United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of U.S. PATENT AND TRADEMARK OFFICE And NATIONAL TREASURY EMPLOYEES UNION CHAPTER 245	Case No. 2024 FSIP 042

The National Treasury Employees Union, Chapter 245 (Union) filed the request for Panel assistance in the above-captioned case, pursuant to 5 U.S.C. § 7119 of the Federal Service Labor Management Relations Statute (the Statute), over a successor collective bargaining agreement (CBA). The U.S. Patent and Trademark Office (Agency or Office) is the federal agency responsible for granting U.S. patents and registering trademarks. The Union represents one of three bargaining units within the Agency. Specifically, the Union's bargaining unit consists of approximately 800 Trademark Attorneys and Examiners within the Trademark Examining Operation and 20 Interlocutory Attorneys within the Trademark Trial and Appeal Board. The parties are currently covered under a CBA, which expired on December 31, 2020, and remains in place pending the execution of a successor.

BACKGROUND AND BARGAINING HISTORY

In September 2019, the Agency notified the Union of its intent to renegotiate the parties' CBA. After negotiating ground rules with the assistance of this Panel in FSIP Case No. 21-052, the parties began negotiations in March 2022. Following extensive negotiations, in September 2023, the parties began engaging in mediation with the assistance of the Federal Mediation and Conciliation Service (FMCS). With the continued assistance of FMCS, the parties participated in twenty mediation sessions. Unable to agree over provisions from several articles, FMCS released the parties to the Panel in March 2024. Shortly thereafter, the Union filed the request for Panel assistance in this matter.

On June 13, 2024, the Panel voted to assert jurisdiction over this matter and ordered the parties to resolve their impasse through a mediation-arbitration with the undersigned, Panel Member Joseph Slater. The parties were advised that if they did not reach settlement in mediation, I would move the parties into arbitration mode which would lead to me issuing a binding decision to resolve the

matters that remained at impasse. In accordance with the Panel's procedural determination, I conducted a virtual mediation-arbitration on July 12, 2024, with representatives of the parties.

During the mediation phase, the parties were able to voluntarily resolve outstanding issues related to all but two articles, Article 9 (Union Rights) and a new article on Student Loan Repayment. I then moved into the arbitration phase on the remaining matters. At arbitration, the parties had the opportunity to provide their last best offers (LBOs) and file Post-Hearing Briefs. Subsequently, the Union withdrew its proposal for a new article on Student Loan Repayment. The parties' briefs were received on July 30, 2024, and they address the only remaining article, Article 9 (Union Rights). I sincerely thank the parties for being prepared and engaged at the mediation-arbitration and for submitting well-organized and comprehensive briefs.

In accordance with 5 U.S.C. § 7119 and 5 C.F.R. § 2471.11 of the Panel's Regulations, I must issue a final decision resolving the parties' remaining issues. I have made this decision after carefully considering the entire record, including the parties' Post-Hearing Briefs and related supporting materials.

ISSUES AT IMPASSE AND PARTIES' ARGUMENTS

The parties have been unable to agree on three matters related to formal discussions within Article 9 (Union Rights) of their successor CBA.[1] First, the parties are at impasse over language involving the Agency's notice to the Union of an upcoming formal discussion. Next, the Union is seeking notice of certain meetings, even if the Agency believes a meeting may not be a formal discussion. Finally, the parties are at impasse over how to handle any settlement agreements, which the Union was not involved in negotiating, that may affect conditions of employment.

Issue #1: Formal Discussion Notice

The Union's LBO proposes:

The Union is entitled to attend "last chance" meetings, settlement discussions to resolve employee problems, and discrimination complaint

[1] 5 U.S.C. § 7114(a)(2)(A) provides:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

settlement meetings to the extent the discussion or meeting constitutes a formal discussion (unless otherwise prohibited by law).

The Agency's LBO proposes:

To the extent a settlement discussion regarding a discrimination complaint and/or grievance and/or proposed adverse, disciplinary and/or performance-based action with a bargaining unit member constitutes a formal discussion under the law, the Office will give the Union notice of any such meeting.

Union's Position

The Union asserts in its proposal that it is entitled under the Statute to attend "last chance" meetings, settlement discussions to resolve employee problems, and discrimination complaint settlement meetings, to the extent they are formal discussions. In support of its proposal, the Union cited FLRA cases involving formal discussions and a case involving "last chance" agreements concerning conditions of employment under the Statute.[2]

Agency's Position

The Agency identifies in its proposal scenarios (*i.e.*, discrimination complaints, grievances, and where an employee is facing a proposed adverse, disciplinary, or performance-based action), in which the Union would be entitled to receive notice if they constituted a formal discussion. The Agency claims its proposal is clear, descriptive, and reflects the standard way agencies apply formal discussion provisions under the Statute.

Issue #2: Specific Meeting Notice

The Union's LBO proposes the following:

The Office will give the Union notice of any such meeting, including whether the Office believes the meeting is a formal discussion (with PII redacted). The Office shall provide the Union with the opportunity to attend all such meetings that constitute formal discussions.

The Agency's LBO does not propose including language related to notice to any meetings that it does not deem formal.

Union's Position

The Union takes the position that it is more cost and time efficient for the Agency to notify the Union of "any 'last chance' meetings, settlement discussions to resolve employee problems, and discrimination complaint settlement meetings." The

[2] *Civil Engineers Squadron, Norton AFB*, 22 FLRA 843 (1986) and *AFLC*, 38 FLRA 309 (1990).

Union claims that the parties could then, through discussion, "work through whether the meeting would constitute a 'formal discussion,' and, when the decision is not clear, the Union can be present in an abundance of caution."[3]

Agency's Position

The Agency takes issue with the Union's proposal that the Agency will provide the Union with notice of all settlement meetings, regardless if they are formal discussions. In support, the Agency cited several FLRA cases involving formal discussions and a case that found a "last chance" meeting was not a formal discussion under the Statute.[4] The Agency also argues that the Union's proposal is inherently impractical because the very nature of an informal settlement discussion initiated by an employee would make it impossible for the Agency to give the Union advance notice. Moreover, the Agency claims that the Union has not provided justification as to why it needs notices of meetings that the Agency claims the Union has no right to attend.

Issue #3: Settlement Agreements

The Union's LBO proposes the following:

Where the Union does not receive notice, and the settlement agreement impacts bargaining unit working conditions (e.g., grants, promises, or gives priority consideration for a promotion, reassignment, training, etc.) the settlement agreement will contain the following statement:

"This settlement agreement is subject to approval for compliance with negotiated agreements between the Office and the Union. Accordingly, it will be forwarded to the Union President and Vice President, with a copy to the appropriate servicing personnel office, for a ten (10) day five (5) workday period of consideration. If the Union alleges the settlement conflicts with any negotiated agreements between the Office and the Union, or other non-discretionary requirements, you will be notified."

The Agency's LBO proposes:

In the absence of notice to the Union and the opportunity to participate in a settlement discussion which constitutes a formal discussion, and which results in a settlement agreement that would modify bargaining unit working conditions, the Office shall provide a sanitized copy (e.g., with PII or other confidential, sensitive, and/or medical information

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[3] Union's Post-Hearing Brief at 3.

[4] *Dep't of Just., Bureau of Prisons, Fed. Corr. Inst., Ray Brook, N.Y.*, 29 FLRA 584, 589 (1987); *GSA Region 9*, 48 FLRA 1348, 1355 (1994); and *AFGE Council 214*, 38 FLRA 309, 329-31 (1990), *enf'd sub nom.*, *Dep't of the Air Force v. FLRA*, 949 F.2d 475 (D.C. Cir. 1991.

redacted) of the settlement to the Union within five working days after the settlement has been executed.

Union's Position

The Union claims that its proposal, for the Agency to notify it of any settlement agreement or offer proposed by the Agency prior to execution, will ensure that there is accountability to all bargaining unit employees. Additionally, the Union asserts that it would be able to provide the Agency with an opportunity to consider potential issues with the proposed agreement, which the Agency may have otherwise missed.

The Union does not agree with the Agency's assertion that the lack of incidences of such agreements justifies the Agency's proposal, which would not afford the Union pre-execution review. Instead, the Union claims that not implementing the Union's proposal will "certainly lead to more costs and more litigation to remediate the matters."[5] As evidence of comparability, the Union presents several examples of similar pre-execution provisions contained in other bargaining unit CBAs within the federal sector.

Agency's Position

The Agency proposes providing the Union with copies of settlement agreements resulting from formal discussions, which the Agency did not provide the Union with notice or opportunity to attend. The Agency asserts that it is proposing to provide sanitized copies of such settlement agreements to address the Union's concerns and "close the information gap."

The Agency opposes the Union's proposal, which would require any settlement agreement to contain a "subject to approval" clause. Specifically, the Agency notes that the Union has not provided any examples of situations in which the Agency has entered into a settlement agreement with an employee that breached the terms of the parties' CBA. Rather, the Agency argues that the Union's examples of informal resolution further support the Agency's claim that the Union is able to participate in settlement discussions when expressly requested by the employee.

The Agency rejects the Union's argument for inclusion of pre-execution language based on comparable language in other federal sector CBAs, arguing that the Union failed to establish that its bargaining unit is similarly situated. Instead, the Agency claims the Union's bargaining unit, compared to the units in the CBAs cited by the Union, is relatively small, comprised entirely of attorneys, and has had very limited formal and informal grievances. Specifically, the Agency noted that there have been three grievances between the parties within the past three fiscal years. The Agency further noted that within that timeframe, the Agency has

[5] Union's Post-Hearing Brief at 3.

entered into one settlement agreement with an employee. Finally, the Agency claims that the Union's proposal could exceed the Union's rights under the Statute.

ANALYSIS AND CONCLUSION

The Panel often tasks a party proposing to change the parties' status quo with providing evidence of the need for such change, and the parties in this case were so instructed in this case. As the parties have both proposed changes, to differing degrees, from the status quo, I have considered their obligations to demonstrate the need for a change and find as follows.

Issue #1: Formal Discussion Notice

The parties agree that, under the Statute, the Union is entitled to notice and the opportunity to attend any formal discussion. The parties have also both proposed identifying specific types of meetings that may be formal discussions. However, they cannot agree on the list of meetings that may qualify as formal discussions.

The Statute defines a formal discussion and case law has reviewed the numerous nuances related to what constitutes a formal discussion.[6] That is, regardless of the parties having a list of the types of meetings that may be formal discussions, the Statute and applicable case law controls. Here, the parties cannot agree on a comprehensive list of meetings that may be formal discussions, and neither party has provided any reason that such a list is either necessary or particularly helpful. Accordingly, I find no reason for the parties to include such a list.

Therefore, I order the parties to adopt the following language:

> *Unless otherwise prohibited by law, the Union is entitled to attend any discussion or meeting that constitutes a formal discussion under 5 U.S.C. § 7114. Accordingly, the Office will give the Union notice and the opportunity to attend any such formal discussion.*

Issue #2: Specific Meeting Notice

On first reading the Union's language in their proposed Section B, one might assume that the Union's proposal involved notice of formal discussions. However, based on the Union's Post-Hearing Brief, I understand that the Union is proposing the Agency notify the Union of "any 'last chance' meetings, settlement discussions to resolve employee problems, and discrimination complaint settlement meetings."

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[6] *E.g.*, *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Ray Brook, N.Y.*, 29 FLRA 584, 588-89 (1987); *F.E. Warren AFB, Cheyenne, Wyoming*, 52 FLRA 149, 156-58 (1996).

Under the Union's rationale, the parties would then meet to "work through whether the meeting would constitute a 'formal discussion,' and, when the decision is not clear, the Union can be present in an abundance of caution."[7]

While I am sympathetic to the Union's interest in enforcing and preserving its statutory right to notice and the opportunity to participate in formal discussions, the Union has not provided evidence that this new additional safeguard is needed. That is, neither at Arbitration or in their Post-Hearing brief, has the Union provided any examples of the Agency failing to provide it with notice and the opportunity to attend a formal discussion. Moreover, the Union's examples of incidents where it was able to informally and proactively resolve disputes provides further evidence of an absence of a need to change the status quo. On the other hand, requiring the Agency to provide the Union with notice of a certain type of meeting, even when the meeting is not a formal discussion, would create a not-insignificant burden on the Agency. Such a new burden has not been justified.

Therefore, I order the Union to withdraw its proposed Section B.

Issue #3: Settlement Agreements

The parties are in general agreement to begin having the Agency provide the Union with copies of settlement agreements that the Union did not negotiate. They cannot agree on when the Agency will provide the Union with copies of such settlement agreements, or if the Union will be afforded pre-execution review of the settlement agreements.

First, I am not inclined to order CBA language that could be read to limit union rights were the Agency to violate the Statute by not affording the Union notice and the opportunity to attend a formal discussion. Accordingly, I do not accept the Agency's proposal that the Union shall receive copies of settlement agreements, "(i)n the absence of notice to the Union and the opportunity to participate in a settlement discussion which constitutes a formal discussion…" Further, the parties have already agreed to include the following language in the same article, "(n)othing in this Article shall limit the Union's rights under this Agreement, law, rule, or regulation to attend formal discussions." Here, the Union's contractual right to such settlement agreements does not come at the cost of their statutory rights, including the right to statutory remedies if the Agency fails to provide notice of a formal discussion.

In order to "close the information gap," when the Union is not involved in the negotiation of a settlement agreement, the Agency shall provide copies of settlement agreements that impact bargaining unit working conditions (e.g., grants, promises, or gives priority consideration for a promotion, reassignment, training, etc.) within

[7] *Id.*

five working days. This gives the Union the contractual right to receive notice of the agreement in a timely manner, so that it may grieve the terms of the settlement, if necessary. This will also afford the Union the ability to receive a copy of the settlement agreement, regardless of whether the Union was entitled to attend any discussions leading to the agreement. The Union expressed its concern about potential disagreements between the parties over whether a certain settlement agreement meeting constituted a formal discussion. By providing for a contractual right to obtain such settlement agreements, the Union's access to the agreements is not subject to the Agency's formal discussion assessment.

Next, however, I am also not inclined to order a solution to a problem that the Union has not established. Specifically, the Union argues that it needs pre-execution review of settlement agreements that it did not negotiate. The Union presented several examples of similar pre-execution provisions contained in other bargaining unit CBAs within the federal sector. While the Union has certainly shown that its proposal is comparable, the Union has not provided a demonstrated need for the proposed change in the status quo.

The Union did not, at Arbitration or in its Post-Hearing Brief, provide any evidence of a need for a pre-execution review of settlement agreements. There are no concrete examples of the Agency entering into agreements with individual employees that implicate broader union bargaining rights and not sharing such agreements with the union in ways that prejudiced union rights. Indeed, settlement agreements with individual employees themselves are, per the evidence submitted, quite rare. In its Post-Hearing Brief, the Union claims that not implementing the Union's proposal for pre-execution review of all settlement agreements will "certainly lead to more costs and more litigation to remediate the matters." But the Union has provided no evidence that the status quo, in which the Union does not have a pre-execution review, has resulted in any costs or litigation to remediate matters. Here, the Union's request for pre-execution review may be appropriate under different circumstances, but as of now, it is a solution for a problem that does not exist.

Therefore, I order the parties to adopt the following language:

> *When the Union is not involved in the negotiation of a settlement agreement, which impacts bargaining unit working conditions (e.g., grants, promises, or gives priority consideration for a promotion, reassignment, training, etc.), the Office shall provide the Union with a copy (with PII redacted) within five working days after the settlement has been executed. Nothing in this Article shall limit the Union's remedies under this Agreement, law, rule, or regulation involving formal discussions.*

ORDER

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Section 7119 of the Statute, I hereby order the parties to adopt the language outlined herein to resolve their impasse.

Joseph Slater
Joseph Slater
Arbitrator

August 26, 2024
Washington, D.C.