



**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C. 20424

OALJ 18-04

DEPARTMENT OF DEFENSE  
DOMESTIC DEPENDENT ELEMENTARY AND  
SECONDARY SCHOOLS  
FORT BUCHANAN, PUERTO RICO

RESPONDENT

Case No. BN-CA-17-0170

AND

ANTILLES CONSOLIDATED EDUCATION  
ASSOCIATION

CHARGING PARTY

Gail M. Sorokoff  
For the General Counsel

Robert E. Sutemeier  
For the Respondent

Richard J. Hirn  
For the Charging Party

Before: CHARLES R. CENTER  
Administrative Law Judge

**DECISION ON MOTIONS FOR SUMMARY JUDGMENT**

Motions for summary judgment filed under § 2423.27 of the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority) are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In this case, the General Counsel (GC), the Charging Party, and the Respondent have all filed motions for summary judgment asserting that there are no genuine issues of material fact in dispute. After reviewing the motions and other pleadings, I find that summary judgment is appropriate, and that a hearing is not necessary because there is no genuine dispute as to any material fact and the only issues to be decided are questions of law.

## STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On March 6, 2017, the Antilles Consolidated Education Association (Union/Charging Party) filed an unfair labor practice (ULP) charge against the Department of Defense, Domestic Dependent Elementary and Secondary Schools, Fort Buchanan, Puerto Rico (Agency/Respondent). GC Ex. 1. On April 27, 2017, the Regional Director of the Boston Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing and refusing to implement a new collective bargaining agreement and violated § 7116(a)(1) and (6) of the Statute by failing and refusing to comply with a decision of the Federal Service Impasses Panel (Panel). GC Ex. 22. The Complaint advised the Respondent that the hearing would take place on June 29, 2017. *Id.* The Respondent filed a timely Answer in which it admitted certain allegations but denied violating the Statute. GC Ex. 23.

On June 9, 2017, the GC filed a Motion for Summary Judgment and a Brief in Support of its motion (GC Br.), along with Exhibits 1 through 24. On June 13, 2017, the Charging Party filed a Motion for Summary Judgment and a Brief in Support of its motion (CP Br.), along with a declaration from Union attorney Richard Hirn and Exhibits 1 through 41. On June 13, 2017, the Respondent filed a Motion for Extension of Time to Respond to the Motions for Summary Judgment. The Respondent's motion was served on the Acting General Counsel of the FLRA and the Charging Party's counsel, but was not served on the GC's counsel of record.

On June 14, 2017, the Respondent filed Exhibits 1 through 22. On June 14, 2017, the Respondent's Motion for Extension of Time to Respond to the Motions for Summary Judgment was granted allowing a response to be filed through June 21, 2017. On June 16, 2017, the GC filed a Motion for Sanctions (GC Mot. for Sanctions). On June 20, 2017, the Respondent filed a Motion to Dismiss Complaint for Failure to State a Claim upon Which Relief Can Be Granted. On June 21, 2017, the Respondent filed a Cross-Motion for Summary Judgment and a brief in support of its motion (R. Br.), the GC filed an Opposition to the Respondent's Motion to Dismiss (GC Opp'n), and the Charging Party filed an Opposition to the Respondent's Motion to Dismissal and Cross-Motion for Sanctions (CP Opp.). On June 26, 2017, the hearing was indefinitely postponed, because the General Counsel and the Charging Party had filed Motions for Summary Judgment and the Respondent had filed a Cross-Motion for Summary Judgment. The General Counsel and the Charging Party were given until July 3, 2017, to file responses to the Respondent's Cross-Motion for Summary Judgment. On June 27, 2017, the Charging Party filed a Response to Respondent's Motion for Summary Judgment (CP Resp. Br.). On June 30, 2017, the General Counsel filed a Response to Respondent's Cross-Motion for Summary Judgment (GC Resp. Br.).

After reviewing the pleadings and based upon the record, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing and refusing to implement a new collective bargaining agreement, and that the Respondent violated § 7116(a)(1) and (6) of the Statute by failing and refusing to comply with a decision of the Federal Service Impasses Panel. In support of this determination, I make the following findings of act, conclusions of law, and recommendations.

### FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of Section 7103(a)(4) and is the certified exclusive representative of employees of the Respondent in Puerto Rico (the unit). GC Ex. 22. At all material times, Robert Sutemeier, Deputy General Counsel, and Ronald James, Chief, Labor Management and Employee Relations, were supervisors or management officials of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute and agents of the Respondent acting on its behalf.

The Defense Dependents Elementary and Secondary Schools (DDESS) operate schools in seven states, Guam, and Puerto Rico. GC Ex. 10 at 2. The Union represents teachers and other professionals employed by the DDESS in Puerto Rico. *Id.*; GC Ex. 18 at 1. There are approximately 200 permanent employees in the bargaining unit. GC Ex. 10 at 3; GC Ex. 24 at 1. Teachers employed by the DDESS outside of Puerto Rico are represented by the Federal Education Association – Stateside Region (FEA). GC Ex. 10 at 2.

The Agency and the Union have regularly bargained over wages and other matters since at least 1996. Hirn Decl. at 2. In 1996, 1999, 2005, and 2011, the parties reached collective bargaining agreements that included retroactive pay increases. Hirn Decl. at 2-3; *see also* GC Ex. 10 at 5. In 2011, the parties chose Matthew Franckiewicz as their factfinder, and in that position, Franckiewicz helped the parties reach agreement upon the 2011 collective bargaining agreement (2011 CBA). GC Ex. 10 at 3. During that time, Franckiewicz recommended, and the parties agreed, that the pay increases in the 2011 CBA would apply retroactively to the time in 2008 when the 2005 collective bargaining agreement (2005 CBA) expired. These retroactive pay increases were implemented even though Article 37, Section (a)(1) of the 2005 CBA which provided that the “terms and conditions . . . will remain in full force and effect pending completion of negotiation of a new Agreement.”<sup>1</sup> Hirn Decl. at 2-3, 28, Ex. 3.

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<sup>1</sup> Article 37 of the 2005 CBA states, in pertinent part:

Section a. This Agreement . . . will continue in full force and effect until 31 July 2008 following Agency Head review as provided for in 5 U.S.C. 7114(c). Either Party may request commencement of negotiations for a new Agreement no earlier than 120 calendar days prior to the expiration of this Agreement.

(1) If such a request is submitted, the Party receiving the request will respond within thirty (30) calendar days proposing a reasonable date for commencement of negotiations. The terms and conditions of this Agreement will remain in full force

In 2015, the Union asked the Agency to bargain over a successor agreement to the 2011 CBA, which would expire (and did expire) on July 24, 2015. GC Ex. 10. On July 15, 2015, the Union and the Agency signed a ground rules agreement (the ground rules agreement) for negotiations over a successor agreement. Hirn Decl. at 3-4; GC Ex. 2. Several sections of the ground rules agreement are relevant to this dispute. With respect to impasses, Section N of the ground rules agreement provided:

If, during the course of negotiations, the Parties fail to reach agreement on any item it shall be tabled until the Parties have concluded negotiations on all other items at which time the Parties shall attempt to resolve the tabled item(s). After good faith efforts fail to bring agreement on the tabled item(s), either Party may seek the services of the Federal Mediation and Conciliation Service (FMCS). Should the services of FMCS prove unsuccessful, either Party may request assistance from the Federal Service Impasses Panel (FSIP).

GC Ex. 2 at 5-6.

With respect to Union ratification, Section P of the ground rules agreement provided:

When the Parties have agreed upon all matters, the contract will be prepared by the Agency (one hard copy and an electronic version) and the Agency's Chief Negotiator will advise the Union's Chief Negotiator in writing that the agreement is ready for ratification and/or execution. The Union will then have (45) calendar days . . . from the date of the Union's receipt of the Agency's letter to obtain contract ratification. If ratified by the Union during this time frame, or if the Agency receives no reply during this period, then the Agency and the Union will sign the document and will forward the contract for Agency Head Review . . . .

*Id.* at 7.

With respect to the approval of the collective bargaining agreement, Section Q of the ground rules agreement similarly provided: "Once agreement is reached on all proposals/provisions of the collective bargaining agreement, and it is signed by the negotiation team members, the agreement will be formally executed (signed and dated) and submitted for Agency Head review . . . ." *Id.*

Finally, Section R(3) provided that the ground rules agreement would "terminate on the date that the new collective bargaining agreement is implemented." *Id.* at 8.

The parties held four week-long negotiation sessions between October 26, 2015 and February 12, 2016. GC Ex. 24 at 2. A mediator from the Federal Mediation and Conciliation Service (FMCS) met with the parties, and the parties were able to reach agreement on some issues, but economic and other issues remained unresolved. Hirn Decl.

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and effecting pending completion of negotiation of a new Agreement.

Hirn Decl. at 28, Ex. 3.

at 5; GC Ex. 24 at 2. Because the parties were at impasse, the Union submitted a request for assistance from the Federal Service Impasses Panel on February 22, 2016. GC Ex. 24 at 2. In its request, the Union asserted that the impasse had “arisen out of negotiations for a successor . . . agreement” and that the parties were at impasse on fourteen articles, including Articles 19, 25 and 26. GC Ex. 3 at 3, 6, 9-10.

On April 25, 2016, the Panel informed the parties by letter that it had “determine[d] to assert jurisdiction over all unresolved issues in their successor collective-bargaining agreement negotiations.” GC Ex. 4 at 1. The Panel directed the parties to resume bargaining and to select a private facilitator/factfinder of their choice to assist them. The Panel advised that if the parties and the factfinder could not resolve all outstanding issues, then the factfinder would submit a written report with recommendations and rationale for settling the issues. *Id.* at 2. The Panel further advised that if either party did not accept the factfinder’s recommendations, then that party should raise its objections to the Panel, which would then “take whatever action it deems appropriate to resolve the issues.” *Id.*

On May 4, 2016, the parties again selected Matthew Franckiewicz as their Factfinder. GC Ex. 10 at 2; Hirn Decl. at 6. At the time of Franckiewicz’s selection, the parties were at impasse on fifteen articles (including Articles 19, 25 and 26) and four appendices. GC Ex. 10 at 2, 6, 13-14.

Franckiewicz (Factfinder) met with the parties at the Agency’s offices for a weeklong mediation and fact-finding session that began on July 11, 2016. GC Ex. 6 at 1; GC Ex. 9 at 7; GC Ex. 10 at 2. During that time, the Agency asserted that the Union’s proposal to retain a portion of Article 19 of the 2011 CBA concerning the workday was nonnegotiable because it affected management’s right to assign work, and the and the parties submitted letters explaining their positions on that issue. GC Ex. 6 at 1, 3-4; GC Ex. 7 at 1-2.

In his letter, Hirn stated that the Union sought to retain Article 19 of the 2011 CBA. Citing *U.S. Dep’t of Def., Fort Bragg Dependents Sch., Fort Bragg, N.C.*, 49 FLRA 333, 349-50 (1994) (*Fort Bragg*), Hirn wrote:

[T]he corresponding language of Article 19 . . . defines the teacher workday at school as seven and one half-hours (including lunch) for pay purposes only. Article 19, section 3(d) states that “[t]he Agency is also free to assign additional work hours” at school whenever it wishes, *without restriction*, provided the employee is “compensated by the Agency at either the employee’s earned hourly rate or with compensatory time.”

GC Ex. 6 at 3.

Citing *Nat’l Educ. Ass’n, Overseas Educ. Ass’n, Laurel Bay Teachers Ass’n*, 51 FLRA 733, 737 (1996) (*OEA*), Hirn continued:

Similarly, the Authority held that a proposal at another DDESS school which provided that “the normal duty day for all professional employees will be 7:45 to 3:15” but which allowed management to extend the workday for particular purposes did not interfere with management’s right to assign work because

“the sentence is intended to establish the normal duty day for compensation purposes only.” . . .

GC Ex. 6 at 4.

As a counter argument, the Agency’s contented that:

[N]either the Agency’s or the [Union’s] proposal in Article 19 . . . deal with the “normal duty day.” The current contract language provides for an 8-hour workday and both parties have stated same in their current bargaining proposals. . . .

Thus, the current workday is (8) hours in length and unit member salaries are based on an 8-hour workday. Under the Agency’s proposal, the workday will continue to be (8) hours in length. . . . The difference between the current contract language and the Agency’s proposal is: (1) presently, [employees] are allowed to determine when they will perform the 8th hour of the workday, i.e., some employees perform the 8th hour immediately following the 7th hour, while others perform the 8th hour later in the evening; and (2) currently, the 8th hour is mostly used for preparation and professional tasks. Under the Agency’s proposal, it has determined that the 8th hour will be performed either immediately at the beginning of the workday or after, or a combination of both . . . .

GC Ex. 7 at 2-3.

Sutemeier continued that these activities could include: supervision of students; required training; professional development; teacher collaboration; continuous school improvement and accreditation activities; case study committee and student support team meetings; conferences; and miscellaneous activities. *Id.* at 3.

On August 29, 2016, the Agency and the Union began a second weeklong session with the Factfinder. GC Ex. 10 at 2.

During the factfinding sessions, the parties initialed tentative agreements on a number of items. However, sixty issues affecting four articles and four appendices remained in dispute. GC Ex. 10 at 2, 5; GC Ex. 24 at 3. Thereafter, the Factfinder conducted a hearing. At the hearing, the Union introduced evidence, mostly news reports, to support its arguments that: (1) the rapidly rising cost-of-living in Puerto Rico justified the Union’s request for higher salaries; and (2) “numerous vacancies . . . and a high turnover rate of personnel” justified the Union’s claim that salary rates were insufficient to attract and retain qualified employees. *Hirn Decl.* at 7; *see also* GC Ex. 18 at 3. For its part, the Agency countered that it “hardly ever had a problem filling a vacant professional . . . position” with the current salary schedule. GC Ex. 9 at 26.

The parties filed post-hearing briefs in September 2016. *Hirn Decl.* at 8. After the hearing, the parties reached agreement and signed off on one of the appendices that had been in dispute. GC Ex. 24 at 3.

### Factfinder's Report and Recommendation

On November 4, 2016, Franckiewicz submitted his report and recommendations to the Panel. The Factfinder addressed the unresolved issues before him, and those relative to this dispute are discussed below.

With respect to the Agency's negotiability arguments and Article 19, the Factfinder noted that while the Agency had "successfully proposed inclusion of the current Sections 1, 2 and 3 of Article 19" for the 2011 CBA, the Agency "now claims that the retention of the language it sought five years ago is non-negotiable . . ." GC Ex. 10 at 6; *see also id.* at 8. The Factfinder determined that Article 19 was negotiable. In this regard, the Factfinder stated that Article 19 of the 2011 CBA "recognizes the Employer's right to lengthen the work day or the work year, so long as it provides appropriate compensation." *Id.* at 7. With respect to the Agency's claim that it wanted to "use an additional hour" for duties performed on campus, the Factfinder stated that the Agency "is free to require its teachers to perform any or all of these duties, and to schedule these activities as it deems appropriate so long as it pays the teachers for their additional time." *Id.* In addition, the Factfinder rejected the Agency's claim that it could not schedule these activities at a time of its choosing, stating:

Under existing language, the Employer can schedule a safety conference for all teachers at 4:00 p.m., or a parent-teacher conference for a specific teacher at 5:00 p.m. Doing so may involve additional compensation for the teacher(s) involved, but there is no doubt that the Employer can assign and schedule the work.

*Id.*

The Factfinder added that the Authority "has recognized that a proposal establishing the basic workday for compensation purposes is negotiable, at least where the employer retains the right to assign work outside the normal workday in return for additional compensation." *Id.* (citing *Fort Bragg*, 49 FLRA at 349-50). For these reasons, the Factfinder stated, "I do not regard modification of the current Article 19 Sections 1(a) and 1(b) to be a non-negotiable issue." *Id.* at 8. The Factfinder added that to the extent those sections "recognize that employees perform work at home, both Parties acknowledge that the issue of where assigned tasks are to be performed is a negotiable one." *Id.* at 8 n.6.

The Factfinder then considered the Agency's proposed changes to Article 19, Sections 1(a) and 1(b) of the 2011 CBA. The Agency wanted to change Article 19, Section 1(a) to "require employees to be present on site for 8.5 hours per day," as opposed to the "7.5 hours under the [2011 CBA]." *Id.* at 6. And the Agency wanted to change Article 19, Section 1(b) of the 2011 CBA "to eliminate the 'realization and expectation' that employees perform one hour per workday of preparation that may be accomplished at the work site or elsewhere." *Id.* The Factfinder stated that the Agency's proposal was "an attempt to impose additional work without additional compensation." *Id.* at 8. Moreover, "[t]he consideration of greatest significance" for the Factfinder was that Article 19, Sections 1(a) and 1(b) of the 2011 CBA "were included in the [2011 CBA] as one part of a package amounting to a major change from the Parties' prior system. . . . [T]he Agency's proposed change would remove one of the pillars on which the 2011-2015 agreement was structured. I regard this as an

unwise course.” *Id.* “In conclusion,” the Factfinder stated, “I do not recommend the Employer’s proposed changes to Article 19[,] Section[s] 1(a) and 1(b).” *Id.* The Factfinder also rejected the Agency’s proposed change to Article 19, Section 3(d), which would have reflected the Agency’s proposed change to Article 19, Section 1(a). *Id.* at 8-9. Finally, the Factfinder rejected the Agency’s proposal to change Article 19, Section 3(b) of the 2011 CBA. *Id.* at 11-12. As for the Union, the Factfinder rejected its proposals regarding Article 19, Sections 1(a), 1(b) and 3(b). *Id.* at 9, 12. The Factfinder concluded by recommending that Article 19, Sections 1(a), 1(b), 3(b) and 3(d) of the 2011 CBA be retained in the successor agreement.<sup>2</sup> *Id.* at 8-9, 12.

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<sup>2</sup> Article 19 of the 2011 CB A states, in pertinent part:

Section 1. Workday.

a. The workday for full-time bargaining unit members shall consist of eight (8) hours. Unit members must be physically present at the work site for a seven and one-half (7 ½) hour duty day which includes a 30-minute non-paid duty-free lunch period.

b. Salaries in this contract were negotiated with the realization and expectation that bargaining unit members will perform one (1) hour per workday of preparation and professional tasks for completion of their assigned eight (8) hour workday. While this one (1) hour of preparation and professional tasks may typically be performed at or away from the work site at the election of the unit member, the Agency reserves the right to require that this eighth hour on a particular workday be accomplished at the school site for activities such as training, staff development, or faculty meetings. Not more than ten (10) general faculty meetings which extend the duty day should be scheduled during the school year. Such meetings may continue one hour beyond the regular duty day.

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Section 3. Work Year.

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b. The Agency is free to assign additional workdays. When additional workdays are assigned, the bargaining unit member will be compensated at his/her earned hourly rate of pay. Additional workdays for full-time bargaining unit members will be eight (8) hours in length not including a 30-minute non-paid duty-free lunch period. Exceptions to this provision include: summer school or Extended School Year program, and reassignments per Section 3g or Section 5 of Article 28. In those instances pay will be based upon actual hours worked.

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With respect to Article 25 of the 2011 CBA, the Factfinder noted that the Union had proposed adding Article 25, Paragraph (f) to the successor agreement. GC Ex. 10 at 13; *see also* GC Ex. 8 at 9. The Agency, by contrast, wanted to retain Article 25 adopted to in the 2011 CBA. GC Ex. 9 at 23. The Factfinder noted that the Union's proposal would provide tuition reimbursement for courses that the Agency required for employee recertification. GC Ex. 10 at 13. The Factfinder added that there was "no issue regarding the desirability of continuing education, nor over the Agency's authority to require it. The only question involves who pays for such required education." *Id.* Finding that U.S.C. § 4109 "permits . . . such reimbursement," the Factfinder determined that the Union's proposal was "appropriate . . . since the Agency requires employees to incur these expenses, the Agency should pay for them." *Id.* In addition, the Factfinder stated that while Article 20, Section 2(a) provided for optional reimbursement, "required reimbursement for required attendance" should also be provided. *Id.* Accordingly, the Factfinder recommended the addition of Article 25(f) to the successor agreement, which states: "The Agency shall reimburse employees for tuition and related expenses incurred by the employee to meet recertification requirements imposed by the Agency as a condition for maintaining employment, to the extent permitted by 5 U.S.C. § 4109." *Id.* Consistent with this recommendation, the Factfinder rejected the Agency's proposal that Appendix G, the teacher acknowledgement form, be modified to specify that teachers are responsible for the costs of maintaining professional certification. *Id.* at 23.

The Factfinder then reviewed Article 26 and the issue of employee pay. *Id.* at 13. The Factfinder noted that the salary schedule in Article 26 of the 2011 CBA matched the "rest of the U.S." schedule, one of four different salary schedules under the DDESS-FEA collective bargaining agreement. *Id.* at 16. (The other three salary schedules were the "West Point" "Quantico," and "Guam" schedules.) *Id.* The Factfinder also noted that Article 26 of the 2011 CBA linked future salary increases to salary increases in the General Schedule, also referred to as the "GS Schedule." *Id.* I note that in the previous five school years, salaries under the Puerto Rico schedule/the General Schedule increased by only 3 percent, while salaries under the "Rest of the U.S." schedule increased by more than 15 percent. Hirn Decl. at 4; GC Ex. 10 at 21.

The Factfinder stated that the Union wanted to abandon the "rest of the U.S." schedule in favor of a "most favored nation" clause, which would ensure employees in Puerto Rico were the highest paid in the DDESS system, and that the Agency wanted to tie salary increases to salary increases in the "GS schedule," even if that meant "sacrific[ing]" its goal of basing employee pay on the "rest of the U.S." schedule. GC Ex. 10 at 16. In

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d. The Agency is also free to assign additional work hours. When additional work hours are assigned, the bargaining unit member will be compensated by the Agency at either the employee's earned hourly rate or with compensatory time. Employees may elect, at the time additional work hours are assigned, to be compensated at their earned hourly rate or with compensatory time.

addition, the Factfinder noted that the parties “reach[ed] different conclusions as to what is necessary to attract and retain qualified employees.”<sup>3</sup> *Id.* at 15. He elaborated:

The [Union] asserts that of the 34 teachers hired from outside Puerto Rico since 2011 who have fulfilled their commitment, only nine remain. It concludes that the Agency has a “retention problem” and that it is wasteful for the Employer to incur the moving costs, in both directions, for such individuals. The Employer counters that it has hardly ever had a problem filling a vacancy.

*Id.*

The Factfinder stated that Article 26 of the 2011 CBA should be changed “only where it has shown to be flawed.” The Factfinder recommended that “coupling the Puerto Rico salary system to the ‘rest of the U.S.’ should be retained,” even if it imposed a “me-too aspect on salary bargaining.” *Id.* at 16-17. In reaching this conclusion, the Factfinder rejected the Union’s desire for even higher salary increases, determining that it was “simply too large a step to expect the Agency to take.” *Id.* at 17. “Accordingly,” the Factfinder stated, “I recommend that salaries for employees in Puerto Rico be brought up to the level applicable to those received by their ‘rest of the U.S.’ counterparts.” *Id.* Consistent with this determination, the Factfinder recommended that the “rest of the U.S.” salary schedule be adopted in Appendix F. *Id.* at 23. By recommending that employee salaries be brought up to their “rest of the U.S.” counterparts, the Factfinder was recommending a 12.5 percent pay increase for employees. GC Ex. 15 at 6; *see also* GC Ex. 8.

Next, the Factfinder turned to the issue of “how the salary matrix should be adjusted over the future years of the agreement.” GC Ex. 10 at 17. The Factfinder determined that the system set forth in the 2011 CBA of linking prospective salary increases to increases in the General Schedule was “a mistake,” because increases in the General Schedule were based on the calendar year rather than on the school year, and because the General Schedule had not been adopted by any other professional bargaining unit employees in the DDESS as a basis for salary increases. *Id.* Accordingly, the Factfinder determined that it would be better “to keep employees in Puerto Rico on the same salary schedule as the ‘rest of the U.S.’ as that schedule is adjusted.” *Id.*

The Factfinder then addressed the parties’ dispute as to whether salary increases should also be applied retroactively. *Id.* at 18. In this regard, the Factfinder noted the Agency’s argument that Article 36, Section 2 of the 2011 CBA prevented the “resulting

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<sup>3</sup> With respect to pay and the cost of living, the Factfinder wrote:

I have no confidence that even with the benefit of the data presented by the Parties, I can reach any reliable conclusions in this regard. I am not comfortable that I can do any better in trying to determine parity between Puerto Rico and the mainland than the government economists who analyze the data and compute cost of living adjustments (COLAs) and locality pay.

increases” from being applied retroactively. *Id.* at 17. As relevant here, Article 36, Section 2 of the 2011 CBA, provides:

Renewal. Either party may provide written notice . . . before the expiration of this Agreement of its desire to engage in bargaining a new agreement. In the event such notice is submitted, the terms and conditions of the Agreement, including any annual salary increases, shall remain in effect until that bargaining is concluded and new provisions are executed and approved in accordance with 5 U.S.C. 7114(c).

Hirn Decl. at 81, Ex. 8.

The Factfinder determined that Article 36, Section 2 of the 2011 CBA did not preclude retroactivity, explaining:

As I read it, this sentence governs how employees [are] to be paid from the stated expiration date until a new agreement is reached, but it does not address what the terms of the successor agreement may or may not include. Thus a successor agreement could include . . . a retroactive salary increase . . . . It is extremely rare for one collective bargaining agreement to attempt to reach out beyond the grave and dictate terms that must (or must not) be included in the successor agreement, and I do not believe this was the intent of the Parties in Article 36 Section 2 of the 2011 [CBA], especially in view of their history, as noted in my 2011 Report, of providing for retroactive increases in a new collective bargaining agreement.

GC Ex. 10 at 18.

Specifically, the Factfinder noted that in his 2011 report he wrote:

Historically, these parties have not been able to conclude a new collective bargaining agreement before the expiration of the prior agreement, and usually a new agreement has not been achieved until several years into its term. Their agreements have always provided retroactive increases covering the period from the expiration of the prior agreement through the time the new agreement was reached. This history removes the urgency of a deadline by creating the expectation that the salary agreement, when ultimately reached, will be implemented retroactively.

*Id.*

Turning back to the parties’ current dispute, the Factfinder added: “[A] dollar tomorrow is not the same as a dollar yesterday. I continue to be of the view that employees should not suffer because negotiators have been phlegmatic.” *Id.*

In addition, the Factfinder stated that he was recommending that increases in pay “be retroactive to the 2015-2016 school year, inasmuch as the predecessor agreement expired on July 24, 2015.” *Id.* at 17.

Based on these findings, the Factfinder recommended that Article 26, Section 1 of the 2011 CBA be modified to read, in pertinent part:

Retroactive to July 25, 2015, the base salary schedules for bargaining unit employees shall be the same as the “rest of the U.S[.]” schedules in effect under the DDESS-FEA collective bargaining agreement. Changes to the “rest of the U.S.” schedule under the DDESS-FEA collective bargaining agreement shall be effective for employees in the current bargaining unit at the same time as those changes become effective under the DDESS-FEA collective bargaining agreement.

*Id.* at 18.

As for the tentative agreements that the parties had reached, the Factfinder stated: “Of course, I recommend that all tentative agreements reached between the parties, whether before or after I became involved in the process, be incorporated in the new collective bargaining agreement.” *Id.* at 2.

The Agency Objects to the Recommendations and the Panel Issues an Order to Show Cause

On November 9, 2016, the Panel asked Hirn, the Union’s attorney, and Sutemeier, the Agency’s attorney, if they accepted the Factfinder’s recommendations. GC Ex. 11. On November 23, 2016, Sutemeier responded that the Agency objected to several aspects of the Factfinder’s recommendations. Hirn Decl.; GC Ex. 12. As relevant here, Sutemeier stated that the Agency did not accept the Factfinder’s recommendations with respect to Article 19, Sections 1(a), 1(b), 3(b) and 3(d); Article 25(f); and Article 26 and Appendix F (specifically, that annual salaries be brought up to the “rest of the U.S.” pay schedule, and that those salary increases be applied retroactively). GC Ex. 12. I note that the Agency did not raise any objection to the Factfinder’s recommendation that all tentative agreements be incorporated into the successor agreement. *Id.* Unlike the Agency, the Union accepted all of the Factfinder’s recommendations. GC Ex. 13.

On December 14, 2016, the Panel issued an Order to Show Cause to resolve “the remaining issues . . . concerning the parties’ impasse over provisions for a successor collective bargaining agreement.” GC Ex. 14. The Panel directed the Agency to submit a statement of position supporting its opposition to the Factfinder’s recommendations, and it directed the Union to submit a rebuttal statement of position. The Panel advised that it would review the entire record and “take whatever action it deems appropriate to resolve the impasse, which may include the issuance of a Decision and Order.” *Id.* (italicization omitted).

On December 28, 2016, Sutemeier filed a response on behalf of the Agency to the Order to Show Cause. GC Ex. 15. The Agency objected to the Factfinder’s recommendations on Article 19, asserting that Article 19 permitted an employee to perform his or her eighth hour of work at any time of the day, rather than before or after the seven other hours of work, and that this affected management’s right to assign work. *Id.* at 1-2. In this regard, Sutemeier acknowledged that “under the [2011 CBA], the (8) hour workday allows members to perform the 8th hour whenever they desire, and the Agency was in

agreement with that proposal.” *Id.* at 2 n.2. “However,” Sutemeier argued, “times have changed and now the Agency needs the 8th hour to be performed following the 7th hour” so that teachers would be on campus to collaborate with colleagues, meet with parents, and perform other duties that could only be done on campus, during the regular workday. *Id.* at 2 n.2.

The Agency also objected to the Factfinder’s recommendations on Article 25(f), which pertained to reimbursement for tuition related to teacher recertification, because: (1) such reimbursement was permitted, but not required, under 5 U.S.C. § 4109; (2) such reimbursement created an “unreasonable financial burden”; (3) the Agency had already committed to considering employee requests for attendance at professional development courses and would pay all or part of such training; (4) public school districts do not reimburse teachers for their recertification costs. *Id.* at 4.

Further, the Agency objected to the Factfinder’s recommendations on Article 26 and the “rest of the U.S.” schedule, because: (1) the Secretary of Defense is required to determine the level of compensation required to attract qualified teachers; (2) the Agency had had hardly any trouble filling vacancies; (3) the Agency did not have a problem retaining teachers; (4) employees’ salaries exceeded salaries in local Puerto Rico schools; and (5) salaries set forth in the 2011 CBA are reasonable and, in fact, are higher than others who are similarly situated. *Id.* at 6-8. The Agency also objected to the Factfinder’s recommendation that the salary increases in Article 26 should be applied retroactively, because: (1) the Factfinder and the Panel lacked authority to “retroactively change the terms of an existing agreement”; and (2) retroactive pay increases were prohibited under Article 36, Section 2 of the 2011 CBA. *Id.* at 9-10. In response to the Show Cause Order, the Agency again raised no objection to the Factfinder’s recommendation that all tentative agreements be incorporated into the new collective bargaining agreement.

On December 31, 2016, Hirn filed a response on behalf of the Union. With respect to the Factfinder’s recommendations, Hirn asserted that: (1) Article 19 was negotiable; (2) reimbursement under Article 25(f) was appropriate, since it was for recertification required by the employer; (3) Article 26’s “rest of the U.S.” pay schedule was appropriate; and (4) Article 26’s imposition of retroactive pay increases was lawful and was not prohibited by Article 36, Section 2 of the 2011 CBA; GC Ex. 16 at 1, 5-10.

On January 12, 2017, Sutemeier sent the Panel a letter responding to its request for additional information about teacher certification and licensure. In his letter, Sutemeier asserted that the Department of Defense Education Activity (DoDEA), including DDESS employees, requires that all professional educators be licensed in accordance with DoDEA Regulation 5000.9. GC Ex. 17 at 1.

#### FSIP Issues a Decision and Order Adopting All of the Factfinder’s Recommendations

On January 25, 2017, the Panel issued its Decision and Order on the matter, *Dep’t of Def. Domestic Dependent Elementary & Secondary Sch. (DDESS), Fort Buchanan & Ramey Annex, P.R.*, 16 FSIP 052 (2017), and emailed the parties copies of the Decision and Order. GC Ex. 19. In the Decision and Order, the Panel began by stating that it would give deference to the Factfinder, explaining:

In cases of this nature, the Panel gives deference to a Factfinder who, as here, has met extensively with the parties, heard the parties' presentations and arguments directly, and has provided the Panel with a rational and supported recommendation. Where the objecting party is simply disagreeing with the Factfinder's conclusions on the merits we are least likely to decline to adopt the recommendation. Especially in this case, the Panel has been influenced by the clarity of the Factfinder's rationale and his knowledge of the parties, their bargaining history and working conditions, and his familiarity with the negotiation of the 2011 CBA.

GC Ex. 18 at 3-4.

With respect to the Agency's claim that Article 19 was not negotiable, the Panel stated that there was "no colorable negotiability claim" and noted in particular that Article 19, Section 1(b) "reserves the right to require that this 8th hour on a particular workday be accomplished at the school site for activities." *Id.* at 5, 15.

Turning to the merits of the Factfinder's recommendation that Article 19, Sections 1(a), 1(b) and 3(d) of the 2011 CBA be retained in the successor agreement, the Panel noted that it "looks to the party proposing a change from an existing negotiated agreement to show 'demonstrated need.'" *Id.* at 6. The Panel stated that the Factfinder was "unpersuaded that a change in the status quo warranted" and determined that "no cause has been shown for rejecting [the Factfinder's] conclusions. *Id.* Accordingly, the Panel adopted the Factfinder's recommendation that Article 19, Sections 1(a), 1(b) and 3(d) from the 2011 CBA be retained in the successor agreement. *Id.* at 6, 15.

With respect to the Factfinder's recommendation that Article 3(b) from the 2011 CBA be retained in the successor agreement, the Panel stated that the Agency "failed to demonstrate any rationale for disagreement with the Factfinder's recommendation." *Id.* at 8. Accordingly, the Panel adopted the Factfinder's recommendation that Article 3(b) from the 2011 CBA be retained in the successor agreement. *Id.* at 8, 15.

With respect to the Factfinder's recommendation that Article 25(f) be added to the successor agreement, the Panel noted that the Agency "presented no new arguments" and determined that there was "no cause to reject the recommendations of the Factfinder." *Id.* at 9-10. Accordingly, the Panel adopted the Factfinder's recommendation to add Article 25(f) to the successor agreement. *Id.* at 10.

With respect to Article 26 and the "rest of the U.S." schedule, the Panel noted that "after hearing each of the parties' arguments to change the pay scale, and considering their supporting data," the Factfinder recommended "continuation of the approach adopted in [the 2011 CBA] to use the 'rest of the US' as the benchmark for setting base salary." *Id.* The Panel found the Factfinder's recommendation to be "persuasive," especially since the Agency "provided no additional arguments that overcome our predisposition to accept the Factfinder's recommendation; no additional information was offered to demonstrate the need to change the status quo established by the 2011 CBA." *Id.* Accordingly, the Panel adopted

the Factfinder's recommendation to continue to use the "rest of the U.S." benchmark in the successor agreement. *Id.* at 10-11, 16. Relatedly, the Panel also adopted the Factfinder's recommendation that the "salary standard" in Appendix F be updated in the successor agreement. *Id.* at 14-16.

With respect to Article 26 and imposing pay increases retroactively, the Panel stated that the Factfinder recommended that "any increases due to employees beyond what was granted by the Agency after the expiration of the last contract (July 24, 2015) should be retroactive to the 2015-2016 school year." *Id.* at 11. In this regard, the Panel noted the Factfinder's finding that "the delay in reaching agreement on a new CBA would unfairly harm the employees if the pay increases were not applied retroactively." *Id.* at 11. Further, the Panel stated that it would "reject" the Agency's claim, based on Article 36, Section 2 of the 2011 CBA, that the Factfinder lacked "authority to recommend and the Panel to impose a retroactive award." *Id.* The Panel explained:

The terms of the predecessor agreement expired on July 24, 2015. The Factfinder has recommended salary considerations to begin effective the start of the 2015-2016 school year, which is after the expiration of the predecessor CBA term. The Factfinder has made a recommendation under the authority vested in him by the parties and the Panel to address conditions under the new CBA.

*Id.*

Accordingly, the Panel adopted the Factfinder's recommendations regarding "retroactivity of pay increases under Article 26." *Id.* at 11, 16.

I note that the Factfinder clarified that by recommending that pay increases "be retroactive to the 2015-2016 school year," he was recommending that pay increases be "[r]etroactive to July 25, 2015." GC Ex. 10 at 17-18. As the Panel decided to "adopt the Factfinder's recommendations", the Panel's Decision and Order awarded retroactive pay increases to July 25, 2015. GC Ex. 18 at 12.

Having found that the Agency failed to show cause for departing from the Factfinder's recommendations, the Panel ordered the parties to adopt all of the Factfinder's recommendations. *Id.* at 15-17; *see also* GC Br. at 5; R. Br. at 5. In this regard, the Panel "impose[d]" the contract provisions that were recommended by the Factfinder and that were challenged by the Agency, including Articles 19, 25 and 26. GC Ex. 18 at 15-16. In addition, the Panel ordered the parties to "[a]dopt the Factfinder's recommendation that all of the tentative agreements reached be put into the [successor agreement]" and to "[a]dopt[] the Factfinder's recommendations that were not challenged by the parties." *Id.* at 17.

#### The Agency Refuses to Implement the Panel's Decision and Order

Upon receiving the Panel's Decision and Order, Hirn sent Sutemeier an email on January 25, 2017, asking him to "prepare the final agreement for prompt execution." GC Ex. 19. Sutemeier did not respond. Hirn Decl. at 10. When Hirn followed up on February 1, 2017, Sutemeier stated that he was not able to provide the Union a copy of the

successor agreement and that the Agency was still trying to determine what course of action it would take in response to the Panel's Decision and Order. *Id.* Hirn had similar conversations with Sutemeier on February 8 and 15, 2017. *Id.* At that point, Hirn "realized that . . . the [successor] agreement was not subject to ratification by the [Union's] membership." *Id.* at 11. On February 24, 2017, Sutemeier called Hirn to inform him that the Agency still had not made a decision on how to proceed. Hirn asked Sutemeier if the Agency was conducting agency head review, and Sutemeier said that it was not. *Id.*

The Agency did not approve or disapprove the successor agreement within thirty days of the issuance of the Panel's Decision and Order, nor at any time thereafter. *See id.*; GC Ex. 21 at 2; GC Br. at 5; R. Br. at 5.

On February 27, 2017, Hirn sent Sutemeier a letter asking that the Respondent "take immediate steps to implement the terms" of the successor agreement, "including placing the new salary schedule into effect at the beginning of the next pay period, March 5." GC Ex. 20 at 1.

Sutemeier forwarded Hirn's letter to James and, on March 1, 2017, James sent Hirn a letter detailing the Agency's position. James wrote, "I am informing you that the Agency disagrees with your contention that the tentative agreement went into effect on February 25, 2017, and has decided that it cannot execute the agreement that would normally flow from the [Panel's Decision and] Order . . ." GC Ex. 21 at 1. James asserted that "the tentative agreement can't be executed" because: (1) the Panel "lacked jurisdiction to order a decision on Articles and/or issues not at impasse"; (2) the Panel improperly "impose[d] a *tour of duty* on management" and "denie[d]" the Agency "the ability to assign work" in Article 19; (3) Article 25(f) was contrary to 5 U.S.C. § 4101-4118; (4) the "rest of the U.S." pay scale "imposed by the Panel" in Article 26 "was not established using the guidelines" set forth in 10 U.S.C. § 2164; (5) the "retroactive pay ordered by the Panel" in Article 26 "violates . . . the Back Pay Act" and "contradicts" Article 36, Section 2 of the 2011 CBA; and (6) the Union "failed to secure . . . ratification . . . as required by" the ground rules agreement. *Id.* In closing, James asserted that "litigation is an option" but that "the better option is for the parties to return to the bargaining table." GC Ex. 21 at 5.

Since January 25, 2017, the Respondent has not complied with the Panel's Decision and Order and has not executed or implemented the successor agreement. GC Ex. 24 at 5; *see also* GC Ex. 21 at 1; GC Br. at 5; R. Br. at 5.

## POSITIONS OF THE PARTIES

### General Counsel

The GC asserts that a final action of the Panel is binding upon the parties and that an agency violates § 7116(a)(6) of the Statute by failing or refusing to cooperate in impasse decisions made by the Panel. GC Br. at 6. Further, the GC asserts that an agency's refusal to implement a Decision and Order of the Panel requiring the parties to adopt language in their collective bargaining agreement violates § 7116(a)(1) and (6) of the Statute unless the Authority finds that the failure to comply with the Panel's Decision and Order was justified because the provisions are contrary to the Statute or other law. GC Br. at 6 (citing *U.S. Dep't*



of the Treasury, IRS, 23 FLRA 774, 777-78 (1986)). The GC contends that by failing and refusing to abide by the Panel's order to implement the successor agreement, the Respondent violated § 7116(a)(1) and (6) of the Statute. GC Br. at 6.

In addition, the GC asserts that an agency's failure to implement contract provisions imposed by the Panel violates § 7116(a)(1) and (5) of the Statute, because the duty to negotiate in good faith includes the obligation to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement. *Id.* at 7 (citing 5 U.S.C. § 7114(b)(5); *Headquarters, Nat'l Guard Bureau, Wash., D.C.*, 54 FLRA 316 (1998) (*Nat'l Guard*)). In this regard, the GC argues that: (1) after the Panel issued its Decision and Order, no further action was needed to execute the agreement, meaning that the date of the Panel's Decision and Order, January 25, 2017, was also the date the successor agreement was executed; (2) the successor agreement's execution triggered the thirty-day period for agency head review; and (3) after the Agency failed to take action during this period, the successor agreement went into effect on February 25, 2017, thirty-one days after the successor agreement was executed. *Id.* at 6-7 (citing *AFGE, AFL-CIO, Local 1815*, 69 FLRA 309, 320 (2016)). The GC argues that by refusing to implement the successor agreement, the Respondent violated § 7116(a)(1) and (5) of the Statute. *Id.* at 7.

The GC submits that the Respondent's defenses are unfounded. *Id.* The GC contends that the Panel had jurisdiction over the parties' impasse and "once having jurisdiction over this matter, was empowered to take 'whatever action is necessary' to resolve the impasse, including imposing a new CBA on the parties in its entirety." GC Resp. Br. at 4 (citing *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 561 (1990) (*Masters, Mates & Pilots*); *NASA, Headquarters, Wash., D.C.*, 12 FLRA 480, 497-98 (1983) (*NASA*)). The GC adds that the Panel is not limited by the wording in a party's request for assistance. GC Br. at 10 (citing 5 U.S.C. § 7119(c)(5)(B)(iii); *AFGE, AFL-CIO, Local 3732*, 16 FLRA 318, 327 (1984) (*Local 3732*); *NASA*, 12 FLRA at 497). Further, the GC contends that in the past the Panel "has ordered the inclusion of previously agreed upon provisions" in a collective bargaining agreement. *Id.* (citing *Masters, Mates & Pilots*, 36 FLRA at 561).

The GC asserts that the ground rules agreement did not require ratification of the successor agreement. *Id.* at 8. Specifically, the GC argues that the ground rules agreement "anticipate[s] a scenario where ratification does not occur and notes that if the Agency receives no reply during this period, the parties are to sign the document and forward it for agency head review." *Id.* In addition, the GC maintains that because negotiations were complete once the Panel issued its Decision and Order, there was no need for the Union to ratify the successor agreement. *Id.* at 8-9 (citing *Local 1815*, 69 FLRA at 320; *Masters, Mates & Pilots*, 36 FLRA at 562).

The GC submits that proposals establishing the basic workday for compensation purposes are negotiable, at least where the employer retains the right to assign work outside the normal workday in return for additional compensation. *Id.* at 14 (citing *Fort Bragg*, 49 FLRA at 348-50). The GC argues that Article 19 is negotiable because it defines the workday "for pay purposes only" and permits the Respondent to assign additional work hours provided the employee is compensated. *Id.* The GC asserts that the Authority found a

similar proposal to be negotiable in *OEA*. *Id.* In addition, the GC contends that Article 19 does not require the Agency to assign overtime. GC Resp. Br. at 8. Further, the GC argues that Article 19 preserves the Agency's right to require that the eighth hour of work be accomplished at the school site. *Id.* (citing *AFGE, Local 727*, 59 FLRA 674, 677 (2004) (*Local 727*)). Moreover, the GC argues that the geographical location of where work will be performed does not involve an assignment of work. GC Br. at 14-15 (citing *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs., Balt., Md.*, 57 FLRA 704, 707 (2002) (*HHS*)). The GC also argues that Article 19 does not affect management's right to establish a tour of duty under § 7106(b)(1) of the Statute "for the same reason it does not interfere with its right to assign work." *Id.* at 15.

With respect to Article 25(f), the GC contends that the language imposed by the Panel is not unlawful as the Respondent claims, because Article 25(f) is applicable only to the extent permitted by 5 U.S.C. § 4109. *Id.* at 15-16. In addition, the GC argues that the Authority has found similar proposals to be negotiable. *Id.* at 16 (citing *Fort Bragg Ass'n of Educators, NEA*, 30 FLRA 508, 521-22 (1987), *rev'd & remanded on other grounds, Fort Bragg Ass'n of Educators v. FLRA*, 870 F.2d 698 (D.C. Cir. 1989)).

The GC asserts that the "rest of the U.S." pay scale imposed by the Panel in Article 26 is not contrary to 10 U.S.C. § 2164. In this regard, the GC submits that the Respondent's obligation to bargain over pay is well settled, and that under 10 U.S.C. § 2164, employees are permitted to bargain over wages, hours, and other terms and conditions of employment that previously had been bargainable under 20 U.S.C. § 241. *Id.* at 10-11 (citing *Fort Stewart Sch. v. FLRA*, 495 U.S. 641 (1990); *Antilles Consol. Educ. Ass'n*, 56 FLRA 664, 665-66 (2000) (*ACEA*)). Further, the GC notes that while the Respondent argues that the Factfinder and the Panel are sitting in the place of the Secretary of Defense when fixing compensation and thus are under the same obligation to abide by 10 U.S.C. § 2164(e)(3)(B), the Respondent is "incorrect when it claimed there was no evidence that the Panel considered the statutory criterion." GC Resp. Br. at 7. Furthermore, the GC asserts that 10 U.S.C. § 2164 does not set forth specific steps or findings that must be included in a Panel decision. GC Br. at 11-12. Moreover, the GC contends, the Respondent did not present evidence that the Secretary of Defense ever concluded the rate ordered by the Panel was incorrect. GC Resp. Br. at 7.

The GC argues that the retroactive pay increases in Article 26 imposed by the Panel are not contrary to law. In this regard, the GC submits that the Authority has previously upheld a Panel order imposing retroactive pay increases. GC Br. at 12 (citing *U.S. Dep't of Energy, Wash., D.C.*, 25 FLRA 1090 (1987) (*DOE*)). Furthermore, the GC asserts that the Panel's regular issuance of orders imposing retroactive pay increases demonstrates that such orders are lawful. *See id.* (citing *NASA, NASA Exchange-Johnson Space Ctr., Houston, Tex.*, 98 FSIP 65 (1998) (*NASA Exchange*); *DOD, Domestic Dependents Elementary & Secondary Sch. Sys., Fort Stewart, Ga.*, 98 FSIP 11 (1998) (*DOD Ft. Stewart*); *DOD, Domestic Dependents Elementary & Secondary Sch., Laurel Bay Dependents Sch., Laurel Bay, S.C.*, 96 FSIP 66 (1996) (*DOD Laurel Bay*); *DOD, DOD Stateside Dependents Sch., Fort*

*Campbell Dependents Sch., Fort Campbell, Ky.*, 95 FSIP 160 (1996) (*DOD Ft. Campbell*). The GC also submits that by giving the pay increases retroactive effect, the Panel fulfills “a legitimate policy decision to remove the incentive for a party to stall and delay reaching an agreement on pay.” GC Resp. Br. at 6.

The GC argues that the Factfinder and the Panel rejected the Respondent’s claim that retroactive pay increases were prohibited by the 2011 CBA, and the GC adds that the pay increases ordered by the Panel begin only after the expiration of the 2011 CBA. GC Br. at 13. Finally, the GC submits that the Panel “did not order back pay or monetary damages” and that the Panel’s Decision and Order is not contrary to the doctrine of sovereign immunity or the Back Pay Act. *Id.* at 12; GC Resp. Br. at 6.

As a remedy, the GC argues that the Agency should be ordered to fully comply with the Panel’s Decision and Order implementing the successor agreement. GC Br. at 17 (citing *NTEU*, 64 FLRA 443 (2010)). In addition, the GC requests that the Respondent be ordered to reimburse bargaining unit employees as a result of the Respondent’s refusal to comply with the Panel’s Decision and Order. *Id.* at 18.

### **Charging Party**

The Charging Party raises many of the same arguments raised by the GC, and it is unnecessary to repeat those duplicative arguments. However, the Charging Party also asserts that the Respondent failed to object to the Factfinder’s recommendation that all tentative agreements reached by the parties be incorporated in the successor agreement. CP Br. at 22.

With regard to ratification, the Charging Party contends that contract provisions imposed by the Panel are not subject to a ratification vote. *Id.* at 22-23 7 (citing *SSA, Office of Disability Adjudication, Wash., D.C.*, Case No. WA-CA-14-0068, OALJ 15-48, 2015 WL 5965158 (Sept. 15, 2015); *U.S. Dep’t of the Air Force, AFMC*, Case Nos. CH-CA-60398 & CH-CO-60608, ALJDR No. 137, 1998 WL 840917 (Oct. 22, 1998)).

With regard to retroactive pay and Article 26 imposed by the Panel, the Charging Party contends that even if the Panel’s Decision and Order constitutes an award, the award is equitable in nature and therefore is not barred under the doctrine of sovereign immunity. CP Resp. Br. at 5 (citing *NTEU*, 68 FLRA 960, 965 (2015)).

For a remedy, the Charging Party argues that the Respondent should be ordered to pay back pay and submits that it “may also be entitled to the attorney fees it has incurred in this proceeding under the Back Pay Act,” 5 U.S.C. § 5596. CP Br. at 52 (citing *Dep’t of the Air Force Headquarters, 832d Combat Support Grp. DPCE, Luke AFB, Ariz.*, 32 FLRA 1084, 1090 (1988) (*Luke AFB*)). The Charging Party asserts in this regard, the FLRA’s Office of Administrative Law Judges “should retain jurisdiction for the purpose of entertaining an application for fees for a period of 30 days following a final order of the Authority in this case.” *Id.* at 52-53.

## Respondent

The Respondent “concur[s] with” the GC’s assertion that “[s]ince January 25, 2017, Respondent has failed and refused to comply with the Panel’s Decision and Order . . . .” GC Br. at 5; R. Br. at 5. But the Respondent denies the GC’s claim that the Respondent has failed and refused to implement the successor agreement, arguing that “it has not been established that the Panel’s [Decision and] Order produced an enforceable agreement.” R. Br. at 5. In addition, the Respondent asserts that the Panel’s Decision and Order is inconsistent with law. *Id.* at 6 & n.2.

The Respondent contends that the Panel “exceeded its jurisdiction,” by ordering the parties to adopt the Factfinder’s recommendation that tentative agreements and unchallenged matters be included in the successor agreement. *Id.* at 15-16 (citing 5 U.S.C. § 7119; 5 C.F.R. § 2470.2).

The Respondent asserts that the Panel “directly contradicted” a portion of the ground rules agreement requiring the Agency “to prepare the agreement in a final hard copy when all matters had been agreed to.” *Id.* at 16.

The Respondent argues that Article 19 imposed by the Panel excessively interferes with management’s right to assign work under § 7106(a)(2)(B) of the Statute. *Id.* at 24-25. In this connection, the Respondent asserts that Article 19: (1) prevents the Agency from assigning tasks that can be accomplished only on campus; (2) entitles teachers to spend their eighth hour of work doing “preparation,” rather than some other type of work; (3) requires the Agency to “allow employees to work a [ninth] hour and receive overtime pay”; and (4) is not an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute.

The Respondent contends that Article 25(f) imposed by the Panel is contrary to law, even while acknowledging that “[r]eimbursement of employee education expenses is permitted by law and government-wide regulation.” *Id.* at 28. With respect to 5 U.S.C. § 4103, the Respondent argues that while there is a Department of Defense regulation concerning training, DDESS “has not executed its own regulation definitively determining the components of a tuition reimbursement program.” *Id.* at 29. With respect to 5 U.S.C. § 4108, the Respondent asserts that Article 25(f) does not address issues pertaining to “continuation of service” agreements. *Id.* With respect to 5 U.S.C. § 4109, the Respondent argues that Article 25(f)’s reference to “tuition and related expenses” is “so vague and ambiguous” that it would result in “near endless grievance-arbitration activity.” *Id.* at 30. In addition, the Respondent also argues that Article 25(f) is “incomplete, ambiguous, and incapable of implementation,” and that Article 25(f) “could be read to place a near limitless financial obligation on the Agency.” *Id.* at 30-32.

With respect to the salary provisions of Article 26 imposed by the Panel, the Respondent argues that the Panel erred by adopting the “rest of the US” pay scale without considering the standard set forth in 10 U.S.C. § 2164, which requires the Secretary of Defense to “determine the level of compensation required to attract qualified employees.” *Id.* at 18-22 (citing *NTEU v. Nixon*, 492 F.2d 587, 601 (D.C. Cir. 1974)).

As for the retroactive pay increases imposed by the Panel in Article 26, the Respondent argues that the Authority has not previously determined that retroactive pay increases are negotiable. *Id.* at 14-15 (citing *Commander Carswell AFB, Tex.*, 31 FLRA 620 (1988)). Citing the canon of *inclusio unius est exclusio alterius* (also referred to as *expressio unius est exclusio alterius*), a canon of construction holding that to express or include one thing implies the exclusion of the, or of the alternative, *see expressio unius est exclusio alterius*, *Black's Law Dictionary* (10th ed. 2014), the Respondent argues that because Congress provided for retroactive pay increases for prevailing-rate employees but not for other employees, Congress must have intended to prohibit retroactive pay increases for non-prevailing-rate employees. R. Br. at 9 (citing 5 U.S.C. § 5344). The Respondent also contends that by imposing a pay increase retroactively, the Panel improperly “overruled” Article 36, Section 2 of the 2011 CBA, which concerns “the effective date of future salary increases.” *Id.* at 17-18. In addition, the Respondent contends that Article 26’s retroactive pay increases are contrary to the doctrine of sovereign immunity and violate the Back Pay Act. *Id.* at 8-9, 11-13. The Respondent adds: “Any argument that sovereign immunity applies only to formal law suits is baseless. It applies to any claim for monetary damages.” *Id.* at 11 n.9.

The Respondent argues that any remedy should be limited to a posting and an order that the Agency execute the successor agreement, and that it should not be ordered to implement the successor agreement, so that the Respondent can retain its “right to review the agreement” under agency head review. *Id.* at 34-35.

## ANALYSIS AND CONCLUSIONS

### Preliminary Matters: The Motion to Dismiss the Complaint is Denied; the Requests for Sanctions are Denied

#### *Respondent’s Motion to Dismiss the Complaint and the Charging Party’s Request for Sanctions Are Denied*

On June 20, 2017, the Respondent filed a Motion to Dismiss the Complaint. In its motion, the Respondent argues that the Complaint was “defective” and should be dismissed because it “failed to allege and demonstrate that any or all of the contested provisions were negotiable under existing FLRA case law.” Mot. to Dismiss at 2. The Respondent bases this argument on *U.S. Army Aeromedical Ctr., Fort Rucker, Ala.*, 49 FLRA 361, 365 (1994) (*Fort Rucker*), which it quotes as stating: “In order for the Authority to determine that the provision is negotiable and, therefore, that Respondent . . . violated section 7116(a)(1) and (6) of the Statute, the General Counsel was required to allege and demonstrate that the matter was negotiable.” Mot. to Dismiss at 1-2. The General Counsel counters that the Respondent’s Motion to Dismiss should be rejected as untimely because it was filed on June 20, 2017, less than ten days before the scheduled hearing date of June 29, 2017. GC Opp. at 1 (citing 5 C.F.R. § 2423.21). In addition, the GC argues that the Complaint met the requirements set forth in 5 C.F.R. § 2423.20(a), and that the GC did not need to allege in the Complaint that the terms of the successor agreement were negotiable. GC Opp. at 1-2

(citing *Nat'l Guard*, 54 FLRA at 324). The Charging Party similarly opposes the Respondent's motion. In addition, the Charging Party argues that *Fort Rucker* "says the opposite of the premise for which it is cited," and that the Charging Party should be sanctioned for its "patent misrepresentation" of *Fort Rucker*. CP Opp. at 1, 3.

Section 2423.21 of the Authority's Rules and Regulations provides that prehearing motions "shall be filed at least 10 days prior to the hearing." 5 C.F.R. § 2423.21(b)(1). Because the Respondent filed its Motion to Dismiss on June 20, 2017, nine days before the June 29, 2017, hearing, the Respondent failed to file the motion on time. Moreover, the Respondent provided no explanation for this failure. Nevertheless, noncompliance with the Regulations may be excused where the other party is not prejudiced by the procedural error, see *U.S. DOJ, INS, W. Reg'l Office Labor Mgmt. Rel., Laguna Niguel, Cal.*, 58 FLRA 656, 658 (2003) (*INS*), and there is no evidence that the other parties were prejudiced by a pleading filed one day late. Indeed, both the General Counsel and the Charging Party filed timely oppositions to the Respondent's motion. Because the Respondent's procedural failure did not prejudice the other parties, the merits of the Respondent's motion will be addressed.

Section 2423.20(a) of the Authority's Rules and Regulations requires that a complaint set forth: (1) notice of the charge; (2) the basis for jurisdiction; (3) the facts alleged to constitute an unfair labor practice; (4) the particular sections of 5 U.S.C., chapter 71 and the rules and regulations involved; (5) notice of the date, time, and place that a hearing will take place before an Administrative Law Judge; and (6) a brief statement explaining the nature of the hearing. 5 C.F.R. § 2423.20(a). The Authority has stated that the purpose of a complaint is "to put a respondent on notice of the basis of the charges against it," and that the Authority "[does] not judge the sufficiency of that notice by rigid pleading requirements." *AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1660 (1996).

The General Counsel's Complaint satisfies the requirements set forth in 5 C.F.R. § 2423.20(a). Specifically, the Complaint notified the Respondent of the charge, set forth the basis for jurisdiction, stated the facts alleged to violate § 7116(a)(1), (5) and (6) of the Statute, and provided the requisite information about the hearing. GC Ex. 22. Moreover, it is clear from its pleadings that the Respondent understood the basis of the charges. See *U.S. DOJ, Office of Justice Programs*, 50 FLRA 472, 477 (1995) (respondent showed it understood allegations in complaint by addressing those allegations to the Authority). All of this supports the conclusion that the GC's Complaint was sufficient.

The Respondent's arguments to the contrary are unpersuasive, as they are based on a misreading of the Authority's decision in the *Fort Rucker* decision. In that case, the General Counsel issued a complaint alleging that the agency violated § 7116(a)(1) and (6) of the Statute by refusing (after agency head review) to approve a Panel imposed provision. 49 FLRA at 361-62, 376. The complaint did not allege that the provision was negotiable. *Id.* at 364. After the agency failed to timely file an answer, the GC filed a motion for summary judgment arguing that the agency admitted the allegations in the complaint and thus admitted that it violated the Statute. *Id.* at 362. The administrative law judge (ALJ) determined that because the GC did not allege, and the agency did not admit, that the provision was negotiable, the GC failed to establish that the agency violated the Statute. The ALJ denied the GC's motion for summary judgment and dismissed the complaint. *Id.* at 362-63. On

review, the Authority stated that the ALJ correctly determined that the agency's failure to file a timely answer to the complaint was "insufficient to support a conclusion" that the agency violated the Statute. *Id.* at 364. The Authority stated in this regard, "In order for the Authority to determine that the provision is negotiable and, therefore, that [the respondent] violated [§] 7116(a)(1) and (6) of the Statute, the General Counsel was required to allege and demonstrate that the matter was negotiable." *Id.* at 365. "However," the Authority continued, "we agree with the General Counsel that the [ALJ] erred in dismissing the complaint . . . absent a finding that the Panel-imposed provision is nonnegotiable and, therefore, was properly disapproved." *Id.* On the merits, the Authority determined that the provision was nonnegotiable and that the respondent properly disapproved the provision. *Id.* at 366, 368.

Thus, *Fort Rucker* holds that a complaint alleging a violation of § 7116(a)(1) and (6) should not be dismissed for failing to claim that the provision at issue is negotiable. 49 FLRA at 365; *see also Nat'l Guard*, 54 FLRA at 324 (complaint alleging respondent refused to comply with a Panel imposed provision established a prima facie violation of § 7116(a)(1) and (6), and the respondent failed to rebut this by showing the provision was contrary to law). Applying *Fort Rucker* to our case, it is clear that the Complaint's failure to allege that the Panel imposed provisions are negotiable is not a basis for dismissing the Complaint. 49 FLRA at 365. Accordingly, the Respondent's Motion to Dismiss is denied.

While the Respondent based its argument on an incorrect reading of *Fort Rucker*, the sanctions requested by the Charging Party are not warranted pursuant to 5 C.F.R. § 2423.24(3). Although Respondent's counsel should have been able to assess *Fort Rucker* correctly, it is fair to say that the *Fort Rucker* decision is not a model of clarity. Indeed, dicta within *Fort Rucker* states that the General Counsel was "required to allege . . . that the matter was negotiable" before actually ruling that the GC's failure to make that allegation was not a basis for dismissing the complaint. 49 FLRA at 365. Given this opacity, it is possible that the Respondent's counsel was merely confused and not presenting a "patent misrepresentation" of the *Fort Rucker* holding. Accordingly, the Charging Party's request for sanctions is denied.

#### *GC's Motion for Sanctions Is Denied*

The General Counsel argues that the Respondent should be sanctioned for failing to follow the Authority's rules and regulations. Specifically, the GC argues that the Respondent failed to obtain the GC counsel's position before filing a motion requesting an extension of time to respond to the GC's and Charging Party's motions for summary judgment, as required by 5 C.F.R. § 2423.21; and failed to serve the motion on the GC's counsel, as required by 5 C.F.R. § 2429.27. The GC argues that these failures prevented it from submitting a response prior to an Order granting the Respondent's extension request being issued. Mot. for Sanctions at 2. In addition, the GC contends that the Respondent failed to serve its Prehearing Disclosure on the GC's counsel at least fourteen days prior to the scheduled hearing date, in violation of the prehearing order and 5 C.F.R. § 2423.23. The GC contends that it was "prejudiced" by this failure. *Id.*

In assessing the GC's request, it must be determined if the Respondent's procedural failures actually prejudiced the other parties. *See INS*, 58 FLRA at 658. Here, the General Counsel asserts that it was unable to provide a timely response to the Respondent's request for an extension of time. Mot. for Sanctions at 2. However, the General Counsel does not submit that it would have opposed the Respondent's request were it given the opportunity. Indeed, the GC could have agreed to the Respondent's request, especially when the aggrieved Charging Party registered no objection to the request. More importantly, given the legitimate justification provided for the request, and the lack of objection by the aggrieved party who filed the charge, the motion for an extension would have been granted even if the GC filed an opposition because a legitimate basis for the request was established. Similarly, the GC does not explain how it was prejudiced by the Respondent's failure to timely serve its Prehearing Disclosure on the GC's counsel. Because the record contains no evidence that the Respondent's procedural failures prejudiced either of the other parties and each had the opportunity to express their legal interests in full about the substantive matters, the GC's Motion for Sanctions is denied.

#### Respondent Violated § 7116(a)(1), (5) and (6) of the Statute

The Panel is an entity within the Authority that provides assistance in resolving negotiation impasses between agencies and exclusive representatives. 5 U.S.C. § 7119(c)(1). After investigating an impasse submitted to it, the Panel is empowered to either recommend to the parties procedures for the resolution of the impasse or assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate. 5 U.S.C. § 7119(c)(5)(A). If the parties do not arrive at a settlement, the Panel may "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse," including ordering parties to agree to specific proposed language. 5 U.S.C. § 7119(c)(5)(B)(iii); *NTEU, Chapter 83*, 35 FLRA 398, 415 (1990).

The Statute thus provides the Panel with "broad authority to make swift decisions" in order to end disputes when the negotiation process has failed. *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Council of Prison Locals*). A final action of the Panel is binding on the parties during the term of the agreement, unless the parties agree otherwise. 5 U.S.C. § 7119(c)(5)(C). An agency's refusal to implement a decision and order of the Panel requiring the parties to adopt language in their collective bargaining agreement violates § 7116(a)(1) and (6) of the Statute unless the failure to comply is justified because the provisions are contrary to the Statute or other law. *NTEU*, 61 FLRA 729, 723 (2006).

When the Panel's decision and order resolves all matters between the parties, such that no further action is needed to finalize a complete collective bargaining agreement, the date the Panel issues and serves its decision and order upon the parties is also the date of execution of the agreement for purposes of agency head review under § 7114(c) of the Statute, and the execution triggers the thirty-day period for agency head review. *Local 1815*, 69 FLRA at 319-20 (citing *Masters, Mates & Pilots*, 36 FLRA at 560, 562). If no action is taken by the agency head within that thirty-day period, the agreement takes



effect and is binding upon the parties, subject to the requirements of the Statute or other law. 5 U.S.C. § 7114(c)(3); *see also Masters, Mates & Pilots*, 36 FLRA at 560 (absent timely service of a written disapproval, a collective bargaining agreement becomes effective on the 31st day following its execution).

Section 7114 of the Statute sets forth the basic collective bargaining responsibilities of an agency and the exclusive representative of a unit of the agency's employees. This includes the obligation, if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement. 5 U.S.C. § 7114(b)(5). An agency violates § 7116(a)(1) and (5) of the Statute if it refuses to comply with the lawful orders of the Panel. *See U.S. Dep't of Energy, Wash., D.C.*, 51 FLRA 124, 129-30 (1995) (*DOE II*); *see also Nat'l Guard*, 54 FLRA at 317 (agency's refusal to implement Panel-imposed provision violated § 7116(a)(1), (5), (6) and (8) of the Statute); *cf. Local 3732*, 16 FLRA at 326-30 (union violated § 7116(b)(6) of the Statute by failing and refusing to comply with the Panel's decision and order and violated § 7116(b)(5) of the Statute by failing and refusing to execute a Panel-ordered provision).

On January 25, 2017, the Panel issued its Decision and Order and it was served upon the parties. The Panel ordered the parties to adopt all of the Factfinder's recommendations into the successor agreement, ordered the parties to adopt the Factfinder's recommendation that all of the tentative agreements reached be put into the successor agreement, and ordered the parties to adopt the Factfinder's recommendations that were not challenged by the parties. GC Ex. 18 at 15-17. By ordering the parties to adopt all of the Factfinder's recommendations, the Panel's order encompassed all aspects of the successor agreement. GC Ex. 18 at 15-17; *see also* GC Br. at 5; R. Br. at 5. Because no further action was needed to finalize the successor agreement, the successor agreement was executed for purposes of agency head review on January 25, 2017, when the Panel issued the Decision and Order and served it upon the parties. GC Ex. 19. The Agency did not approve or disapprove the successor agreement during the thirty-day period for agency head review. *See Hirn Decl.* at 11; GC Ex. 21 at 2; GC Br. at 5; R. Br. at 5. Accordingly, the successor agreement went into effect and became binding on the parties on February 25, 2017. *See Masters, Mates & Pilots*, 36 FLRA at 560. However, an agency can challenge the Panel's Decision and Order by showing that it is "contrary to law." *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 56 FLRA 119, 121 (2000) (*DEA*).

The Respondent admits that it failed and refused to comply with the Panel's Decision and Order, and it tacitly admits that it has not implemented the successor agreement. GC Br. at 5; R. Br. at 5. The Respondent argues that it did not violate the Statute, because "it has not been established that the Panel's [Decision and] Order produced an enforceable agreement," and because the Panel's Decision and Order is inconsistent with law. R. Br. at 5-6 & n.2. However, the Respondent's defenses are unpersuasive.

The Respondent argues that the Panel "exceeded its jurisdiction" by ordering the parties to adopt the Factfinder's recommendation that tentative agreements and unchallenged matters be included in the successor agreement. *Id.* at 15-16. But it is apparent that the parties intended the Factfinder and the Panel to resolve all matters encompassing the

successor agreement when resolving the impasse. The Union's request for assistance asked for help with the impasse that had "arisen out of negotiations for a successor . . . agreement." GC Ex. 3 at 3. It is appropriate to interpret this request broadly, as the Panel's investigatory authority "is based upon the request of a party to consider a 'matter,' rather than any specific impasse issue," and as the Panel is empowered to investigate any impasse presented to it and "not just those technically identified as impasse issues in an initial request." *NASA*, 12 FLRA at 497. In asserting jurisdiction, the Panel recognized that it was to resolve the impasse in the context of "successor collective-bargaining agreement negotiations." GC Ex. 3 at 3; GC Ex. 4 at 1.

That the parties wanted a resolution to all aspects of the successor agreement is further reflected in the words of the Factfinder who, after engaging in two week-long mediation/factfinding sessions with the parties, treated the matter as assumed, stating that he would "[o]f course . . . recommend that all tentative agreements" be incorporated into the successor agreement. GC Ex. 10 at 2. Any doubt that this reflected the wishes of the Respondent is extinguished by the fact that it did not object to this recommendation in the November 13, 2016, letter to the Panel or in the December 28, 2016, response to the Panel's Order to Show Cause. GC Exs. 13 & 15. Accordingly, the record supports the conclusion that the Union and the Agency wanted the Factfinder and the Panel to resolve all matters encompassing the successor agreement. Further, the only evidence to the contrary – James's March 1, 2017, letter to Hirn asserting that the Panel lacked jurisdiction to order the parties to adopt tentative agreements and unchallenged matters – is entirely unconvincing, since it was only written after the Agency was in litigation over the failure to comply with the Panel's January 25, 2017, Decision and Order.

Given that the Respondent and the Union wanted the Factfinder and the Panel to resolve all issues encompassing the successor agreement, this situation is like that in *Masters, Mates & Pilots*. There, the parties sought Panel assistance with impasses on a number of outstanding issues that arose during bargaining. 36 FLRA at 556. The Panel directed the parties to engage in mediation/arbitration with a member of the Panel (the arbitrator), and the parties asked the arbitrator to "direct the adoption of the full contract," meaning that he should issue a decision that "included provisions which had been agreed on bilaterally, those on which agreement was reached during mediation with the arbitrator, and those which the arbitrator decided." *Id.* at 561. Consistent with the parties' wishes, the arbitrator directed the parties to adopt a complete collective bargaining agreement. *Id.* at 556. In apparent approval of this approach, the Authority determined that the issuance of the arbitrator's decision triggered the thirty-day period for agency head review. *Id.* at 562. In reaching this conclusion, the Authority noted that no further action was necessary to finalize the collective bargaining agreement, and that requiring the parties to execute the agreement would be a "meaningless formality." *Id.*

Just as in *Masters, Mates & Pilots*, in this case it would have been a "meaningless formality" to require the parties to execute the successor agreement on their own. The parties wanted the Factfinder and the Panel to resolve all matters encompassing the successor agreement, and the Panel's decision left the parties with no further steps needed to finalize a complete agreement. In ordering that the parties adopt the Factfinder's recommendations in their entirety, the Panel acted within its "broad authority to make swift decisions" to end

disputes when the negotiation process has failed. *Council of Prison Locals*, 735 F.2d at 1499. Put differently, the Panel acted within its authority to take “whatever action is necessary . . . to resolve the impasse.” 5 U.S.C. § 7119(c)(5)(B)(3). Accordingly, the Respondent’s argument is rejected.

The Respondent asserts that the Panel “directly contradicted” a portion of the ground rules agreement requiring the Agency “to prepare the agreement in a final hard copy when all matters had been agreed to.” R. Br. at 16. Initially, it is noted that being contrary to the ground rules agreement (or any other collective bargaining agreement) is not the same as being contrary to the Statute or other applicable law. *DEA*, 56 FLRA at 121.

Further, because the Panel’s Decision and Order resolved all matters between the parties, it was unnecessary to require the Agency to prepare the agreement in a final hard copy. *See Local 1815*, 69 FLRA at 319-20; *Masters, Mates & Pilots*, 36 FLRA at 562. Indeed, allowing the Respondent to insist on the procedural formalities set forth in the ground rules agreement would negate the effect of the Panel’s Decision and Order and would impair the Panel’s ability to make swift decisions to end the dispute. *See Council of Prison Locals*, 735 F.2d at 1499. Were the Respondent allowed to use ground rules for a negotiation that was never culminated to delay compliance with the Panel’s Decision and Order, the Respondent would be rewarded for bargaining to impasse. *See Local 1815*, 69 FLRA at 320.

The provisions of the ground rules agreement upon which the Respondent relies apply only when the parties reached agreement on their own, without Panel intervention. *See GC Ex. 2 at 7* (requiring the Agency to prepare the contract “[w]hen the Parties have agreed upon all matters”; requiring execution “[o]nce agreement is reached on all proposals/provisions”). Similarly, the provision for ratification applies only “[w]hen the Parties have agreed upon all matters.” *GC Ex. 2 at 7*. Moreover, ratification was not a condition precedent for execution, since execution could occur if the Union failed to ratify the agreement. Further, the parties recognized in their ground rules agreement that Panel assistance could be requested (*GC Ex. 2 at 5-6*), and the parties should have understood that under the precedent cited above, a decision and order from the Panel render procedures set forth in a ground rules agreement moot. For all of these reasons, I reject the Respondent’s claim that the Panel’s Decision and Order “contradicted” the ground rules agreement.

Next, the Respondent argues that Article 19 imposed by the Panel excessively interferes with management’s right to assign work. As relevant here, Article 19, Section 1(a) defines the workday for full-time employees as lasting eight hours, and requires that the employee be physically present at the work site for seven hours of work and a half-hour non-paid lunch period. *Hirn Decl. at 73, Ex. 8*. Article 19, Section 1(b) notes that employees are expected to perform “preparation and professional tasks” during the eighth hour of the workday (the eighth hour). However, Article 19, Section 1(b) also provides that while the eighth hour “may typically be performed at or away from the work site at the election of the” employee, the Agency “reserves the right to require that this eight hour . . . be accomplished at the school site for activities such as training, staff development, or future meetings.” *Id.* Article 19, Section 3(b) provides that the Agency is free to assign additional workdays, that

employees will be compensated at their hourly rate of pay, and states that pay will be based upon actual hours worked. *Id.* Article 19, Section 3(d) provides that “[t]he Agency is also free to assign additional work hours,” that employees “will be compensated by the Agency” when additional work hours are assigned. *Id.*

Consistent with the Authority’s approach in negotiability disputes, it is appropriate to analyze this language in terms of the meaning given by the Union and the Factfinder. *See NAGE, Local R1-144, Fed. Union of Scientists & Eng’rs*, 65 FLRA 552, 554 (2011) (“If the union’s explanation is consistent with the proposal’s plain wording, then the Authority adopts that explanation for the purpose of construing what the proposal means.”).

In his letter to the Factfinder regarding the negotiability of Article 19, Hirn argued that: (1) Article 19 “defines the teacher workday . . . for pay purposes only”; (2) Article 19, Section 3(d) provides that the Agency is “free to assign additional work hours at school whenever it wishes, *without restriction*,” so long as the employee is compensated. GC Ex. 6 at 3-4 (citing *OEA*, 51 FLRA at 737; *Fort Bragg*, 49 FLRA at 349-50). The Factfinder agreed that Article 19 was negotiable, finding that Article 19 permits the Agency to: (1) lengthen the workday or work year, so long as it provides appropriate compensation; (2) require employees to perform duties and to schedule activities as it deems appropriate so long as it pays the teachers for their additional time. GC Ex. 10 at 7. Thus, the Union argued, and the Factfinder determined that Article 19’s references to the workday were set forth for compensation purposes only, and were not intended to prevent the Agency from assigning work. Deferring to the Factfinder’s determination, the Panel concluded that Article 19 presented “no colorable negotiability claims.” GC Ex. 18 at 5, 15.

The Authority has found that proposals pertaining to the workday for compensation purposes only are negotiable. In *OEA*, the Authority considered whether a provision stating “normal duty day . . . will be 7:45 to 3:15” was negotiable in light of the union’s claim that the proposal was intended to establish the normal duty day for compensation purposes only. 51 FLRA at 737. The Authority adopted the union’s interpretation of the provision and construed it as defining the normal duty day for compensation purposes only and as not preventing management from changing the hours of work. *Id.* at 737-38. Accordingly, the Authority rejected the agency’s claim that the provision affected management’s authority to determine its mission and concluded that the provision was negotiable. *Id.* at 738. In *Fort Bragg*, the Authority considered whether a proposal providing that “[t]he work day shall consist of seven hours and thirty minutes without additional compensation” was negotiable. 49 FLRA at 348. The Union explained that the proposal did not prevent management from assigning a longer workday, so long as employees were provided additional compensation. *Id.* at 349. Noting that the proposal was intended to establish compensation and that the agency was permitted to extend the workday so long as it provided extra compensation for doing so, the Authority determined that the proposal did not affect management’s right to assign work under § 7106(a)(2)(B) of the Statute and was negotiable. *Id.* at 349-50. Similarly, in *Local 727*, 59 FLRA at 677, the Authority considered the negotiability of a proposal requiring the agency, consistent with federal regulations, to compensate court supervision officers for any overtime worked when they missed their lunch period as a result of their required participation in court proceedings. The Authority found that the proposal

did not preclude the agency from requiring the officers from performing work during their lunch hour. *Id.* Rather, the proposal required the agency to compensate the officers, consistent with applicable regulations, when they performed work during their lunch hour. Because the proposal required the agency to compensate the officers with overtime or compensatory time only in those situations where they would be entitled to it under regulations, the Authority found that the proposal did not affect management's right to assign work under § 7106(a)(2)(B) of the Statute and was negotiable. *Id.* at 677-78.

Article 19, Section 1(a) establishes that the workday shall be eight hours, but it does so only for pay purposes. The provision does not prevent the Agency from assigning more (or, for that matter, fewer) hours of work. *See* GC Ex. 6 at 3-4. Further, Article 19, Section 3(b) expressly permits the Agency to assign additional workdays, and Article 19, Section 3(d) expressly permits the Agency to assign additional work hours, so long as employees are compensated for the extra work. *Hirn Decl.* at 73, Ex. 8. And while Article 19 requires the Agency to compensate employees when the Agency assigns extra hours of work, Article 19 does not require the Agency to assign extra hours of work and therefore does not affect management's right to assign overtime. *See Local 727, 59 FLRA* at 677.

Further, while Article 19, Section 1(b) provides that the eight hour of work may "typically" be performed at or away from the work site at the election of the employee, the Agency "reserves the right to require that this eight hour on a particular workday be accomplished at the school site for activities *such as* training, staff development, or faculty meetings." *Hirn Decl.* at 73, Ex. 8 (emphasis added). That is, Article 19, Section 1(b) preserves management's right to require employees to perform their eighth hour of work at the school. Moreover, while Article 19, Section 1(b) lists types of activities that can be assigned, these are only examples of the activities that management could assign, and nothing in Article 19, Section 1(b) prevents management from assigning any type of activity it deems necessary. Even if Article 19, Section 1(b) entitled employees to perform "preparation and professional tasks" away from the worksite, the Respondent has failed to demonstrate that these tasks can only be performed at the worksite and therefore has failed to show that management's right to assign work is affected in this regard. *See U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs., Balt., Md., 57 FLRA* at 707 (the geographical location where work will be performed does not involve an assignment of work unless management establishes that a relationship exists between the job location and the job duties).

For these reasons, the Respondent's claim that Article 19 affects management's right to assign work is rejected. Further, as the Respondent has abandoned its claim that Article 19 affects management's right to establish a tour of duty (*see R. Br.* at 23-27), it is unnecessary to consider whether Article 19 constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. *Fort Bragg, 49 FLRA* at 350.

The Respondent contends that Article 25(f) imposed by the Panel is contrary to law. However, Article 25(f) expressly indicates that it applies only "to the extent permitted by 5 U.S.C. § 4109." GC Ex. 10 at 13. Moreover, while the Respondent asserts that DDESS has not executed its own regulation definitively determining the components of a tuition

reimbursement program, the Respondent does not explain how that makes Article 25(f) contrary to 5 U.S.C. § 4103, which pertains generally to the establishment of training programs. Similarly, while the Respondent asserts that Article 25(f) does not address issues pertaining to continuation of service requirements, the Respondent does not explain how that renders Article 25(f) contrary to 5 U.S.C. § 4108, which pertains to employee agreements and service after training.

The Respondent also argues that Article 25(f) is vague, ambiguous, and incapable of implementation. But Article 25(f) is clear and understandable to anyone but the obtuse. The clear language requires the Agency to reimburse employees for tuition and related expenses incurred by the employee to meet recertification requirements imposed by the Agency as a condition for maintaining employment. Reimbursement provisions such as these are not difficult to understand. See *Fort Bragg Ass'n of Educators, NEA*, 30 FLRA at 521-22; *Overseas Educ. Ass'n*, 29 FLRA 485, 488 (1987). Even if Article 25(f) were vague, ambiguous, or impossible to implement, the Respondent fails to explain how this would render Article 25(f) unlawful such that it could refuse to adopt it as ordered by the Panel. See *DEA*, 56 FLRA at 121. Similarly, the Respondent's claims that Article 25(f) would result in "endless" grievances and a "limitless" financial obligation are unsupported and do not excuse the Respondent's failure and refusal to comply with the Panel's Decision and Order. Cf. *DOE II*, 51 FLRA at 128 (claim that provision would create "disruption in the bargaining process" was insufficient to demonstrate that the provision was unlawful). For all of these reasons, the Respondent's arguments regarding Article 25(f) are without merit.

With respect to salaries and Article 26 imposed by the Panel, the Respondent argues that the Panel erred by adopting the "rest of the US" pay scale without considering the standard set forth in 10 U.S.C. § 2164(e)(3)(B), which requires the Secretary of Defense to "determine the level of compensation required to attract qualified employees." R. Br. at 18-22. While 10 U.S.C. § 2164 requires the Secretary of Defense to "determine the level of compensation required to attract qualified employees" in "fixing the compensation of employees," a savings provision within that same statute requires the Secretary of Defense "to collectively bargain with respect to hours, wages and other terms and conditions of employment," *ACEA*, 56 FLRA at 665. As held in *ACEA*, the ability to collectively bargain over wages predated the passage of § 2164, and its language regarding determining levels of compensation did not eliminate, it actually preserved the ability to bargain collectively with the Secretary over wages, hours, and other terms and conditions of employment. *ACEA*, 56 FLRA at 665. Thus, Article 26 was imposed upon the parties by the Panel under the process established by 5 U.S.C. § 7119 to resolve a bargaining impasse, and 5 U.S.C. § 2164 did not preclude such action. The Respondent cites, *NTEU v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), to argue that the Secretary of Defense's obligation to determine the level of compensation required to attract qualified teachers prevents the Agency and the Union from being bound by a collective agreement using the "rest of the U.S." pay schedule. However, that case did not involve 10 U.S.C. § 2164, and more importantly, it held that even the President was required to comply with salary setting procedures established by law. And since the collective bargaining required of the Secretary of Defense in this case was set forth in the savings provision of § 2164, the precedent of *NTEU* squarely contradicts the Respondent's argument.

Moreover, after the parties presented their positions with respect to the level of pay necessary to attract and retain qualified employees, the Factfinder determined that salaries in Puerto Rico needed to be based on the “rest of the U.S.” pay schedule, and the Panel found the Factfinder’s determination to be “persuasive,” especially in light of the fact that the Respondent “provided no additional arguments” to demonstrate that the Factfinder’s recommendation was incorrect. GC Ex. 10 at 15, 18; GC Ex. 18 at 10. Because nothing indicates that 10 U.S.C. § 2164 prevents a collective bargaining agreement establishing a “rest of the U.S.” pay schedule, and because the Factfinder considered the parties’ positions regarding the appropriate level of compensation, the Respondent’s argument is rejected.

The Respondent argues that the Authority has not previously determined that retroactive pay increases are negotiable. R. Br. at 14-15. However, the Authority has determined that employee pay is negotiable for the employees in this matter, *ACEA*, 56 FLRA at 665, and the Authority has upheld a Panel order imposing retroactive pay increases. *DOE*, 25 FLRA at 1097-98. That the Panel regularly orders that pay increases have retroactive effect is another sign that such orders are neither unusual nor unlawful. *See NASA Exchange*, 98 FSIP at 65; *DOD Ft. Stewart*, 98 FSIP 11; *DOD, Laurel Bay*, 96 FSIP at 66; *DOD Ft. Campbell*, 95 FSIP at 160.

Furthermore, it is well settled that the Authority can require that an agency give retroactive effect to Panel imposed provisions that were improperly disapproved by the agency head, under § 7118(a)(7) of the Statute, *Interpretation & Guidance*, 15 FLRA 564, 568-69 (1984), and this power would mean little if the Panel could not itself impose provisions having retroactive effect. Further, it is essential that the Panel be able to impose contract provisions retroactively, especially over pay, to remove an agency’s financial incentive to delay negotiations. *Cf. NTEU, Chapter 83*, 35 FLRA at 415-16 (“It is clear that Congress viewed a [Panel] order requiring parties to adopt specific proposed language as a desirable alternative in the Federal sector to the strikes, work stoppages, and other forms of labor unrest that have traditionally accompanied the failure of the negotiation process in other sectors.”). For these reasons, the Respondent’s argument is rejected.

Citing the canon of *inclusio unius est exclusio alterius*, the Respondent argues that because Congress provided for retroactive pay increases for prevailing-rate employees in 5 U.S.C. § 5344, Congress must have intended to prohibit pay increases for retroactive pay increases for all other employees. But the Respondent has done nothing to demonstrate that this doctrine applies in this case. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (“[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series’ justifying the inference that items not mentioned were excluded by deliberate choice.”). Accordingly, the Respondent’s argument is rejected.

The Respondent contends that by imposing a pay increase retroactively, the Panel improperly “overruled” Article 36, Section 2 of the 2011 CBA, which, according to the Respondent, concerns the effective date of future salary increases. R. Br. at 17. Article 36, Section 2 of the 2011 CBA provides that once one party notifies the other of its intent to engage in bargaining over a new collective bargaining agreement, the terms of the current agreement, including any annual salary increases, shall remain in effect “until bargaining is concluded and new provisions are executed and approved in accordance with 5 U.S.C. 7114(c).” Hirn Decl. at 81, Ex. 8. Contrary to the Respondent’s claim, the terms of the 2011 CBA were not overruled. Rather, consistent with Article 36, Section 2 of the 2011 CBA, the terms remained in effect until bargaining concluded, that is, until the Panel issued its Decision and Order and the Agency failed to approve or disapprove the successor agreement under § 7114(c). Accordingly, the Respondent’s argument is meritless.

The Respondent argues that retroactive pay increases are contrary to the doctrine of sovereign immunity and the Back Pay Act. R. Br. at 8-9, 11-13. The United States, as a sovereign, is immune from suit except as it consents to be sued. As such, an award by an arbitrator that requires an agency to provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy. *AFGE, Local 2145*, 66 FLRA 911, 912 (2012). Here, the Respondent has not been sued, and the Panel has not imposed monetary damages pursuant to a legal claim, i.e., money paid as compensation for loss or injury. *See damages, Black’s Law Dictionary* (10th ed. 2014). The Panel’s order of retroactive pay increases is an equitable remedy, and equitable remedies are not barred under the doctrine of sovereign immunity. *See NTEU*, 68 FLRA at 965. For all of these reasons, the Panel’s order of retroactive pay increases did not require a waiver of sovereign immunity under the Back Pay Act or other statutory waiver. Accordingly, I reject the Respondent’s argument.

Because the Respondent failed and refused to implement the Panel’s Decision and Order and failed and refused to implement the provisions encompassing the entire successor agreement as ordered by the Panel without demonstrating the provisions are contrary to the Statute or other law, I find that the Respondent violated § 7116(a)(1), (5) and (6) of the Statute.

### REMEDY

When the Authority finds that a party has committed an unfair labor practice by failing to implement a decision and order of the Panel, the Authority orders the violating party to cease and desist from failing to comply with the decision and order, orders the party to implement the provisions as ordered by the Panel, and orders the party to post notices to employees. *See NTEU*, 64 FLRA at 449. The Respondent argues that it should not be required to implement the successor agreement as ordered by the Panel, so the Respondent can exercise its “right to review the agreement” under agency head review. R. Br. at 34-35. However, that right expired after the thirty-day period for reviewing the successor agreement passed on February 24, 2017 without a review being conducted. Accordingly, the



Respondent's argument is unfounded. Additionally, as the Respondent has failed to demonstrate that the order of the Panel is contrary to the Statute or other law as part of this litigation, such a review would only allow the Respondent to further delay a determination it should have made within thirty days after the Decision and Order was served on the parties.

The GC and the Charging Party request that the Respondent to reimburse employees in accordance with the Back Pay Act. However, consistent with the precedent of *DOE*, 25 FLRA at 1090, retroactive pay for the eligible employees is a requirement of the collective bargaining agreement between the parties imposed by the Decision and Order of the Federal Service Impasses Panel in Case No. 16 FSIP 052. Thus, an Order to comply with that Decision and Order provides the legal basis for the payment of retroactive pay. In short, the Respondent must provide the pay increase and do so retroactively because it is a requirement of the bargaining agreement imposed by the Panel after the parties bargained to impasse rather than reaching an agreement upon such matters on their own.

While the Charging Party indicated in its brief that an award of attorney fees may be appropriate, such fees are permitted only if the requesting party demonstrates that its request is warranted under 5 U.S.C. § 7701(g)(1). *See Luke AFB*, 32 FLRA at 1095-96. As the Charging Party failed to request or justify the award of attorney fees and cites no authority permitting the retention of jurisdiction by the Office of Administrative Law Judges for subsequent submission of documentation supporting such a request, attorney fees are not awarded as part of this decision. Furthermore, retention of jurisdiction post decision would be contrary to 5 C.F.R. § 2423.34(b), which mandates that ALJ decisions be transmitted to the Authority upon issuance.

Based on the foregoing, I recommend that the Authority adopt the following order:

### **ORDER**

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the of the Federal Service Labor-Management Relations Statute (Statute), the Department of Defense, Domestic Dependent Elementary and Secondary Schools, Fort Buchanan, Puerto Rico, shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the Decision and Order of the Federal Service Impasses Panel in Case No. 16 FSIP 052, or in any other manner failing or refusing to cooperate with impasse procedures and decisions.

(b) Failing or refusing to implement the collective bargaining agreement containing the provisions ordered by the Federal Service Impasses Panel in Case No. 16 FSIP 052.

(c) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with the Decision and Order of the Federal Service Impasses Panel in Case No. 16 FSIP 052.

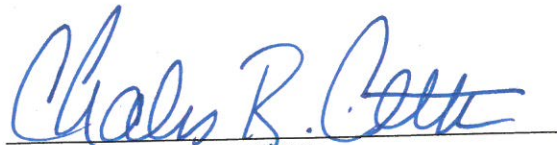
(b) Implement the entire collective bargaining agreement containing the provisions ordered by the Federal Service Impasses Panel in Case No. 15 FSIP 052, including those provisions related to a retroactive pay increase for bargaining unit employees.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Community Superintendent, and shall be posted and maintained for sixty (60) consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) In addition to physical posting of paper notices, the Notice shall be distributed to electronically, bargaining unit employees, on the same day as the physical posting of the Notice.

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, provide the Regional Director, Boston Region, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., October 31, 2017



CHARLES R. CENTER  
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF**

**THE FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of Defense, Domestic Dependent Elementary and Secondary Schools, Fort Buchanan, Puerto Rico, has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail or refuse to comply with the Decision and Order of the Federal Service Impasses Panel (Panel) in Case No. 16 FSIP 052.

**WE WILL NOT** refuse to implement the collective bargaining agreement containing the provisions ordered by the Panel in Case No. 16 FSIP 052.

**WE WILL NOT** in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

**WE WILL** comply with the Decision and Order of the Panel in Case No. 16 FSIP 052 and will implement the entire collective bargaining agreement containing the provisions ordered by the Panel in Case No. 15 FSIP 052, including those provisions related to a retroactive pay increase for bargaining unit employees.

\_\_\_\_\_  
(Respondent/Agency)

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.