

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF THE
TREASURY, OFFICE OF THE COMPTROLLER OF
THE CURRENCY

And

NATIONAL TREASURY EMPLOYEES UNION

Case No. 19 FSIP 014

DECISION AND ORDER

This case was filed jointly by the Department of the Treasury, Office of the Comptroller of the Currency (Agency or OCC) and the National Treasury Employees Union (Union or NTEU) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, over the parties' successor collective bargaining agreement (CBA). The OCC is an independent bureau of the U.S. Department of the Treasury. Its mission is to charter, supervise, and regulate national banks, federal savings institutions, and federally-licensed branches of foreign banks that operate in the United States. The Union represents a nationwide consolidated bargaining unit consisting of approximately 2,680 profession and non-professional employees that mostly encumber the position of Bank Examiner. The parties are covered by a CBA that became effective in December 2013 for a period of five years. Two articles - Article 15, Office Space Allocation in OCC Leased Offices and Article 39, Employee Compensation and Benefits - were reopened during the term of the agreement and were revised effective 2016.

The OCC does not receive appropriations from Congress. Instead, pursuant to 12 U.S.C. §§ 481 and 482, the OCC's

operations are funded primarily by assessments on national banks and federal savings associations. Sections 481 and 482 of Title 12 provide the Comptroller of the Currency authority to set and adjust compensation for OCC employees, subject to collective bargaining under the Statute. Pursuant to this law, the OCC is required to maintain "comparability with, other Federal banking agencies" when it comes to the "total amount of compensation and benefits" of OCC employees.¹

Unlike the majority of other federal agencies, the Union has a right to negotiate over compensation.² As a result, the parties have executed several CBAs covering compensation and benefits for bargaining-unit employees setting forth specific funding levels for annual merit pay increases and bonuses, as well as formulas for the distribution of these funds based on employee performance ratings.³ In the current negotiations of the successor CBA, the parties disagree over the funding levels for merit pay increases and bonuses, as well as other aspects of employee compensation and benefits.

BARGAINING AND PROCEDURAL HISTORY

On April 30, 2018, the Agency provided notice to the Union of its intent to reopen 13 articles in the CBA. In late May, the parties reached agreement on ground rules and subsequently bargained over the 13 articles that the Agency reopened. The parties negotiated 15 times from June to August 2018. The parties could not reach agreement during the negotiations, so they enlisted the Federal Mediation and Conciliation Service (FMCS) to assist them. The parties engaged in four days of face-to-face mediation with Mediator Scott Blake over the 13 articles in September 2018. The parties reached tentative agreement on four articles; however, the parties could not resolve nine articles. Therefore, the FMCS Mediator released the parties on September 28, 2018.

On April 3, 2019, the Panel asserted jurisdiction over 39 issues contained in the nine articles, declining to assert jurisdiction over one subsection of an article due to a colorable duty-to-bargain argument. The Panel directed the

¹ 12 U.S.C. § 482.

² 12 U.S.C. § 481.

³ A merit pay increase is a permanent increase in an employee's base pay based on the quality of his or her performance. A merit bonus is a lump-sum payment to award an employee because his or her performance is so significant that recognition beyond a merit increase is warranted and/or when an increase to base pay is constrained because the employee is at the top of the pay scale.

parties to resolve the remaining issues through a two-day Informal Conference with Member David R. Osborne at the Panel's Office in Washington, D.C. on May 29 and May 30, 2019. During the Conference, the parties resolved 25 issues. Member Osborne ordered the parties to submit their final offers and written positions, along with any authority relied upon, over the remaining 14 issues to the Panel by June 13, 2019. The parties timely provided their final offers and written positions.

PROPOSALS AND POSITIONS OF THE PARTIES

1. Article 11, Section 4A, Merit Promotion

a. Agency's Final Offer

Absent an emergency, all vacancy announcements will be open for a minimum of five (5) workdays.

The Agency asserts that it has a strong business need to change the time period that vacancy announcements are posted for bargaining-unit positions. Currently, the CBA requires that, absent an emergency, vacancy announcements will be open for a minimum of 10 workdays and may not be opened on a Monday. The Agency is proposing that the minimum time period be reduced to five workdays with no restriction on the opening day.

The Agency contends that reducing the number of days a vacancy announcement is open would allow the Agency to start reviewing applications sooner. In addition, the Agency states that shortening the posting period would have the effect of limiting the number of applications received. In calendar year 2018, the Agency asserts that it had 27 vacancies that resulted in 100 or more applicants per vacancy. The large number of applications increased the time to hire, since Human Resources needed to review each application. Additionally, since the parties agreed that if a selecting official interviews any internal or external applicant on any certificate for a position, the selecting official must interview all bargaining-unit employees (up to a maximum of 10) appearing on any certificate, it further delayed the hiring process. Thus, the Agency states that having the option to reduce the time that vacancy announcements for bargaining-unit positions are posted is important in assisting the Agency efficiently fill positions and accomplish its mission.

b. Union's Final Offer

Absent an emergency, all vacancy announcements will be open to bargaining unit employees for a minimum of ten (10) workdays. In addition, the Employer may post a separate vacancy announcement for external applicants (to which a bargaining unit employee could also apply) for a shorter period. For those vacancy announcements that will only be open for the minimum 10 workdays, the Employer agrees that these announcements will not be opened on a Monday.

The Union's proposal reflects the status quo from the current agreement. The Union is concerned about limiting the posting period to five workdays because employees travelling on work-related assignments may not see the posting, or may not have time to prepare their application prior to the closing of the announcement. The Union contends that it has addressed the Agency's interest by adding language to recognize that it may advertise a separate external posting for a shorter period in order to limit the number of outside applicants, as it deems necessary.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Union's proposal. As the Union points out, it is important to allow a sufficient amount of time so that prospective and current employees can apply to a position. This will provide the Agency a better opportunity to obtain the most qualified candidates. However, neither the Agency nor the Union have submitted evidence that separate vacancy announcements would increase efficiency or assist the Agency in accomplishing its mission. Thus, the Panel orders the parties to adopt the following language:

Absent an emergency, all vacancy announcements will be open for a minimum of ten (10) workdays.

2. Article 22, Section 6, Parental Leave

a. Agency's Final Offer

No corresponding OCC proposal.

The Agency opposes the Union's proposal to mandate up to 480 hours of paid parental leave in connection with the birth or

adoption of a child. The Agency asserts that paid parental leave is not offered throughout the Federal government. Nonetheless, it states that OCC employees are entitled to invoke the Family and Medical Leave Act (FMLA), which allows employees to take up to 12 weeks of unpaid leave (if full-time) during any 12-month period in connection with the birth or adoption of a child.

The Agency states that the OCC already offers a number of flexibilities for new parents under existing policies to avoid or minimize the amount of time in an unpaid status. For example, the Agency asserts that employees may use accrued sick leave for any period of time that sick leave is authorized. The Agency states that sick leave can be carried over from year-to-year, and the Agency can advance up to 240 hours of sick leave. Employees may also use accrued annual leave, and the Agency can advance annual leave to an employee who does not have enough, up to the amount the employee will earn during the remainder of the leave year. The Agency asserts that it also offers two programs to assist employees who do not have enough leave by accepting donations from other employees who wish to share their leave: the Leave Bank and the Leave Transfer Program.

The Agency contends that it does not have a reliable method for tracking the number of births or adoptions by employees each year. However, based on FMLA requests and employee-initiated changes to Federal Health Benefits, the Agency asserts that at least 51 employees would have been eligible for parental leave in 2018. The Agency contends that 480 hours of paid leave for the 51 employees would have resulted in \$1,634,346 for 2018.

b. Union's Final Offer

The Employer will provide an employee up to four hundred eighty (480) hours of paid parental leave in connection with the birth or adoption of a child.

The Union proposes that the OCC provide an employee with up to 480 hours of paid parental leave in connection with the birth or adoption of a child. The Union asserts that this provision would provide paid leave for the period under which the employee is otherwise entitled to unpaid leave under FMLA, without requiring the use of accrued annual or sick leave. The Union asserts that many of the employees who have a need for parental leave are younger and do not have large amounts of accrued annual and sick leave, and they should not have to exhaust all their annual and sick leave by becoming parents.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The Agency has demonstrated that the cost to providing 480 hours of paid parental leave is extraordinary. Additionally, the Agency has also presented evidence that employees have several options available to them if they are wanting to take leave for the birth or adoption of a child. Thus, the Union is ordered to withdraw its proposal.

3. Article 39, Section 1A, Employee Compensation and Benefits

a. Agency's Final Offer

For pay increases effective the first pay period in January 2019, and in each subsequent year until this Agreement is reopened, the Employer will allocate a portion of the budget for merit increases and merit bonuses. In the event across the board pay increases are set at zero for all or some executive branch employees by statute, regulation, presidential order, direction or guidance, the Employer may set Merit Pay Pools at zero. Otherwise, the Merit Pay Pool will be set between 1% and 5% of base pay, and the bonus pool will be set between 0% and 3% of base pay. The Employer will determine whether and by how much to adjust the pool(s) and the amount from each pool to be paid to employees. In determining the amount to payout, the Employer will consider the following:

- (1) the principle that equal pay should be provided for work of equal value;
- (2) the need to protect purchasing power of employees of the Office, taking into consideration the Consumer Price Index (CPI) and other economic indices as appropriate such as the Personal Consumption Expenditures (PCE) and Employment Cost Index (ECI);
- (3) the requirement that the Employer consult with and seek to maintain comparability with other Federal banking agencies;
- (4) the need to remain competitive with the market, taking into consideration data from the World at Work Salary Budget Survey, FIRREA Compensation Survey, and any other survey data as necessary; and
- (5) such other criteria as the Employer considers appropriate, including, but not limited to, the annual

budget and the extent to which the Office is succeeding in fulfilling its mission and accomplishing the Executive Committee's initiatives.

The Agency argues that its proposal sets forth a new merit pay framework under the current performance system and better aligns compensation with the Agency's goals of efficiency and effectiveness. It aims to more directly link employee compensation to individual performance and achievements of the OCC. Its proposal will allow the Comptroller to exercise discretion in setting the merit pay pool and merit bonus pool.

The Agency states that the OCC is a pay-for-performance organization, but under the current CBA and the Union's proposal, the size of the merit pay pool and the merit bonus pool are set at the same amount each year irrespective of the OCC's performance or any other factors. The Agency believes that the merit pools should be based on consideration of relevant factors, which are identified in its proposal. The Agency asserts that its ability to weigh these factors and determine the amount to budget and pay for merit pay is critical to ensuring that the OCC is operating in a fiscally responsible way and to incentivize employees to work toward OCC goals.

Under the Agency's proposal, the OCC could set the merit pay pool at zero in the event that across-the-board pay increases are set at zero for all or some executive branch employees. This would allow the OCC to comply with a government-wide pay freeze rather than be contractually bound to increase employee salaries. The Agency contends that bonuses should be set after considering the achievements and success of the OCC. The Agency states that under the Union's proposal, merit pay and bonuses are provided without regard to economic factors, or the OCC's budget and performance, and that is inconsistent with the OCC's obligation to act as a good steward of funds collected from banks and financial institutions.

b. Union's Final Offer

For pay increases effective the first pay period in January 2019, and in each subsequent year until this Agreement is reopened, the Employer will allocate a portion of the budget for merit increases and merit bonuses. The Merit Pay Pool will be set for at least 3.1% of base pay, and the bonus pool will be set for at least 0.9% of base pay.

The Union proposes to maintain the status quo reflected in the current CBA. The Union contends that the Agency's proposal seeks to provide the OCC with unilateral discretion to set the funding level for merit pay and merit bonuses on an annual basis. The Union argues that this would require the Union to waive its statutory right to bargain over employee compensation and benefits.

The Union contends that the OCC is statutorily required to "seek to maintain comparability" with respect to compensation and benefits with other Federal banking agencies. The Union states that the FDIC is most similar to the OCC in terms of its mission and types of employees and it provides a 3.4 percent merit pay pool to its employees. The Union contends that based on this data, maintaining a 3.1 percent merit pay pool will help to sustain comparability with the other banking agencies.

Finally, the Union states that the Agency's proposed list of criteria does not provide an adequate basis for determining the annual funding level for merit increases. The Union contends that the Agency has not explained how the first factor is relevant to setting funding levels for merit pay pools. The Union states that the fifth factor is too broad. The only factor that the Union appears to agree with is the third factor, which the Union states is arguably the single most important factor on the list, since that is a statutory requirement.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Agency's proposal. First, the Union's contention that the Agency's proposal requires the Union to waive its statutory right to negotiate over compensation and benefits is without merit. The Agency is not refusing to negotiate merit pay or merit bonus increases with the Union, nor is it asking the Union to waive its statutory right to negotiate over these aspects of employee compensation; rather, it is making a proposal to the Union that it will exercise its discretion in a specific manner for the life of the contract with respect to those aspects of employee compensation. While the Union is not obligated to agree to such a proposal, it does not follow that a proposal with which the Union disagrees is unlawful.

In this instance, the Agency is asking the Union to agree to an arrangement regarding merit pay and bonus increases during term negotiations. Parties routinely agree to address specific matters in an agreed-upon way during the life of a collective

bargaining agreement. Further, the Union has provided no case law to suggest that the FLRA would find the Agency's proposals waive the Union's right to negotiate over conditions of employment. Thus, the Union's duty-to-bargain argument is unfounded and the Panel will continue to assert jurisdiction over Article 39.

Turning to the merits of the proposals, to understand the parties' proposals, it is necessary to explain the Agency's current Performance Management Program. Article 39 of the parties' current agreement establishes a system for awarding merit pay and merit bonus increases to employees who receive high performance ratings. The Agency's current performance system uses a four-point rating scale from Level 1 (lowest) to Level 4 (highest), resulting in a summary rating of 1, 2, 3, or 4. The Agency then determines each employee's summary rating for merit purposes, which distinguishes employees who receive a rating of a 3 into two categories: 3 or 3 high depending on the number of 3 and 4 ratings for the different elements. Each employee's annual performance plan also includes job-specific objectives that describe what the employee must do. Each objective is rated as "met" or "not met." Failure to achieve one objective results in an annual performance rating of Level 1 and ineligibility for a merit pay increase for the appraisal period.

The Agency allocates a portion of its budget for the merit increase pool - 3.1 percent of the aggregate base pay of its employees. In addition, the Agency allocates .9 percent of the aggregate base pay of its employees for merit bonuses. The merit pool is divided into separate pools for each division, otherwise known as, "line of business." At the conclusion of each fiscal year, the Agency gathers information regarding the annual performance rating distributions for each line of business. After consulting with the Union, the Agency publishes a matrix for each line of business (more fully discussed below) that will establish a distinct merit increase percentage for each eligible performance rating, i.e., 3, 3 high, and 4.

The Agency's approach to awarding merit increases is fiscally responsible and prudent, as it will allow the Agency to set the merit pool based on what other Federal banking agencies are providing its employees, i.e., complying with its "comparability" requirement under 12 U.S.C. § 482. If the Agency is not meeting its goals, it is contradictory to issue monetary performance awards. As a "pay-for-performance" organization, the Agency should have the ability to weigh how

well it is performing relative to its budget to determine the amount of merit increases to provide its employees; otherwise, maintaining a merit pay and bonus system based on performance is meaningless.⁴ The Agency's proposal allows it to do that, while also rewarding employees for their performance when budget permits.

Conversely, the Union's proposal would lock the Agency into a set amount to pay its employees. That does not allow for any flexibility to adjust the merit increases and bonuses based on what the other Federal banking agencies are providing its employees. The Union states that the OCC is most comparable to the FDIC. Based on the data provided by the Union, from 2017 to 2019, the FDIC distributed 3.40 percent of its budget to merit pay increases, but distributed 0 percent to merit bonuses. The OCC's total distribution of its merit pool exceeded that of the FDIC by .06 percent. Under the Agency's proposal, it would allow greater flexibility to adjust the merit pool and remain comparable with other Federal banking agencies, like the FDIC. Otherwise, the merit pool will be static and will not provide the OCC the best opportunity to remain competitive to other banking agencies.

The Agency bases the criteria upon which to issue merit pay and merit bonuses on five factors. However, as the Union notes, the Agency, in its statement to the Panel, did not explain how it would apply the five factors to determine whether and how much merit pay and bonuses to issue to its employees. Thus, the Panel will remove three of the five criteria, leaving the Agency with two criteria to use: "the requirement that the Employer consult with and seek to maintain comparability with other Federal banking agencies" and "the annual budget and the extent to which the Office is succeeding in fulfilling its mission and accomplishing the Executive Committee's initiatives." This will ensure that the Agency is in compliance with 12 U.S.C. § 482 and that its budget permits the awarding of monetary performance awards.

The Agency states in its proposal that if there is a pay freeze set by statute, regulation, presidential order, direction

⁴ See *U.S. Dep't of Defense Education Activity*, 18 FSIP 061 (2018) (Issue 5) (The Panel stated, "[i]n order for the Agency to be fiscally responsible, the Agency must maintain flexibility in determining when and if to issue awards, so it can balance its awards budget with mission-critical priorities." The Panel ordered the parties to adopt the Agency's proposal, which provided for performance awards contingent on budgetary constraints and the agency's discretion).

or guidance, then the Agency may set its pay pools at zero. The Agency is asking the Union to agree to allow a government-wide regulation that is issued after an agreed-upon CBA to control over the CBA. That notion is contrary to the Statute.⁵ While the Union can voluntarily agree to such a provision, it cannot be compelled to negotiate away a right provided to it under Statute. Because the Union has not agreed to such a waiver, the Panel orders the Agency to remove the term, "regulation" from its proposal.

Additionally, the Panel modifies "president order" to "Executive Order," which will provide clarity over that phrase. Finally, the Panel removes the language that states, "direction or guidance," as it is unclear what that means. As such, the Panel orders the parties to adopt the Agency's proposed language with the suggested modifications, as indicated below.

For pay increases effective the first pay period in January 2019, and in each subsequent year until this Agreement is reopened, the Employer will allocate a portion of the budget for merit increases and merit bonuses. In the event across the board pay increases are set at zero for all or some executive branch employees by statute or Executive Order, the Employer may set Merit Pay Pools at zero. Otherwise, the Merit Pay Pool will be set between 1% and 5% of base pay, and the bonus pool will be set between 0% and 3% of base pay. The Employer will determine whether and by how much to adjust the pool(s) and the amount from each pool to be paid to employees. In determining the amount to payout, the Employer will consider the following:

- (1) the requirement that the Employer consult with and seek to maintain comparability with other Federal banking agencies; and
- (2) such other criteria as the Employer considers appropriate, including, but not limited to, the annual budget and the extent to which the Office is succeeding in fulfilling its mission and accomplishing the Executive Committee's initiatives.

⁵ In *DOC, PTO*, 65 FLRA 817, 819 (2001), the FLRA held it is an unfair labor practice to enforce any rule or regulation which is conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the regulation was prescribed under 5 U.S.C. § 7116(a)(7).

4. Article 39, Section 1B, Salary Structure and Pay Cap

a. Agency's Final Offer

Effective the first pay period in January 2019 and in each subsequent year until this Agreement is reopened, the Employer will consider increasing the base salary structure minimum and maximum rates. In determining whether to provide an increase and, if so, the percentage increase each year, the Employer will consider the criteria set forth in Section 1A.

All bargaining unit employees will be subject to a pay cap. Effective the first pay period in January 2019 and in each subsequent year until this Agreement is reopened, the Employer will increase the pay cap by up to 2 percent rounded up to the next highest \$100. The pay cap will be calculated as the sum of an employee's base pay, geographic pay, and merit pay increase. In determining whether to provide an increase and, if so, the percentage increase each year, the Employer will consider the criteria set forth in Section 1A.

The Agency argues that its proposal seeks to maintain flexibility for the Comptroller to exercise discretion in deciding whether to raise the salary structure and the pay cap in a given year using the criteria set forth in Section 1A. The Agency would no longer be contractually required to provide certain compensation-related adjustments and benefits that it currently provides. Rather than eliminate them altogether from the CBA, the Agency proposes to keep open the possibility that it "may" be provided to bargaining-unit employees.

The Agency assessed its salary ranges as compared to those of other Federal banking agencies in Washington, D.C. It compiled information into several graphs comparing the different pay bands at four other Federal banking agencies: the FDIC; the CFPB; the Securities and Exchange Commission (SEC); and the Federal Reserve Board (FRB). Based on the data, the Agency asserts that the OCC's salaries are comparable at the band levels held by the majority of bargaining-unit employees, aside from FRB, which is notably higher.

Finally, the Agency states that the data presented by the Union, comparing the OCC Bank Examiners and Attorneys to those positions at the FDIC and the CFPB is misleading. The Agency contends that the employee population for each location could be

heavily concentrated with OCC employees at a lower grade compared to other agency employees at a higher grade. The Agency states that this would give the appearance that OCC employees are paid less, but the work being performed by the OCC and other agency employees might be different.

b. Union's Final Offer

Effective the first pay period in January 2019 and in each subsequent year until this Agreement is reopened, the Employer will increase the base salary structure minimum and maximum rates by 2%.

Pay Cap

All bargaining unit employees will be subject to a pay cap. Effective the first pay period in January 2019 and in each subsequent year until this Agreement is reopened, the Employer will increase the pay cap by 2 percent rounded up to the next highest \$100. The pay cap will be calculated as the sum of an employee's base pay, geographic pay, and merit pay increase.

The Union argues that its proposal reflects the status quo under the parties' current CBA, in which the salary structure is increased by 2 percent each year. The Union argues again that the language in the Agency's proposal establishes that the Agency is seeking unilateral authority to determine whether or not to increase the salary structure and the amount of any such increase. This, according to the Union, would require the Union to waive its statutory right to bargain this condition of employment.

On the merits, the Union states that the adjustment of the salary structure will help ensure that the OCC pay rates remain competitive with the labor market and provide comparability with other Federal banking agencies. The Union compared the salaries of employees in the two most predominant occupations at the OCC - Bank Examiner and Attorney (taking into account base pay and any locality pay or geographic differentials) - to those two positions at the FDIC and CFBP. The Union states that the data shows the OCC employees are generally paid less than employees at other Federal banking agencies. The Union also asserts that the FDIC increases its pay scale each year by an amount equal to the increase in the GS scale, which was 1.4 percent in 2019, and

the National Credit Union Administration (NCUA) increases its pay scale by 1.25 percent each year.

Finally, the Union states that adjusting the pay scale annually will help ensure employees at or near the top of the pay range will receive a salary increase based on their performance, rather than having their merit pay increase converted to a lump sum, which occurs for any amount above the top of the pay range. Even though a 2 percent adjustment does not provide employees their full merit increase as a salary, the Union states that it provides a minimal adjustment to keep up with increases in the cost of living and reflects a compromise between receiving the full increase or no increase at all.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. As stated under Section 1A, the Union's argument that the Agency's proposal requires it to waive its right to negotiate over compensation and benefits is without merit. The Panel will continue to assert jurisdiction over the parties' proposals.

The parties' dispute here is over the OCC's base salary minimum and maximum rates and its pay cap. The Union contends that the Agency should continue to increase the base salary and pay cap by two percent each year. The Agency pays employees based off of pay bands ranging from NB-I to NB-IX, with steps included for some of the pay bands. Each pay band has a minimum and maximum base salary, which only includes base pay, not geographic pay (discussed further below). The "pay cap" is the maximum amount an employee can earn in one year, including base pay and geographic pay, i.e., the pay cap can be higher than the maximum base salary.

The Agency provided data that suggests its salaries are comparable with other banking agencies. The data provided compared four of the OCC pay bands of employees at the band levels held by the majority of bargaining-unit employees (NB-III, NB-IV, NB-V, and NB-VI) to employees at the FDIC, FRB, CFPB, and SEC with and without geographic pay. For example, considering base pay and geographic pay from the NB-IV pay band, the OCC pays its employees between \$61,343 and \$113,676 compared to the FDIC (\$59,487 - \$114,631); the CFPB (\$58,011 - \$111,575); the SEC (\$58,489 - \$108,772); and the FRB (\$64,900 - \$140,100). The Agency's data appears to indicate that the OCC employees' salaries are comparable to most of the other Federal banking

agencies. Further, based on the Federal Employee Viewpoint Survey conducted by the Agency in 2018, a majority of the employees indicated that they were satisfied with their pay.

The Union, however, states that OCC salaries are lower than the employees at the FDIC and CFPB. Using the Union's data, the average salary for OCC employees is \$125,642; \$143,994 for FDIC employees; and \$125,006 for CFPB employees. However, as the Agency notes, the Union did not indicate the grade levels of the employees at each location, which could influence the salary averages if, for example, there is a heavy concentration of lower-graded OCC employees at one location compared to a larger amount of higher-graded employees at that same location working for a different agency. Thus, the Union's data is misleading.

The Union also states that two other Federal banking agencies, the FDIC and NCUA, increase their pay scale. However, under the Agency's proposal, it will allow the OCC to maintain that comparability the Union is concerned about by setting and adjusting the minimum and maximum salaries of its employees, as well as the pay cap based on how much other Federal banking agencies are paying its employees if, for example, other Federal banking agencies salaries increase. If the Agency does not have this discretion, the disparity between the OCC salary ranges and pay caps may be even greater. Thus, to allow the Agency the best opportunity to maintain and achieve comparability, the Agency's proposal is adopted.

5. Article 39, Section 1C, Merit Pay Matrix

a. Agency's Final Offer

The calculation of merit pay is based on the mid-point of the pay band.

STRENGTH OF PERFORMANCE	MERIT INCREASE ALLOCATION
4	2.5 (X)
3 high	1.5 (X)
3	1.0 (X)
2 or 1	0

The Agency asserts that its proposal is primarily intended to respond to employee feedback and management's desire to better differentiate the merit pay outcomes for different levels of employee performance. In the 2018-Federal Employee Viewpoint

Survey, the Agency states that only 40.5 percent of employees responded favorably to the statement: "In my work unit, differences in performance are recognized in a meaningful way." The Agency states that only 42.3 percent of employees responded favorably to the statement: "Pay raises depend on how well employees perform their jobs." Finally, the Agency states that only 52.6 percent of employees responded favorably to the statement: "Awards in my work unit depend on how well employees perform their jobs."

To its next concern, the Agency contends that the largest difference in merit pay increases between the highest rating (4) and the next highest rating (3 high) for any line of business was only .75 percent. The Agency asserts that its proposal seeks to increase the difference between top performers and those at the next highest level by increasing the merit allocation for employees rated at a level 4 and decreasing the merit increase allocation for employees rated at 3 high. The current system provides level 4 employees a merit increase allocation of 2.0 and 3 high employees 1.67. The Agency proposes to increase the merit allocation for level 4 employees to 2.5 and decrease the allocation for 3 high employees to 1.5 to incentive and reward top performers with a more pronounced difference in their merit increases, consistent with employee feedback.

Finally, the Agency states that the second point of difference between the parties' proposals is the calculation of merit pay based on the mid-point of the applicable pay band rather than calculating it individually for each employee. After considering its position, the Agency has decided to withdraw this proposal.

b. Union's Final Offer

STRENGTH OF PERFORMANCE	MERIT INCREASE ALLOCATION
4	2.0 (X)
3 high	1.67 (X)
3	1.0 (X)
2 or 1	0

The Union proposes maintaining the status quo under the current performance system, which will only remain in place until the OCC's new merit pay system is implemented in October 2019. The Union contends that even with merit pay funding

maintained at 3.1 percent, based on the ratings distribution last year, the merit pay increase for an employee rated as a 3 would drop as low as 1.64 percent. The Union also contends that if funding for merit pay were set below 3.1 percent, say at 1 percent, the merit pay increase would drop to a range of .52 to .68 percent for employees rated as a level 3 and only 1.30 to 1.69 percent for employees rated as a level 4.

The Union also states that there has been persistent evidence of disparate treatment in the distribution of performance ratings and merit pay under the current system, which is subject to a national grievance. The Union contends that it would be inappropriate to increase the reliance on these ratings to shift more of the money to employees rated as "high performers," which would only exacerbate the disparate treatment.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal and permits the Agency to withdraw its mid-point proposal. The parties' dispute is over the distribution of merit pay under the current Performance Management Program. As stated under Section 1A, after the Agency determines the merit pool, the Agency will gather information regarding the annual performance rating distributions for each line of business. It will then publish a matrix for each line of business that establishes a merit increase percentage for each level of performance.⁶ The percentages vary from one line of business to another because each line of business has different numbers of employees rated at different rating levels. All employees who earn a performance rating of a 3, 3 high, or 4 are eligible to receive an annual merit pay increase.

In 2018, the Agency conducted a Federal Employee Viewpoint Survey in which 77 percent of the employees participated. The results indicated a high percentage of negativity around the following areas: the Agency not recognizing differences in performance in a meaningful way; pay raises related to how well employees performed their jobs; and awards being dependent on how well employees performed their jobs. To account for the employees' feedback and to better differentiate performance amongst the higher performing employees, the Agency's proposal increases the difference between level 4 performers (from 2.0x

⁶ The parties agreed that an employee rated a "4" would receive twice the merit increase compared to an employee rated a "3." The "x" is defined within each line of business based on performance rating distributions.

to 2.5x) and 3 high performers (from 1.67x to 1.5x). This will better incentivize and reward employees who are performing at a high level.

The Union contends the current performance system has resulted in disparate treatment amongst the employees and as a result there is a national grievance pending. Therefore, the Union states that further increases in the differences between merit pay and bonuses to the employees would contribute even more to the disparity. While disparate treatment certainly should not be condoned, the Panel's jurisdiction is limited to examining the parties' positions and interests and ordering language to resolve the impasse. Thus, it would be inappropriate for the Panel to comment on this matter. The national grievance is a better forum to address the Union's allegations.

6. Article 39, Section 1E, Merit Bonuses under the Current Performance System

a. Agency's Final Offer

If the Employer decides to award merit bonuses for work performed during each fiscal year covered by Sections 1C and 1D of this Article, the merit bonus pool will be divided into separate pools for each line of business. At a minimum, the merit bonus pool will be sufficient such that employees rated "4" will receive a minimum of 0.9 percent of their current base pay as a merit bonus and employees rated "3 high" will receive a minimum of 0.5 percent of their current base pay as a merit bonus. Merit bonus determinations will be made fairly and equitably, based on strength of performance against performance objectives and standards, and/or contribution to business unit or Employer objectives.

The Agency states that the parties agree as to how the bonus pool will be divided and distributed to employees. The Agency states that the sole dispute concerns the first clause of the Agency's proposal, which reflects the fact that the merit bonus pool could be set at 0 under Section 1A. The Agency contends that the Union has not demonstrated why the Agency should be contractually bound to pay bonuses if, for example, the Agency has not met its performance goals in a given year.

b. Union's Final Offer

For work performed during each fiscal year covered by Sections 1C and 1D of this Article, the merit bonus pool will be divided into separate pools for each line of business. At a minimum, the merit bonus pool will be sufficient such that employees rated "4" will receive a minimum of 0.9 percent of their current base pay as a merit bonus and employees rated "3 high" will receive a minimum of 0.5 percent of their current base pay as a merit bonus. Merit bonus determinations will be made fairly and equitably, based on strength of performance against performance objectives and standards, and/or contribution to business unit or Employer objectives.

The Union states that its proposal maintains the status quo under the current performance system. The Union argues that the Agency's proposal waives its right to negotiate over the level of employee salary increases and bonuses by allowing management to determine these amounts unilaterally.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over whether the Agency will issue merit bonuses under the current Performance Management Program. The Union argues that the Agency's proposal waives its statutory right to negotiate over compensation and benefits. However, for reasons discussed under Section 1A, the Union's argument is without merit.

The Agency currently awards employees that receive a summary rating of "4" with a merit bonus equal to .9 percent of their current base pay, not to exceed 15 percent of base pay; employees with a summary rating of "3 high" will receive a minimum merit bonus equal to .5 percent of their current base pay, not to exceed 7 percent of current base pay; and employees with a summary rating of "3" are eligible for merit bonuses, but are not subject to a minimum amount. As articulated under Sections 1A and 1B, in order for the Agency to best maintain comparability with other Federal banking agencies, it should have discretion when determining whether to issue merit increases. This discretion will enable the Agency to determine each year how much of a merit bonus to pay its employees based

on relevant factors such as its budget, its success in achieving its goals, and what other banking agencies are providing its employees, ensuring that the OCC's total compensation and benefits are similar to other Federal banking agencies.

7. Article 39, Section 1G, Merit Pay and Bonus Distribution under the Agency's New Performance Management System

a. Agency's Final Offer

1. Upon implementation of the revised Performance Management System, the Merit Pay pool will be set between 1% and 5% in accordance with Section 1A. All employees receiving a summary rating of Successful will receive an equal share of 50% of the Merit Pay pool. The remaining 50% of the Merit Pay pool will be allocated to employees who Achieved/Exceeded or Far Exceeded their Objectives based on the share system described in #2, below.

2. In addition, to the merit pay distribution received under section G (1), employees with a summary rating of Successful will receive an additional merit pay distribution. Successful rated employees will receive additional shares of the Merit Pool as follows:

- a. Achieved/Exceeded Agency Objective(s): one share
- b. Achieved/Exceeded Line of Business Objective(s): one share
- c. Achieved/Exceeded Individual Objectives: two shares
- d. Far Exceeded Agency Objective(s): two shares
- e. Far Exceeded Line of Business Objective(s): two shares
- f. Far Exceeded Individual Objective(s): four shares

Under the Agency's proposal, the merit pay pool would be set between 1 and 5 percent, unless the Agency determines to set it at zero pursuant to Section 1A. Assuming it is set between 1 and 5 percent, the Agency would then divide the merit pay pool in half. All employees receiving a summary rating of "Successful" would receive an equal share of 50 percent of the merit pay pool. The remaining 50 percent of the merit pay pool would be allocated to higher performers. Employees would receive a set number of "shares" of the pool depending on the type of objective, e.g., agency, line of business, or

individual, and whether they "achieved/exceeded" or "far exceeded" each objective.

The Agency states that noticeable differences in merit pay outcomes will motivate and incentivize employees to strive for the highest level of performance and is consistent with employee feedback. The Agency asserts that the rating levels for the objectives distinguishes between good and exceptional performance by including a "far exceeded" category in addition to the "achieved/exceeded" category. The Agency argues that this is critical to differentiating how well employees perform in their objectives.

b. Union's Final Offer

1. Upon implementation of the revised Performance Management System, the Merit Pay pool will be set for at least 3.1% in accordance with Section 1A. All employees receiving a summary rating of Successful will receive an equal share of the Merit Pay pool, except that if the Agency increases the Merit Pay pool above 3.1%, 75% of the amount above 3.1% will be allocated to employees who Exceeded their Objectives based on the share system described in #6, below.

6. Employees who are identified as having exceeded one or more of their Objectives will receive a Merit Bonus. Employees will receive shares of the Merit Pool as follows:

- a. Exceeding Agency Objective(s): one share
- b. Exceeding Line of Business Objective(s): one share
- c. Exceeding Individual Objectives: two shares

The Union again states that the Agency's proposal would require it to waive its statutory right to negotiate over the level of employee salary increases and bonuses by allowing management to set these amounts unilaterally. Turning to the merits of the proposal, the Union asserts that its proposal requires the Agency to maintain the status quo with respect to merit pay increases and bonus increases, while also adding language to address the Agency's new performance system in which the Union proposes that employees receive additional merit pay for exceeding objectives. The Union states that merit pay pools should remain the same as under the current agreement - 3.1 percent and all employees with a summary performance rating of

"Successful" would receive an equal share of the pool. If the Agency increased the funding above 3.1 percent, then 75 percent of the amount above 3.1 percent would be allocated to employees who exceeded their objectives based on the share system proposed by the Union.

The Union states that the Agency's grouping of "achieves" and "exceeds" is inappropriate and confusing, and, as a result, there will likely be difficulty distinguishing between "exceeds" and "far exceeds." The Union asserts that a more simplified evaluation system will likely result in less grievances over merit pay.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Agency's proposal. The parties' dispute is over how the Agency will distribute merit pay under the new Performance Management System. The Union again asserts that the Agency's proposal requires it to waive its statutory right to negotiate over compensation and benefits. However, for reasons already articulated under Section 1A, the Union's argument is without merit.

The Agency is moving to a two-tiered summary rating system, rating employees as "Successful" or "Unacceptable," for their performance elements (called "performance dimensions" under the new system). Each employee will have an Agency objective, a line of business objective, and an individual objective that will be rated on a four-point scale. The assessment of objectives will not affect the employee's performance ratings, but will be used to differentiate performance and input into merit pay decisions.

The Agency's new system is designed to link employee's performance to specific individual and OCC objectives. It will allow employees who are rated Successful to still receive a merit pay increase (50 percent of the pay pool), but it will also allow employees who obtain high ratings in their objectives to obtain a greater percentage of the pool. This will reward employees who are high performers, while also providing benefit to employees who successfully meet their performance dimensions. This system not only rewards employee performance, but aligns

the Agency's goals with that of the employees' goals. Employees will be rewarded for not only achieving their individual objectives, but also for reaching Agency objectives, making an efficient and effective performance system in the best interest of the government.

The Union's proposal would reward higher performing employees only if the Agency increases its merit pay pool. Thus, if the pay pool remains the same, then all employees will receive an equal share of the merit pay pool. Employees who obtain high ratings in their objectives will not receive any additional increase in their merit pay unless the Agency increases the merit pay pool. If one employee receives a successful rating and does not achieve higher marks on their objectives, yet another employee, receiving the same successful rating exceeds his or her objectives, the employees would receive the same share of the merit pay pool, unless the Agency were to increase the pool. The Union's proposal does not adequately differentiate employees from one another, and does not incentivize extraordinary performance.

The Panel does agree with the Union, however, that the Agency's groupings of objectives is confusing. The Agency will rate objectives using a four-point scale: inadequate progress; demonstrated progress; achieved/exceeded; and far exceeded. The Agency groups "achieved" with "exceeded" when determining to reward objectives. Achieves and exceeds mean two different things; however, the Agency is equating them to the same meaning for a rating. To make matters more confusing, the Agency has a separate category for employees that "far exceeds" their objectives. As the Union notes, these groupings have the possibility of leading to litigation when determining whether an employee received a justified rating. Thus, the Panel orders the parties to adjust the names of the groups as follows: "achieved/exceeded" to "achieved;" and "far exceeded" to "exceeded," resulting in four groups, as follows: "inadequate progress;" "demonstrated progress;" "achieved;" and "exceeded." These grouping will more clearly different levels of performance of the employees.

8. Article 39, Section 1G, Section 1G2, 3, 4, and 5 of the Union's proposal, Procedural Protections for Employees under the New System

a. Agency's Final Offer

No corresponding language in OCC proposal

The Agency objects to the Union's proposal and does not have a counter-proposal. The Agency states that Section 2 of the Union's proposal is objectionable because it requires the Agency objectives and line of business objectives to be identical for all employees in the same position at the same band level. The Agency states that its intent in establishing objectives is to have each manager and employee develop individualized objectives at the start of the performance year. The Agency states that it would not be possible to standardize Agency and line of business objectives for all employees in the same position at the same band level without making them very general and rendering them meaningless. The Agency acquiesces that many employees in a position at a particulate band level will have the same or similar objectives, but employees may have different roles or ways in which they will contribute toward Agency and line of business goals. In addition, the Agency states that the Union's desire to have individual objectives be "comparable" for employees in the same position at the same band level could easily lead to litigation because the Union has not defined the term.

b. Union's Final Offer

2. Employees will also be evaluated in a fair and equitable manner based on their performance in meeting objectives. Each objective will fall into one of three categories: Agency Objectives, Line of Business Objectives, and Individual Objectives. Agency Objectives and Line of Business Objectives will be identical for all employees in the same position at the same band level. Individual Objectives will be comparable for employees in the same position at the same band level.

3. Objectives will be:

- Aligned with the OCC's strategic objectives and priorities, as well as those of the specific business unit.

- Individual and Job-specific, identifying what the employee must do.
- Results-focused, stating what the employee will achieve rather than the tasks he or she will complete.
- Measurable (quality, quantity, timeliness, cost effectiveness, customer feedback).
- Realistic, and reasonably within the control of the employee.

4. Employees and their Supervisors will meet at the beginning of each evaluation period to discuss and clarify Objectives, and expectations and deadlines related to each Objective. The Objectives and any identified expectations or deadlines will be documented and provided to the employee within 30 days of the start of the evaluation period. Such discussions and documentation will also occur if there are any changes to the Objectives during the evaluation period.

5. Employees will be provided with regular feedback on their progress in meeting or exceeding their Agency, Line of Business and Individual Objectives in conjunction with the discussions about performance under Article 8, Section 4. Employees will also receive such feedback during regular discussions about work assignments, and expectations and deadlines related to these assignments.

The Union proposes moving language contained in the procedural protections under Article 8, Performance Evaluation of the CBA to Article 39, which will detail the new Performance Management System. To address one of the Agency's concerns, that "[o]bjective be comparable for employees in same position at the same band level," the Union states that under the current performance system, performance standards are identical for all employees in the same position in the same pay band. Under the new system, individual objectives will vary by employee based on specific duties and assignments. In order to protect against favoritism, bias, or other forms of unfairness in setting individual objectives, the Union states that it is necessary to include language to provide a level playing field for employees to achieve their objectives and earn merit pay. The Union also states that its language is critical because it provides employees with regular feedback on their progress in meeting or exceeding their objectives.

The Union states that it would also agree to the Agency's alternative offered during the Informal Conference: "Agency

objectives will be identical for the same position and band level. Measurement of outcomes may be different based on employee role. Line of business and individual objectives and the metrics used to assess all [sic] objectives will be commensurate with the employees' position and band level."

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over whether to include language that addresses the fair and equal evaluation of employees and to ensure employees receive regular feedback during their performance year within Article 39. The Agency is opposed to including this language in Article 39 because it requires identical Agency objectives and business objectives for all employees in the same position at the same pay band. As the Agency notes, this standardization does not account for employees that might have differing duties or responsibilities and each line of business having different objectives. Further, the parties agreed to language in Article 8 that will ensure that the Performance Management System is fair and equitable, while also providing the employees clear and transparent expectations and guidelines throughout the rating period, which should address the Union's interests.

The Union states that it would accept the Agency's offer made during the Informal Conference; however, the Agency made that offer during the negotiations in an effort to reach agreement on Article 39. Because the parties did not reach agreement on Article 39, it has not offered that proposal to the Panel. Therefore, the Panel orders the Union to withdraw its proposal.

9. Article 39, Section 1G3 of the Agency and IG7 of the Union, Merit Bonus Pool under PMR

a. Agency's Final Offer

For work performed during each fiscal year, the Merit Bonus pool (if any) will be divided into separate pools for each line of business. Employees who are identified as having a summary rating of Successful and Achieved/Exceeded or Far Exceeded on all of their

Objectives are eligible for a bonus. Bonus determination will be made utilizing the Indicators of Excellence.

The Merit Bonus pool (if any) will be set between 0 and 3% upon implementation of the revised Performance Management system.

The Agency proposes to set the merit bonus pool between 0 and 3 percent once the new performance system goes into effect, in accordance with Section 1A. The Agency argues that it should not be contractually required to pay bonuses if, for example, the Agency has not met its goals and accomplished important initiatives in a performance year. Instead, the Agency states that setting the amount of the merit bonus pool should be based on Agency performance.

b. Union's Final Offer

For work performed during each fiscal year, the Merit Bonus pool will be divided into separate pools for each line of business. Employees who are identified as having a summary rating of Successful and Achieved/Exceeded or Far Exceeded on all their Objectives are eligible for a bonus. Bonus determination will be made utilizing the Indicators of Excellence.

The Merit Bonus pool will be set between 0.9% and 3% upon implementation of the revised Performance Management system.

The Union proposes that the Agency set funding for merit bonus pools between .9 percent and 3 percent, which maintains the status quo with the current agreement. The Union contends that allowing the Agency to set the amount within a range not agreed to by the Union would amount to a waiver of the Union's statutory right to negotiate over changes in conditions of employment.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Agency's proposal. The parties' dispute is over the percentage that the Agency will pay its employees for merit bonuses under the new Performance Management System. The Union again asserts that the Agency's proposal requires it to waive its statutory right to negotiate over conditions of employment.

However, for reasons already articulated, the Union's argument is without merit.

As explained under the recommendation for the current system, the Agency should maintain its discretion when determining whether and how much to reward employee performance. This will best allow the Agency to evaluate, from year-to-year, that its total compensation and benefits is comparable to other Federal banking agencies. In accordance with the modifications under Issue 7, the Panel modifies the Agency's proposal here from "Achieved/Exceeded" to "Achieves" and from "Far Exceeded" to "Exceeds."

10. Article 39, Section 2B, Unused Special Increase (SI) Funds

a. Agency's Final Offer

The Employer may add any unused Special Increase funds available within a line of business to the merit pay pool for that line of business using the considerations described in Section 1A. Funds designated for Special Increases for pre-commissioned examiners are restricted to that purpose and are not available for distribution into merit or merit bonus pools.

Under the Agency's proposal, it would maintain discretion as to how to re-allocate unused Special Increase (SI) funds. The Agency contends that it should have the discretion to determine the best use of the funds, including whether unused funds should be used for merit pay increases within a line of business.

b. Union's Final Offer

A minimum of 50 percent of any unused Special Increase funds available within a line of business will be added to the merit pay distribution for employees in that line of business, with any remaining amount distributed as bonuses to all employees in that line of business. Funds designated for Special Increases for pre-commissioned examiners are restricted to that purpose and are not available for distribution as bonuses.

The Union states that by providing the Agency unilateral discretion to change the percentage of unused SI funds that would go toward the merit pay pool, the proposal would require the Union to waive its right to negotiate over a change in

conditions of employment. On the merits, the Union contends that the Agency budgets for 10 percent of its employees to receive SI increases each year, but frequently does not meet this target. The unused funds for each line of business are generally added to the merit pool for that line of business. The current CBA provides that a minimum of 50 percent of unused funds for each line of business will be added to the merit pay distribution for that line of business. The Union's proposal reflects the status quo.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over whether the Agency will allocate unused Special Increase funds or "SI" funds to the merit pay pool. A SI is a 5 percent increase to base pay to recognize job growth or demonstrated new skills. For example, obtaining a certification and using those skills on an ongoing basis. It is intended to provide an incentive for employees to continue to develop new skills and demonstrate initiative in their jobs. The Agency allocates funds each year for SIs in each line of business, but the budgeted amount is not typically spent. The Agency would like to have the discretion to determine how to best allocate unused SI funds.

The Union again argues that the Agency's proposal requires it to waive its statutory right to negotiate over compensation and benefits. However, for reasons already discussed, the Union's argument is without merit. On the merits, the Union would like the Agency to continue to add a minimum of 50 percent of unused SI funds to the merit pay pool. Requiring the OCC to allocate a percentage of unused money into the merit pool will not afford the Agency flexibility when determining comparability, nor will it allow the OCC to ensure that its budget permits the distribution of such funds. Conversely, the Agency's proposal will allow it the flexibility to determine if it can re-allocate the SI funds based on comparability to other Federal banking agencies and its available budget. Accordingly, the Panel orders the parties to adopt the Agency's proposal.

11. Article 39, Section 3, Geographic Pay

a. Agency's Final Offer

A. Geographic pay (GEO) is a salary differential that employees receive in addition to their base pay, based on differences in the cost of labor and cost of living in

and/or around their respective duty station. GEO rates shall remain at current levels for 2019, and each subsequent year until this Agreement is reopened.

The OCC provides a salary differential, termed "geographic pay" or "geo pay" to account for variations in the cost of labor and cost of living among OCC duty locations, with cost of labor as the primary factor. All employees receive geo pay ranging from 1 to 38 percent based on the location of their duty station. The Agency asserts that its geo rates reflect the differences in cost of labor and living, as well as the Agency's interest in recruiting and retaining employees, particularly in key locations. Thus, the Agency proposes not to change current geo rates for 2019 and each subsequent year under the successor CBA.

The Agency states that the Union is proposing to change its boundaries for its geo pay areas to reflect the boundaries under the federal locality pay program.⁷ However, the Agency states that the federal locality boundaries are generally much larger than the OCC's, so the Union's proposal would have the effect of increasing the areas in which employees would be entitled to geo pay. The Agency contends that the boundaries that the Office of Personnel Management (OPM) uses to set locality pay for most of the Federal government extends 50 miles from the OPM defined area. All OCC locations are assigned to a zone for geo pay purposes, which extends 30 miles from the OCC location.⁸ The Agency states that OPM should not be used to set the Agency's geo pay because it is not representative of OCC pay band employees. The Agency argues that this is because OPM sets locality pay by comparing GS and non-federal pay in each locality pay area, based on salary surveys conducted by the Bureau of Labor Statistics (BLS).

In addition, the Agency contends that the Union is seeking to maintain the current OCC geo rates, but increase them each year equal to the annual increases in the federal locality pay rates. The Agency argues that the data the Union has compiled indicating that other agencies have increased their locality pay does not establish that the OCC's geo rates should increase. The Agency states that the OCC must seek to maintain comparability of total compensation pursuant to 12 U.S.C. § 482,

⁷ Federal locality pay is set by comparing GS and non-Federal pay in each locality pay area, based on salary surveys conducted by the Bureau of Labor Statistics. OPM Pay & Leave, Salaries & Wages.

⁸ The zones were established using cost of labor data from the Economic Research Institute (ERI).

but is not required to match every element of compensation from the other Federal banking agencies.

b. Union's Final Offer

A. Geographic pay (GEO) is a salary differential that employees receive in addition to their base pay, based on differences in the cost of labor and cost of living in and/or around their respective duty station. Geographic Pay will be adjusted for each location in 2019 and each subsequent year of this agreement by an amount equal to the annual increase in the federal locality pay rate for locations in that locality pay area.

The Union contends that almost all federal employees receive some version of geo pay, most commonly through the federal locality pay program. The Union does state that Federal banking agencies are not obligated to follow the Federal locality pay program. However, the Union states that two Federal banking agencies - the SEC and the CFTC - use both the definition of the federal locality pay areas and the federal locality pay rates established to provide locality pay to their employees, which are included in negotiated agreements between NTEU and each of these agencies.

In 2019, the Union asserts that locality pay increases for employees under the GS pay system were funded at .5 percent. The Union states that for SEC employees, the adjustment of locality pay rates resulted in an average employee pay increase of .7 percent because more of its employees are located in areas with higher labor costs, i.e., major cities. The Union states that two other Federal banking agencies - the FDIC and NCUA - use the definitions of federal locality pay areas, but use their own methodologies, based on the same cost of labor data collected by BLS to calculate their own locality pay rates.⁹ In the FDIC, locality pay increases have been funded at .4 percent for the past several years. The Union contends that NCUA's locality pay increases range from 0 to 3 percent depending on the size of the pay gap in each location based on the BLS data. The Union states that one other agency - CFPB - uses the definitions of federal locality pay areas, with rates of each locality pay area established by the terms of the CBA.

⁹ The Union states that the provisions regarding locality pay for FDIC and NCUA are also included in NTEU's negotiated agreements with these agencies.

The Union asserts that the OCC is the only agency, other than CFPB, which does not provide for annual adjustments of geo or locality pay rates. The Union also states that the OCC has no methodology for determining appropriate geo rates, or for adjusting these rates based on changes to the cost of labor or the cost of living. The Union claims that the OCC geo rates are lower than other regulators; the OCC has adjusted its geo rates only once in the past six years. Thus, the Union contends that current OCC geo pay rates fail to provide comparability with other Federal banking agencies.

The Union also states that the OCC is the only agency which does not use geographic boundaries for pay areas established by the federal locality pay program. Instead, the Union states that the OCC uses a much smaller geographic area - a 30-mile radius around the OCC office. The Union contends that the OCC's current geo pay boundaries are not based on data or other evidence concerning the coverage of the relevant labor market. The Union explains that the smaller boundaries used by the OCC would have a negative impact on employees who are approved to telework. Under a provision of the new Telework Article that was recently negotiated, but not yet implemented, employees may be approved for "remote telework." However, the Union states that under the terms of the Agency's geo pay proposal, employees who live more than 30 miles from the office could lose their geo pay adjustment who elect to telework remotely. As a result, the Union contends that many of these employees will not seek to participate in remote telework and the Agency, therefore, will not realize the savings on office space for those employees.

The Union asserts that its proposal provides the OCC with comparable geographic locality pay increases as received by employees at other Federal financial regulatory agencies. The Union further states that the increases provided under its proposal reflect the most current data, with the amount of the increase for each area based on the relative pay gap, as collected by the BLS. The locality pay system, which the Union bases its proposal, is used by every other federal agency and anchors the OCC's system to real data on relative labor market costs.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Union's proposal. The parties disagree over whether geo pay will be adjusted each year under the parties' successor CBA. The Agency maintains that adjustments to its geo rates and

geographical boundaries are not warranted. The Agency further contends that the federal locality pay system is not representative of its employees. However, other than provide conclusory statements, the Agency has not supported its proposal. The Agency does not explain how it arrives at its geo rates and how maintaining the 2019 geo rates appropriately account for cost of living and cost of labor increases.

The Union, conversely, has demonstrated that several other Federal banking agencies, such as the SEC, CFTC, FDIC, CFBP, and NCUA apply some form of the federal locality pay program when determining locality pay or locality areas. The Union further established that the OCC is the only agency, other than CFBP, that does not provide for annual adjustments of geo or locality pay rates. The Agency argues that the federal locality pay program uses the GS pay scale to calculate locality pay and the OCC employees are pay band employees; therefore, it should not be adopted. However, the Union is not asking the Agency to adopt the GS pay scale, but to incorporate the numerical data used by OPM to determine locality pay increases, comparable to what other Federal banking agencies are using for its employees. The Agency has not provided rationale for why it should be considered unique to those other agencies using the federal locality pay program. Thus, in order for the Agency to remain comparable to other banking agencies, the Panel orders the parties to adopt the federal locality pay program outlined in the Union's proposal.

The Union expressed a concern over the impact of the OCC's 30-mile radius around each OCC office to determine geo pay for remote teleworkers. However, remote telework is a benefit not a requirement, offered to employees to alleviate the burdens of traveling to and from work and creates a better work-life balance. If employees are impacted by the Agency's geographic boundaries then they should weigh the costs and benefits to remote telework. The possibility of remote teleworkers not receiving geo pay is not a compelling reason to require the OCC to re-define its geographic boundaries for the purpose of geo pay. As such, the Panel orders the parties to adopt a modified version of the Union's proposal that will provide geo pay increases comparable with federal locality pay increases, but does not require the Agency to re-define its geographic boundaries of locality pay areas. The parties shall add a concluding sentence to the Union's proposal as follows: "The Agency is not required to re-define its geographic boundaries of locality pay areas."

12. Article 39, Section 4A1 and 4B1, Discretionary
Contribution to 401(k) Accounts

a. Agency's Final Offer

In addition, during the fourth quarter of each calendar year for the term of the Article, the Employer may provide each eligible employee who was on the Employer's payroll as of the last day of the last full pay period of each fiscal year a discretionary contribution to their 401(k) account.

Under the Agency's proposal, it has the discretion to make contributions to each eligible employee's 401(k) account during the fourth quarter of each calendar year. The Agency states that this is in addition to the matching contributions described above, which the Agency has agreed to continue providing. The Agency wants to maintain the discretion to provide the 401(k) contribution, but does not want to be contractually required to do so if the budget does not permit it.

b. Union's Final Offer

During the fourth quarter of each calendar year for the term of the Article, the Employer will provide each eligible employee who was on the Employer's payroll as of the last day of the last full pay period of each fiscal year a discretionary contribution of \$1,000 to their 401(k) account.

The Union states that the Agency has provided an additional annual contribution of \$1,000 to each employee's 401(k) account since at least 2005. The Union contends that when the parties negotiated their first CBA covering compensation, this \$1,000 additional contribution to the 401(k) was a mandatory obligation on the part of the Agency; however, it continued to be called a "discretionary contribution" because that was the term by which most employees knew it. The Union asserts that the Agency has not provided evidence demonstrating the need to reduce or eliminate it. Further, the Union argues that the Agency's proposal would require it to waive its right to negotiate over this benefit.

c. Conclusion

The Panel orders the parties to adopt a modified version of the Agency's proposal. The OCC offers a 401(k) plan that

provides its employees a contribution of 4 percent of salary and up to 1 percent of salary in matching contributions. The Agency provides a generous compensation and benefits package to its employees that includes matching contributions to the Thrift Savings Plan, dental and vision insurance, up to \$75 per pay period toward Federal Employee Health Benefits, reimbursement up to \$200 for out-of-pocket costs related to physical exams, and a Life Cycle Account that provides employees with a \$1,250 allowance to assist with work-life needs.

The Union contends that the Agency's proposal requires it to waive its right to negotiate over such conditions of employment. However, the Union's argument is without merit, for reasons previously discussed. As to the merits, with all of the benefits the Agency already provides its employees, the Agency should maintain the ability to determine whether it can provide 401(k) contributions to the employees on a year-to-year basis, based on the factors indicated under Section 1A. The Agency's proposal will best allow it to maintain comparability with other Federal banking agencies. The Panel orders the modification of the proposal to reflect that the Agency will consider the factors outlined under Section 1A when determining whether to issue the 401(k) contribution, as indicated below.

The Employer will consider the factors outlined under Section 1A when determining whether to issue the 401(k) discretionary contribution.

13. Article 39, Section 7, Travel Stipend Program

a. Agency's Final Offer

The Employer may provide on an annually determined basis a stipend of \$40 to each employee for each night out in a calendar year from the 51st night out through the 70th night out, and \$50 for each night out beginning with the 71st night, for charter specific direct supervision travel.

The Agency asserts that the OCC's Travel Stipend Program is designed to encourage retention by recognizing hardships associated with excessive overnight travel performed by OCC employees. Under the program, employees who travel more than 51 nights a year are paid a stipend for each night out. The program was established to address heavy travel during the financial crisis.

Since this time, the Agency states that it has seen a reduced need for employees to travel. It has determined that some of the work previously performed on site at banks can be performed at the employee's duty station. The Agency also contends that this program is viewed as creating a financial incentive for employees to travel more, not less. Thus, the Agency proposes it would determine annually whether to offer the program for the upcoming year and that it would limit eligible travel to only that related directed to bank supervision. The Agency stresses that its proposal appropriately recognizes and compensates those employees who are high travelers, when that travel directly supports the mission of the Agency.

b. Union's Final Offer

During each year of this Agreement, the Employer shall provide a stipend of \$40 to each employee for each night out in a calendar year from the 51st night out through the 70th night out, and \$50 for each night out beginning with the 71st night, pursuant to the OCC's Travel Stipend Program.

The Union's proposal reflects the status quo under the current CBA and maintains comparability with other financial regulatory agencies with respect to this benefit. The Union asserts that the Travel Stipend Program was established by the OCC to provide a bonus to employees to help offset the burden of heavy travel required in connection with OCC work assignments and has been in place since at least 2000. Originally, the Union states that it was designed principally for employees traveling frequently to perform bank examinations, but was later expanded to cover all travel required for official Agency duties.

The Union states that the current policy is identical to frequent travel stipend programs at other Federal banking agencies with employees who travel frequently, such as the FDIC and the CFPB. The Union further states that NCUA also has such a program, but with a higher monetary compensation to the employees, e.g., \$50 per night (rather than \$40) beginning on the 51st night, \$75 beginning on the 101st night, and \$100 on the 151st night and subsequent nights. Finally, the Union argues that the Agency's proposal requires it to waive its statutory right to bargain over this benefit.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over whether the OCC will continue to provide travel stipends to employees. Employees at the OCC, particularly Bank Examiners, travel to different locations to audit the operations of private banks. This travel was frequent and required extended stays. The Agency contends, however, that employee travel is not as frequent and not as long as it was in the past. Therefore, the Agency would like to remove the automatic stipend to its employees and only permit it for certain types of travel, e.g., bank supervision, bank examination.

The Union contends that the Agency's proposal requires it to waive its right to negotiate over such conditions of employment. However, the Union's argument is without merit, for reasons previously discussed. On the merits, the Union asserts that the OCC should continue to pay its employees a travel stipend, since it maintains comparability with other banking agencies, such as the FDIC, CFPB, and the NCUA. However, if employees are now able to travel less than when the program was implemented, the need for a travel stipend is not as apparent as it once was. Employees can perform their jobs at their duty stations, obviating the need to travel as frequently or as long. When the employees do need to travel, the Agency's proposal permits it to grant a travel stipend to the employees, maintaining its comparability with other Federal banking agencies.

14. Article 39, Section 10, Reimbursement for Airlines Early Check-in Fees

a. Agency's Final Offer

No corresponding management proposal.

The Agency has no counter-proposal to the Union's proposal which requires the OCC to reimburse employees for early check-in fees. The Agency does not view the convenience of an earlier check-in time as being necessary for an employee on government travel.

b. Union's Final Offer

Employees may claim reimbursement for fees charged by an airline to check in early for their flight. The right to

claim reimbursement will continue to be included in the OCC FTRS.

The Union asserts that its proposal maintains the status quo under the current agreement, which permits an employee to claim reimbursement for fees charged by an airline to check-in early for a flight. The Union states that this benefit was designed specifically for travelers on Southwest Airlines, so that they could receive early boarding positions and avoid the likelihood of getting a middle seat. The Union contends that the scope of the benefit is minimal, as it only affects one airline, the costs are minimal, and the OCC policy allow for travelers to receive reimbursement for fees associated with booking an aisle or window seat to avoid a middle seat assignment.

c. Conclusion

The Panel orders the parties to adopt the Agency's proposal. The parties' dispute is over whether to provide employees reimbursement for early check-in fees. Southwest Airlines offers travelers the option of early check-in before boarding a flight starting from \$15. Because Southwest does not assign seats to its travelers, early check-in affords travelers a better position to enter the flight and, thus, a better chance of a window or aisle seat. The Union contends that the Agency should continue to provide this benefit to its employees. The Agency is opposed to continuing to offer this benefit.

Early check-in is not necessary or related to government travel. Early check-in is a convenience that travelers can enjoy at their personal expense. If, under the OCC's policy, employees are permitted reimbursement for fees associated with booking a window or aisle seat, the employees may take advantage of it when flying airlines that permit travelers to book their seating assignment. The Union is ordered to withdraw its proposal.

ORDER

Pursuant to the authority vested in by the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. §2471.6(a)(2), the Federal Service Impasses Panel under §2471.11(a) of its regulations hereby orders the parties to adopt the provisions as stated above.

By direction of the Panel.

A handwritten signature in blue ink, appearing to read 'Mark A. Carter', with a long horizontal stroke extending to the right.

Mark A. Carter
Chairman, FSIP

July 23, 2019
Washington, D.C.

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