schedule bargaining sessions for June and July 2020, but the Agency also insisted on 2 days of FMCS mediation in July. The Union reluctantly agreed. The parties received mediation assistance on July 16 and 17 over parts or all of 54 articles that still remained in dispute after months of bilateral negotiations. In the Union's view, the parties made progress up through the second day of mediation. Indeed, they signed several proposals and a few articles. But, the Agency declined to engage in further mediation efforts and declared bargaining at a conclusion on 4 p.m. on the 17th, i.e., only after 2 days of mediation. The Agency's decision to end mediation was premature. Tellingly, according to the Union, the Mediator declined to release the parties from mediation.

The above conduct demonstrates the Agency's bad-faith conduct, conduct that is the subject of Union-initiated grievances. In addition to allegedly being inconsistent with the NLRB's own precedent, the Union argues that the Agency's conduct

is illegal under FLRA authority concerning bad-faith negotiations.

In addition to the above, the Union notes that an arbitrator recently concluded that the Agency acted in bad faith during the course of bargaining the parties' ground rules. And, while not clear, it appears that the arbitrator ordered the parties to resume negotiations. All of the above is proof that the Panel should not assert jurisdiction at this time.

II. Agency Position

Management argues that it bargained in good faith and that the parties are at a legitimate bargaining impasse. Contrary to the Union's assertions, the parties exchanged proposals and engaged in discussions over them.² Management also explained why it was unwilling to accept the Union's new articles. Moreover, it actually agreed to an additional 35 hours of negotiations through June-July 2020. And, the parties reached tentative agreement over parts of nearly 25 articles during negotiations.³ Contrary to the Union's claim, then, the parties engaged in extensive bilateral negotiations.

As to mediation, the Agency notes that it had 2 days of mediation with FMCS and, contrary to the Union's claim, the Mediator provided the parties with written confirmation that he had released the parties from mediation. Moreover, the Agency contends that it was actually the Union who hindered mediation. In this regard, on the first day of mediation, the Union provided seven new counterproposals.

As to the recent ground-rules arbitration decision, the Agency states that it intends to file exceptions with the FLRA that challenge the arbitrator's decision. According to the Agency, the arbitrator made several inaccurate findings and improperly usurped the role of the Panel. According to Management, there is no basis for delaying jurisdiction due to pending bad faith allegations.

III. Conclusion

The Panel declines the Union's request. The Union's bad faith claims do not serve as a per se obstacle to jurisdiction: no existing precedent mandates such a conclusion. The Agency has

² See Agency Rebuttal at 3.

³ See *id.* at 4.

also provided evidence that the parties engaged in several months of bilateral negotiations and multiple days of mediation. Further, the Mediator released the parties from mediation, a fact he confirmed with the Panel. There is sufficient information in the record to conclude that the parties are at a legal impasse.

As to the arbitration award discussed above, the Panel first notes that neither party provided a copy of the award in the record. But, assuming the parties' description of it is accurate, it would not provide a basis for declining jurisdiction. Although the arbitrator has apparently ordered the parties to resume negotiations over ground rules, the parties have not indicated that he issued any order with respect to these proceedings over the parties' collective bargaining agreements.

Moreover, the arbitration award is not yet final because the Agency has stated that it intends to file exceptions with the FLRA. Under 5 U.S.C. §7122(b), an arbitration award is considered "final and binding" when: (1) more than 30 days has passed from the award's issuance; and (2) neither party has filed exceptions with the FLRA. Thus, if a party *does* file exceptions within the 30-day window, the award does not bind the parties or anyone else. Because the Agency has indicated it will file timely exceptions, the award cannot be considered to have any current legal effect.

B. Negotiability Appeals

I. Union Position

The Union has two pending negotiability appeals with the FLRA. The Union filed its first appeal on August 10, 2020. This appeal arose because, as the Union claims, the Agency "variously asserted throughout bargaining that many of the [Union]'s proposals were non-negotiable." Accordingly, on July 27, 2020, the Union formally requested that the Agency declare about 50 Union proposals non-negotiable. When the Agency failed to respond to the Union's request, the Union elected to proceed with its negotiability appeal.

After the parties submitted their substantive arguments for this dispute to the Panel on November 16, 2020, the Union filed its second negotiability appeal with the FLRA on November 19, 2020. In this appeal, the Union claimed that the Agency raised over 60 non-negotiability allegations across 26 articles in its

arguments to the Panel. Thus, the Union asserted that Agency had declared these proposals non-negotiable.

Based on the foregoing, the Union argues that the Panel should decline jurisdiction over this dispute. Per the FLRA's decision in *Commander Carswell AFB and AFGE Local 1364*, 31 FLRA 620 (1988) (*Carswell*), the Panel lacks the authority to resolve duty-to-bargain issues unless a party provides precedent involving "substantively identical" language. The Union argues that the Agency never provided such precedent. As such, the Union contends that the Panel is obligated under *Carswell* to decline jurisdiction over all issues involved in the Union's negotiability appeals.

Additionally, in 19 FSIP 045, the Panel imposed ground rules for bargaining this contract that state "[a]ny matter in which a declaration of non-negotiability has been issued is severed from negotiations. If the provision is later found to be negotiable, the term agreement shall be reopened solely to permit negotiation on that provision."⁴ The Union alleges that the Agency's failure to respond to the Union's July 27th negotiability request is the equivalent of a declaration of non-negotiability. The Union makes a similar claim concerning its second negotiability appeal. As such, the Union argues that the Panel-imposed ground rules prohibit jurisdiction in these circumstances.

II. Agency Position

The Agency argues that the pending negotiability appeals should not bar jurisdiction. As to the first negotiability appeal, although the Union requested that the Agency formally declare some of the Union's proposals non-negotiable, the Agency never responded to that request.⁵ Moreover, the Agency states there is no legal authority for the proposition that a failure to respond to a request for non-negotiability is the equivalent of a declaration of non-negotiability. To the contrary, in the absence of an agency declaration of non-negotiability, the FLRA routinely dismisses union-filed negotiability appeals.⁶ Indeed, the FLRA has already issued an order to show cause to the Union requesting that the Union demonstrate why the FLRA should not

⁴ The Union is currently challenging the validity of these ground rules in Federal litigation.

⁵ See Agency Position at 8.

⁶ See *id.* at 10 (citation omitted).

simply dismiss its first appeal due to a lack of Agency declaration of non-negotiability.

The Agency also argues that the second negotiability appeal is in a similar status. Although the Agency did raise several legal arguments in its November 16 Panel submission, the Agency has never declared any Union proposal non-negotiable. Rather, the Agency raised these issues so that the Panel could resolve them consistent with *Carswell*. Moreover, after the Union filed its second negotiability appeal, the Agency filed a statement with the FLRA clarifying that, to the extent the Agency had inadvertently raised any non-negotiability allegation, the Agency was withdrawing it.

III. Conclusion

The Panel rejects the Union's argument. Although the Union has filed two negotiability appeals with the FLRA, the Agency has never declared any proposals non-negotiable. In *Department of Veteran Affairs and AFGE*, 20 FSIP 022 (Nov. 2020) (*DVA*), the Panel addressed a similar scenario. As a result of legal arguments raised by the Department of Veteran Affairs in its submissions to the Panel, the AFGE claimed that the Panel was compelled to decline jurisdiction. In response, the VA stated that it never declared any AFGE proposals non-negotiable. The Panel rejected the AFGE's argument and instead stated that it would simply apply the holding of *Carswell* to ascertain whether it had the authority to resolve each legal argument.⁷ The Union in this dispute has provided no basis for departing from this approach.

The Union's claim that, under the parties' ground rules, a failure to respond to a negotiability request is the equivalent of a declaration of non-negotiability is unsupported by the record, the ground rules, or case law. Indeed, the Union cited no authority for such a proposition. Thus, this claim is rejected as well.

ISSUES

There are parts of over 50 articles that remain in dispute. Of this number, over 20 are new articles proposed by the Union that the Agency summarily rejected on the grounds that it was unwilling to add these new articles to the agreements.

⁷ See *DVA*, 20 FSIP 022 at 4-5.

Article 1 - Principles, Purposes, and Policies

A. Agency Position

The Agency proposes language that references the respective parties involved, i.e., the Board, General Counsel, and the Agency. Management's language also excludes references to labor-management forums and committees. These items are specifically prohibited by Executive Order 13,812, "Revocation of Executive Order Creating Labor-Management Forums" (September 2017). Management believes the Union's proposed language is too cumbersome and complex.

B. Union Position

The Union contends that its language is appropriate for adoption because it emphasizes Congressional findings that collective bargaining is an important public interest.⁸ This inclusion is vital because the Agency has downplayed its good-faith bargaining obligations throughout the process of negotiating this agreement, including in the parties' ground rules dispute. Should the Agency fail to live up to the aforementioned interests, the Union's language calls for participation in labor forums and committees.

C. Conclusion

The Panel will order the parties to adopt the Agency's proposals for each CBA. As the Panel has previously stated, "[a] preamble is an introductory fact or circumstance, one indicating what is to follow."⁹ Yet, the Union's proposal sets forth conclusions of law and additional terms of agreement, including institution of a Labor-Management Forum and Labor Management Committee. Meanwhile, the Agency's proposal merely sets forth agreed-to language describing the nature of the agreements and identifying the parties thereto.

Article 3 - Precedence of Law

A. Agency Position

The Agency argues for adoption of its language, which concerns governing and conflicting law, because it believes its

⁸ Union Article 1 Argument at 3.

⁹ *Dep't of Homeland Security and AFGE, Council 118*, 19 FSIP 008 (2019) (citing Merriam-Webster Dictionary).

language provides a clearer explanation of how the law operates within the context of the overall agreement.¹⁰ Moreover, the Agency believes that its language addresses potential future conflicts. The Agency is opposed to the Union's deletion of language that acknowledges that Executive Orders are considered potential sources of governing authority.

B. Union Position

The Union proposes language that "clarifies" the parties' mid-term bargaining obligations. The language would require mid-term changes required by law to be negotiated *prior* to implementation.¹¹ The Union is opposed to Management language that would supposedly allow the Agency to unilaterally implement Agency rules or regulations. Similarly, the Union objects to Agency language that would allow the Agency to unilaterally implement Executive Orders or government-wide regulations that go into effect after the CBA's execution. This, according to the Union, is inconsistent with 5 U.S.C. §7116(a)(7).¹²

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal for each CBA. The Agency's proposal sets forth language from the previous agreements but removed the terms "future"¹³ and "published." "Future," in the Agency's view, would likely violate the principle that provisions in a collective bargaining agreement control over conflicting government-wide regulations for the express term of the agreement during which the government-wide regulation was first prescribed.¹⁴ Meanwhile, as the Agency notes, "published" is an unnecessary qualification for "policies and regulations," and introduces ambiguity where

¹⁰ See Agency Argument, Article 3 at 1.

¹¹ See Union Argument, Article 3 at 3.

¹² This section makes it an unfair labor practice for any agency to "enforce any rule or regulation . . . which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed." 5 U.S.C. §7116(a)(7).

¹³ Although the Agency's LBO does not reflect its intent to remove "future," the Agency's argument to the Panel clearly does. Therefore, the Union's argument relative to the term "future" need not be addressed.

¹⁴ *U.S. Dep't of Commerce and NTEU, Chapter 245*, 65 FLRA 817, 819 (2001); see 5 U.S.C. § 7116(a)(7).

there is none. The Agency's proposal therefore improves upon language in the previous agreement.

The Union's allegations that the Agency has bargained in bad faith and may do so again over interim changes in legal authority are not advanced in the proper forum. The Agency's proposal sets forth its legal obligation to notify and bargain with the Union as required by law.

Article 4 - Management Rights and Obligations

A. Agency Position

The Agency believes its language is consistent with management rights set forth under 5 U.S.C. §7106. By contrast, the Agency argues, the Union's language infringes upon those rights, is confusing and ambiguous, and addresses topics beyond the scope of management rights.¹⁵ The Agency also believes it is unnecessary to include Union language on transit subsidies because that topic is already covered by Agency policies. Similarly, Union language about information requests is already addressed by 5 U.S.C. §7114(b) (4).

B. Union Position

The Union's language clarifies Management's obligations with respect to its exercise of management rights. Under the Union's Section 2, the Union emphasizes the Agency's bargaining obligations when it decides to exercise various budgetary actions. The Union's Section 3 proposes that Management will agree that it cannot exercise its rights in an "arbitrary and capricious" fashion.¹⁶ The Union believes that the Agency has failed to provide any evidence to justify adoption of Management's proposal.

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal, which sets forth largely agreed-to language concerning the Agency's management rights and its obligations to negotiate. Meanwhile, the Union's proposed Section 2 adds additional and overly expansive notice and bargaining requirements that may actually serve to curtail agreed-to language concerning the Agency's management rights. And the Union's proposed Section 3-

¹⁵ See Agency Argument at 4

¹⁶ See Union Argument, Article 4 at 4.

an apparent attempt to restate the Agency's obligations to act and to negotiate in good faith—is unnecessary given that such obligations are fully set forth in law; to the extent either party must allege violations of the other's legal obligations, such allegations may be raised at that time in the proper forum.

Article 5 - Transit Pass Program

A. Union Position

The Union proposes an article that codifies a 2018 Agency policy on transit subsidies. Under it, "employees receive [transit] passes on a quarterly basis in an amount equal to commuting costs."¹⁷ The Union believes this provision is non-controversial as its language requires subsidies to be "consistent with law." The Agency never provide budget-based reasons for striking this article; indeed, the Agency never provided any rationale. Figures show that this subsidy amounts to \$65,604 per annum, or a fraction of Management's overall budget.

B. Agency Position

The Agency did not provide an argument in response to this article or otherwise address it. Management has no counter proposal.

C. Conclusion

The Panel will order the adoption of the Union's proposal. The Agency and the Union submitted evidence that the transit subsidies are provided by the Agency in a more fully developed Agency policy, and the Union asserts that its proposal is a reiteration of language from the current CBA. Meanwhile, the Agency did not submit any argument as to maintaining the transit subsidies or removing references to the program in the agreement.

Article 6 - Employee Rights and Responsibilities

A. Union Position

The Union's language recognizes established law and practice arising under the Statute and is consistent with language that has appeared in relevant CBA's for 20 years. The

¹⁷ See Union Argument, Article 5 at 2.

purpose of this language is to recognize employee's full-throated rights that arise under the Statute. To include language within the agreements for management rights but not employee rights would be incongruous. Striking employee-rights language would only continue to foster an environment in which the Agency ranks next-to-last in job-satisfaction rankings for mid-sized Federal agencies.¹⁸

B. Agency Position

The Agency opposes the Union's language on a number of grounds. The Union's language mostly recites existing legal authority, and the Panel has rejected similar language in other disputes.¹⁹ The Union again improperly acts for an "arbitrary and capricious" standard and also improperly proposes a confusing multi-tiered structure for challenging various management actions. Management also believes that the Union has proposed lengthy and confusing procedures for the investigatory process. On balance, then, the Agency contends Union's language should be rejected.

C. Conclusion

The Panel will order that the Union withdraw its proposal. Even accepting the Union's argument that its proposal "sets forth well-established employee rights under the Statute and law"—which the Agency disputes—the Union has not explained why such a recitation needs to be included within its CBA. The only plausible explanation raised by the Union for the inclusion of such language is to provide a succinct summary of employees' rights; however, its duty of fair representation may compel them to provide employees with such information directly.

Additionally, the practical effect of including the Union's language within the CBA is to turn every dispute over governing law into a grievance. Clearly, the Union can accomplish its objectives of making employees aware of their rights without creating these challenges.

Article 7 - Notices to Employees

A. Union Position

¹⁸ See Union Argument, Article 6 at 7 (citation omitted).

¹⁹ See Agency Argument, Article 6 at 1 (citing *HHS and NTEU*, 18 FSIP 077 (2019)).

The Union proposes that the Agency provide all employees with a litany of notices concerning topics like changes in budgetary conditions that affect employee programs, emergency plans, and side agreements. Under the Union's proposal, Management must also provide the Union with information about new hires and must also ensure that the Union has a role in new employee orientation. Although the Agency has informed the Union that information will be available to employees on the Agency's intranet, that arrangement is of no use to the Union as the Agency has prohibited the Union from using Agency resources for representation purposes.

B. Agency Position

The Agency believes its language is more efficient and, therefore, should be adopted. The Union's language requires Management to provide a Union "welcome package" to new employees that, among other things, solicit dues. The Union can provide such a package on its own. Additionally, each unit has around 75 employees and are both located on one floor. And, each office has one steward.²⁰ Moreover, information will be posted on the Agency's intranet. The Union, then, will not face onerous conditions if Management's proposal is imposed.

C. Conclusion

The Panel will order that the parties adopt a modified version of the Union's proposal. Both parties seek to replace previous contract language with new language, but the Union's proposal provides more robust notice and information to employees, while matching the Agency's efforts to more efficiently disseminate information in electronic form and allowing for flexibility as to the means of electronic dissemination. It also requires that new employees within the bargaining unit be informed that the Union is their exclusive representative.

However, Section 2 of the Union's proposal would require that the Agency share employees' identities with the Union and impose burdens on the Agency that rest more efficiently on Union officials. Should the Union wish to recruit new members, it may proactively obtain relevant information by other means and engage in such recruiting without access to new employee orientation sessions. Instead, Section 2 of the Union's proposal

²⁰ See Agency Argument, Article 7 at 1.

creates an affirmative obligation on the Agency to provide constant updates on recruiting opportunities to the Union or risk a grievance. Similarly, should the Union wish to provide its own recruitment materials to employees, it need not create an affirmative obligation on the Agency to insert those materials into Agency folders and disseminate them to staff or risk a grievance.

Accordingly, Article 7 is imposed as follows:

ARTICLE 7

NOTICES TO EMPLOYEES

Section 1. All new employees will be informed by the Agency that the Association is the exclusive representative of employees in the unit.

Section 2. The Agency shall annually notify employees with respect to emergency evacuation plans, all emergency plans, and names, phone numbers, and office locations of emergency coordinators, and the Agency contact numbers.

Section 3. The Agency shall provide all affected unit employees with electronic copies of any side agreements and copies of any changes, modifications, additions, or deletions to this Agreement, within seven (7) calendar days of the change.

Section 4. Consistent with other provisions of this Agreement, the Agency shall notify employees prior to discontinuing any term or condition of this employment due to budgetary or staffing emergencies and shall notify employees on at least a quarterly basis as to whether the emergency in question is continuing or has ceased.

Article 8 - Association Rights and Obligations

A. Agency Position

The Agency argues that its language is more straightforward and should be adopted. The Union's right to represent employees in certain meetings exists regardless of what language is in the agreement, so the Agency believes contractual language on this topic is redundant. The Union's language would also impermissibly continue labor forums. There is also no need to hold quarterly meetings about the Agency's financial spending plans, as the Union requests, when the Union can seek that information via statutory information requests under 5 U.S.C. §7114(b)(4).

B. Union Position

The first two sections in the Union's proposal, according to the Union, do nothing more than recite existing statutory protections.²¹ The Union's proposed language for sections 3 and 4 create deliberative bodies for the Agency and the Union to use to seek amicable resolution on disputed topics. In the Union's section 5, the Union proposes a standard for information requests that differs from the standard used under §7114(b)(4) of the Statute. Specifically, the Union proposes a "relevancy" standard utilized under the National Labor Relations Act.²² As all parties are familiar with this law, it will not be difficult to employ within the workplace.

C. Conclusion

The Panel will order that the parties adopt compromise language based on their previous CBA. The Agency proposes to reduce Article 8 to a single sentence, and in so doing removes language from the previous CBA clarifying for employees' the role of the exclusive representative. On the other hand, the Union seeks to add language giving Union representatives the right to speak during and after formal discussions with the Agency, with the latter happening on official time; requiring at least 20 additional meetings each year between Union representatives and Agency personnel; and imposing a new "relevance" standard and numerous deadlines on the Agency in meeting any Union information requests.

A modified version of the Union's proposal and language from the past contract will provide needed information to employees while eliminating inefficiencies for all parties. Article 8 is imposed as follows:

ARTICLE 8

ASSOCIATION RIGHTS AND OBLIGATIONS

Section 8.1. The Association shall be entitled to act for and to negotiate agreements covering all employees in the unit as provided by law. The Association shall be responsible for representing all employees in the unit without discrimination and without regard to membership in a labor organization.

²¹ See Union Argument, Article 8 at 4.

²² See *id.*

Section 8.2. The Agency will not in any way restrain, interfere with, coerce, or discriminate against any Association representative with respect to the responsible exercise of his or her right to serve as a representative for the purposes of collective bargaining, handling of grievances and appeals, or acting in accordance with applicable regulations and agreements on behalf of an employee or group of employees in the unit.

Section 8.3. The Association will not represent individuals to whom the provisions of the National Labor Relations Act apply or affiliate directly or indirectly with an organization that represents individuals to whom the provisions of the National Labor Relations Act apply.

Article 9 - Equal Employment Opportunity and Non-Discrimination

A. Agency Position

The Agency includes language that recognizes its commitment to adhering to non-discrimination principles, but Management also proposes excluding violations of them from the parties' negotiated grievance procedure. Excluding such matters from the grievance procedure is consistent with effective and efficient government because it places these matters in forums that are governed by experts in the topic of anti-discrimination. The Agency rejects Union language that would permit the creation of discrimination-related forums, and Management rejects language concerning information requests.

B. Union Position

The Union's language emphasizes and reiterates the importance of anti-discrimination principles. It also makes available to employees long-standing forums and requires the Agency to voluntarily turn over important anti-discrimination information. The Union argues that Management's limited language - which also prohibits anti-discrimination grievances - pays lip service to Management's stated commitment to anti-discrimination virtues.

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal. Both parties are committed to nondiscrimination principles and have proposed expansions upon those principles

beyond those already in the current CBA and EEOC protections. However, the Agency's proposal promotes efficiency by specifying that employees may file discrimination complaints with the EEOC and by excluding EEOC-related complaints from the grievance and arbitration procedures. By contrast, the Union's proposal requires continued bargaining, discrimination-related forums, and requirements for the Agency that well beyond its obligations not to discriminate against employees.

Article 10 - Grievance Procedure

A. Agency Position

The Agency proposes excluding 25 topics from the parties' negotiated grievance procedure.²³ Many of these items can be addressed in other statutory forums, and Management believes it would be more efficient and effective to let them be resolved elsewhere. The Agency further contends that, consistent with Executive Order 13,839 "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (May 2018) (Removal Order), the Panel should accept its proposed exclusions for Management's Article 10, Sections 1(g), (j), (k), (n), (o), (p), (q), and (y).²⁴ The Agency also argues that challenges to performance ratings and telework decisions interfere with management rights.²⁵

The Agency also asks for "sole discretion" to decide issues of grievance timeliness. In Section 5 of its proposal, the Agency also lays out different procedures for each of the two units involved in this dispute. Different units present different situations, so it makes sense to adopt this bifurcated approach. Finally, Management includes other language that ensures the grievance will continue if amendments or changes are made to the grievance and related filings.

B. Union Position

The Union believes its proposal is effective and efficient and that Management's proposed exclusions are not justified. It relies upon the decision of the United States Court of Appeals for the District of Columbia in *AFGE v. FLRA*, (D.C. Cir. 1983) (*AFGE*), to note that any proponent of a proposed grievance

²³ See Agency Proposal, Article 10 at 1-2.

²⁴ See *id.*; Management Argument, Article 10 at 1.

²⁵ See Management Argument, Article 10 at 1 (citation omitted).

exclusion must “establish convincingly” in a “particular setting” that the exclusion is “reasonable.”²⁶ The Union maintains that the Agency cannot meet this burden for any of its proposed exclusions; indeed, the Union has filed few grievances over the topics that Management proposes to exclude.

The Union also notes that Management’s proposal would limit the Union’s ability to file ULP-based grievances. Given that the FLRA has lacked a General Counsel since January 2017, this limitation would hamper significantly the Union’s ability to process ULP’s. Finally, the Union’s language includes an alternative dispute resolution (ADR) procedure that is missing from the Agency’s language.

C. Conclusion

The Panel will order that the parties adopt a modified version of the Agency’s proposal because the Agency has proposed the more efficient procedure and standards for resolution of grievances.

However, with respect to certain grievance exclusions, the Agency has not “establish[ed] convincingly that, in [its] particular setting, its position is the more reasonable one” as compared to the Union’s position. *AFGE v. FLRA*, (D.C. Cir. 1983). Some of the proposed exclusions—such as FOIA and EEOC matters—have alternative statutory fora in which such issues may be resolved, and those matters are excluded by statute or elsewhere by the parties. But the Agency wholly failed to present a reasonable basis for excluding other items and proposes broad terminology that may exclude any number of potential grievances.

Accordingly, Section 1 of the Agency’s proposal will read, in its entirety, “A grievance is defined in 5 U.S.C. § 7103(a)(9).” Of course, this does not preclude the Agency from advancing an argument, if facing a grievance concerning these matters, that such a grievance is improper. The remainder of the Agency’s proposal is ordered in full.

Article 11 - Arbitration

A. Union Position

²⁶ See Union Argument, Article 10 at 11.

The Union believes its proposal is more reasonable and efficient. It utilizes a panel of arbitrators instead of requiring the parties to select a new arbitrator for each case as the Agency requests. The Union also proposes a fee-shifting schedule in which the losing party would pay 75% of an arbitrator's fees: the Union believes this structure would discourage inefficient arbitrations. But, the Union is opposed to a bifurcated process for arbitrability hearings. The Union contends that the Agency has a history of raising frivolous and "bizarre" arbitrability claims.²⁷ The Union also offers more detailed provisions for back pay and attorney fees; this section also crafts a period of time for an arbitrator to resolve these two issues since the FLRA's current standard is "vague."

B. Agency Position

The Agency seeks to largely preserve the status quo for this article. For example, it opposes the Union's request to strike language that acknowledges Executive Orders are a governing source of authority. In the name of efficiency, the Agency includes language that would require threshold hearings on arbitration; relatedly, the Agency also proposes that new issues cannot be raised after the grievance stage (with the exception of jurisdictional issues that may be raised at any time or a proceeding). The Agency also prefers simpler language on the selection of arbitrators and attorney fees and backpay. Management believes the Union's language on these topics is too cumbersome.

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal. The Agency's proposal largely repeats language from the current CBA and otherwise provides for a more efficient process for arbitration. For instance, the Agency's proposal provides for a threshold determination as to arbitrability, which would prevent baseless grievances—including so-called "bizarre" claims about which the Union objects—from advancing further. The Agency also provides for selection of arbitrators without institution of a permanent panel, shorter deadlines, and splitting of all costs. The Union advances a more protracted process with a cost shifting provision that may have the effect of further entrenching the parties and preventing resolution of grievances once they reach arbitration.

²⁷ See Union Argument, Article 11 at 6 (citations omitted).

Article 12 - Disciplinary and Adverse Actions

A. Agency Position

The Agency's language covers both disciplinary and adverse actions and is intended to provide all interested parties a clear and concise roadmap. It acknowledges, but does not require, use of the concept of progressive discipline. The proposal further recognizes the Merit Systems Protection Board's *Douglas* factors.²⁸ Management's language also provides quick and efficient internal processes for employees to challenge proposed action. Relatedly, the Agency proposes that, for any action involving a statutory appeal option, an employee *must* pursue that option if it wishes to appeal a Management proposed action. Management believes that the Union's language is inconsistent with the Removal Order and other portions of the Code of Federal Regulations because, among other things, the language usurps Management's discretion to decide discipline.²⁹

B. Union Position

The Union maintains that its language is appropriate for adoption and largely reflects existing practice for the past 20 years or so. The Union's language mandates the use of progressive discipline, which the Union believes is appropriate. And, unlike the Agency's proposal, the Union would allow employees to utilize the grievance procedure to challenge disciplinary and adverse actions. Any other scenario, the Union contends, would be unfair.

C. Conclusion

The Panel will order that the parties adopt a modified version of the Agency's proposal. The Agency's proposal calls for a more efficient and concise process with appropriate references to federal law. However, with respect to exclusions of grievances over disciplinary actions, the Agency has not "establish[ed] convincingly that, in [its] particular setting, its position is the more reasonable one" as compared to the Union's position.³⁰ Accordingly, while Section 8 of the Agency's

²⁸ See Agency Final Offer, Article 12 at 1 (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981)).

²⁹ See Agency Argument, Article 12 at 1 (citations omitted).

³⁰ *AFGE v. FLRA*, (D.C. Cir. 1983).

proposal will be omitted, all other provisions of the Agency's proposal will be adopted.³¹

Article 13 - Calculation of Service

A. Union Position

The Union offers language on this topic, a topic that the Agency does not want to include within the agreements. The parties have agreed to use an employee's length of service as a measurement throughout several articles. So, the Union's proposed language creates a method for defining service. Given the foregoing facts, there is no logical reason for excluding this topic from the agreements.

B. Agency Position

The Agency has not included any argument on this topic. But, it opposes inclusion of language on this topic.

C. Conclusion

The Panel will order the parties to withdraw their proposals and, instead, impose the existing contract language to resolve this article. In the Panel's view, neither party has provided a sufficient basis for the imposition of their respective proposals. Accordingly, it most appropriate to simply retain the status quo to resolve the parties' dispute over this article.

Article 14 - Performance Appraisal

A. Agency Position

The Agency maintains that its proposal is in alignment with Federal regulation.³² Unlike the Union's proposal, Management's

³¹ The Union asks the Panel to consider a new article, "Adverse Actions Based on Unacceptable Performance." But, neither party presented this article to the Panel during its initial investigation. As such, the Panel did not assert jurisdiction over it. But, even if it were before the Panel, the resolution for Article 12 resolves the dispute over this newly proposed article.

³² See Agency Argument, Article 14 at 1 (citing 5 CFR § 430.208(a)). The foregoing regulation outlines procedures for agencies to administer annual performance ratings.

language does not create several performance evaluations during the year and it does not permit Union representation. The Agency's language on performance-improvement-plans (PIP) is consistent with Office of Personnel Management rules and regulations. It is also consistent with the Removal Order, because Section 4(c) does not allow agencies to grant more than 30 days for a PIP period.³³

B. Union Position

The Union's language provides clear and concise guidance to the parties on how to address performance plans. Sections 4 and 5 of the Union's proposal provides clear guidance and timelines for employees on how to address performance issues and performance opportunities.³⁴ Finally, the Union argues that the Agency's reliance upon the Removal Order is illegal and, as such, the Union does not wish to bargain over the Agency's reliance upon it.

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal. The Agency's proposal is more concise and more flexible, while still observing all relevant protections for public employees. Meanwhile, the Union proposed a more complicated process in which the Union is involved at nearly every turn, slowing down meaningful appraisal of performance and creating Agency obligations not required by existing law. The Agency's proposal better preserves its authority in this area and incentivizes employees to perform by standards meaningful to the Agency.

Article 15 - Awards

A. Agency Position

The Agency wishes to eliminate existing awards language because that language grants the Union a role in the awards process. As the Panel has recognized, agencies need a significant amount of "flexibility" in administering awards to reward its workforce.³⁵ The Agency also rejects Union language that would require awards distribution by April 15th; in this regard, the Agency notes that it actually has 3 different groups

³³ See E.O. 13,839, Sec. 4(c).

³⁴ See Union Argument, Article 14 at 7.

³⁵ See Agency Argument, Article 15 at 1. (citations omitted).

of employees impacted by this dispute, all of whom are all affected by different performance dates.³⁶

B. Union Position

The Union's language largely continues the status quo. The Agency has successfully relied upon the Union for years to help determine the amount of award pools that should be used for awards distribution. The Union does not believe that the Agency has demonstrated any need to change this arrangement. The awards program under recognized contract language provides employees with a "clear" expectation of the type of awards they should expect but still gives Management freedom in making award-based decisions. The Union maintains that the Agency's proposed structure will lead to favoritism and inequitable distribution of awards.

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal. The Agency's proposal gives the Agency greater flexibility in administering awards to public employees and moves away from the current system in which awards are pooled and distributed to employees who did not receive an "outstanding" performance rating. The Union wishes to maintain the status quo in most respects and argues that the Agency's proposal fails to provide employees with information as to how awards are distributed; however, contrary to the Union's argument, the Agency has developed a policy and accompanying manual in which eligibility and criteria for performance awards are set forth and under which employees will be awarded.

Article 16 - Promotions

A. Agency Position

The Agency's language allows Management to retain discretion to make decisions on promotions and selections for positions. The foregoing is vital to ensuring that the Agency can locate and acquire skilled individuals to perform the necessary duties of the Agency. The Agency also opposes Union language that would permit automatic promotions; reaching a certain level does not automatically mean that an employee is performing sufficiently at a certain level, the Agency contends.

³⁶ See *id.*

B. Union Position

The Union requests language that is comparable to the status quo. Under the Union's language, bargaining-unit employees would have a clear opportunity for advancement and would be entitled to consideration for positions (although they would not necessarily be entitled to positions). Under the language, the Agency also has an obligation to provide notice to the unit that positions have been made available. The Union believes that the Agency's proposed approach would only exacerbate employee opinion that promotions are not based upon merit.³⁷

C. Conclusion

The Panel will order that the parties adopt the Agency's proposal, which reserves determinations on promotions to the Agency based on performance. Meanwhile, the Union's proposal largely automates promotions based on length of service, removing the discretionary role for management in incentivizing and rewarding top performers. The Union's argument that employees will continue to believe promotions are not based on merit is misplaced; if anything, the Union demonstrates that the current system is perceived as awarding something other than merit and that the current system may benefit from the Agency's proposed changes.

Article 17 - Position Classifications

A. Union Position

The Union largely retains existing commonsense language. The language defines position descriptions for employees and explains how the classification process works. Pivotaly, the Union's language describes the Agency's internal process for appeals of classification decisions. The Union maintains that it is important for the agreements to have this language because even OPM recommends that employees first seek a classification from their own agency prior to turning to OPM or elsewhere. The Union believes that the Agency's unwillingness to inform employees of their rights is baffling.

B. Agency Position

³⁷ See Union Argument, Article 15 at 5.

The Agency proposes striking this article from the agreements. According to Management, the Union's proposal covers topics addressed by Agency policies, reworks Agency protocols, and interferes with statutory management rights. The Union limitations placed upon the classification process, the Agency contends, interferes with Management's right to assign work under 5 U.S.C. §7106(a).³⁸ The Agency also opposes Union language that it believes will allow the Union to challenge the contents of position descriptions: under FLRA case law, a union may not grieve such issues.³⁹ Finally, the Agency opposes Union language that would automatically grant its representatives official time to address classification appeals.

C. Conclusion

The Panel will order the Union to withdraw its proposal. As the Agency argues, the Union's proposal would interfere with the Agency's right to assign work and encourage Union challenges to job descriptions in the context of grievances instead of the Agency's classification appeal standard operating procedure. The Union points out that OPM recommends that employees wishing to challenge their classification should seek an appeal decision from their agency prior to appealing to OPM and that its proposal is necessary to allow for such an appeal decision from the Agency. But the Agency's policy already permits employees to seek such a decision, and the Union fails to explain why such a policy is insufficient. Finally, the Union's proposed entitlement to official time for "any desk audit or meeting with any Agency representative concerning the appeal" is not supported by any evidence that such official time would be reasonable, necessary, and in the public interest.

Article 18 - Participation in Related Litigation and Representation Case Drafting

A. Agency Position

The Agency proposes in its section 4 that it may, upon employee request, assign different work to employees in different offices and branches; but, these decisions may not be subject to grievance or arbitration. In Management's Section 5, any decisions concerning case processing are the sole discretion of Management and may not be subject to any negotiations.⁴⁰ The

³⁸ Agency Argument, Article 17 at 1.

³⁹ *Id.* (citation omitted).

⁴⁰ See Agency Proposal, Article 18 at 1.

Agency believes its language allows for efficient case processing while also providing employees with potential opportunities. Moreover, its language is consistent with statutory management rights.⁴¹

B. Union Position

The Union includes language in its Section 4 that would grant opportunities to employees in the Agency's Office of Representation Appeals to draft decisions for the Board itself.⁴² Such assignments, the Union contends, are key for employee development. The Union opposes the Agency's language because it eliminates opportunities for employees and would impermissibly waive the Union's statutory right to engage in impact and implementation negotiations under 5 U.S.C. §7106(b)(2) and (3).

C. Conclusion

The Panel will order that the parties adopt a modified version the Agency's proposal. The Agency's proposed Section 4 would allow the Agency to assign work in an efficient manner and across offices and branches, potentially eliminating backlogs and allowing for cross-training. Meanwhile, the Union's insistence on giving staff attorneys within the Office of Representation Appeals experience drafting decisions as a matter of Agency policy interfere with the Agency's right to assign work and would put the burden on the Agency to demonstrate that operational needs require another assignment.

However, the Agency's proposed Section 5 would preclude impact and implementation and/or effects bargaining over changes to case processing procedures, and the Agency wholly fails to explain how such bargaining would interfere with its right to assign work. Accordingly, in adopting the Agency's proposal, the parties will omit the Agency's proposed Section 5 in its entirety.

Article 19 - Supervisory Assignment Procedures

A. Agency Position

The Agency proposes language that firmly grants Management full authority and autonomy in making decisions about which employees will be supervised by which supervisors. Management

⁴¹ See Agency Argument, Article 18 at 1.

⁴² See Union Argument, Article 18 at 2.

also proposes that it will not be required to even consider employee requests for supervisor changes or have to provide employees with explanations for why such requests were denied. Moreover, the Agency will not agree to withhold information from supervisors about employees under their purview who request reassignment. The Agency believes its language strengthens its ability to conduct its workforce operations in an effective and efficient manner.

B. Union Position

The Union offers language that would allow employees to have input about supervisor assignments. But, the Union's acknowledges that the Agency has the ultimate right to make such decisions and that such decisions cannot be grieved. The Union's proposal requires nothing more than for Management to consider non-binding feedback. The Union cannot understand why the Agency is so opposed to this approach.

C. Conclusion

The Panel will order that the parties adopt a modified version of the Agency's proposal. Both parties agreed that the Agency has sole discretion to assign supervisors, and both parties allow the Agency to consider employees' supervisor preferences, yet the Union's proposal requires the Agency to provide to employees "reason(s)" for assigning any supervisor other than the employee's first choice. Such justification is not required, and the Union provides no evidence to suggest that such a requirement would be helpful to the employee in any manner. The Union's argument that the Agency will arbitrarily assign supervisors without provision of an explanation is likewise unsupported.

However, the parties are ordered to adopt the Union's language with respect to the parties proposed Sections 2.B. and 2.C. The Agency does not support its apparent desire to specify that the "Office of Appeals Steward" will be the point of contact for the Agency and employees with respect to supervisor determinations for the Office of Appeals. Identifying the Union generally as the point of contact for such determinations is consistent with the general practice elsewhere in Article 19 and provides the Agency and employees with flexibility if the Office of Appeals Steward is absent, unavailable, or unresponsive.

Article 20 - Compensatory Time

A. Agency Position

The Agency proposes language that caps the amount of compensatory time an employee can carry at 60 hours.⁴³ Management also places other limitations on the use of compensatory time as well. The Agency argues this language is necessary because it is legacy language and is consistent with law.

B. Union Position

The Union's section 1(b) states that the parties will adhere to rules for compensatory time set forth under 5 C.F.R. § 550.105(a) and 5 C.F.R. § 550.106(a).⁴⁴ The Union believes that the Agency's language is illegal.

C. Conclusion

The Panel will order that the parties adopt a modified version of the Agency's proposal. The parties largely agree on language for Article 20 but disagree in Section 1.B. as to guidance for accruing excessive compensatory leave credits. The Agency's formulation merely sets expectations for such accrual, but the Union argues that the Agency's formulation could violate relevant regulations concerning accrual of compensatory leave credits. Accordingly, the parties will be ordered to adopt the Agency's proposal but with a revised Section 1.B. reading, in full:

(b) An employee is ordinarily precluded from accruing compensatory leave credits in excess of 60 hours. In addition, at the close of the last full pay period in each quarter, an employee ordinarily may not carry forward to the next quarter more than 40 hours of compensatory leave credits, except that any compensatory leave credit earned during the last full pay period in any quarter shall be exempt from this limitation. The foregoing limitations may be exceeded only if consistent with law and when it is established to the satisfaction of a Division Head (or manager of equivalent rank) that the failure to adhere to these limits was due to an exigency of the service beyond the employee's control. Employees are encouraged to seek guidance from the Office of Human Resources

⁴³ See Agency Proposal, Article 20, Sec. 1(b).

⁴⁴ See Union Argument, Article 20 at 1.

concerning compensatory time, including issues concerning expiration of compensatory time.

Article 21 - Official Time

A. Agency Position

The Agency proposes limitations on official time usage that it contends are consistent with Section 7131 of the Statute and Executive Order 13,837, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order). So, among other things, the Agency proposes 1 hour of official time per bargaining-unit employee, a ban of the use of official time on EEO and workers' compensation matters, and outlined procedures for requesting official time. Management contends that the Union has done an inefficient job of tracking and reporting official time and, as such, the foregoing is needed. The Agency contends that the Union's claims about the illegality of the Official Time Order are misplaced.

B. Union Position

The Union argues that its language is fair and consistent with law. For example, it proposes 10 hours of official time per bargaining unit employee for activities that arise under 5 U.S.C. §7131(d) and permits the Union to utilize official time for more activities than those permitted under Management's language. Almost all Union representatives are centrally located, so there would not be a need for complex coordination that would put a strain on official time resources. Finally, for a number of reasons set forth in its arguments, the Union maintains that the Agency's proposals are illegal.⁴⁵

C. Conclusion

The Panel will impose a compromise proposal as follows:

Section 1. The parties disagree about whether to recognize past practices regarding official time; the Agency wants past practices to not be recognized, while the Union objects to the Agency's language to that effect. The Agency's desire to limit the Article to its express terms for purposes of "finality and clarity" is reasonable. Further, the Agency cites a decision of the FLRA in which the Authority found that "arbitrators may not modify the plain and unambiguous provisions of an agreement

⁴⁵ See Union Argument, Article 21 at 5 (citations omitted).

based on parties' past practices."⁴⁶ The Union provided no argument against inclusion of the Agency's language nullifying past practices. **The Panel will impose the Agency's proposal.**

Section 2(b). The parties agree generally that only employees listed by the Union as "designated union representatives" may use official time. The only dispute involves whether the limitation shall apply universally, as the Agency proposes, or whether other employees may use official time "as provided elsewhere" in the article, as the Union proposes. The Union contends the Agency's proposal "is outside the duty to bargain because it is inconsistent with 5 U.S.C. § 7131(a) and (c)." While the statute does permit "any employee" to utilize official time in some circumstances, such as when negotiating the terms of a collective bargaining agreement, the Union has already agreed to the language limiting official time use to those employees identified by the Union to the Agency as "designated union representatives." Further, no other provision elsewhere in the article specifically provides for the use of official time by employees other than those on the list provided by the Union to the Agency, making inclusion of the Union's added language irrelevant. **The Panel will impose the Agency's language.**

Section 3(d). While the Agency's submission indicates the parties have *not* tentatively agreed to language prohibiting the use of official time for "internal union business," the Union's submission indicates the parties *have* tentatively agreed to the proposed language. However, since the parties' language is identical, there appears to be no dispute over the provision. **The Panel will refrain from imposing language as the parties do not appear to be at impasse.**

Section 3(e). Under § 7131 of the Statute, use of official time for purposes unrelated to contract negotiation or procedures before the Authority must be "reasonable, necessary, and in the public interest." The Union has failed to show why authorizing use of official time to pursue complaints involving workers' compensation and EEOC matters meets this standard. Further, the parties' previous CBA does not appear to have expressly authorized use of official time for such purposes and the Agency contends that "Union officials are presently not recording official time for these activities" and that its goal is to "curtail official time under "§ 7131(d) to time that is necessary." Lastly, the Panel has recently imposed language

⁴⁶ SSA, 70 FLRA 525 (2018).

preventing the use of official time for processing EEOC complaints because its use for such purposes had not been shown to be "reasonable, necessary and in the public interest."⁴⁷

Accordingly, the Panel will impose the Agency's language.

Section 3(g). The prior CBA provided up to 54 hours of official time annually for "in-house training for Association representatives with respect to the administration of this Agreement and the rights and responsibilities of a labor organization under the Civil Service Reform Act." However, the Agency argues that the use of official time for "union-sponsored training" is not "reasonable, necessary, and in the public interest." The parties appear to agree that use of official time for "union-sponsored training" shall no longer be authorized; they simply use different language to express the same conclusion. The Union argues that the Agency's proposal is "outside the duty to bargain" because it would "encourage or discourage membership" in the Union "by discrimination in connection with hiring, tenure, promotion, or other conditions of employment" in violation of § 7116(a)(2) of the Statute. However, the Union has already agreed to the substance of the Agency's proposal. Still, to avoid any potential duty to bargain concerns, **the Panel will impose the Union's language for this provision.**

Section 3(h)-(i). Regarding Section 3(h), the parties agree that official time may not be used for "political activities" but disagree over whether official time may be used for lobbying; the Agency seeks to prohibit it while the Union seeks to permit it. Regarding Section 3(i), the Agency proposes, over the Union's objection, limiting the use of official time for "pursuing or preparing grievances or arbitration." While the Agency points out that its proposals are "consistent with E.O. 13837," the Union argues that it need not bargain the matters because the EO operates as a "governmentwide rule." In the absence of a showing by the Union that the use of official time for lobbying and for pursuing grievances and arbitration is "reasonable, necessary, and in the public interest," as required by § 7131(d) of the Statute, **the Panel will impose the Agency's language.**

Section 4(a). **The Panel will impose a modified version of the Agency's proposal.** There are two areas of dispute in Section 4(a).

⁴⁷ *U.S. Dept. of Veterans Affairs, 2020 FSIP 022 (2020).*

First, while the parties agree that official time may be used for participation in term and mid-term collective bargaining negotiations as required by the Statute, the Agency proposes to prohibit the use of official time to prepare for bargaining "in accordance with 5 U.S.C. 7131(a)." However, the Statute does not specifically prohibit or permit the use of official time to prepare for bargaining. For its part, the Union does not explain why it should be entitled to unlimited official time to prepare for bargaining, and nothing prevents it from using official time under § 7131(d) for such purposes.

Accordingly, the Panel will strike the second sentence each of Sections 4(a)(1) and (2) of the Agency's proposal, with the effect of authorizing the use of official time for bargaining "in accordance with" § 7131(a) of the Statute.

Second, in its Section 4(a)(4), the Union proposes allowing the use of official time for "shop meetings" and to pursue grievances. The Agency counters that its language, which does not permit the use of official time for such purposes, more closely aligns with E.O. 13837. As with Section 3(i), the union has again failed to show that the use of official time to pursue grievances is "reasonable, necessary, and in the public interest." For consistency with and for the reasons expressed in the resolution of Section 3(i), **the Panel will impose the Agency's language.**

Section 4(b). The Agency's proposal would restrict the amount of official time available to the Union for purposes of § 7131(d) of the Statute to one hour per bargaining unit employee per year; the Union proposes a bank of 10 hours per bargaining unit employee per year. While the Agency's proposal does not indicate whether official time under § 7131(a) and (c) of the Statute would count against the bank, the Union's proposal specifies that it would not. Both parties agree that unused time in one year will not carry over to the next. The core of the Agency's argument is that its proposed language is "consistent with E.O. 13837."

The existing CBA does not appear to establish a bank of official time hours, and neither party documented the amount of official time historically used by the bargaining unit. Accordingly, neither party has demonstrated that its proposal reflects an amount of official time that is "reasonable, necessary, and in the public interest." Accordingly, **the Panel will impose the Agency's language.**

Section 4(e). The Union argues the Agency's proposal, which would limit the number of employees that could be designated as union representatives in order to "prevent an operational burden," is "outside the duty to bargain" because it "concerns PA business and not conditions of employment."

The Agency's only argument is that its proposal is "consistent with E.O. 13837." While the Agency's proposal may not be inconsistent with the executive order, neither is the number of employees that may be designated as union representatives eligible for official time specifically addressed in the order. The Union has raised a colorable duty to bargain objection and has already accepted terms designed to address the Agency's concern about having too many employees using official time at once, while the Agency has failed to adequately justify its proposal. **Accordingly, the Panel will impose the Union's language.**

Section 5(a), (b). The Agency argues it needs two days' notice to review official time requests and ensure official time is being used appropriately. It also contends that the union's less precise language "could generate disputes over the actual reasonableness of the advance notice."

The Union contends that the Agency's proposal "is outside the duty to bargain" because it "[imposes] requirements on the use of official time that do not extend to the use of annual leave", in violation of § 7116(a)(2).⁴⁸ However, the evidence provided by the Union in support of its position is weak, consisting of two incidents regarding employee leave use in 2017. In the first instance, the employee requesting leave substantively followed the procedure the Agency proposes to govern requests for official time. In the second instance, an employee accidentally returned late from his lunch break, apologized to his supervisor, and asked to cover the time with credit hours. Neither case is evidence of the agency imposing stricter official time requirements than govern annual leave use. Further, the only case cited by the Union in support of its position, *NTEU*, 64 FLRA at 985, does not appear to be on point, making no mention of official time or even addressing unfair labor practices under § 7116(a)(2) of the Statute.

⁴⁸ "(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-- ... (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment..."

The Agency's proposal has the advantages of precision and clarity, clearly specifying how, when, in what format, and to whom official time requests must be submitted, whereas the Union's simply states that "reasonable" notice will be given "when practicable" before the use of official time. The Agency's proposal will also help it better prepare for and manage the use of official time in a way that minimally disrupts its operations and better aligns with the Statute's directive that it "be interpreted in a manner consistent with the requirement of an effective and efficient Government."⁴⁹ **Accordingly, the Panel will impose the Agency's language.**

Section 6. The parties agree that "A union representative may request [leave without pay] LWOP to engage in union activities" and that such requests will be approved "pursuant to Agency policy." However, the Union opposes the Agency's proposal to exclude denials of LWOP from the grievance procedure.

AFGE v. FLRA, 712 F.2d 640 (D.C. Cir. 1983) directs the Panel to "impose a broad scope grievance procedure unless the limited-scope proponent can persuade it to do otherwise." In this case, the Union did not explain its objection to the Agency's proposed exclusion. However, the Agency did not explain why the exclusion was necessary. Generally, Article 10 is the focus of the parties' dispute over grievance exclusions, and the Agency notes here that the exclusion proposed in Section 6 of Article 21 "is captured in" its proposal for Article 10, Section 1(h). **Accordingly, the Panel will impose the Union's language for this Section and allow the Panel's resolution of Article 10 to settle the substantive issue.**

Article 22 - Leave

A. Agency Position

The Agency proposes a straightforward article that does not go into specificity as it concerns different types of leave. According to Management, various laws and policies already address different forms of leave; therefore, the Union's language is unnecessary.⁵⁰ The Union's language also forces Management to take certain actions that are inconsistent with management rights. The Agency also opposes Union language that would encroach upon Management's ability to use forced leave in

⁴⁹ 5 U.S.C. § 7101(b).

⁵⁰ See Agency Argument, Article 22 at 1.

situations involving adverse actions; Management believes this proposal is illegal.⁵¹ The Agency also includes language defining individuals for purposes of types of leave that may be used.

B. Union Position

The Union believes its language does a much better job of protecting employee rights because it more explicitly describes the type of leave that is available to the Agency's work force. The Union also describes how leave without pay is to be addressed. Moreover, the Union's language states that employees will not be penalized for using authorized leave, an important protection.

C. Conclusion

The parties' disagreement generally centers on style more than substance. While the Union's proposal spells out employees' legal rights regarding various types of leave, the Agency's more streamlined proposal does not attempt to recite the leave elsewhere granted to employees by statute, regulation, and agency policy. This Panel has consistently avoided imposing overly complicated contract terms that unnecessarily repeat what is already provided for in statute and regulation. The Union does not present compelling arguments for abandoning this preference. **Accordingly, the Panel will impose the Agency's language.**

Article 23 - Voluntary Leave Bank

A. Agency Position

The Agency does not believe an article on this topic is necessary because the Agency already has a policy that covers it. But, if there is to be an article on this topic, the Agency requests imposition of its straightforward language.

B. Union Position

The Union's language recognizes the Agency's policy on voluntary leave but also creates a board to address issues concerning this topic. Federal regulation requires agencies to establish a leave board and further states that this board must

⁵¹ See *id.*

have a representative from organized labor.⁵² The Union's proposal, then, is consistent with law.

C. Conclusion

The Parties acknowledge that a voluntary leave bank program already exists and is governed by a board comprised of Agency and Union representatives pursuant to existing Agency policy. The Union acknowledges that the program "works well" and is "administered fairly and properly." However, the Union argues that, since federal regulations require a board to oversee the program, the requirement for a board should be written into the collective bargaining agreement as well. This is unnecessary. However, **the Panel will address the Union's concern by modifying the Agency proposal to read: "The Agency will operate a Voluntary Leave Bank pursuant to established Agency policy and applicable law."**

Article 24 - Part-Time Career Employment

A. Agency Position

The Agency proposes language that grants employees the ability to request part-time employment but leaves full discretion with Management to make the final decision. The Agency needs to have full freedom to assess the appropriateness of granting or denying such requests, and Management needs flexibility to consider a variety of factors. The Agency believes the Union's language is too broad and potentially interferes with various statutory management rights.⁵³

B. Union Position

The Union believes that its language is clearer and provides for part-time employment on a temporary and a permanent basis. The Union's language is fairer because, among other things, it requires an explanation for denials, the use of same performance standards for all positions, and protects against retaliation for seeking part-time status. The Union's language closely matches existing language.

C. Conclusion

⁵² Union Argument, Article 23 at 2 (citation omitted).

⁵³ See Agency Argument, Article 24 at 1.

Most of the Union's proposal unnecessarily, and perhaps illegally, hinders the Agency's ability to assign work. However, the Union's argument that it should be informed by the Agency of changes in employees' full or part-time status is reasonable, as such information may be relevant to the Union for dues withholding or other purposes. **Accordingly, the Panel will impose a modified version of the Agency's proposal that incorporates Section 5 of the union's proposal, which reads, "The Agency will promptly notify the Association any time an employee changes from part-time to full-time status or full-time to part-time status."**

Article 25 - Facilities and Services

A. Agency Position

The Agency's language provides it with full authority to determine how office assignments will be made. Additionally, consistent with the Official Time Order, the Agency proposes prohibiting the Union from using *any* Agency resources, e.g., office space, equipment, Agency email, for representational purposes. The Agency believes that its language is more efficient and will reduce the need for prolonged discussion and actions involving moving employees to offices. Management believes the Union's proposed language is burdensome and would not contribute to effective and efficient government operations.

B. Union Position

The Union's language establishes an orderly process for ascertaining how certain employees will have certain offices.⁵⁴ The Union feels this language provides easy-to-understand guidance for its workforce. The Union likewise believes the remainder of its language provides for efficient operations because it gives employees a clear understanding of workplace rules concerning office space. Finally, the Union opposes the Agency's reliance upon the Official Time Order because it believes that the Agency is treating the Union differently than other similarly situated entities.

C. Conclusion

The Agency argued convincingly for the need for flexibility in managing office space, pointing out that its budget has remained flat since fiscal year 2017 and that office costs are

⁵⁴ See Union Proposal, Article 25 at 1-2.

its second largest expense. Further, the limitations on Union use of Agency resources proposed by the Agency align with the public policy goals articulated by E.O. 13837 and help promote the statutory goal of "an effective and efficient Government."⁵⁵ The Agency also explained that the Union's use of Agency computer and email systems had resulted in a past grievance after Union emails were disclosed pursuant to a FOIA request. The Union argued that the Agency's proposal violates 5 U.S.C. § 7116(a) (2)⁵⁶ by preventing use by the Union of resources the Agency permits outside entities to use. The Union did not explain how the Agency's proposal "encourages or discourages" union membership, however, and the one example cited by the Union of the Agency allowing use of its facilities by an outside entity was vague and not necessarily analogous to the Union's use of Agency resources. **Accordingly, it is appropriate to impose the Agency's language to resolve this dispute.**

Article 26 - Health and Safety

A. Agency Position

The Agency proposes a one-paragraph article in which it reiterates that it will adhere to guidance provided by the General Services Administration (GSA) and other appropriate authorities in providing a safe and healthy work environment. The Agency leases its property from a private entity, so the Union is not in a position to insert itself into the space-leasing process. The Agency has access to health and safety experts who are far more knowledgeable than Union individuals. Thus, there is no need for health and safety boards.

B. Union Position

The Union's language is not a cursory explanation of health and safety responsibilities. Instead, the Union's language lays out procedures to be followed and, importantly, creates a health and safety board. Such a board, the Union argues, allows for safety issues to be addressed proactively. The recommendations from the board are not binding, so it is unclear why the Agency objects to this process. The Union is also concerned that the

⁵⁵ 5 U.S.C. § 7101(b).

⁵⁶ "(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency ... (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment..."

Agency's proposal does not provide for space for new mothers to "express" milk.

C. Conclusion

The Agency convincingly argues against adoption of many components of the of the Union's proposed article but fails to make the case for its own extremely truncated proposal.

Accordingly, the Panel will impose the Union's proposal, minus the components to which the Agency raises persuasive objections.

Section 1. The Panel will impose (b) but not (a). Regarding (a), the Agency points out that the reference to OSHA is unnecessary and that the meaning of the reference to "authorized government entity" is "overly broad and not accurate." The rest of the subsection does little more than require the Agency to abide by applicable health and safety codes, an obligation it must satisfy without a CBA requirement.

Regarding (b), the parties agree on inclusion of this language, which is the entirety of the Agency's proposed article.

Section 2. The Panel will not impose the Union's language for this section. The Union proposes to establish a "Health and Safety Advisory Committee." However, the Agency argues convincingly that committee's functions can "be handled on as needed basis rather than requiring the expenditure of significant employee time through mandatory meetings that may not be necessary." The Agency also points out that, for practical reasons, the committee would be unable to fulfill some of the tasks assigned to it under the Union's proposal.

Section 3. The Panel will impose the Union's proposal for (c), but not (a), (b), or (d). The Union's proposal for (a) establishes a detailed procedure for processing employees' oral complaints about safety or health concerns, including an obligation for the Agency to "promptly" report such concerns to the "DC Environmental Protection Agency or other appropriate local authority." However, the Agency points out various impracticalities in the Union's proposal, such as that "[l]ocal authorities have no role in handling or addressing NLRB office safety issues."

Regarding (b), the Union seeks to require the Agency to provide it with health and safety reports within three days of receipt by the Agency. The Union failed to show why this

provision is necessary and, even without a contractual right to the information, the Union likely still has a legal right to copies of such reports under the Freedom of Information Act and/or § 7114(b)(4) of the Statute.

As for (c), the provision: (1) requires the reporting to the Agency by employees or the Union of "imminent danger situations" that "could reasonably be expected to cause serious physical or mental harm"; (2) allows employees to decline to continue working in the dangerous area, but requires that they remain available to continue working "in another work area"; and (3) provided "procedures are strictly followed," allows employees to continue to be paid for work performed outside the dangerous area. The Agency did not explain why the Union's proposal was objectionable or inappropriate.

Lastly, (d) would create detailed requirements for "an annual safety and health inspection" in which the Union would be entitled to participate. The Agency again points out practical concerns that make the Union's proposal both unnecessary and impractical. For instance, the Agency notes that the building management of the leased NLRB HQ facility already conducts an inspection annually but does not provide the Agency with advanced notice.

Section 4. The Panel will impose (a) and (b), but not (c). The Agency's only objection to (a) and (b) – which require the Agency to familiarize employees with its emergency action plan and to furnish office first aid kits and appropriate emergency supplies – is that such requirements are "redundant." But if the Agency is already complying, inclusion of the language in the CBA should be of little concern. However, (c) would require the Agency to offer CPR and AED training to employees "at least annually on duty time," a significant disruption of Agency operations that the Union has not sufficiently shown to be in furtherance of "an effective and efficient Government."⁵⁷

Section 5(a). The Panel will not impose the Union's language for this section. The Union proposes re-instatement of an "in-office Health Unit" that would perform such functions as "[caring] for employees during emergency situations" and providing "first aid, testing, inoculations, and special programs." However, the Agency explained that its previous, \$330,000 per year health unit was disbanded by the Agency in 2018 after a working group, in which the Union president participated, recommended doing so as a way to close the

⁵⁷ 5 U.S.C. § 7101(b).

Agency's budget shortfall without implementing a RIF. The Agency argues persuasively that reinstatement of the little-used health unit would be "cost prohibitive."

Section 5(b). The Panel will impose the Union's proposal, which obligates the Agency to provide designated spaces for lactation purposes. The Agency contends the proposal is "redundant" as it has already provided for two dedicated lactation rooms and provided accommodations for employees who so choose to use their private offices. As such, satisfying the Union's proposal should not impose an undue burden on the Agency.

Section 6. The Panel will not impose the Union's proposal. The short section requires the Agency to "encourage GSA to secure a lease that provides an on-site fitness center for use by Agency employees free of charge." However, the Agency counters that the NLRB HQ already has a gym and that "the Agency has no authority over GSA and its lease arrangements."

Section 7. The Panel will impose the Union's proposal, which calls for the creation of a work group to "to explore implementation of flexible spending accounts" in the event "the Agency is granted the authority to expand the scope of expenses covered by pre-tax dollars..." A similar provision was included in the prior CBA, and the Agency offered no specific arguments against the proposal.

Section 8. The Panel will not impose the Union's proposal. The Union seeks to require the Agency to "annually test the indoor air and drinking water quality" and to implement a robust system of refrigerator filter replacement. However, the Agency points out that the NLRB's HQ in Washington, D.C. relies on city water over which it does not exercise control and that adding a testing requirement "is not necessary." Further, the Agency notes that it already arranges for replacement of water filters. The Union's proposal is unnecessary and overly burdensome.

Article 27 - Transfers

A. Agency Position

The Agency argues that its proposal should be adopted because it is consistent with management rights and also supports Management's ability to smoothly run its operations. By contrast, although the Union supposedly recognizes Management's rights, the Agency believes that the Union has trammled upon

them. Among other things, the Agency argues that the Union's proposal requires all assignments to be done on a volunteer basis, mandates a yearly quota of reassignments, and creates a vague "consideration" standard supervisors must adhere to for certain selections.

B. Union Position

The Union maintains that transfers are highly sought out by the workforce, so its proposed language establishes procedures for such personnel actions. This language also encourages Management to grant transfers. Although the Union's proposal does call for voluntary transfers, it still allows Management to rely upon involuntary transfers should the need arise. And, Management would have to take into consideration several factors, like seniority. Transfers can create a hardship for employees, so this language is meant to alleviate some of that potential burden.

C. Conclusion

The Panel will impose the Agency's proposal. The Agency argues persuasively that its proposal would "provide flexible procedures for the Agency to meet its operational needs" and that the Union's proposal infringes on the Agency's statutory rights to "assign work" and "direct" its employees.⁵⁸

The Authority has previously found that proposals requiring an Agency to transfer employees on grounds unrelated to Agency operations affect management's statutory right to assign work.⁵⁹ The Union's proposed Section 3, which would require at least four transfers per year, is just such a provision. While § 7106(b)(3) of the Statute provides that an Agency may be required to bargain over "appropriate arrangements for employees adversely affected by the exercise of" management rights, the bulk of the Union's proposed article, in the Union's words, is oriented towards facilitating employees' desire to "seek transfers", which it argues are "highly sought." In other words, it seeks to limit management rights.

Finally, the Agency seeks to exclude grievances involving its selection of personnel for involuntary permanent reassignments. As the Union's arguments do not provide sufficient rationale to overcome the Agency's stated need for

⁵⁸ 5 U.S.C. § 7106.

⁵⁹ 64 FLRA 77 (2010).

"flexible procedures... to meet its operational needs" and allowing grievances would implicitly limit the Agency's right to assign work, the Agency's proposal to exclude such grievances is the more reasonable one.⁶⁰

Article 29 - Educational Development/Professional Training

A. Agency Position

Agency training is conducted by its Office of Employee Development (OED), and Management's language recognizes that all decisions concerning employee training rests with it. The OED will consider and authorize training requests and will account for all aspects related to training. The Agency opposes Union language creating another "board," this time for assessing training opportunities. The Agency believes this approach impermissibly encroaches upon the Agency's autonomy and is also a drain on the Agency's budget. Management's language is also consistent with law and recognizes the importance of granting Management largely unfettered authority in the field of employee development.

B. Union Position

The Union's proposal continues two key aspects of training: a commitment that all employees will receive one training per year and permission to permit Union involvement in a training board. The Agency's proposal ties training to an employee having an individual development plan (IDP). But, according to Union information requests, few employees have IDP's.⁶¹ Thus, the Union's language is necessary for ensuring that all employees have an opportunity for career development. The Union does not believe that its involvement in a training board is burdensome. Moreover, eliminating Union participation could create a possibility of favoritism in granting training requests.

C. Conclusion

The Panel will impose the Agency's proposal. The Agency's proposal represents a shift away from the rigid annual training program in place previously to a more individualized and flexible approach which provides for more targeted training to

⁶⁰ The Panel has recently relied on similar reasoning to exclude grievances implicating management rights. See 19 FSIP 070.

⁶¹ See Union Argument, Article 29 at 1.

better meet the needs of the Agency and the interests of individual employees while restraining cost. The Union's objections are unavailing.

The Union argues that tying training to employees' IDP, as the Agency proposes, "is made in bad-faith and patently offensive" because only one employee presently has an IDP, an unsurprising fact given that annual training currently takes place automatically and without the need for an IDP. The Union both incorrectly assumes the present level of employee interest in IDPs is an immutable fact and does not contend that employees seeking training under the system proposed by the Agency would be prevented by the need to do so consistent with an IDP.

Further, the Union objects to the Agency's proposal to do away with the training committee and the obligation to incorporate the Union into the new employee orientation process because that's "what the process has been for decades," but this is not a substantive reason for opposing the Agency's changes. The Union's generalized concerns about "favoritism" potentially resulting from a less structured training program are both speculative and insufficient to do away with the Agency's right to manage and train its workforce in the way it deems most conducive to efficient Agency operations.

Finally, the Union argues that training costs should not be a concern as it comprises only a small part of the Agency's overall budget. The Union points out that the Agency has had a budget surplus in recent years, but it also true that the Agency's budget has been frozen since 2017. Further, the Agency-provided data on training costs the Union cites shows increasing costs since FY 2018. Regardless, all else being equal, lower costs serve the interests of "an effective and efficient Government."⁶²

Article 30 - Voluntary Deduction of Professional Association Dues

A. Agency Position

The Agency includes new language that calls for the Agency to halt dues deduction after 1 year from enactment as soon as permitted by law.⁶³ Management also proposes limitations on how many times dues amounts can change per year and what happens to

⁶² 5 U.S.C. § 7101(b).

⁶³ Agency Article 30, Section 5.

dues when an employee transfers to another unit. The Agency is opposed to Union language that would require Union officials to sign an employee's due revocation forms. The Agency argues that the right to pay, or not to pay, dues is a statutory one that belongs exclusively to an employee under 5 U.S.C. §7115. The Agency's proposed language, and the Agency's opposition to the Union's language, flows from this premise.

B. Union Position

The Union argues that the Agency's 1-year rule on dues revocation is illegal because, in the Federal Register, the FLRA clarified that its new rules on dues deduction - 5 C.F.R. §2429.19 - only impacts dues agreements that are executed *after* the new rules goes into effect.⁶⁴ The Union believes the Agency's language on temporary reassignments and dues cessation is onerous because Management would require employees to fill out a new dues-revocation form upon return to the unit. The Union also includes language that would require the Agency to correct any payment errors. The Union does not believe it should be responsible for correcting Management's payment errors.

C. Conclusion

The Panel will impose the Agency's language to resolve this dispute. The below discussion will outline several of the sections that support this conclusion.

Section 5. The Panel will impose the Agency's language.

This provision governs employees' revocation of dues deduction authorizations. Under the Agency's proposal, an employees' revocation will be processed immediately following the one-year anniversary of the employee's SF 1187 authorization. If more than a year has passed since the employee's authorization, the Agency will process the revocation at "the earliest date permitted by law."

In contrast, the Union's proposal would add a requirement that revocations be signed off on by the Union so that it "can discuss with the employee the reason for the revocation." However, the Agency convincingly argues that the statutory right to authorize and cancel dues deductions belongs to the employee alone, not the Union, and points out that "[t]he execution of the SF-1188 only requires the employee's signature—not the

⁶⁴ Union Argument, Article 30 at 4 (citing 85 Fed. Reg. 41169, 41170 (2020)).

Union's..." The Union's proposal lacks justification and imposes an undue burden on employees' right to revoke authorization for dues deductions.

Further, the Union argues the Agency's proposal is "outside the duty to bargain" because it is inconsistent with 5 CFR § 2429.19, which provides that employees may revoke authorization for dues deductions "at any time the employee chooses" following "the expiration of the one-year period during which an assignment may not be revoked under 5 U.S.C. 7115(a)."

As nothing in the Agency's proposal contradicts the regulation itself, the Union points to the rule's interpretive publication in the Federal Register, which notes that "the rule would not require agencies to disregard the terms of previously authorized assignments that the agencies received before the effective date of the rule" on August 10, 2020.⁶⁵ Accordingly, the Union believes it is a violation of "governmentwide regulations" for the Agency's proposal to permit the immediate cessation of dues for those employees who authorized deductions prior to August 10, 2020 and paid dues for more than one year before submitting their revocation. In such instances, the Union's proposal would require that deductions continue until the March 1 following the revocation, as provided in the previous CBA.

While the Union is correct that 5 CFR § 2429.19 did not take effect until August 10, 2020, its argument that it is therefore impermissible for the rule to ever apply to authorizations executed before that date is misplaced.

The terms of the SF 1187 do not independently limit employees' ability to revoke payroll deductions, but arguably incorporate by reference any CBA provisions imposing such restrictions, stating the revocation "will not be effective... until the first full pay period which begins on or after the next established cancellation date of the calendar year after the cancellation is received..."⁶⁶ In this case, the "established cancellation date" was set by the prior CBA as the March 1 following revocation. The recognition in the final rule establishing 5 CFR § 2429.19 that the regulation "would not require agencies to disregard the terms of previously authorized assignments" (emphasis added) was, in all likelihood, intended to prevent the regulation from being interpreted in a way that

⁶⁵ 85 FR 41169.

⁶⁶ https://www.opm.gov/forms/pdf_fill/sf1187.pdf

would impair existing contractual provisions such as these. However, nothing in the rule *prohibits* an Agency from negotiating a new CBA with different terms governing the revocation of SFs 1187 executed prior to the effective date of 5 CFR § 2429.19.

Further, the Authority has previously determined that “[t]he most reasonable way to interpret” the statute governing and preexisting the regulation, 5 U.S.C. § 7115(a), is that it protects employees’ “right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses.”⁶⁷

The Panel is guided in part by the Authority’s determination that the kind of procedure the Agency seeks to implement “would assure employees the fullest freedom in the exercise of their rights under the Statute.”⁶⁸

Section 6. The Panel will impose the Agency’s proposal. The parties generally agree on this section. The dispute concerns the Agency’s proposal to limit the Union’s ability to alter its dues rate to no more than twice per year. The Agency presents a persuasive argument that it is merely seeking “to retain legacy language.” This language has created no issues that have been made evident to the Panel, so it shall remain.

Sections 7 and 9. The Panel will impose the Agency’s language for Section 7 and declines to impose the Union’s proposed Section 9. The parties have agreed to language for most of this section, but the Union objects to the Agency’s proposal to automatically terminate dues deductions when an employee “is temporarily assigned to a non-bargaining unit position” and to require the employee to submit another SF 1187 “upon return to the bargaining unit position.” Instead, the Union proposes in its Section 9 to automatically “reinstate dues withholding” when an employee returns to the bargaining unit.

The Union describes the Agency’s proposal as an “onerous” and “bad faith” attempt to “[erect] hurdles for employees to stay in the union.” The Agency counters that the Union’s position is “inconsistent with the Statute.” 5 U.S.C. 7115(b) provides that authorized dues deductions “shall terminate when the agreement between the agency and the exclusive representative involved ceases to be applicable to the

⁶⁷ 71 FLRA 107 (2020).

⁶⁸ Ibid.

employee." As support, the Agency cites 44 FLRA 58 (1983), which notes that, "section 7115 operates to require the termination of a dues allotment when an employee is temporarily promoted to a supervisory position."

More recently, however, the Authority has held that, while An Agency "must" cease dues deductions when an employee temporarily transfers out of the bargaining unit, it "may resume deducting union dues without the employee executing a new SF-1187 once the employee returns to the unit."⁶⁹

Nevertheless, as the Agency's proposal provides employees with the fullest control over the authorization of dues withholdings, it best protects employees' statutory right to "freely" choose to "join" or "refrain from" joining a union and will therefore be adopted.⁷⁰

Union's Section 10. The Panel will decline to impose the Union's proposal. The Agency objects to the Union's proposal – which provides, "Administrative errors that deny the Association its full amount of dues will be corrected, and the next remittance to the Association will be adjusted to include the amount not previously forwarded" – and offers no counter. In the Panel's view, the Agency appropriately argues that "[a]ny errors [should] be corrected among the Union and its employees."

Union's Section 11. The Panel will decline to impose the Union's proposal. The Union's section, which the Agency opposes without offering a counter, contains additional procedures governing Agency errors in processing dues withholdings. However, the Union's section 10 should adequately address such administrative mistakes. In some cases, the Union's proposal would obligate the Agency to compensate the Union out of its own funds for withholding shortfalls. The Agency correctly argues in response that dues payment is primarily an arrangement between the employee and the Union and, accordingly, "dues are derived from the employee's pay—not the Agency's budget."

Article 31 – Law Student Employees

A. Union Position

The Union wishes to include language in the agreements that acknowledges that temporary law-student employees receive rights

⁶⁹ 68 FLRA 108 (2015).

⁷⁰ 5 U.S.C. § 7102.

comparable to other bargaining unit employees, such as arbitration rights. Because these employees are also bargaining unit employees, the Union believes that it is only appropriate to ensure that their rights are spelled out in the agreements.

B. Agency Position

The Agency opposes the above-referenced Union language. Since law students are with the Agency for only a temporary basis, Management does not believe it would be efficient to subject them to arbitration provisions.

C. Conclusion

Section 1. The Agency seeks to prevent the application of four CBA articles to temporary law student employees, including Article 6 (employee rights and responsibilities), Article 10 (grievance procedure/alternative dispute resolution, Article 11 (arbitration), and Article 13 (computation of time). As discussed above, the Panel declines to impose the entirety of the Union's Article 6, to which the Agency offers no counter. Striking the reference to Article 6 in this Article is therefore consistent with that conclusion. Regarding Articles 10 and 11, the Agency reasonably argues that, since law student employees work "on a temporary and limited appointment," "it would not be efficient to subject the parties to possible arbitration fees based on the temporary nature of law student appointment."

As for Article 13, the core of the article is its clarification that "service," for purposes of the CBA, shall be "calculated on the basis of cumulative employment as an attorney (or other professional) with the with the Agency, unit, branch or office, as applicable..." The Union contends, and the Agency does not dispute, that the Agency considers law student employees to be bargaining unit members, and the Agency offers no justification for excluding the application of Article 13 to law student employees. **Accordingly, the Panel will order adoption of the Agency's Section 1, modified to retain Article 13 (computation of service) in the list of articles applying to law student employees.**

Section 2. The Panel will impose the Union's language. The Agency acknowledged in its statement of position that it agrees with the Union's proposal.

Section 3. The Panel will impose the Union's language. The Parties' proposals are nearly identical, such that the Agency acknowledges the Parties agree on the section.

Article 32 - Reduction in Force (RIF)

A. Agency Position

The Agency proposes language that would prohibit grievances over RIF matters. The Agency contends that the Union has statutory rights to challenge RIF actions in other forums, and it would be more appropriate to rely upon those forums rather than inexperienced arbitrators. The Agency also opposes including language that would grant "bump and retreat"⁷¹ rights to employees in the Excepted Service. According to Management, such rights are addressed already by Federal law and policy. The Agency is also opposed to language that would grant the Union the ability to provide alternative recommendations to a RIF. Management maintains that RIF's are budgetary-based decisions, and it would be inappropriate to grant the Union a role in that process.

B. Union Position

The Union did not submit a written argument in response to the Agency's position. However, the record does contain the Union's proposal on this topic.

C. Conclusion

The Panel will impose the Agency's article. The Agency argues convincingly that its proposed Section 1 exclusion of reductions in force from the grievance procedure is the most reasonable. The Agency pointed out that employees have a statutory right to seek review before the MSPB and that availing themselves of this right before "expert adjudicators" is more conducive to "effective and efficient government" than resorting to "non-expert arbitrators resolving these matters with the expenditure of unnecessary fees." As for Sections 2, 3, and 4, the Agency contends generally that its proposals consist of "legacy language" that the Union has "presented no compelling reason to change."

⁷¹ "Bumping and retreating" refers to the process by which Federal employees subject to a RIF-action may move to differently graded, but occupied, positions in order to avoid separation.

Article 33 - Hours of Work

A. Agency Position

The Agency proposes language about flexiplace schedules that would allow it to retain existing "core hours" but would require flexiplace-employees to report to duty no earlier than 7 a.m. The Agency argues that this arrangement is consistent with its business hours and operations.⁷² Management's language also places a duty of "candor" upon employees in reporting accurate work-hour-information and would also require employees to request authorization for credit hours ahead of time. The foregoing is necessary to ensure that Management can provide sufficient workplace coverage.

B. Union Position

The Union offers proposals that expand flexibility for work schedule options. For example, its proposals offer certain options for compressed work schedules, expand hours that employees on flexiplace schedules may work, and allow employees to earn credit hours with fewer obstacles.⁷³ The Union argues that the Covid-19 pandemic has demonstrated that the Agency's mission will not suffer as a result of expanded-workplace options. The Union believes that aspects of Management's proposal are illegal and that it would be inappropriate to discipline employees for "innocent" mistakes on their timesheets.

C. Conclusion

Sections 2(c), (d). The Panel will impose the Agency's language. Subsection (c) involves designation of "core hours", jointly defined by the parties as "the hours/days during which an employee must either be present for work or use leave or credit hours." The Agency proposes retaining the current core hours - weekdays from 9:30am to 3:30pm - while the Union proposes limiting the core hours to weekdays from 11am to 2pm.

Similarly, subsection (d) sets the "flexible band," jointly defined by the parties as "the time before and after the core hours during which employees can schedule starting and quitting

⁷² See Agency Argument, Article 33 at 1.

⁷³ See Union Argument, Article 33 at 8.

times." The following table compares the parties' proposals with the current CBA:

Proposal	Morning band	Afternoon band
Current CBA	6-9:30am	3:30-8pm
Agency proposal	7-9:30am	3:30-8pm
Union proposal	5-11am	2-9pm

The Union argues for maximum schedule flexibility, pointing out that "the NLRB has allowed for even greater flexibility in hours during the COVID-19 pandemic" without sacrificing efficiency. The Agency counters that the Union's proposal would harm its "ability to provide effective supervision" and may cause employees to "lose significant time to collaborate, attend meetings, etc..." The Agency further points out that the parties have agreed on language in Section 9 allowing the Agency the discretion to grant "greater flexibility in work hours."

While the Union has shown that the Agency has weathered the pandemic despite the suspension of typical parameters for working hours, it has not shown that making such emergency measures permanent is appropriate. If the Agency is convinced, as is the Union, that narrower core hours and broader flexible bands assist the Agency in performing its functions, it retains the discretion to provide such flexibility, as the pandemic has shown it is willing to do.

Section 3(e)-(j). The Panel will impose the Agency's proposals. The parties disagree about whether employees should obtain Agency approval prior to working credit hours. The Agency argues that OPM guidance "requires" Agency approval for credit hours, while the Union contends the matter is "outside the duty to bargain" because "it is inconsistent with governmentwide OPM guidance regarding credit hours."

The Union contends that the Agency's proposal to require advanced approval to work credit hours would "[require] employees to constantly email their supervisors whenever they wish to perform additional work." However, this misunderstands the Agency's somewhat clumsily worded proposal, which would only require that an employee receive one-time approval to use credit hours and, thereafter, credit hours "are earned at the employee's election."

This aligns with the OPM guidance cited by the Union, which provides that,

"If the agency's FWS plan permits credit hours, the agency may approve an employee's request to work credit hours to be applied to another workday, workweek, or biweekly pay period.. Credit hours are worked at the election of the employee consistent with agency policies; they are distinguished from overtime hours in that they are not officially ordered and approved in advance by management."⁷⁴

The parties also disagree about the number of hours per day an employee can work "without supervisory approval"; the Agency proposes 10 hours, as provided in the prior CBA, while the Union proposes 12 hours. The Agency accurately contends that the Union "provided no compelling evidence to change the legacy language."

Finally, the Union objects to the Agency's proposal that would authorize disciplinary action for failure to accurately record time worked in the Agency's timekeeping system; the Union argues discipline should only be permitted for "willful misrepresentations." However, willful or not, failure to accurately record hours worked has the potential to be a serious matter, and the Agency should retain discretion regarding appropriate discipline.

Section 3(c). The Panel will impose the Agency's proposal.

The Agency proposes that employees working a standard business hour schedule be "required to sign in or sign out at the supervisor's election." The Union's proposal contains no such language, but the Union offers no argument against the Agency's apparently reasonable proposal.

Section 4. The core dispute involves subsection (a) and whether to permit, as the Union advocates, a 4-10 compressed work schedule in addition to the existing 5-4-9 schedule. Neither side presented compelling arguments in support of its position; the Agency accused the Union of failing to present "any compelling evidence to change legacy language" while the Union countered that the Agency was "unable to identify any concrete problems" with a 4-10 CWS. As both the Agency and Union proposals for Section 6 subject an employee's request for an alternative work schedule to Agency approval, the Agency will retain the option of denying employee use of a 4-10 CWS if it believes it would be "incompatible with the Agency's mission and workload requirements." **The Panel will impose the Union's**

⁷⁴ See <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/handbooks/alternative-work-schedules>

language for subsection (a) and the Agency's language for the remainder of Section 4.

Section 5. The Panel will order adoption of the Agency's proposal. This section involves what the Agency calls "flexitime" schedules and what the Union calls "variable week" schedules. The parties' proposals are not dramatically different – both permit employees to craft their own 80-hour per pay period schedule within the established core hour and flexible band parameters – and neither side articulates much reason to prefer its proposal to the other's. However, the Agency's proposal is more aligned with imposed language from other sections and will, therefore, be imposed here for consistency.

Section 6. The Panel will impose the Union's proposal. Both parties agree that the Agency may deny an employees' request for an alternative work schedule if it is "incompatible with the Agency's mission and workload requirements." The Union's lengthier and more precise proposal would require the Agency to "promptly" respond to employee requests and would permit the Union to grieve the Agency's "failure to grant a request by an eligible employee for an alternative work schedule." As the Agency provides no argument for excluding such grievances, the Panel is directed by *AFGE v. FLRA*, 712 F.2d 640 (D.C. Cir. 1983) to impose the broader scope grievance procedure.

Agency Section 9/Union Section 8. Both parties' proposals provide for Agency discretion to grant "greater flexibility of work hours" than provided for elsewhere in the CBA. **As the Agency's language is more concise, however, it will be imposed by the Panel.**

Article 34 - Telework

A. Agency Position

The Agency proposes language that grants its supervisors and managers broad authority to make decisions concerning employee requests for telework. Its language grants individual components the autonomy to assess what, if any, telework arrangement are appropriate for its workplace. Management needs the ability to balance the needs of its workforce with requests for telework. The Agency argues that the Union's language is too broad. For example, the Union proposes a complicated internal scheme for appealing disagreements over telework. Management cannot agree to this idea because it would make telework

decisions wholly inefficient. Thus, the Agency argues that its language should be adopted.

B. Union Position

The Union proposes language that preserves the Agency's "longstanding telework arrangements, including, but not limited to, a right to regular telework; telework during inclement weather, transportation disruptions, and other emergencies; and regular telework for employees who live outside of the Washington metropolitan area."⁷⁵ During the pandemic, much of the Agency's workforce has been on full-time telework. However, even before this time, many employees were teleworking 2-3 times per week. Telework has been a major boon to the Agency and its employees; indeed, even the Agency's Chairman has commended the ability of employees to adapt to expanded telework during the pandemic. Thus, the Union argues that the Panel should adopt its language, particularly since its also consistent with FLRA case law.

C. Conclusion

The Panel will impose the Agency's language for this article, with two minor modifications to Section 2. Generally, the Union argues for broad adoption and availability of telework, offering prescriptive language granting employees broad rights to telework and limiting the Agency's discretion in managing telework. The Union offers numerous affidavits of NLRB employees attesting to the value they place on the ability to telework during the COVID-19 pandemic and various articles propounding the value of telework generally.

For its part, the Agency explains its proposals were designed to "seek maximum flexibility to meet operational demands without cumbersome processes." While the Agency does not argue telework is non-negotiable, it does argue that the Agency's position is "consistent with Agency policy and supported by caselaw." The Agency cites *U.S. Dept. of Ag.*, 71 FLRA 703 (2020), in which the Authority determined "...that the frequency of telework... is inherent to management's right to assign work" under § 7106(a)(2)(b) of the Statute. The Authority further held that telework arrangements can "affect[] the [agency's] right to direct employees under § 7106(a)(2)(A)." Finally, the directive that the Statute "be interpreted in a manner consistent with the requirement of an effective and

⁷⁵ Union Argument, Article 34 at 18.

efficient Government"⁷⁶ weighs in favor of granting the Agency broad discretion to manage teleworking by its workforce.

While the recent pandemic necessitated a sudden expansion of telework, that does not mean that the teleworking procedures adopted by the Agency in response to an emergency are suitable for permanent extrapolation to more normal circumstances. If, as the Union contends, expanding telework has improved the Agency's efficiency, the Agency may well opt to maintain its prevalence. But that's a decision the Agency should have the discretion to make as it seeks to carry out its duties in the most effective way possible.

Section 2. The Panel will impose a modified version of the Agency's language. In its proposed Section 2(i), the Agency seeks the right to inspect the home work space of tele-working employees at any time. The Union's counterproposal, found in its Article 2(h), provides more protections for the employees' privacy in their homes by requiring the Agency to "normally" provide the employee with at least 24 hours' advanced notice of such inspections and by granting the employee the right to have a Union representative present during the inspection."

Further, the Agency's Section 2(l) is modified as follows to render it consistent with the Panel's conclusion for Article 33, Section 4, which permits a 4-10 compressed work schedule:

"Employees on a compressed 5-4-9 work schedule cannot telework on a regularly scheduled basis, but may execute a telework agreement to telework during weather closures or emergencies."

Article 35 - Details and Flexible Work Assignments

A. Agency Position

The Agency needs freedom to utilize details as it deems fit, so Management's proposal grants it broad leeway to do so. Management offers details to its workforce "pursuant to [the Agency's] right to assign work, direct employees, and determine organization."⁷⁷ The Agency believes that the Union's proposed arrangement for assigning details infringes upon the foregoing. Additionally, the Agency proposes excluding detail-related decisions from the negotiated grievance procedure. During Fiscal

⁷⁶ 5 U.S.C. § 7101(b).

⁷⁷ Agency Argument, Article 35 at 1.

Year 2019, the Agency had to address three detail-related arbitrations. But, Management believes that the existing contract language that allowed those arbitrations to proceed is inconsistent with the aforementioned management rights. So, Management argues its position on grievances is appropriate. The Agency also opposes other Union language that is unnecessary.

B. Union Position

The Union proposes language that "guarantees" employees short- and long-term details.⁷⁸ These details are necessary to an employee's ability to gather experience and knowledge in the Agency's various components. The Union is proposing procedures for assignments that have worked well for decades and, as such, should continue to remain in place. Under the Union's proposal, seniority is used for assessing detail-assignments when all other factors are equal. But, the Union's proposal also permits the Agency to make selections when operational needs dictate. The Union opposes the Agency's proposed grievance exclusion.

C. Conclusion

The Panel will impose a modified version of the Agency's article. The Union's proposal would require the Agency to offer a guaranteed minimum number of details and flexible work assignments, arguing that such cross-training opportunities "create[] more knowledgeable, flexible, and well-rounded employees..." The Union's proposal strictly regulates the assignment of details and flexible work assignments, arguing such regulations are needed to ensure access to such assignments is "fair" and "transparent." Further, the Union's proposal would delegate responsibility for administration of details and temporary assignments to a labor-management "Field Detail Committee."

On the other hand, the Agency seeks wide latitude in assigning employees to details and flexible work assignments "pursuant to [management's] right to assign work, direct employees, and determine organization." It describes the Union's requirements as "cumbersome" and inconsistent with "maximum operational effectiveness" and the Agency's "operational needs." The Agency contended, with some documentation, that assigning details regardless of operational needs can impose thousands of dollars in travel costs on the Agency. The Agency further argues that any minimum required number of details and/or assignments

⁷⁸ Union Argument, Article 35 at 7.

"to any positions outside the bargaining unit... are permissive subjects of bargaining."⁷⁹ **In the end, the Agency's position most advances the interests of "an effective and efficient Government"**⁸⁰ **and its arguments carry the day in regards to its Sections 1-5.**

The one exception involves the Agency's proposal in Section 6 to exclude details and flexible work assignments from the negotiated grievance procedure. Relying on FLRA precedent, the Agency makes a persuasive case that whether to exclude grievances regarding out of bargaining unit details/assignments is a permissive subject.⁸¹ However, the Agency does not offer a compelling argument for excluding grievances involving details/assignments to positions *within* the bargaining unit. The Agency simply notes that the Union filed three arbitrations in FY2019 involving "the number of details." The Agency notes that its exceptions to one arbitration are presently before the Authority and that the arbitrator dismissed the Union's grievance in another. No explanation is provided for the third arbitration, nor does the Agency explain why these arbitrations are so unreasonable as to warrant exclusion in the future. Accordingly, the Panel is directed by *AFGE v. FLRA*, 712 F.2d 640 (D.C. Cir. 1983) to impose the broader scope grievance procedure advocated by the Union.⁸²

⁷⁹ The Agency cites three FLRA decisions, which do appear to support its position: 25 FLRA 90 (1987) ("The Agency contends that the proposal is outside the duty to bargain because it does not involve conditions of employment of unit employees but rather addresses 'selections and selection procedures for nonbargaining unit positions.' We agree."); 56 FLRA 142 (2000) ("...[B]argaining over proposals that directly implicate conditions of employment of supervisors [outside the bargaining unit] is permissive..."); and 61 FLRA 113 (2006) ("...[A]ny proposal to subject the selections and selection procedures for nonbargaining unit positions to the parties' negotiated grievance procedure is outside the duty to bargain. This longstanding precedent also applies to supervisory or managerial positions filled on a temporary basis.") (internal citations omitted).

⁸⁰ 5 U.S.C. § 7101(b).

⁸¹ 61 FLRA 113 (2006).

⁸² In any event, the Agency's more streamlined article and broader discretion should give rise to fewer opportunities for related grievances in the future.

The Panel will impose the following modified language for the Agency's Section 6:

"Flexible Work Assignments and Details made pursuant to this Article to positions outside the bargaining unit are excepted from the grievance and arbitration procedures of Articles 10 and 11."

Article 36 - Midterm and Impact and Implementation Bargaining

A. Agency Position

The Agency acknowledges it has an obligation to bargain over mid-term changes in conditions of employment, but Management maintains that its language is more consistent with the scope of that obligation than the language offered by the Union. The Agency offers a timeline for notice and an opportunity to negotiate that is consistent with effective and efficient government.⁸³ Similarly, the Agency offers language involving the timing and methods for bargaining. The Agency opposes the Union's language for this article because it provides for a far greater amount of time before the parties meet, to say nothing of the proposed timeframe for negotiations. The Agency argues that the Union's language is inefficient and would hamper the Agency's ability to move forward with mid-term changes in an efficient manner.

B. Union Position

The Union offers proposed timeframes that are realistic and would allow the parties to have meaningful negotiations over proposals. Additionally, the Union contends that the Agency's proposals impermissibly limit the Union to bargaining impact and implementation in *all* circumstances.⁸⁴ The Union maintains that there may be circumstances where it is entitled to bargain beyond those conditions. The Union also contends that the Agency's proposal is illegal because it cuts off bargaining after 14 days. According to the Union, this proposed Management arrangement is inconsistent with the duty to bargain in good faith.

C. Conclusion

⁸³ See Agency Proposal, Article 36 at 1.

⁸⁴ See Union Argument, Article 36 at 4 (citations omitted).

The Panel will impose a modified version of the Agency's Article which, as a general matter, best accomplishes the goals of an "effective and efficient Government."⁸⁵ The Panel also notes that one of the public policy goals of E.O. 13836⁸⁶ is to ensure an expeditious timeline for mid-term impact and implementation bargaining.

However, the Union raises a colorable duty to bargain objection when it contends that part of the Agency's proposal in Section 1(c) appears to limit the Union's ability to bargain changes to conditions of employment to only "...procedures and appropriate arrangements regarding the change pursuant to 5 U.S.C. § 7106..."⁸⁷ **Accordingly, the first sentence of the Agency's proposal will be modified as follows:**

"The Union will have seven (7) calendar days to advise the Agency, in writing by email, of the Union's intent to negotiate over ~~procedures and appropriate arrangements regarding the change pursuant to 5 U.S.C. § 7106~~ and/or request a briefing."

Relatedly, the Union argues the Agency's proposal for Section 2(c) is "outside the duty to bargain" because it purportedly allows the Agency to "unilaterally refuse to continue bargaining beyond 14 days even where no impasse had been reached." However, the Union's argument misconstrues the Agency's proposal, which merely provides that the parties shall "strive" to conclude bargaining within 14 days and permits additional time "by mutual agreement." The Panel has imposed similar language recently and believes it is appropriate to do so again here.⁸⁸

Article 37 - Oral Argument

⁸⁵ 5 U.S.C. § 7101(b).

⁸⁶ "To achieve the purposes of this order, agencies shall begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for FMCS mediation of disputed issues not resolved within those time limits, and, as appropriate, promptly bring remaining unresolved issues to the Panel for resolution."

⁸⁷ As support, the Union cites Authority precedent holding that, "[W]aivers of statutory rights constitute permissive subjects of bargaining." 64 FLRA 985 (2010).

⁸⁸ See, for example, 2020 FSIP 066.

A. Agency Argument

This article concerns the assignment of oral argument duties. The Agency will tell an employee if they are not selected to conduct an oral argument, but the Agency believes it would be time-consuming to provide rationale in writing if an employee is not selected. The Agency also notes that the parties have tentatively agreed to exclude this item from the negotiated grievance procedure.

B. Union Argument

The Union agrees this item should be excluded from the grievance procedure, so it cannot understand why the Agency is so opposed to providing a detailed explanation for any non-selection. Attorneys can often spend a month of their time extensively working on a brief that will be the basis of an oral argument. As such, the Union believes that it's only fair that employees should receive a fully detailed explanation for why they have not been chosen to argue that brief. Any other scenario, the Union contends, is disrespectful to the employee.

C. Conclusion

The Panel will impose the Agency's proposal. The Agency's proposal, which obligates it to notify the briefing attorney when another employee is selected to handle oral argument, but does not obligate it to provide written notice, mirrors the equivalent provision in the previous CBA. The Agency contends that the "Union presents no compelling reason why the decision must be in writing." Indeed, the Union provides an affidavit suggesting that there were only three instances in the past 10 years in which the Agency selected someone other than the briefing attorney to argue the case and, in each instance, the change was "discussed.. both orally and in writing."

Article 38 - Duration and Effect of Agreement

A. Agency Position

The Agency proposes a CBA-duration of 7 years. The Agency has accrued costs of \$238,400 for bargaining these agreements, and that figure does not even include costs associated with preparation time.⁸⁹ The Agency also proposes eliminating any existing MOU's, settlement agreements, or agreements that are in

⁸⁹ See Agency Argument, Article 38 at 1.

effect on the date of the execution of these CBA's. Such a proposed action, the Agency argues, is consistent with effective and efficient government and is also consistent with FSIP decisions on this topic.⁹⁰

B. Union Position

The Union proposes a duration of 3 years and would also propose an annual re-opening of up to 3 articles. The Union contends this approach is consistent with well-settled Federal-sector practices and is reasonable. The Union believes that a 7-year term could also lead to decertification due to dissatisfied bargaining-unit employees.

C. Conclusion

The Panel will impose the Agency's language for this Article. The Agency documented that the cost of negotiating the present CBA has approached a quarter-million dollars. The Agency points out that the prior CBA was in effect since 2002, far longer than seven years. The Agency also correctly notes that its proposal advances the public policy goals of effective and efficient government articulated by E.O. 13836 and 5 U.S.C. § 7101(b) better than the Union's proposal. Further, the Agency correctly notes that the Panel has repeatedly imposed seven-year CBA terms and provided for the termination of past practices upon the execution of the new CBA.⁹¹

The Union's only argument against a seven-year term is speculative, namely, that the union may lose its certification. However, the choice of exclusive bargaining representative is statutorily reserved to employees⁹² and the certification or decertification of any particular union by any particular bargaining unit lacks sufficient public policy relevance to dictate CBA terms.

Finally, the Union proposes the automatic re-opening of up to three CBA articles annually on the grounds that it will help "[keep] the contract up to date without the burden of completely renegotiating the contract." However, even absent such a provision, nothing prevents the parties from mutually agreeing

⁹⁰ See *id.* (citations omitted).

⁹¹ The Agency points to 20 FSIP 036 citing Nos. 19031, 19019, and 20012.

⁹² See 5 U.S.C. §§ 7111(a) and 7102.

to re-open provisions of the CBA if a need to do so is recognized.

Article XX - Ground Rules (New Article)

A. Agency Position

The Agency proposes a new article on ground rules that would be used to govern the negotiations of successor term agreements in the future. Management's proposal is largely patterned after the Panel's ground-rules decision involving these parties in 19 FSIP 045. Additionally, Management has tailored its proposal to be consistent with the Official Time Order and Executive Order 13,836, "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining" (May 2018) (Bargaining Order). So, among other things, the Agency's proposal limits official time to 1 hour per bargaining unit employee, imposes bargaining timelines consistent with the Bargaining Order, and places limits on the number of Union bargaining team members who would participate in negotiations that are smaller than those suggested by the Union. The Agency is also opposed to Union language that would require the use of interest arbitrators to resolve impasses. The Agency argues that this approach would deprive the Panel of its statutory role in the collective bargaining process.

B. Union Position

The Union opposes several aspects of Management's proposed language, including its reliance upon the applicable Executive Orders. The Union would also permit for more official time and for a larger number of representatives at the bargaining table. The Union also objects to the first sentence of Section 14 of the Agency's proposal concerning ratification. In this regard, the Union argues that it has a right to submit a tentative agreement to its membership for ratification prior to the Union's acquiescence to an agreement. The Union argues that Management's proposed language deprives the Union of this right.

C. Conclusion

The Panel will direct adoption of the Agency's proposed article, with one minor modification. The Agency's proposal provides for a more efficient and effective process for bargaining, the value of which is acknowledged by both the

Statute⁹³ and E.O. 13836, and largely reflects the ground rules imposed on the parties by the Panel for bargaining the contract currently at impasse.

The Union's proposal calls for unnecessarily large, eight-person bargaining teams. The Agency's proposal would initiate bargaining sooner – 90 days after contract termination instead of 120. The Agency provides for four hours of bargaining two days a week for six months, while the Union proposes longer daily bargaining sessions lasting "for a minimum of six consecutive months."

Further, the Union seeks to receive official time for bargaining preparation, which should be denied for the reasons articulated above in the conclusion for Article 21, Section 4(a). The Union would also require the parties to retain a private arbitrator to attempt to resolve impasses before turning the Panel, adding unnecessary costs and delays to the impasse resolution process.

Lastly, the Union argues that the Agency's Section 14 proposal regarding contract ratification is "outside the duty to bargain" because it purportedly conditions the Union's right to submit the executed agreement to its membership for ratification upon Agency approval. The disputed provision reads:

"After execution, the parties agree that the executed term agreement *may* be referred to the PA for ratification. If the PA fails to ratify the term agreement in whole or in part, the parties *may* negotiate a resolution." (emphasis added)

It's possible the Agency used "may" not as a means of granting itself direction over the ratification process, but rather as recognition of the fact that it cannot require the Union to submit the contract to ratification or to return to the bargaining table if ratification fails. Still, to increase clarity and avoid any potential duty to bargain concerns, **the Agency's provision is modified as follows:**

"After execution, the parties agree that the executed term agreement may, at the PA's sole discretion, be referred to the PA for ratification. If the PA fails to ratify the term agreement in whole or in part, it may demand the parties may negotiate a resolution."

⁹³ 5 U.S.C. § 7101(b).

Article XX - Back Up Care (New Article)

A. Union Position

The Union argues for the addition of a new article that would require the Agency to explore offering additional benefits related to child and elder care. The Union argues that such programs are common throughout the Federal government and provide employees with options in the event of unintended disruptions. The Union's language does nothing more than call for the Agency to explore the idea of these programs.

B. Agency Position

The Agency opposes the Union's language because it is "vague and overbroad" with little details on how it is intended to work.⁹⁴ The Agency argues that the Union provided little data during bargaining to demonstrate a need for this article, and that the Union also did not provide enough data to demonstrate how the Union's proposal could impact Management's budget. The Agency is also concerned about creating such a program for only what is essentially a small portion of its workforce.

C. Conclusion

The Panel will order the Union to withdraw its proposal. The Union has failed to adequately demonstrate a need for the proposed work group. While the Union contends its proposal "costs nothing," creation of and participation in a work group would require a diversion of employee and managerial time and attention away from the Agency's mission. Further, the Agency expressed valid concerns about the article's vagueness.

Article XX - By-Lines and Promotion of Ethical Lawyering (New Article)

A. Union Position

The Union proposes adding an article to the agreements that would allow attorneys the option to object to the inclusion of their name on Agency work product that they create. The Union relies heavily upon various ethical rules detailed for attorneys under the American Bar Association's Model Rules of Professional

⁹⁴ Agency Argument, Back Up Care at 1.

Conduct (Model Rules).⁹⁵ The Union claims that reliance upon the Model Rules would provide employees with protection against "retaliation" and would provide them with a process for lodging objections.

B. Agency Position

The Agency opposes the Union's language. Management notes that the Union never provided a single instance during negotiations in which an employee has raised or encountered ethical concerns about this topic. Management further contends that Agency employees are already subject to ethical obligations under Federal law, rule, and regulation. The Agency also believes that the Union's proposal would permit employees the option of ignoring the Agency's Office of Ethics. Finally, the Agency argues that the Union's proposal is inconsistent with the Anti-Deficiency Act.

C. Conclusion

The Panel will order the Union to withdraw its proposal. The Union offers no compelling need for adoption of the new article, simply reciting existing ethical rules governing attorneys' behavior. The Agency persuasively contends that ethics matters are appropriately and adequately addressed "by law, rule, and regulation" and that the Union's proposal unreasonably sidelines the legal opinions of the Agency's Ethics Office. Further, the Union's proposal has the potential to seriously impair Agency operations should bargaining unit staff attorneys and Agency leadership disagree over matters of policy direction or legal interpretation.

Article XX - Childcare Subsidy (New Article)

A. Union Position

The Union requests a new article on this topic but it did not include any argument in its Panel submissions. The proposal, however, is in the record and it calls for the Agency to establish a childcare subsidy program in accordance with law. The Union also proposes that Management must create this program within 1 year of the date of the agreement.

B. Agency Position

⁹⁵ See Union Argument, By-Line Article at 1.

The Agency opposes this article because of its potential budgetary impacts. Management is particularly concerned because the Union never provided any data concerning cost estimates. The Agency also maintains that the Union's proposal would eliminate Management's discretion to eliminate the program and that this program is unnecessary for a unit of mostly GS-14 and GS-15 employees. Finally, Management argues that the proposal is inconsistent with the Agency's right to determine its budget.

C. Conclusion

The Panel will order the Union to withdraw its proposal, for which it neither provided evidence nor argument. Meanwhile, the Agency has raised budgetary concerns with implementation of the Union's proposal and asserts that, during bargaining, the Union did not present evidence of estimated costs or benefits.

Article XX - Employee Assistance Program (EAP) (New Article)

A. Union Position

The Union seeks to add an article concerning EAP so that the Agency will agree that it *must* provide such a program. This program is tremendous benefit to the workforce and should be available for the duration of the agreements.

B. Agency Position

The Agency believes the Union's proposal is unnecessary because the Agency already has a policy that addresses EAPA which entitles employees up to 6 visits per year. Additionally, Management believes that the Union's language places impermissible requirements on EAP providers. Based on the foregoing, Management contends that there should not be an article on this topic.

C. Conclusion

The Panel orders the Union to withdraw its proposal. Both parties appear to recognize that the Employee Assistance Program is of value and that the Agency is currently providing the program to bargaining unit employees. Accordingly, there is little need for such a provision beyond ensuring that it remains in existence unchanged for the life of the agreement. However, duplicating the EAP in the collective bargaining agreement would also reduce the flexibility necessary to manage the contract with the EAP provider.

Article XX - Fairness and Equitability (New Article)

A. Union Position

The Union proposes an article that requires the Agency to apply the agreements in a fair and equitable manner. The Union's language defines the term "fair and equitable" as meaning "the Agency will exercise the referenced authorities or discretion fairly and consistently so as to avoid adverse impact."⁹⁶ Although the Union's proposal is in the record, the Union did not provide any written argument in support of its position.

B. Agency Position

The Agency objects to the Union's language because it is too broad and vague. The Agency maintains that it does not need language to emphasize its legal obligations. The Union's language, Management contends, will create confusion for the parties.

C. Conclusion

The Panel will order the Union to withdraw its proposal, for which it provided no evidence or argument. There is no need to include additional language defining the parties' legal obligations to one another, particularly when such language may conflict with existing legal obligations to deal with one another in good faith. The Union's proposal is unnecessary.

Article XX - Outside Employment (New Article)

A. Union Position

The Union wishes to include a new article on outside employment because it is an "important area of concern" for the bargaining unit. The Union's language is consistent with Office of Government Ethics standards and other applicable laws, rules, and regulations.⁹⁷ The proposal also requires Management to timely process requests for outside employment and to provide a written explanation to an employee if it denies a request. The Union maintains that the Agency never explained why this article should be rejected.

⁹⁶ See Union Proposal, Fairness and Equitability Article.

⁹⁷ See Union Argument, Outside Employment at 3.

B. Agency Position

The Agency opposes the Union's language because it addresses matters already covered by law, rule, and regulation. This governing authority already establishes a framework for granting and denying requests. Unlike the Union's proposal, nothing in the foregoing establishes a timeline for processing these requests. The Agency is also concerned because it believes the Union's language would insert arbitrators into the outside-employment process.

C. Conclusion

The Panel will order the Union to withdraw its proposal. Again, the Union wishes to largely duplicated Agency obligations already imposed by existing law, yet fails to advance a basis for such duplication. Meanwhile, the Agency raises concerns about potential conflict between existing law and the language proposed by the Union as well as potential for interference with the Agency's ethics-related decisions.

Article XX - Probationary Employees (New Article)

A. Union Position

The Union offers a new article concerning probationary employees that defines existing law for this category of employees (but the Union did not submit a written argument). The proposal also establishes procedures for the Agency to follow in evaluating these employees and also describes information that Management must provide employees who are terminated during this period. The Union's language also allows terminated probationary employees the option of resigning instead of accepting termination.

B. Agency Position

The Agency maintains that the Union's proposed article is unnecessary because this area is already covered by applicable law, rule, and regulation. The Agency argues that the Union's proposed procedural scheme burdens Management's ability to govern probationary employees and is arguably illegal. Management also argues that allowing employees the option of choosing how they end their employment is inconsistent with Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (May 2018).

C. Conclusion

The Panel will order the Union to withdraw its proposal.

The Union failed to show any rationale for adopting its article. The Agency effectively countered that many components of the Union's article are unnecessary, as they are already "covered by law, rule, regulation, and Agency policy." Further, the Agency points out that those elements of the Union's proposal that exceed the rights already afforded to probationary employees would "place undue burdens on management and [interfere] with procedures to terminate employees serving in a trial/probationary period." Lastly, the Agency rightfully points out that the Union's proposals would run contrary to the public policy goals of E.O. 13839⁹⁸ and potentially to recently adopted federal regulations.⁹⁹

Article XX - Protections Against Prohibited Personnel Practices (New Article)

A. Union Position

The Union requests this new article but it did not submit a written argument. Nevertheless, the Union's proposal reiterates protections against prohibited personnel practices that are established by 5 U.S.C. §2301, et. seq. In addition to contacting the Office of Special Counsel (OSC), the Union's language states that an aggrieved employee may pursue a grievance.

B. Agency Position

⁹⁸ "...[T]he Federal workforce should be used efficiently and effectively." "Removing unacceptable performers should be a straightforward process that minimizes the burden on supervisors." "Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action."

⁹⁹ 5 CFR § 432.108, not 5 CFR 431.108 as the Agency indicates in its statement of position.

The Agency opposes the Union's language because it does nothing more than reiterate existing law, rule, and regulation. Thus, the Agency argues that the Union's language is unnecessary. Management is also opposed to Union language that would allow employees to file grievances concerning prohibited personnel practices. The Agency argues that such actions can be pursued via statutory procedures, such as contacting the OSC.

C. Conclusion

The Panel will order the Union to withdraw its proposal. The Union failed to offer any reason as to why inclusion of the Article is necessary. As the Agency points out, much of the article simply reiterates existing law. Attempting to list and explain every external legal authority that may be applicable to bargaining unit employees would result in a collective bargaining agreement of cumbersome length and at risk of being rendered out-of-date by changes in such external authorities. Further, the Agency argues compellingly that employee complaints regarding statutorily prohibited personnel practices should be resolved not through the negotiated grievance procedures, but by agencies established to address such matters, such as the Office of Special Counsel, which

"...ensures employees are guaranteed an effective review process, access to experts in this area without charge, and a possible appeal to an Article III Court; thereby, preventing non-expert arbitrators resolving these matters with the expenditure of unnecessary fees."

As such, the Agency has established that the exclusion of grievances over prohibited personnel practices is the more reasonable position.

Article XX - Reimbursement of Bar Dues (New Article)

A. Union Position

The Union proposes an article to require the Agency to reimburse attorney bar dues up to \$300 per year and, to the extent permitted by law, the reimbursement would not be taxable. The Union argues this language would allow the Agency to remain competitive in recruiting talented attorneys. This proposal would amount to roughly \$36,000 per year *total*.¹⁰⁰ Agency

¹⁰⁰ See Union Argument, Bar Dues at 2.

attorneys *must* be licensed, so it makes sense to reimburse them for associated fees.

B. Agency Position

The Agency opposes the Union's language largely due to budgetary reasons. Its budget has been "flat" for several years, and the Union's language does not grant Management any discretion to discontinue the program. The Union's proposal would also disrupt parity with other Agency employees who are not represented by the Union. Finally, the Agency has no say over tax issues, so the Union's language on that aspect is inappropriate.

C. Conclusion

The Panel will order the Union to withdraw its proposal. While the Union points out that the Agency has experienced a modest budget surplus in recent years, the parties acknowledge that the Agency's funding levels have been frozen since 2017. Although the Agency has managed to create a surplus through cost-cutting and efficiencies, it should retain as many tools as possible to control costs and respond to contingencies in the future. It is worth bearing in mind that not including the Union's article would not prevent the Agency from deciding to implement reimbursement for bar dues if it believes it would serve the Agency's interest and is consistent with available resources.

Article XX - Retirement (New Article)

A. Union Position

The Union proposes a new article that would place an affirmative duty upon the Agency to inform employees of their retirement options. The article also sets forth several retirement scenarios. The Union contends that retirement is an important working condition and that the article places little cost on the Agency.

B. Agency Position

The Agency opposes the Union's language because it believes the language is vague and conflicts with long-standing OPM/NLRB authority. The Agency already has retirement resources through its HR department, and employees can contact that department at any time with questions. Additionally, training about retirement

arguably falls under the Agency's statutory right to assign work.

C. Conclusion

The Panel will impose a modified version of the Union's proposal. Section 1 of the Union's proposal would require the Agency to offer annual retirement training on duty time for all interested employees nearing retirement eligibility. The Agency argues that requiring such training encroaches on its "right to assign work." If nothing else, mandating such training would divert the time and attention of Agency personnel from fulfilling the Agency's mission. However, the Union's intent that employees receive information about retirement benefits is reasonable. **Accordingly, the Panel will impose the following language for Section 1 and impose the rest of the article as proposed by the Union:**

"The Agency will make informational retirement counseling material available to any bargaining unit employee who is within three (3) years of eligibility for retirement."

Article XX - Shutdown Furloughs (New Article)

A. Union Position

The Union proposes an article concerning shutdown furloughs that may arise due to a lack of Congressional appropriated funding. There have been several such instances over the past decade, so the Union believes an article on this topic is appropriate. Among other things, the Union's article would require the Agency to provide reasonable notice to employees, provide the employees with information concerning outside employment during a furlough period, and provide guidance concerning "use or lose" leave situations.

B. Agency Opposition

The Agency opposes the Union's article as inappropriate and unnecessary. Federal law, rule, and regulation already establishes processes and procedures for lapses in appropriated funding scenarios. Moreover, Management is unclear on the parameters of its various responsibilities under the Union's language, such as providing "notice" to employees. The Agency also argues that the Union's language would hinder Management's ability to act consistent with law. For example, "use or lose" situations are addressed by OPM; the Agency has no say in how

this category of leave would be treated in a lapsed funding situation.

C. Conclusion

The Panel will order the Union to withdraw its proposal. The Agency correctly points out that aspects of the proposal are "vague and confusing." Others are simply unworkable, such as the requirement that employees "listen to radio and/or television broadcasts to learn when an appropriation or continuing resolution has been signed by the President or overridden by veto" and "report to work no later than four (4) hours after that announcement." Further, the Agency reasonably argues that aspects of the Union's proposal, such as the recovery of "use it or lose it leave" lost during the furlough, would likely be determined by other entities like the Office of Personnel Management and the Office of Management and Budget. Accordingly, the Agency argues persuasively that it needs "flexibility" to respond to what is treated as an "emergency" situation. Nonetheless, as noted in 2020 FSIP 019, the lack of an article on shutdown furloughs does not alleviate the Agency's need "to bargain a planned or emergency shutdown when required by the Statute."

Article XX - Student Loan Repayment Program (New Article)

A. Union Position

The Union proposes that the Agency "will" establish a student loan repayment program in accordance with law. Prior to implementation, the Agency must solicit feedback from the Union. The Union believes this article will assist the Agency's recruitment efforts. The Union believes that its proposal will not impact Management's overall budget.

B. Agency Position

The Agency opposes the Union's language because creating a student loan repayment program is "overly burdensome" and the Agency would prefer not to engage in such an undertaking.¹⁰¹ Moreover, the Agency contends that employees may take advantage of a student loan reimbursement program established by the Department of Education. The Agency disputes the Union's claim that the Agency has recruitment problems. The Agency is also concerned about impacts on its overall budget. This concern is

¹⁰¹ See Agency Argument, Student Loan Repayment at 1.

only exacerbated by the fact that the Union provided little cost estimate information during negotiations over this article.

C. Conclusion

The Panel will order the Union to withdraw its proposal. As the parties have noted repeatedly, the Agency has both dealt with frozen funding levels since 2017 and, as a result of its response to limited funding, managed to cultivate a modest surplus. The Union claims a student loan repayment program would be "exceptionally minor in comparison to the NLRB's overall budget" but offers no cost estimates. The Agency counters that, in addition to the unknown but potentially "serious budget implications," establishing a program compliant with "complex" federal regulations would be an "administrative burden" as well. Finally, the Agency points out that employees already have the ability to take advantage of the Department of Education's Public Service Loan Forgiveness Program, under which a government employee can have the balance of their student loans forgiven after 10 years.¹⁰² In short, the Union hasn't presented a compelling need for the article while the Agency has persuasively argued for continued flexibility in managing a flat budget.

Article XX - Waiver of Overpayment (New Article)

A. Union Position

The Union's language is meant to reference and expand upon the Agency's ability to recuperate or not recuperate erroneous payments from employees in accordance with 5 U.S.C. §5584.¹⁰³ The Union's language sets forth various timelines and procedures that the Agency and employees must adhere to in overpayment situations, such as information the Agency must provide and schedules the employee must adhere to. The Union also proposes that an impacted employee would not have to reimburse Agency-sponsored training under certain situations.

B. Agency Position

¹⁰² <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service>

¹⁰³ This statute grants Federal agencies the ability to recover erroneous payments made to employees. But, under this statute, agencies also have the authority to waive those payments if certain conditions are satisfied.

The Agency opposes the Union's proposal because it covers matters addressed by law and is confusing. The Agency already has its own policy for debt collection, and the Union's proposal would essentially displace that policy. Adoption of the Union's proposal, the Agency argues, would interfere with the Agency's ability to recuperate debt from its workforce.

C. Conclusion

The Panel will order the Union to withdraw its proposal. The Union did not present any compelling reason for its article and referenced no instances in which the Agency's existing overpayment recovery/waiver process was deficient. In fact, existing law and the Agency's existing policies already reflect many of the practices the Union seeks to impose through bargaining, including, but not limited to: written notice to the employee, the ability to repay in installments, and capping repayment amounts at 15 percent of the employee's disposable income unless the employee voluntarily agreed to a higher amount.¹⁰⁴ In short, the Agency is correct when it argues that "the Union failed to establish any evidence to change existing procedures governed by Agency policy."

Article XX - Surveys (New Article)

A. Union Position

The Union proposes that the Agency will provide the Union with notice before it sends out Agency-wide surveys and will also consult with the Union about the same. After the Agency receives the results of a survey, it must provide those results to the Union. The Union argues that this language is necessary to ensure that the Agency does not avoid its obligations under the Statute by engaging bargaining unit employees directly.

B. Agency Position

The Agency did not provide any argument or counter-language. Moreover, the Agency did not identify this topic as one of the remaining disputed articles when it requested Panel assistance.

C. Conclusion

¹⁰⁴ See Agency Exh. 1.

The Panel will decline to take any action on this article as it is not properly before the Panel. The Statute directs that the Panel shall "investigate any impasse presented to it" by a federal agency or union upon the failure of "voluntary arrangements" and third-party mediation to resolve the dispute and empowers the Panel to "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse."¹⁰⁵

The Panel's regulations define "impasse" as

"...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."¹⁰⁶

Panel regulations further direct that parties seeking Panel assistance must submit a request to the Panel which, among other things, includes a "[s]tatement of issues at impasse and the summary positions of the initiating party or parties with respect to those issues..."¹⁰⁷

Upon receipt of a request, the Panel is directed to "promptly conduct an investigation" and "[a]fter due consideration," either "[d]ecline to assert jurisdiction in the event that it finds that no impasse exists" or "[a]ssert jurisdiction" and assist the parties in its resolution.¹⁰⁸

In the present case, the Agency's July 29, 2020 request for Panel assistance listed 51 specific articles at impasse in the negotiation of the parties' successor CBA, including 18 articles sought by the Union but opposed by the Agency and to which it offered no counter proposals. It is over these articles that the Panel voted to assert jurisdiction on September 24, 2020. However, this article, "Surveys," was not among them. In fact, the Panel had no indication that this article may be at impasse prior to its receipt of the Union's written submissions. To date, the Agency, as the entity seeking Panel assistance, has offered no indication or acknowledgement that the article is at impasse.

¹⁰⁵ 5 U.S.C. § 7119.

¹⁰⁶ 5 CFR § 2470.2.

¹⁰⁷ 5 CFR § 2471.3(a)(2).

¹⁰⁸ 5 CFR § 2471.6.

Accordingly, as no impasse over this article was presented to the Panel, this article is not subject to the Panel's September 24, 2020 assertion of jurisdiction. Additionally, the Panel lacks sufficient information at this time to evaluate whether the parties have completed the prerequisite bargaining and mediation necessary to be at impasse and, consequently, whether assertion of Panel jurisdiction is appropriate.

Article XX - Contracting Out (New Article)

A. Union Position

The Union's article is motivated by a recent incident in which the Agency contracted out certain duties. The Union feels that it was "left in the dark" about the circumstances surrounding this incident, so it wants detailed language that addresses situations in which Management elects to exercise its right to contract out duties. The Union's language requires the Agency to provide the Union with notice and an opportunity to negotiate before the contracting decision is executed. Such a scheme would grant the Union an opportunity to present a case to Management about why contracted duties should remain with the Agency's employees. However, the Union notes that its language still allows the Agency to move forward if it chooses to do so after discussions with the Union.

B. Agency Position

The Agency opposes the Union's language. As an initial matter, the Agency argues that the Union's request to require negotiations prior to the execution of a contracting decision interferes with the Agency's statutory right to contract out. Additionally, the Agency argues that the Union's language requiring the Agency to provide the Union with certain information is burdensome. The Agency contends that the Union can always seek out information pursuant to statutory information requests under 5 U.S.C. §7114. Management also opposes Union language in its Section 7 that would permit grievances concerning contracting decisions when such decisions are "pretextual or unsupported by substantial evidence."¹⁰⁹ The Agency is opposed to this language because that same section states that contracting decisions will *not* be subject to grievances when supported by "substantial evidence of efficiency." Management argues the foregoing creates a confusing and inconsistent standard.

¹⁰⁹ See Union Proposal, Contracting Out, Section 7 at 2.

C. Conclusion**The Panel will order the Union to withdraw its proposal.**

The Union's proposed language would require that the Agency observe an extensive process of soliciting comments from and providing information to the Union concerning its decision to contract out any bargaining unit work. Yet it failed to advance any reason why such a process would be helpful or promote efficiency—indeed, the Union anticipates “making a case for retention of the work” but admits it cannot interfere with the Agency's right to assign work. The Agency argues convincingly that such a process would impede efficiency and impose new and otherwise unnecessary record-keeping requirements. Should the Union benefit from information concerning the Agency's decision to contract out, it may obtain such information by other means.

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 in the above Panel majority opinion.



David Osborne
FSIP Member

December 23, 2020
Washington, D.C.

Member Andrea Newman concurring in part and dissenting in part:

I respectfully dissent from the determination of the majority of the Panel regarding Article 21 concerning Official Time.

A handwritten signature in cursive script that reads "Andrea Newman". The signature is written in dark ink and is positioned above a horizontal line.

Andrea Newman, FSIP Member

December 23, 2020
Washington, D.C.