

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

PENSION BENEFIT AND GUARANTY
CORPORATION

And

INDEPENDENT UNION OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE

Case No. 18 FSIP 081

DECISION AND ORDER

This case, filed by the Independent Union of Pension Employees for Democracy and Justice (IUPEDJ or Union) on August 24, 2018, concerns negotiations with the Pension Benefit Guaranty Corporation (PBGC or Management or Agency) over changes to Suitability Investigations under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119.

Following an investigation of the Union's request for assistance, on November 27, 2018, the Panel asserted jurisdiction over some proposals and declined jurisdiction over some proposals. As for the proposals that the Panel determined to assert jurisdiction, under 5 C.F.R. §2471.6(a)(2) of its regulations, the Panel determined that the impasse over those proposals would be resolved through a Written Submission procedure. The parties timely submitted their Written Submissions to each other and the Panel.

BACKGROUND

Created by the Employee Retirement Income Security Act of 1974 (ERISA), the Pension Benefit Guarantee Corporation is a federal agency whose mission is to protect the retirement incomes of more than 40 million American workers in nearly 24,000 private-sector defined benefit pension plans. In November 2011, the Independent Union of Pension Employees for Democracy and Justice was certified as the exclusive representative of approximately 600 bargaining unit employees (BUEs) who work in a variety of financial positions such as, among others, ERISA Attorney, Auditor, Actuary, Accountant, and Financial Analyst. Prior to the certification of IUPEDJ, employees were represented by the Union of Pension Employees (UPE), and the parties were covered

by a collective bargaining agreement (CBA) that became effective May 3, 2011. The CBA continued to cover the IUPEDJ bargaining unit when they took over in 2011. The CBA expired in 2015, but continues to bind the parties. The parties are currently in negotiations over a new successor CBA.

The parties began discussions regarding Suitability Investigations in 2013. Executive Order 10577 (codified in relevant part at 5 CFR 1.1, 2.1(a) and 5.2) directs OPM to examine "suitability" for competitive Federal employment. This section of the regulations addresses determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service. Under Title 5, Code of Federal Regulations, part 731 (5 CFR 731), OPM, and agencies with delegated authority, are vested with the authority to make suitability determinations and take suitability actions in cases involving positions that are subject to investigation. Positions covered by 5 CFR 731 are those in the competitive service, those in the excepted service where the incumbent can be noncompetitively converted to the competitive service, or a career appointment to the Senior Executive Service. The positions subject to investigation requirements are described at 5 CFR 731.104.

The parties had a briefing and some negotiations in 2014 . However, the topic was tabled due to the Agency's lack of funding to begin conducting investigations. In 2016, after the occurrence of the OPM Privacy Breach, the Agency confirmed that the investigations continued to be on hold. On August 26, 2016, the Agency announced that it was publishing a new policy on the topic and started to conduct Suitability Investigations in June 2017, without completing bargaining. The Union filed an institutional grievance (for failure to bargain) and a group grievance (on behalf of the employees who have been subjected to the investigations). As a result of the grievances, the Agency provided notice to the Union and agreed to bargain. The biggest change involved the reinvestigation of employees. Initially, all of the bargaining unit employees were subject to "new hire" suitability investigations, but not reinvestigation. But as a result of the new requirements of the Executive Order, all the impacted employees, as a result of their assigned positions, were changed from the designation of "low risk" to the designation of "moderate" and "high" risk employees and, therefore, are now subject to periodic reinvestigations.

The Union submitted new proposals (including 31 provisions). The Agency briefed the Union on June 21, 2017. The parties bargained on several dates. In a Panel Meeting on November 27, 2018, the Panel determined that it would decline jurisdiction over some of the proposals (## 1 – 15, 17 - 20, 23 - 25, 28 - 31) as the duty to bargain claims raised by the Agency were colorable. The parties were advised that they could seek resolve over the negotiability of those provisions in another, more appropriate forum (i.e., the FLRA). The Panel asserted jurisdiction over 2 proposals (16 – Procedural error rendering the suitability decision moot and 32 – Union ratification procedures).

REMAINING PROPOSALS

16. Procedural error rendering the suitability decision moot

Union Proposal: If the Employer finds that there is a suitability problem with respect to any BU employee *or finds that a BU employee is unsuitable*, the Employer shall follow all applicable procedures, and shall notify in writing the employee *of all specific reasons that he or she is unsuitable and shall notify the employee of all rights to challenge, appeal, complain and grieve, including all deadlines (e.g., MSPB, EEOC, grievance, etc.) and rights to representation.* The notice shall also inform the employee of the right to contact the Union. Failure to follow all applicable procedures and to provide full and complete notice shall render the notice and decision ~~null and void~~ *ineffective until the Employer fully complies with this provision.*

Agency Proposal: If a BU employee is found to be unsuitable, the Employer will give reasonable notice to the employee in writing, citing specific reasons why they are deemed unsuitable. This includes information on materials relied upon to make the decision; time limits for response and information regarding their rights to respond and have representation.

32. Union ratification procedures

Union Proposal: The Parties agree that this agreement is subject to Union ratification and Agency Head Review. The process for this agreement is outlined below. This provision does not serve as a precedent for future agreements. The process is as follows:

- a. The Union's ratification will be completed within forty five (45) days of the signing of the tentative agreement.
- b. The outcome of the ratification process will be communicated to the Agency no later than the forty sixth (46) day from the date of the tentative agreement.
- c. If the complete tentative agreement is not ratified, the Parties will resume negotiations at a mutually agreeable date and time, but no later than 30 days after the Union notifies the Agency that that the tentative agreement had not been ratified.
- d. Union ratification and Agency Head Review will commence at the end of the renegotiations
- e. If at the end of renegotiations, the Parties remain at Impasse, either Party may request the services of the Federal Service Impasses Panel (FSIP). The Request must be within fourteen (14) days.

Agency Proposal: The Parties agree that this agreement ("Agreement") is subject to Union ratification before Agency Head Review, and no rights or obligations will attach until then, as outlined below:

- 1 The Union's ratification process must be completed within thirty (30) calendar days of the signing of the tentative agreement (the "Tentative Agreement").
- 2 The outcome of the ratification process will be communicated to the Agency no later than thirty-one (31) calendar days from the date of the Tentative Agreement. Failure to communicate the results of the ratification by the thirty-first day constitutes an agreement. If ratified, the parties will execute the Tentative Agreement.
- 3 If the Tentative Agreement is not ratified, the Parties will resume negotiations at a mutually agreeable date and time, but no later than fifteen (15) calendar days after the Union notifies the Agency that the Tentative Agreement had not been ratified.
- 4 The Renegotiation Period and, if required, FMCS mediated sessions, shall be completed within sixty (60) calendar days from the date of the Tentative Agreement (the "Renegotiation Period").
- 5 If mediation is required and the start delayed by the assigned mediator, the Renegotiation Period will be extended by the number of days of the delay.
- 6 Union ratification of the revised Tentative Agreement shall be completed no later than ten (10) calendar dates from the date the Renegotiation Period was completed. If the Tentative Agreement is ratified, then Agency Head Review shall commence as detailed in #3 below. If the Tentative Agreement is not ratified, then:
 - a. If the Parties remain at impasse on any provision(s), either Party may request the services of the Federal Service Impasses Panel (FSIP). The request must be submitted to the FSIP within seven (7) calendar days of the completion of the Renegotiation Period. At the completion of the FSIP process, the parties will execute the Tentative Agreement.
 - b. In the event neither Party solicits FSIP assistance during the seven (7) calendar day period, the Parties agree that all interim provisions completed during the initial negotiations and the Renegotiation Period shall be considered ratified and the Tentative Agreement executed.
- 7 Agency Head Review shall commence when the Agreement is executed by the Parties as defined above. If either party requests the services of FSIP, Agency Head Review shall commence at the conclusion of any FSIP proceeding.

COLLATERAL ISSUE

In response to the Panel's November 27, 2018-Jurisdictional Determination, the Union included in its submission a request for reconsideration of the Panel's decision to decline jurisdiction over several proposals where the Agency raised a colorable duty to bargain claim. Specifically, the Union objected to the Agency raising negotiability concerns before the Panel. First, the Union argues that they did not request a written declaration of negotiability. The Panel has determined that the argument is misplaced. The Union may challenge the Agency's assertion of negotiability before the FLRA, not the FSIP.

Second, the Union argues that the Union had not been given an equal and fair opportunity to challenge the Agency's colorable claims. The Union asserts that it did not have sufficient time to respond to the Agency's negotiability position. As early as July 2017, in its counterproposals to the Union (which was also the Agency's Last Best Offers), the Agency raised negotiability concerns for a number of the Union's proposals. In October 2018, during the Panel's initial investigation, both parties were provided a consolidated, written summary of each of the parties' Last Best Offers and positions. That document again identified the Agency's negotiability position on a number of proposals. In November 2018, the Agency provided an additional written submission regarding negotiability for each remaining proposal on the table. The Union was provided with that written submission. All of these formal submissions demonstrate that the Union was on notice prior to the Panel meeting on November 27, 2018, that the Agency was raising specific negotiability concerns. With each of those opportunities, the Union raised no arguments to challenge the negotiability concerns. Even in its December 14, 2018-written submission, the Union made no specific negotiability challenge.

The Agency made colorable duty to bargain claims over a number of the Union's proposals. The Union presented no substantive response to the negotiability claims. The Panel determined to decline jurisdiction over those provisions. If the Union believes those provisions are in fact negotiable, they are free to file a negotiability claim with the FLRA. The Union's request for reconsideration of the Panel's decision to decline jurisdiction is denied.

POSITION OF PARTIES AND PANEL DECISION

16. Procedural error rendering the suitability decision moot

The Union argues that the Agency suspiciously elevated the status of the employees from "low risk" to "moderate" and "high" risk as a means to target and get rid of long service employees. The Agency denies this motive and there was no evidence presented to establish such motive. The Union wants to ensure that these employees have due process protection. This proposal addresses the circumstances where an employee's suitability determination in a reinvestigation is unfavorable. The Union is

seeking to ensure that the Agency follows all the applicable procedures and provides the employee notification of their right to challenge the determination and to seek representation. The Union's proposal goes further by allowing the suitability determination to be held in abeyance until any procedural error (even a harmless error) by the Agency has been corrected.

The Agency objects to the Union's language because they believe the Union is seeking to expand its ability to challenge the determination to inappropriate venues, such as the grievance procedure or some other procedure that the Union hasn't yet defined with the proposal – "etc." The Agency argues that the MSPB has the jurisdiction of review over all aspects of a suitability determination, except the ultimate action taken. In that case, OPM or the appropriate delegated agency has the jurisdiction to review or modify the ultimate action taken. The Agency believes the Union's language is inappropriate because it provides review of suitability determinations and procedures to other entities outside of those limited authorities. The Agency's proposal would provide for due process as established by law. The Union objects to the Agency's proposal because they believe the Agency is only willing to abide by some procedures (i.e., 5 C.F.R. §731.401 *et seq.*). The Union believes other procedures also apply (e.g., §731.501 and 5 C.F.R. §1201.21).

The language in Proposal 16 should ensure that the employees are provided due process, including ensuring an employee is informed of their rights. Should there be a breach of an employee's due process rights, the notification should be clear on how and where an employee can find redress for that breach. The appropriate authorities will determine the remedy for any violations. The Panel will order the following modified language:

16. If a BU employee is found to be unsuitable, the Employer shall follow all applicable procedures and will give written notice to the employee, citing specific reasons why they are deemed unsuitable. This includes information on materials relied upon to make the decision, time limits for responding or challenging the finding, information regarding their rights to representation, and information on where to address concerns about their rights.

32. Union ratification procedures

This dispute involves the timeline and procedure for Union ratification. The Union's last best offer provides 45 days for the Union to conduct a membership vote on the terms of the agreement. The Union argues that the 45-day timeline is reasonable and necessary because of the terms of the Union's constitution and bylaws (attached to the Union's submission)¹. The Agency proposes a shorter timeline of 30 days. The Agency argues that the shorter timeline is sufficient to accommodate the ratification requirements under the Union's constitution and bylaws. The Agency further argues

¹ Article XIII of the Bylaws require 15-day advanced notice of membership meeting for votes on the ratification of a collective bargaining agreement.

that the past practice has been 30 days, with no concerns raised. That point is supported by the fact that the Union even proposed a 30-day timeline in July 2017. The Agency sees no reason to change the past practice and the Union offered no reason to change. The Union only offers the unsupported argument that a 30-day timeline will not accommodate a process that is supposed to be completed, under the Union's bylaws, within 15 days.

The parties are also in dispute over the timeframe to renegotiate should a provision fail on Union ratification. The Union's proposal provides for the parties to return to the bargaining table within 30 days, with no timeframe for the renegotiations itself. The Agency proposed that the parties get back to the table within 15 days, with specific limits on how long they will bargain before bringing the matter to the Panel.

The Panel will order language that provides for a 30-day timeline for Union ratification. The Panel would also expect the parties to get back to the bargaining table quickly should a provision fail ratification. The Panel will order the following modified language:

32. The Parties agree that this agreement is subject to Union ratification before Agency Head Review, and no rights or obligations will attach until then, as outlined below:
 - A. The Union's ratification process must be completed within thirty (30) calendar days of the signing of the tentative agreement (the "Tentative Agreement").
 - B. The outcome of the ratification process will be communicated to the Agency no later than thirty-one (31) calendar days from the date of the Tentative Agreement. Failure to communicate the results of the ratification by the thirty-first day constitutes an agreement.
 - C. If the Tentative Agreement is ratified, the parties will execute the Tentative Agreement. Agency Head Review will immediately commence.
 - D. If the Tentative Agreement is not ratified, the Parties will resume negotiations at a mutually agreeable date and time, but no later than fifteen (15) calendar days after the Union notifies the Agency that that the Tentative Agreement had not been ratified.
 - E. If the Parties remain at Impasse, either Party may request the services of the FMCS mediation services. The Request must be within fourteen (14) days.

F. Union ratification of the revised Tentative Agreement shall follow the same procedures, beginning with 32.A. above.

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 following to resolve the impasse:

1. Proposal 16 – The Panel orders the parties to adopt a modified Proposal.
2. Proposal 32 – The Panel orders the parties to adopt a modified Proposal.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

February 13, 2019
Washington, D.C.