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

OALJ 22-07

U.S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
FEDERAL GRAIN INSPECTION SERVICE
LEAGUE CITY, TEXAS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3679, AFL-CIO

CHARGING PARTY

Case No. DE-CA-20-0124

Paige A. Swenson
For the General Counsel

Bradly Siskind
For the Respondent

Cynthia Sanders
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Section 7114(c) of the Statute affords the head of an agency that has negotiated a collective bargaining agreement thirty days to review the agreement, and to either approve or disapprove it. The agency head is instructed to approve it if it is "in accordance with the provisions of this chapter and any other applicable law, rule, or regulation." If the agency head neither approves nor disapproves it within thirty days, the agreement takes effect and is binding on the parties. Today's case focuses on how to measure that thirty-day period when the final terms of the agreement were resolved by the Federal Service Impasses Panel (FSIP or Panel), rather than by the parties themselves.

In this case, the primary question is whether an agency should be able to extend the statutory thirty-day period for several additional months in order incorporate the language imposed by the Panel into the terms that were previously negotiated by the parties. Viewed in this way, the question answers itself: The Statute does not give an agency the luxury of performing a straightforward, ministerial function in a leisurely, whenever-you-get-around-to-it manner. In other words, since the Respondent here failed to disapprove the agreement in question in a timely manner, it was required to put its terms into effect.

Even after an agreement becomes binding, parties are not required to comply with an unlawful provision of that agreement. The Respondent here insists that one of the terms imposed by the Panel violates the Federal Travel Regulations. Upon review of the disputed provision and the law, however, I conclude that it is consistent with federal law and regulations, and the Respondent must comply with it.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On January 21, 2020, the American Federation of Government Employees, Local 3679, AFL-CIO (the Union or Charging Party) filed a ULP charge against the U.S. Department of Agriculture, Agricultural Marketing Service, Federal Grain Inspection Service, League City, Texas (the Agency or Respondent), alleging that the Agency violated the Statute by failing to implement the terms of an agreement ordered by FSIP.[1] GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on August 11, 2021, and an Amended Complaint and Notice of Hearing on August 30, 2021, on behalf of the FLRA's Acting General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5), and (6) of the Statute by refusing to cooperate with the impasse procedures of the Panel and by refusing to implement a local supplemental agreement (LSA). GC Ex. 1(c), 1(f). The Respondent filed its Answer to the Amended Complaint on September 20, 2021, admitting many of the GC's factual allegations while denying others, and denying that it violated the Statute. GC Ex. 1(h).

On October 6, 2021, the General Counsel filed a Motion for Summary Judgment, arguing that there were no material facts in dispute, and that the facts demonstrated that the Agency had violated the Statute as alleged. GC MSJ. On October 14, 2021, the Respondent filed a brief in opposition to the Motion for Summary Judgment, arguing that the LSA was

[1] The Charging Party had previously filed other ULP charges, which are not encompassed in either the Complaint or the Amended Complaint filed by the GC, respectively. The Respondent has cited these earlier charges as a basis for dismissing the complaints, and I will address that issue separately in this decision.

never executed, that the agency head timely disapproved the LSA, that one provision of the LSA ordered by the Panel was contrary to law, and that there were material facts in dispute.

On November 9, 2021, I conducted a conference call with the parties to discuss the pleadings and to determine whether a hearing would be necessary. Since the Respondent contended that some factual issues remained in dispute, I instructed the Respondent to file a statement of those facts it believed were in dispute, along with any evidence to support its position. And since Respondent stated that it was also considering filing its own motion for summary judgment, I set a timetable for the filing of such a motion and for the GC to respond. I postponed the hearing indefinitely and advised the parties that if, after reviewing the pleadings, I believed there continued to be a dispute of any material facts, I would set a new date for a hearing. In accordance with this timetable, the Respondent filed a Motion for Summary Judgment on November 23, 2021, in which it asserted that there were no disputed issues of material fact and that the Agency did not violate the Statute. Resp. MSJ at 9. The General Counsel filed its opposition to the Respondent's motion on December 10, 2021.

DISCUSSION OF MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). If the pleadings, and additional evidence submitted in support, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the motion for summary judgment should be granted. *Id.*

The General Counsel contends in its Motion for Summary Judgment that the parties' local supplemental agreement was executed on August 8, 2019, the date that the FSIP Decision and Order (19 FSIP 032, August 6, 2019) was served on the parties. GC MSJ at 15-19. Thus, the LSA took effect on the thirty-first day thereafter – on September 8, 2019 – since the Respondent's agency head had not disapproved the LSA by that date. *Id.* at 20.

Respondent acknowledges that it has not implemented the LSA, but it insists that it acted lawfully, because the LSA was not executed until both parties had signed it on December 5, 2019. Resp. MSJ at 4; Answer at ¶10. It argues that the LSA was not executed on August 8, because the parties continued to negotiate over provisions of the LSA for the next several months. Resp. MSJ at 4. Since the agency head disapproved the LSA on January 3, 2020, the disapproval was timely, and the LSA therefore never took effect. *Id.* Respondent further contends that one of the provisions imposed by the Panel is contrary to law. Resp. MSJ at 5-8.

The issues in dispute in this case are legal in nature, with one possible exception, and do not require a hearing to resolve. The one possible exception here is the parties' dispute over whether they continued to negotiate concerning the terms of the LSA between August

and November of 2019. However, after examining the documents submitted into evidence by the GC and the Respondent, I am convinced that the parties have set forth all of the facts necessary to resolve the legal issues. While the GC and the Respondent draw different conclusions from these facts, that is a legal issue, which does not require a hearing.

Accordingly, I agree that there are no genuine issues of material fact in this case. It is therefore appropriate to decide the case based on the motions for summary judgment. Below I will summarize the material facts that are not in dispute and make the following conclusions of law and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Ex. 1(h), ¶ 2. The Federal Grain Inspection Service (FGIS) establishes the nation's official standards for a wide variety of products and maintains a network of field offices staffed by employees who work primarily in the grain elevators of private companies and who oversee the inspection, weighing, and grading of the companies' products. FSIP Decision, 19 FSIP 032 at 1-2, 4.

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive collective bargaining representative of nationwide consolidated units of FGIS employees, including those employees assigned to the League City, Texas, field office. GC Ex. 1(h), ¶ 3. AFGE Local 3679, an agent of AFGE for the purpose of representing bargaining unit employees at the League City field office, is a labor organization within the meaning of §7103(a)(4) of the Statute. *Id.* at ¶¶ 3, 4. The FGIS and AFGE are parties to a nationwide collective bargaining agreement (CBA), which had recently gone into effect on April 11, 2018, and which contained a provision allowing parties to negotiate local supplemental agreements (LSAs). FSIP Decision at 2. Our case involves the efforts of the Respondent and the Union to negotiate an LSA for the 56 bargaining unit employees assigned to the League City field office.

As noted in the Panel decision, the Respondent and the Union were parties to an LSA under the prior CBA; although that LSA expired on May 24, 2018, it was to remain in effect until a successor was executed. FSIP Decision at 3. The Agency notified the Union on February 26, 2018 that it was opening negotiations on a new LSA; a ground rules agreement was reached in October, and the parties engaged in negotiations for two weeks in December of that year. *Id.* With the assistance of a mediator from the Federal Mediation and Conciliation Service, the parties reached agreement on a new LSA on December 21, 2018, subject to ratification by the Union membership. *Id.* The membership, however, disagreed with four of the articles in the LSA and refused to ratify it; the Union notified the Agency of this, and the parties resumed efforts to resolve the four disputed articles in February of 2019. *Id.* When those negotiations broke down, the Agency submitted a request for assistance with FSIP on April 1, 2019,[2] and the Panel thereafter asserted jurisdiction. *Id.* at 1, 3. Informal

[2] Hereafter, all dates are in 2019, unless otherwise noted.

discussions with FSIP Member Riches produced agreement on some, but not all, of the disputed issues, prompting Member Riches to request that each party submit their final position statements to him. *Id.* at 1. The full Panel then considered the position statements and issued its Decision and Order on August 6. *Id.* The Decision and Order were served on the parties on August 8. GC Ex. 5 of GC MSJ.

The Panel Decision

The parties were at impasse on, and submitted to the Panel, five provisions in four articles of the LSA: Articles 4, 7, 8 (two disputed issues), and 11. During their informal conference with Member Riches, the parties reached agreement on Article 7, which is reflected in the Decision as Issue 2. FSIP Decision at 6-7. Of the four remaining issues, the Panel ordered the parties to adopt three of the Agency proposals: Issue 3 (Article 8, Tour of Duty and Assignments – Rotations) (*Id.* at 8); Issue 4 (Article 8, Tour of Duty and Assignments – Shift Schedule) (*Id.* at 10); and Issue 5 (Article 11, Overtime) (*Id.* at 12). Regarding Issue 1 (Article 4, Travel and Transportation Reimbursement), the Panel ordered the parties to adopt language that was different from either of their proposals but which substantially conformed to the Union proposal. *Id.* at 6. It is the language of Issue 1 which the Respondent contends is contrary to law, rule, or regulation. Resp. MSJ at 5-8.

The parties' dispute on Issue 1 derives from the fact that while all bargaining unit employees are officially assigned to the League City field office, most of them do not perform their work there; instead, they are assigned to one of several corporate locations, usually grain elevators, and they rotate among these "duty points" periodically. FSIP Decision at 4. Normally they travel directly from their homes to their duty points, which are scattered around the Houston metropolitan area, but mostly within 25 miles of the League City field office. *Id.* Depending on where they live, however, this may mean that some employees travel considerably more than 25 miles every day to their duty points. *Id.* at 4-6. The Agency insisted that because these duty points were within 25 miles of the field office, employees could not be reimbursed unless they travelled to a second location during the day; otherwise, the Agency argued, employees would be getting paid for commuting to work, a violation of the Federal Travel Regulations. *Id.* at 4. The Union demanded that employees be reimbursed for travelling to their first duty point if it exceeded 25 miles. *Id.* at 5.

The Panel noted that the Federal Travel Regulations apply to travel expenses when employees engage in temporary duty (TDY) travel away from their official duty station, while the employees here are engaged in local travel within their duty area. *Id.* at 5-6. The distance employees travel to their rotating duty points can be burdensome to employees, and the Panel held that the employees should not bear the cost of such travel when it exceeds what the Agency has established as a normal commuting distance of 25 miles. *Id.* at 4, 5, 6. While the Panel and the parties agreed that employees may not be reimbursed for their normal commute, the Panel interpreted "commute" as the travel "between their [the employees'] home and actual duty station." *Id.* at 6. Therefore, the Panel stated that "the employees

should not bear the cost of mileage incurred, not from commuting, but from performing services on behalf of the Agency." *Id.* It ordered the parties to adopt the following language into the LSA:

> Management will follow Federal Travel Regulations for temporary duty (TDY) travel away from the official duty station. For an employee that travels within their duty area in their personal vehicle (POV) from their home to the assignment site/duty point, the employee is entitled to reimbursement of actual travel-related expenses, minus 25 miles. Actual mileage is as shown in an electronic standard highway mileage guide or actual miles driven as determined from an odometer reading.

Id.

Events Subsequent to the Panel Decision

Since the FSIP decision was served on the Union and the Agency on August 8, 2019, the Agency has not implemented it. The Respondent does not deny this fact, but asserts two primary justifications for its refusal to do so: it argues that the head of the Agency[3] timely disapproved the LSA on January 3, 2020, and it further argues that the language imposed by the Panel in Article 4 of the LSA regarding travel reimbursement is contrary to law. Resp. Opp. to GC MSJ at 1.

After the FSIP decision was issued, the first evidence of communication between the Agency and the Union is an email sent on September 6 by Cynthia Sanders, the AFGE representative working with local union officials to negotiate the LSA, to her Agency counterpart, Eric Jabs: "Hope all is well! Have you heard anything from the Agency Head? I know it's been a while now under review. I would appreciate any feedback you can share." GC Ex. 7 at 2. On September 9, Jabs replied to Sanders: "We were apprised by Agency Head that we need to incorporate the FSIP changes into the CBA and the parties need to re-sign before it can be submitted for Agency Head Review. We are working on getting the changes completed and will send it to the Union this week for your review and signature." *Id.* at 1.

Another month went by, until October 17, when Jabs sent the Union "the updated Local Supplemental Agreement (LSA) with the incorporated language from the Federal Service Impasses Panel (FSIP)." GC Ex. 8 at 2; Ex. 3 of Resp. MSJ. Jabs noted that "the language highlighted in yellow is added and the language highlighted in grey has been deleted to conform with the FSIP order," and he asked the Union to sign it, so that it could be forwarded to the Agency Head for statutory review. *Id.* (The full LSA with the highlighted text is Exhibit 4 of Respondent's Motion for Summary Judgment.) Sanders immediately emailed Jabs that she would review the document with officials at the Union (GC Ex. 8 at 1), but on November 6 she emailed Jabs and asked him to send her a "clean copy" of the LSA.

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[3] Daniel Kline, the Chief of the Labor Relations Division in the Department of Agriculture, signed the letter disapproving the LSA, on behalf of the Secretary of Agriculture. GC Ex. 11.

GC Ex. 9 at 2. Jabs complied that same day, and on November 13 Sanders sent Jabs a signed copy of the LSA. *Id.* at 1; *see* GC Ex. 4 for the (unhighlighted) text of the LSA.

More than another month passed, until December 16, when Sanders emailed Jabs and inquired about the status of the agency head review of the LSA. "It has been more than 30 days since the Union sent the Agency its signed copy of the CBA via email. . . . On December 13, the 30 days [sic] time period has ended for agency head review." GC Ex. 10. Jabs responded on December 17, advising Sanders that the Agency "has submitted the contract for Agency Head Review." *Id.* The next day, he sent Sanders a signed copy of the LSA. *Id.*

On January 3, 2020, Mr. Kline, the designee of the Secretary of Agriculture, sent a letter to Agency management and the Union that the LSA had been disapproved. Two specific provisions in the LSA were found to be "inconsistent with law, rule or regulation." GC Ex. 11; Ex. 9 of Resp. MSJ. The first paragraph of Article 3 of the LSA, providing the Union with office space and equipment, was found to be inconsistent with Executive Order 13837, Section 4 at (iii). *Id.* at 1. And portions of Article 5, Section 1 were found to be inconsistent with Executive Order 13837, Section 4(v)(1), insofar as they entitled Union representatives to official time for meeting with employees to resolve grievances or for attending grievance meetings with managers.[4] *Id.* at 2. After the LSA was disapproved, the Union rebuffed the Agency's request to resume negotiations on the disapproved provisions. GC Ex. 1(h) (Answer to Complaint) at 5, 10. Neither the FSIP Decision and Order of August 6, 2019, nor the Local Supplemental Agreement that was the subject of the FSIP Decision, has been implemented since that date. Ex. 1 of GC Opp. to Resp. MSJ at 3.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel makes two fundamental arguments in support of its Motion for Summary Judgment: first, that pursuant to section 7114(c) of the Statute, the Agency had until September 7, 2019, to disapprove the LSA, if it believed the LSA was contrary to law, rule, or regulation. The Agency's failure to take any action on the LSA by that date meant that the agreement went into effect, and that the agency head's subsequent effort to disapprove it on January 3, 2020, was untimely and ineffective. Second, the GC insists that the provision which the Panel ordered the parties to incorporate into Article 4 of the LSA regarding travel reimbursement is not contrary to any law, rule, or regulation. Thus the Agency's ongoing refusal to implement that provision, along with the rest of the LSA, is an unfair labor practice.

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[4] When Jabs sent the LSA to Mr. Kline on December 5, for agency head review, he added a recommendation that the portion of Article 4 relating to travel reimbursement, which FSIP had imposed, be disapproved as contrary to law, rule, and regulation. Ex. 9 of Resp. MSJ. Although the agency head took exception to Articles 3 and 5, as noted, he did not cite the travel reimbursement language of Article 4 as inconsistent with law, rule, or regulation. GC Ex. 11.

On the first issue, the GC notes that the dispute over the agency head's disapproval stems from the fact that the LSA was finalized by a Panel order, rather than by mutual agreement through negotiations. GC MSJ at 15-16. Thus, while an agreement is normally considered to be "executed" when the parties sign it, that standard does not apply when the parties fail to reach an agreement and submit their dispute to FSIP. *Id.* at 16 (citing *Patent Office Prof'l Ass'n*, 41 FLRA 795, 803 (1991) (*POPA*); and *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 560-62 (1990) (*IOMMP*)). In such cases, the Authority has held that an agreement is executed on "the date on which no further is action is necessary to finalize a complete agreement." *POPA* at 803.

The GC contends that no further action was required once the Panel's Decision was served, because that decision resolved all issues remaining between the parties. When the Agency submitted the LSA to the Panel on April 1, the parties had reached agreement on all terms of the LSA except for Articles 4, 7, 8, and 11. FSIP Decision at 1, 3. With the Panel's assistance, the parties reached agreement on Article 7, and the Panel imposed its determination on the other articles. Once the Panel ordered the parties to adopt the language specified in its Decision, the LSA was complete; no further action was necessary by the parties to finalize it. Therefore, the GC insists that August 8, 2019 (the date the Decision was served), represents the date the LSA was executed, and that the agency head had thirty days from then (i.e. until September 7) to disapprove it.

The GC disputes the Respondent's contention that the parties continued to negotiate over the terms of the LSA after August 8, and that those negotiations continued until the LSA was fully signed on December 5. GC Opp. to Resp. MSJ at 5-6. The GC asserts that there is no evidence of any negotiations occurring between the Agency and the Union concerning the terms of the LSA in that time period. *Id.* at 6. Although the Union "communicated" with Agency officials, it never "negotiated," and even those communications did not begin until September 9, thirty-two days after they had received the Panel decision. *Id.* In his communications, Jabs told Sanders that he was going to incorporate the language ordered by FSIP into the old LSA, and that he wanted the Union to review and sign the document, while Sanders expressed impatience with the delays in completing the agency head review. GC Ex. 7, 10. The GC insists, however: "Despite the delay, the email exchanges show no bargaining." GC MSJ at 19. According to the GC, the facts of this case demonstrate that the LSA was executed on August 8. *Id.*; GC Opp. to Resp. MSJ at 8. And accordingly, since the Respondent admits it did not disapprove the LSA for another four months, that disapproval was untimely. GC MSJ at 19-21.

The General Counsel further alleges that the travel reimbursement language ordered by FSIP in Article 4 of the LSA is lawful. GC MSJ at 24-28. Defending the Panel's decision, the GC states that "the Panel factored in commuting expenses, Respondent's rotating assignment points, and 5 C.F.R. § 551.422 in coming to an appropriate provision for Article 4." *Id.* at 28. While the Respondent's attack on the Panel decision focuses on the rule that employees are not entitled to reimbursement for their normal commute, the GC notes that both the Union and the Panel accepted that principle, and the Panel sought to establish a reimbursement formula that accounted for the rotating assignments of the

bargaining-unit employees and subtracted the employees' normal commuting miles. *Id.* at 27-28. It cites *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 398 (2014), and *Federal Deposit Insurance Corp.*, 64 FLRA 1177 (2010), as supporting the Panel decision, and compares the Panel's formula to one that was inappropriate in *Dep't of Treasury, IRS, Plantation, Fla.*, 64 FLRA 777 (2010).

The GC finally argues that the Respondent's references to the Union's earlier ULP charges misunderstand the procedures for investigating charges. GC Opp. to Resp. MSJ at 9-10. The GC asserts that the Union's withdrawal of charges in DE-CA-20-0018 and DE-CA-20-0086[5] did not bar the Union from filing a new ULP charge in the current case. *Id.* The prior charges were never dismissed by the FLRA's Regional Director, so there was nothing to appeal or review, and the Union's subsequent charge "is in no way impacted by the Charging Party's decision to withdraw the two, earlier-filed charges[.]" *Id.* at 10.

Respondent

The Respondent asserts that it has not refused to comply with the FSIP decision or implement the LSA, because the agency head disapproved the LSA in a timely manner. Opp. to GC MSJ at 10-13; Resp. MSJ at 4-5. The Respondent states that although the Union may not have been obligated to bargain over the terms of the LSA after the Panel issued its decision, the Union did in fact negotiate after August 8, resulting in an agreement that was signed by the Union on November 13 and by the Agency on December 5, 2019. Opp. to GC MSJ at 10-11. Respondent notes that "Ms. Sanders and Mr. Jabs sent multiple emails regarding the contract that was subsequently rejected by the Agency Head." Resp. MSJ at 4. These communications resulted in a separate agreement that was subject to agency head review. Since that document was not fully signed until December 5, 2019, the agency head's disapproval on January 3, 2020 was timely, and the Agency's refusal to implement the LSA was justified. Opp. to GC MSJ at 12.

Respondent further justifies its refusal to implement the LSA because the language of Article 4, as imposed by the Panel, is contrary to law. *Id.* at 3-9; Resp. MSJ at 5-8. Although the Respondent, GC, Union, and the Panel all cite the basic principle that an employee may not be compensated for his normal commute, Respondent asserts that the Panel decision proceeded to violate that principle by ordering the Agency to reimburse employees for their travel from home to their rotating duty points, minus twenty-five miles. Opp. to GC MSJ at 6-8. Respondent identified one employee, David Coy, as an example of how Article 4 would require the Agency to pay him for his normal commute. Mr. Coy lives 97.3 miles from the League City field office, which is 27.2 miles from the grain elevator where he worked for part of 2020; under the Panel-imposed language of Article 4, Coy would be reimbursed for driving 99.5 (or 124.5 minus 25) miles. This would, if enforced, "require the Agency to violate the Federal Travel Regulations and compensate employees for their commute beyond a reasonable level." *Id.* at 7.

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[5] *See* Ex. 2, 11, and 12 of Resp. MSJ.

The Respondent further asserts that the FSIP decision contradicted itself by stating at one point that the Agency must follow the Federal Travel Regulations, yet also stating that those regulations are not applicable to these employees. *Id.* at 4-5 (citing FSIP Decision at 5-6). Respondent additionally cites Comptroller General opinions such as 32 Comp. Gen. 235 (1952) and subsequent cases such as *In re Delgado*, 01-1 BCA P 31,272 (GSBCA 2001), 2001 WL 26220, as prohibiting reimbursement for an employee's normal commuting mileage. *Id.* at 5-6. Allowing the FSIP formula to be used here would encourage employees to move their residences as far away as possible, even to Dallas 250 miles away, knowing that they would be reimbursed for 225 of those miles. *Id.* at 8.

The Respondent additionally raises a procedural objection to the GC's complaint. It argues that because the Union withdrew two earlier ULP charges on the same facts, without having rescinded its withdrawal or petitioning for review of that action, the current ULP charge must be dismissed. Resp. MSJ at 8-9. It cites *AFGE Council 238*, 64 FLRA 223 (2009) (*Council 238*) and § 2423.11 of the Authority's Regulations in support of this argument.

Finally, Respondent objects to the General Counsel's request that as a remedy for the Agency's alleged unfair labor practice, the expiration of the LSA should be extended for three years from the date the Agency actually implements it. Since the GC insists that the LSA was executed on August 8, 2019, and since the LSA provides that it will remain in effect for three years, Respondent argues that it would defy contract law principles and the Statute to alter the expiration date in that fashion. Opp. to GC MSJ at 14.

ANALYSIS AND CONCLUSIONS

Before addressing the merits of this case, I will explain why the Respondent's procedural objections are unfounded. While the Respondent is correct that the Union filed and later withdrew two ULP charges similar to the current charge, the withdrawal of those charges did not prevent the Union from filing subsequent charges. Pursuant to § 2423.10 of the Authority's Regulations, a charging party is free to request that its ULP charge be withdrawn, with the permission of the Regional Director investigating the charge, and nothing in the Regulations or case precedent suggests that such a withdrawal prejudices the filing of a new charge. 5 C.F.R. §§ 2423.10(a), 2423.11(a).

Respondent's reliance on *Council 238* is entirely misplaced. Resp. MSJ at 8. That case involved the interrelationship of an unfair labor practice charge and a petition for the Authority to review an agency's assertion of nonnegotiability, as the union waited too long (under the Authority's negotiability procedures, 5 C.F.R. part 2424) to file its petition after it had withdrawn a ULP allegation from a grievance. 64 FLRA at 225. The ULP allegation in that case did not involve a ULP charge at all, and the Respondent's attempt to apply rules of the Authority's negotiability procedures to its ULP procedures (5 C.F.R. part 2423) is both illogical and inappropriate.

Respondent then returns to the Authority's ULP regulation and cites § 2423.11(g) to argue that the Union should have filed a request for "reconsideration" of the withdrawal of its charges. Resp. MSJ at 8. But § 2423.11 explicitly applies to appeals of a Regional Director's dismissal of a charge, not a charging party's voluntary withdrawal of a charge. If a charging party wishes to file a new charge after having withdrawn an earlier one, there is no dismissal to appeal; instead, the Regional Director will investigate the new charge and make an independent investigation of its merits. The Union and the Regional Director followed the proper procedures here, and there is no basis for dismissing the current charge; instead, I must address the merits of the complaint issued by the Regional Director on that charge.

The LSA was executed on August 8, 2019, and took effect on September 8, 2019

Section 7114(c) of the Statute is the starting point for analysis of this case. It begins: "An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency." 5 U.S.C. §7114(c)(1). Although the Authority initially held that agreements imposed by FSIP were not subject to agency head review,[6] it abandoned that position in *U.S. Dep't of Justice*, 37 FLRA 1346, 1358 (1990). As a result, all agreements reached through referral to the Panel are subject to agency head review. *Id.* at 1358-59.

Section 7114(c) goes on to provide that the agency head "shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation. . . ." 5 U.S.C. § 7114(c)(2). The Authority has long held that this provision "strictly limits the occasions in which the head of the agency may invalidate an agreement" – that is, only when a portion of the agreement conflicts with the Statute or other legal requirement. *NAGE, Local R4-75*, 24 FLRA 56, 61 (1986). And finally (for our purposes), it states: "If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative. . . ." 5 U.S.C. § 7114(c)(3). These requirements apply equally to national collective bargaining agreements and to local supplemental agreements such as this one. *NTEU, Chapter 52*, 23 FLRA 720, 722 (1986).

Even if an agreement takes effect, however, a provision that is contrary to the Statute or other provision of law may still be challenged by either party, either through the grievance procedure or an unfair labor practice proceeding; and if a provision of the agreement is inconsistent with law, it is unenforceable. *Id.* If an agreement is disapproved by the agency head pursuant to 7114(c), this prevents the entire agreement from taking effect; but if, in a ULP case, an agency challenges provisions of an agreement that has taken effect under 7114(c)(3), the Authority evaluates the lawfulness of each provision separately. *DOD Domestic Dependent Elementary and Secondary Schools, Ft. Buchanan, P.R.*, 71 FLRA 127,

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[6] *Int'l Org. of Masters, Mates & Pilots*, 27 FLRA 958 (1987), *vacated and remanded sub nom. Panama Canal Comm'n v. FLRA*, 867 F.2d 905 (5th Cir. 1989).

134 (2019) (*DOD Schools*), *partially vacated on other grounds sub nom. Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10 (DC Cir. 2020).

It is in this context that the current dispute is framed. The first question is when the parties' LSA was executed. If it was executed when the Panel decision was served on the parties (August 8, 2019), then clearly the agency head did not disapprove it in time to prevent it from taking effect; but if it was not executed until it was signed by both the Union and the Agency (December 5, 2019), then the agency head's disapproval on January 3, 2020 was timely, and it never became binding on the parties.

If the agency head's disapproval of the LSA was untimely, then the Respondent has violated § 7116(a)(1) and (5) by refusing to implement the agreement, and § 7116(a)(1) and (6) by refusing to comply with a decision of the FSIP. *DOD Schools*, 71 FLRA at 135. Nevertheless, Respondent's refusal to comply with Article 4's travel reimbursement formula would still be justified, if that provision is inconsistent with the Federal Travel Regulations or other provisions of law or regulation, as the Respondent insists.[7] Therefore, I will have to evaluate the parties' arguments regarding the status of Article 4. If, on the other hand, the agency head timely disapproved the LSA, then the entire agreement is of no effect, and the Respondent's objection to Article 4 is moot.

This leads us back to § 7114(c)(2), which gave the Respondent's agency head "30 days from the date the agreement is executed" to disapprove the LSA. As the parties have already recognized, the key to determining whether the Respondent complied with this requirement is whether the LSA was executed on August 8 or on December 5; and the key to pinning down the execution date is whether the Agency and the Union resumed negotiations on the terms of the LSA after August 8.

In cases where the parties negotiate a collective bargaining agreement themselves, the agreement is considered "executed" when the parties sign it, because their signatures demonstrate that they have reached a "meeting of the minds." *IOMMP*, 36 FLRA at 560-61. But when the parties cannot fully agree on terms, it is the Panel that ends the negotiations by imposing those terms on which the parties could not agree. In those instances, therefore, it is normally the date the Panel's decision is served, not the signature of the parties, that marks the "execution date" of the agreement and begins the thirty-day period for agency head review. *Id.* at 562. Looking at the facts of that case, where the Panel-imposed decision "encompassed the parties' entire agreement," the Authority in *IOMMP* stated: "There is no basis . . . on which to conclude that the parties agreed that further action was necessary to finalize their agreement." *Id.* at 561, 562. A year later, the Authority elaborated on this principle in *POPA:* "the date of execution that triggers the time limits for agency head review under section 7114(c)(2) relates to the date on which no further action is necessary to finalize a complete agreement." 41 FLRA at 803.

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[7] Although the agency head concluded that Articles 3 and 5 of the LSA were contrary to Executive Order 13837, his objections to those provisions were overruled when Executive Order 13837 was revoked on January 22, 2021. Executive Order 14003, § 3(b).

In *IOMMP,* ascertaining the date on which no further action was necessary was fairly straightforward, because the parties agreed that the Panel's decision "encompassed their entire agreement." 36 FLRA at 561. There was no evidence "that the parties intended to alter, by agreement, any of the provisions imposed by the" Panel. *Id.* at 562. But in *Nat'l Treasury Employees Union,* 39 FLRA 848, 849 (1991) (*NTEU*), the Authority distinguished its *IOMMP* ruling and framed the issue presented in our case. In *NTEU*, the Panel referred six articles of the parties' CBA to an interest arbitrator. The parties stipulated that subsequent to the Panel-imposed arbitration decision, the parties had "several discussions and met extensively on at least one occasion to continue substantive negotiations over several articles which remained unresolved after the arbitrator's award." *Id.* at 849. The Authority did not specify precisely on what date the agreement was executed, but it ruled that it was not executed until after those "further, substantive negotiations following the issuance of the interest arbitrator's decision[.]" *Id.*

In our case, we have facts that fall somewhere between the poles of the *IOMMP* and *NTEU* cases. Clearly, the Panel's decision here did not encompass all terms and articles of the LSA; the Panel accepted jurisdiction of an impasse on five issues involving four articles. On the other hand, there is no evidence that the Agency and the Union engaged in "extensive," "substantive" negotiations on issues that "remained unresolved" after the Panel decision. I will examine the evidence to determine whether the facts of this case fit more closely within the *IOMMP* or the *NTEU* paradigm.

First, it is important to note that when the Panel accepted jurisdiction of the parties' impasse, there were no other "unresolved" issues. The parties had reached agreement on every provision of the LSA other than the ones submitted to the Panel. As the Respondent stated in its Answer to the Complaint, "The Agency provided a summary [in April 2019] of the remaining issues to FSIP's Executive Director. The number of issues was reduced from 18 provisions to five (5) issues." GC Ex. 1(h) at 3. Respondent further stated that in May 2019, "FSIP reviewed the submissions from both parties and asserted jurisdiction over all five (5) remaining issues." *Id.*; *see also* FSIP Decision at 3. Accordingly, once the Panel issued its decision, every provision in the LSA had been resolved, and the parties simply needed to follow the Panel's order to incorporate the now-final terms into the agreement. This is a significant difference from the facts in *NTEU*, where several articles of the parties' agreement had remained unresolved when six articles were referred to the Panel. 39 FLRA at 849.

As for the Respondent's contention that it began negotiating further with the Union after it received the Panel's decision, this contention is not supported by the evidence. In its recitation of the events of 2019 provided in its Answer, Respondent lists nothing for August of that year except "FSIP issued a decision and order on the five (5) remaining issues." GC Ex. 1(h) at 4. The only event identified there for September 2019 is, "The Agency reviews options for a judicial review." *Id.* It is only in October that the Answer identifies any actual communication between the Agency and the Union, and nothing there suggests that the parties actually discussed modifying the terms that had already been resolved. *Id.* The other exhibits offered by the parties similarly reflect no action whatever on the Agency's

part – in August or September – to address any concerns about the terms of the LSA. GC Ex. 7-10; Ex. 3-8 of Resp. MSJ.

This is critical, because the thirty-day window for agency head review opened on August 8, and it would close at midnight on September 7, unless the parties demonstrated that they were engaged in ongoing negotiations to revise or change any of the terms they had previously agreed on, or any of the terms imposed by FSIP. While the Authority has stated that parties are free to renegotiate provisions after a Panel determination[8] -- if both sides consent -- the time to do so was in the thirty days after service of the Panel's decision.[9]

Ms. Sanders's email to Mr. Jabs on September 6 reflects that she was waiting to hear whether the agency head had approved the LSA or not. GC Ex. 7 at 2. It is evident from her inquiry ("Have you heard anything from the Agency Head?") that at that point, nobody from the Agency had approached her to renegotiate any of the terms of the agreement, and that she believed Respondent's agency head was reviewing the LSA. *Id.* In reality, nobody at the Agency had sent the LSA to the agency head, and they apparently had done nothing but "review options." When Jabs got around to responding to Sanders's email on September 9, thirty-two days had passed since he had received the Panel decision, yet he told Sanders that he needed to "incorporate the FSIP changes into the CBA" and the parties needed to sign the new document before it could be sent to the agency head for review. *Id.* at 1. And even though Jabs said he would make the necessary changes and send it to Sanders "this week," he did not do so until October 17. GC Ex. 8 at 2.

Two points need to be made here: first, by the time Jabs sent his initial communication to Sanders on September 9, the thirty-day statutory period for agency head review had already expired; and second, the record reflects nothing even remotely resembling "discussions" or "substantive negotiations" to modify the LSA, as the *NTEU* decision would require. 39 FLRA at 849. Thus, within the crucial thirty-day period after service of the Panel decision, there is no evidence whatever that the parties engaged in negotiations that would warrant extending the date on which the LSA was executed. The lack of any action by the Agency to engage the Union in any substantive discussions corroborates the fact that there were no substantive issues to discuss. All that remained was the ministerial task of inserting the FSIP-imposed language into the LSA.[10] Agency officials did not even begin that simple, ministerial task until more than a month after the Panel decision, and it was not completed for more than another month. This is clearly not what § 7114(c) requires.

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[8] *IOMMP*, 36 FLRA at 561-62.

[9] While parties to a CBA are always free to negotiate consensual changes to their agreement, those negotiations will not delay § 7114(c)'s thirty-day period for agency head review unless they occur within the thirty-day window.

[10] Nowadays, most word-processing computer applications are able to perform this function simply by clicking "merge."

The events between October 17 and November 13 are a bit murky, but the record still contains no indication that the parties negotiated. During this period, Jabs sent the Union a copy of the new LSA with the FSIP-imposed changes highlighted; the parties exchanged emails; and the Union signed a "clean" version. The text of the highlighted version sent by Jabs on October 17 (Ex. 3 and 4 of Resp. MSJ) was identical to the version signed by the Union's president on November 13 (GC Ex. 4 of GC MSJ), but it differed in at least one respect from the language ordered by FSIP. In the first paragraph of Article 8, Section 1 (dealing with the rotation of employees to the various duty points), FSIP directed the parties to adopt the language proposed by the Agency: "All employees of the League City Duty Station must rotate a minimum of three (3) times per year." FSIP Decision at 8. But in the version signed by the parties, the document reads: "All employees (excluding employees at permanent duty points) must rotate through each duty point as scheduled at a minimum of once per year." GC Ex. 4 at 7.[11]

This unexplained,[12] but apparently consensual, modification of the terms ordered by the Panel raises the question of whether there were indeed negotiations that would delay the date the LSA was executed. The short answer is that the modification is immaterial to the agency head review process prescribed in § 7114(c), because it occurred long after the thirty-day window had closed. Furthermore, the change in Article 8 appears to have been made without any actual discussion whatsoever. When Jabs emailed the Union the highlighted draft of the new LSA on October 17, he explained that he had highlighted the additions in yellow and the deletions in grey "to conform with the FSIP order." Ex. 3 of Resp. MSJ. He did not indicate that he was offering any new proposals or changes to the agreement, nor did the Union representatives comment in any way about the discrepancy. There is no evidence that the October 17 email was followed up by any direct conversation between the parties about the substance of the LSA, or any other communication that might be interpreted as "negotiation."

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[11] As evidenced by the text highlighted in grey in Exhibit 4 of Resp. MSJ at 7, the old LSA provided for rotating at least once a year. However, before the Panel, both the Agency's and the Union's proposals required rotating at least three times a year, and the Panel's decision reflected that consensus. *See* FSIP Decision at 7-8. Their impasse regarding Article 8, Section 1 was not over the frequency of rotation but rather over whether all or some of the League City employees should be subject to rotation, and the Panel resolved this issue in favor of the Agency. *Id.*

[12] This discrepancy between the language imposed by the Panel and the language in the signed LSA is not cited by any of the parties in the pleadings or in any of the exhibits accompanying the pleadings. Even though the Respondent has repeatedly argued there were "negotiations" between the Agency and the Union between August and November of 2019, the Respondent has not cited this language as evidence of such negotiations.

Therefore, the particular facts that distinguished the *NTEU* case from *IOMMP,* and justified an exception from the rule that a FSIP-imposed agreement is executed when the Panel decision is served, are not present here. Instead, we have an LSA that was fully agreed-upon except for five issues, all of which were resolved by the Panel. On the date the Panel decision was served on the parties, no further action was required to finalize the LSA except for the Panel's language to be inserted into the otherwise-resolved agreement. August 8 is the appropriate date to mark the LSA's "execution," and to start the statutory period of agency head review. Nothing in the conduct of Agency or Union officials in the ensuing month conveyed the slightest impression that unresolved issues remained. Regardless of how the text of Article 8, Section 1 was subsequently modified from the language imposed by the Panel, that modification occurred long after the LSA had become final and binding, in accordance with § 7114(c) of the Statute.

Our case bears some resemblance to the situation presented in *AFGE Local 1815*, 69 FLRA 309 (2016). There, a union argued that the parties' agreement was not executed when the Panel imposed the terms of the sole unresolved issue in the parties' negotiations, because the parties' ground rules entitled it to review a final text of the agreement assembled by the agency. *Id.* at 317, 320. The Authority affirmed findings that the ground rules did not entitle either party to delay execution after all terms of the agreement had been resolved, and that the agreement had been executed when the Panel served its decision. *Id.* at 309, 320. In our case, the Respondent does not even have a ground rule provision to justify its extension of the agency-head review process. As in *AFGE Local 1815*, Respondent's argument (that the LSA was not executed until both parties signed it) would simply encourage hesitant parties to draw out the agency-head-review process endlessly. *Id.* at 320. Once the Panel served its decision on August 8, incorporating the imposed terms into the otherwise-fully-agreed LSA was a formality that did not require weeks or months to complete. There was no acceptable justification for delaying execution until December 5, or almost four months after the Panel decision. The belated, and nearly imperceptible, exchanges of email between the parties in this case from September 9 to December 5 simply do not constitute negotiations of the sort that occurred in *NTEU.*

Accordingly, I conclude that the LSA was executed on August 8, 2019, and that the Respondent had thirty days thereafter to disapprove it; because the agreement was not disapproved in that time, it became final and binding on September 8. The Respondent was required to implement the LSA on and after that date, and its refusal to do so violated § 7116(a)(1), (5), and (6) of the Statute. I must now consider whether Respondent was similarly required to comply with the travel reimbursement provision of Article 4, imposed by the Panel, or whether that provision is inconsistent with the Statute or any other provision of law.

The Panel-imposed language in Article 4 is not unlawful.

The payment of employee travel expenses is governed by the Travel Expense Act (TEA) (5 U.S.C. §§ 5701, 5702, 5704, 5706, 5707) and the Federal Travel Regulations (FTRs) (41 C.F.R. part 300-1 *et seq.*). The Authority has looked in the past to determinations by the Comptroller General, and more recently by its successor, the General Services Board of Contract Appeals (the GSBCA), for guidance on these issues. *U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 780-81 (2010).

The Travel Expense Act provides that "an employee who is engaged on official business for the Government" is entitled to reimbursement of certain travel costs. 5 U.S.C. § 5704. However, "[a]n employee who is engaged in commuting between his or her residence and official duty station is performing personal business, not official business for the Government," so the employee is not entitled reimbursement for that commute. *In re Milano,* 02-1 BCA P 31695 (GSBCA 2001), 2001 WL 1511869. Accordingly, the Authority has struck down, or found nonnegotiable, contract provisions that allow reimbursement for employees' normal commute from home to their official duty stations. *NFFE Local 2199*, 66 FLRA 412, 413 (2011). But it has upheld provisions that reimburse employees for travel other than for their commute. *Federal Deposit Ins. Corp.*, 64 FLRA 1177, 1181-82 (2010).

In their arguments to the Panel, both the Agency and the Union agreed that employees are not permitted under federal law to be reimbursed for their normal commute from home to work, and in its decision the Panel also agreed. FSIP Decision at 6. The dispute in this case arose because employees here do not normally report to their official duty station (the League City field office) to perform their work, but rather they travel directly from their homes to their rotating duty points. As a result, at least some of the employees are forced to travel farther than would if they reported to the League City office. Recognizing this, the Panel held:

> However, the employees should not bear the cost of mileage incurred, not from commuting, but from performing services on behalf of the Agency. As the employee is rotated from one assignment point to the other, the expense for that travel can be unfairly burdensome on the employee.

Id. In order to balance the employees' additional travel burden along with the prohibition of reimbursing commuting costs, the Panel ruled that employees would be reimbursed for the cost of travelling to their duty points, minus twenty-five miles. *Id.* In effect, this established twenty-five miles as a standard "commute" for all employees. While this formula reimburses employees who live far from the League City office more than those who live close to it, the twenty-five mile standard used by the Panel echoes the twenty-five mile radius (from League City to the corporate grain elevators) that the Agency uses to recoup employee travel costs from the corporate customers. *Id.* at 4. Since the League City office was located in order to be within twenty-five miles of the primary grain elevators, the Agency cannot ask the customers to reimburse it for the employees' travel, and it similarly argued to the Panel that employees should not be entitled to travel reimbursement from the Agency. *Id.*

The facts of the *Milano* case, *supra*, are analogous to those in our case. Mr. Milano was assigned to his agency's New York City office, but on some Saturdays he worked at its Newark office. His agency treated his drive to Newark as his commute and refused to reimburse him for it. The GSBCA agreed that Milano was not entitled to reimbursement, but it disagreed that his travel from home to Newark constituted commuting. "Milano did not commute between his residence and Newark, because Newark was not his official duty station." *Id.* Rather his commute was from home to the New York office, while his travel from home to Newark constituted a local transportation cost. However, because "[a]n agency has the discretion to limit payment for local transportation costs to those in excess of an employee's normal commute[,]" and because Milano's drive to Newark was shorter than his drive to New York City, he was not entitled to reimbursement. *Id.* (citing the same decision, *In re Delgado*, 01-1 BCA P 31272 (GSBCA 2001), that Respondent relies on; *see* Resp. MSJ at 7.)

Respondent's error here (as was the error of Milano's agency) is its insistence that their employees' travel from home to their rotating assignments represents their commute, and that the Agency cannot reimburse them for that travel. The Panel decision recognized that the unit employees' travel to their rotating assignments was a local transportation cost, not a commuting expense. FSIP Decision at 5-6. It sought to comply with *Delgado* and *Milano* by reimbursing employees for that portion of their local transportation mileage which exceeds their commute, but instead of subtracting each employee's actual commute, the Panel established a uniform commute of twenty-five miles.

The reimbursement formula established by the Panel is not defective in the way that the Respondent insists: it does not reimburse employees (such as Mr. Coy, the employee Respondent identified as an example) for their normal commute. In that respect, Article 4 does not violate the TEA or the FTRs. But it reimburses them in a way that will benefit some employees (those who live farther from League City) and disadvantage others (those who live closer to League City). Ideally, a reimbursement formula for the employees' travel to their assignment would subtract their commute (the distance from their home to League City) from the distance they travel to their assignment; the Panel's formula instead subtracts a standard distance of twenty-five miles from the distance they travel to their assignment. Is this departure from an ideal formula inconsistent with some other provision of law?

In my view, it does not. I have already explained that it does not violate the TEA. With respect to the FTRs, the Panel correctly explained that those regulations do not precisely apply to local travel by employees travelling within the area of their official station. FSIP Decision at 5-6. And both the *Milano* and *Delgado* decisions indicate that an agency has discretion in deciding what local transportation costs to reimburse, as long as it doesn't reimburse employees for commuting. *Milano, supra* (citing *Delgado*, *supra*). As the interest arbitrator authorized to resolve impasses, the Panel has similar discretion to establish a reimbursement formula. While the formula ordered by the Panel is not precise – employees who live close to the League City office will be reimbursed less than they would under a precise formula, and employees who live far from League City may be reimbursed more – it

ensures that no employee will be reimbursed unless he travels more than twenty-five miles to his temporary duty point. It establishes twenty-five miles as the standard commuting distance, which is not an unreasonable generalization, especially since it utilizes the same measure that the Agency itself uses in its contracts with its corporate customers and in the reimbursement formula it proposed to the Panel. As a result, all employees will receive some reimbursement if they are required to travel more than twenty-five miles to their assignment. This accounts for the unpredictable travel burden on employees assigned to rotating sites – a factor that the Panel recognized but that the Agency considered irrelevant.

Therefore, I conclude that the language imposed by the Panel in Article 4 of the LSA is in accordance with the Statute and other applicable laws, rules, and regulations. The Respondent was not justified in refusing to implement it, as required by the Panel, and its refusal to do so (along with its refusal to implement all other terms of the LSA) violated § 7116(a)(1), (5), and (6) of the Statute.

Remedy

In order to remedy unfair labor practices of this nature, the Authority traditionally orders the offending party, pursuant to §§ 7105(g)(3) and 7118(a)(7) of the Statute, to cease and desist its conduct and to post a notice to employees. *DOD Schools*, 71 FLRA at 135, 159; *NTEU,* 64 FLRA 443, 449 (2010). This is certainly appropriate here. When, as here, the respondent has refused to implement an agreement and an order of the Panel, it is also necessary to order it to comply with the Panel decision and to implement the terms of that agreement. *NTEU* at 449. In this case, an official of the Respondent signed the LSA on December 5, 2019, and that document represents the agreement that must now be fully implemented. It is also well established that, in appropriate cases, employees may need to be made whole (such as with back pay) for damages they incurred because of the unfair labor practices. *Id.*; *see also F.E. Warren A.F.B., Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996).

From the evidence of record, it is unclear whether the Respondent has refused to put into effect all of the terms of the 2019 LSA, or only some of those provisions. The record does show, at the least, that it has refused to implement the travel reimbursement provision (the fifth paragraph) of Article 4 of the LSA, and that employees' requests for reimbursement under this provision have been denied by the Agency. Employees must be made whole for the losses they incurred by this conduct. This will require the Agency not only to properly pay employees who submitted requests for travel reimbursement, but also those employees who withheld a reimbursement request based on the Agency's stated refusal to implement Article 4 as ordered by the Panel. This will require Agency and Union officials, in coordination with compliance officials of the FLRA Regional Office, to review employee travel on and after September 8, 2019, and to reimburse employees who travelled more than twenty-five miles to their rotating assignments. Similarly, if there are other provisions of the LSA that the Respondent has failed to comply with, and which caused employees to lose pay or benefits, Respondent must make them whole as well.

The General Counsel also requests that the LSA remain in effect for three full years after the Respondent implements it. It argues that since Article 2 of the LSA stipulates that the agreement will remain in effect for three years, and since Respondent has thus far refused to fully implement it, employees will have lost the benefit of more than two of the three years since September 8, 2019. However, in accordance with the preceding paragraph of this decision, I am ordering the Respondent to retroactively comply with Article 4 and the rest of the LSA, dating from September 8, 2019. Employees will be made whole for pay and benefits they have lost during that period. It would be improper, therefore, to effectuate the LSA both retroactively and prospectively. Compliance with my order will enable employees to obtain three full years of the agreement, and extending it further would not be proper.[13]

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Agriculture, Agricultural Marketing Service, Federal Grain Inspection Service, League City, Texas (Respondent), 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 Number 19 FSIP 032, or in any other manner failing or refusing to cooperate with impasse procedures and decisions.

(b) Failing or refusing to implement the Local Supplemental Agreement containing the provisions ordered by the Federal Service Impasses Panel in Case Number 19 FSIP 032 and signed by the Respondent on December 5, 2019.

(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 actions in order to effectuate the purposes and policies of the Statute.

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[13] It is possible that the parties may mutually agree to apply the LSA prospectively for three years rather than retroactively for three years from August 8, 2019. Reviewing the Agency's records and employee travel expenses dating back two-and-a-half years may be more difficult (for both the employees and the Agency) than complying with the terms of the LSA prospectively for three years. I am not ruling out such a solution, but that can be done only with the mutual agreement of the parties. Otherwise, the LSA will be implemented for three years beginning on September 8, 2019, and until a successor agreement is negotiated.

(a) Comply with the decision and order of the Federal Service Impasses Panel in Case Number 19 FSIP 032.

(b) Implement the Local Supplemental Agreement containing the provisions ordered by the Federal Service Impasses Panel in Case No. 19 FSIP 032 and signed by the Respondent on December 5, 2019.

(c) Make bargaining unit employees whole for travel reimbursement due since September 8, 2019, in accordance with Article 4 of the Local Supplemental Agreement, and for any other pay or benefits lost because of the failure to implement other provisions of the Local Supplemental Agreement.

(d) Post copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority, at all of Respondent's League City, Texas, facilities. Upon receipt of such forms, they shall be signed by the Agricultural Marketing Service Administrator, 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.

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

(f) Pursuant to § 2423.41 of the Authority's Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 446, Denver, CO 80204, in writing, within thirty days from the date of this Order, as to what compliance actions have been taken.

Issued, Washington, D.C., February 18, 2022.

RICHARD A. PEARSON
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 U.S. Department of Agriculture, Agricultural Marketing Service, Federal Grain Inspection Service, League City, Texas, has violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to distribute 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 in Case Number 19 FSIP 032, or in any other manner fail or refuse to cooperate with impasse procedures and decisions.

WE WILL NOT fail or refuse to implement the Local Supplemental Agreement containing the provisions ordered by the Federal Service Impasses Panel in Case Number 19 FSIP 032 and signed by the Respondent on December 5, 2019.

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 Federal Service Impasses Panel in Case Number 19 FSIP 032.

WE WILL implement the Local Supplemental Agreement containing the provisions ordered by the Federal Service Impasses Panel in Case Number 19 FSIP 032 and signed by us on December 5, 2019.

WE WILL make bargaining employees whole for travel reimbursement due since September 8, 2019, in accordance with Article 4 of the Local Supplemental Agreement, and for any other pay or benefits lost because of the failure to implement other provisions of the Local Supplemental Agreement.

_____

Respondent

Date: _____ 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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO, 80204, and whose telephone number is: (303) 844-5224.