

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
COUNCIL 222

Case No. 18 FSIP 075

DECISION AND ORDER

This case, filed by the United States Department of Housing and Urban Development (Management or Agency) on August 8, 2018, concerns a dispute over ground rules for negotiating a successor collective-bargaining agreement (successor CBA) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119, between it and the American Federation of Government Employees, Council 222 (Union).

Following an investigation of the Agency's request for assistance, on November 15, 2018, the Panel asserted jurisdiction over the Agency's request for assistance and directed the parties to submit all remaining disputed issues to the Federal Mediation and Conciliation Services (FMCS), with a Mediator to be appointed by FMCS, for a period of 30 days. The Panel further informed the parties that, should any issues remain unresolved following mediation, the parties would be required to submit Written Submissions on every remaining disputed Article along with their final offers within 5 days of being released from mediation. FMCS appointed Mediator Antoinette Turner, and she facilitated assisted mediation during the week of December 10, 2018. The parties resolved 3 Articles and several proposals, but remained deadlocked over parts of 8 Articles. Accordingly, on December 14, Mediator Turner released the parties to the Panel. The parties timely submitted their Written Submissions to each other and the Panel on December 19.

BACKGROUND

The Agency's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. The parties are covered by a CBA that expired but continues to roll over until the parties enter into a new agreement. The Agency initiated negotiations over a new agreement by emailing the Union its initial ground rules proposal on June 8, 2018. The parties then had numerous interactions between this date and August 8, 2018, when the Agency filed its request for Panel assistance. After this filing, the parties continued to exchange proposals. During the aforementioned time, FMCS was present and provided mediation assistance to the Agency; the Union declined assistance. The parties were unable to completely resolve their dispute. Accordingly, the Panel asserted jurisdiction over this matter as described above on November 15.

REMAINING 8 ARTICLES

1. Article 1 - Purpose
2. Article 4 – Location of Negotiations
3. Article 5 – Matters Related to Negotiations
4. Article 6 – Official Time
5. Article 7 - Proposals
6. Article 8 – Negotiations
7. Article 10 – Mediation and Impasse Proceedings
8. Article 11 – Ratification and Execution

PROPOSALS AND POSITION OF THE PARTIES

1. Article 1 – Purpose

- I. Union Proposal

The Current CBA remains in effect until the process of ratification, execution and agency head review, as provided in paragraphs 11 and 12 of this MOU are satisfied.

- II. Agency Proposal

No counterproposal.

III. Union Position

The Union maintains that its proposed language is necessary because the parties do not have a "common understanding" of what is required of the parties under the existing CBA. In this regard, Section 53.01 of the CBA states that the "provisions of this Agreement shall continue in full force and effect until a new Agreement *goes into effect.*" The parties dispute the meaning of "goes into effect," with the Union arguing that this language establishes that a new CBA will not become effective until the steps outlined in its proposed language are complete. The Union maintains that the Agency has a history of misinterpreting the CBA and misapplying established law. The Union's language will resolve these deficiencies.

IV. Management Position

Management does not agree to the inclusion of the Union's requested language. Because the language addresses a matter covered by the CBA, the Agency has maintained throughout negotiations that it concerns a permissive topic of bargaining. Thus, it has consistently declined to bargain over that proposal. However, it is not raising a duty to bargain issue for the Panel to decide. Rather, it asks the Panel to adopt Management's proposal after "evaluation of the merits of each parties' proposal." The Union's language should be rejected so that negotiations on this topic can be reserved in the context of bargaining over the CBA.

V. Conclusion

The Panel orders the adoption of a modified Union proposal. Although the Agency insists that it is asking the Panel to resolve this dispute on the merits, the Agency offers little to no merit based arguments in support of its position. Indeed, it freely admits that "throughout ground rules negotiations, and . . . during [Panel ordered mediation], the agency informed the union that the disputed aspect of the union's proposal is covered by the current CBA, rendering it a permissive topic of bargaining." Thus, the Agency "declined to bargain over that aspect of the proposal." Given that the Agency focused on the allegedly permissive aspects of the Union's proposals during bargaining, it is difficult to see how the Agency could actually have any arguments on the merits. The only potential argument that falls in this category is its claim in its Panel submission that this proposal is a matter that should be reserved for term negotiations because it is "inconsistent" with the purpose of the ground rules agreement. However, the Union's proposal is meant to govern how the parties will treat the existing CBA while they are bargaining over that agreement. In other words, it is a ground rule. Given the Agency's lack of merit based arguments, the Panel will impose the Union's proposal.¹

Notwithstanding the foregoing, the Panel believes a slight modification to the Union's proposal is warranted. To ensure that the language may not violate any potential legal rights the Agency may have, the Panel will include language indicating

¹ During the Panel's investigation, the Agency conceded that it would be bound by a Panel decision on any matter the Agency considered permissive.

that compliance of the proposal will be in accordance with law. Thus, the following language will be added (new language in bold):

Consistent with applicable law, the Current CBA remains in effect until the process of ratification, execution and agency head review, as provided in paragraphs 11 and 12 of this MOU are satisfied.

2. Article 4-Location of Negotiations

I. Management Proposal

A. The Agency and Union will alternate in selecting a location for negotiations, with the Agency selecting the first location after the first week of negotiations. Dates and locations for negotiations will be according to the following schedule. Should bargaining commence sooner, it will occur in Washington, DC, alternating between HUD's Headquarters and a location selected by AFGE.

i. The parties will negotiate March 4-8, 2019, at HUD's Headquarters in Washington, D.C.

ii. Negotiations will continue March 18-22, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.

iii. Negotiations will continue April 1-5, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.

iv. Negotiations will continue April 15-19, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.

v. Negotiations will continue April 29-May 3, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.

vi. Negotiations will continue May 13-17, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.

vii. Negotiations will continue June 3-7, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.

viii. Negotiations will continue June 17-21, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.

ix. Negotiations will continue July 8-12, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.

x. Negotiations will continue July 22-26, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.

- xi. Negotiations will continue August 5-9, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.
- xii. Negotiations will continue August 19-23, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.
- xiii. Negotiations will continue September 9-13, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.
- xiv. Negotiations will continue September 23-27, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.
- xv. Negotiations will continue October 7-11, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.
- xvi. Negotiations will continue October 21-25, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.
- xvii. Negotiations will continue November 4-8, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.
- xviii. Negotiations will continue November 18-22, 2019, with HUD selecting the location for negotiations from Atlanta, Georgia; Fort Worth, Texas; Philadelphia, Pennsylvania; or Washington, D.C.
- xix. Negotiations will continue December 2-6, 2019, with AFGE selecting the location for negotiations from New York, New York; Seattle, Washington; Chicago, Illinois; or Washington, D.C.

For each session above, the selecting party will communicate the location for negotiations to the other party at least thirty (30) days prior to the start of the negotiation session. Space at HUD facilities in the cities identified above may be used for negotiations, at no cost to the Union, if space is available and such use will not disrupt agency operations. When negotiations take place in Washington, D.C., either party may elect to have up to two (2) team members not stationed in the selected city participate by phone. When negotiations take place in an Agency-selected location, and HUD has at least three (3) team members traveling to that location, either party may elect to have up to two (2) team members not stationed in the selected city participate by phone. When negotiations take place in an AFGE-selected location outside of Washington, D.C., and the Union's team has at least three (3) team members traveling to that location, either party may elect to have up to two (2) team members not stationed in the selected city participate by phone. Additional participants by phone may be permitted by mutual agreement. If any session is canceled by mutual agreement of the Parties, such as for inclement weather or a government shutdown, the parties will resume bargaining on the next scheduled date shown above. The

parties may mutually agree to negotiate on additional dates and may mutually agree to negotiate in locations not included in the schedule above.

B. **TRAVEL AND PER DIEM EXPENSES:** Each party will directly pay the costs of its own negotiating team members' travel expenses, including notetakers, scribes, or technical advisors. This also includes alternates and substitutes who attend in place of a team member, for all negotiating sessions, mediation, or impasse resolution proceedings. Any travel or per diem expenses for observer(s) attending negotiating sessions, mediation, or impasse resolution proceedings will be paid by the party bringing the observer.

II. Union Proposal

A. HUD will make available at no expense to the Union negotiation space and facilities at the following locations selected by the Union: New York, Seattle, Washington, DC and Chicago. Similarly, HUD will make available at no expense to the Union negotiating space at the following locations selected by management: Atlanta, Washington DC, Fort Worth and Philadelphia. When the Union chooses Washington, DC, negotiations may be held at AFGE Headquarters at 80 F Street, Northwest. The Agency and Union will alternate in selecting a location for negotiations, with the Agency selecting the first location. The party selecting the location will give 30 days notice. Locations for negotiations are subject to amendment due to inclement weather, government shutdown or lack of funding. However, at the Union's election and if the Union determines it has insufficient funds to conduct in-person negotiations at any chosen location, negotiations may be conducted by telephone.

If any session is cancelled by mutual agreement of the Parties; for inclement weather or a for a government shutdown, the parties will resume bargaining at a mutually agreed upon date.

B. **TRAVEL AND PER DIEM EXPENSES:** The Department shall pay travel and per diem expenses for five (5) Council 222 selected negotiators (which includes lodging, meals and incidentals) in accordance with the Federal Travel Regulations. The Union will make arrangements for the additional two negotiators at its own expense. In the alternative, Management will agree to pay up to a maximum of \$200,000 for the term negotiations of the successor Agreement. Travel orders necessary for Union negotiating team members will be issued no later than ten (10) working days prior to the date of travel. Travel orders and expense reports will include a travel authorization number, a budget code, and contact information for questions regarding the orders. In the event that a situation occurs where an alternate is warranted, the agency will expedite issuance of travel order information. Authorizations and expense reports for non-employee union bargaining team members will be processed promptly.

III. Agency Position

The Agency's proposal addresses a bargaining schedule and bargaining costs. The proposal is a result of the history arising from negotiations over the current CBA. In this regard, the parties bargained from 2010 to 2015 and the Agency covered full travel and per diem costs at a total of \$260,000. Thus, although the Agency had a financial incentive to bring bargaining to a prompt resolution, the Union did not. Accordingly, with respect to costs, the Agency proposes that each party now cover their own respective travel costs. Such an arrangement will provide the parties with incentive to bring this matter to a resolution sooner. Moreover, the Union has sufficient funds to cover travel.

The Agency's proposed bargaining schedule extends from March 2019 to December 2019 (should bargaining be necessary for such a period of time). The parties will alternate selecting the location of bargaining from a list of cities that have HUD facilities. Up to 2 members of a team may participate by telephone if 3 members of the other team physically travel to the location of negotiations. According to the Agency, the foregoing timeframe is consistent with the Union's proposed idea of bargaining every other week. Additionally, this schedule will permit the Agency to secure facilities for negotiations. As for telephone participation, the Agency believes that its language treats the parties "equally."

IV. Union Position

The Union's proposal is meant to address what it perceives to be inequities between the parties. The Agency has an operating annual budget of \$43 billion; the Union has a budget of \$145,000 (this figure discounts \$1 million that has been set aside in a trust fund for training and representational purposes). The Union maintains that the Agency's proposal is meant to bankrupt the Union into submission. It is the Agency who chose to reopen the CBA, and it is the Agency who is proposing to negotiate at various locations throughout the country. Thus, they should share some of the financial responsibility. Moreover, the Union is proposing a limitation of \$200,000 on travel expenses in an effort to compromise. The Agency's telephone limitation is inequitable. The Union has 7 bargaining team members. As such, under Management's proposal, roughly 5 of those members would not be able to participate by phone. Their participation is necessary, and telephonic participation is vital if Management will decline to cover travel costs.

V. Conclusion

The Panel adopts a modified version of Management's proposal. As noted by Management, bargaining over the current CBA lasted for roughly 5 years. In order to ensure effective and focused bargaining, the adoption of Management's proposed timeline makes the most sense. Relatedly, the Agency's proposed cities will ensure that Agency facilities are available for use by both parties. On the issue of travel costs, each party will be responsible for their own travel costs. Such an approach is consistent with

other ground rule dispute decisions issued by this Panel wherein it has required the parties to pay their own respective travel costs.²

The first modification concerns Management's proposed telephone limitation. The Agency proposes, essentially, that no more than 2-3 members could participate by phone if 3 members attend in person. Although not clear, this suggestion appears to be meant to address a disparity in bargaining team sizes. Given that the Union believes 5 of its members could participate by phone, it appears only 2 members of its team would participate in person. Management believes such a situation would be "[un]equal." But, it is not clear how having several individuals attend entirely by telephone would lead to an uneven playing field as Management appears to claim. Thus, the Panel will drop the following language from Management's proposal:

When negotiations take place in Washington, D.C., either party may elect to have up to two (2) team members not stationed in the selected city participate by phone. When negotiations take place in an Agency-selected location, and HUD has at least three (3) team members traveling to that location, either party may elect to have up to two (2) team members not stationed in the selected city participate by phone. When negotiations take place in an AFGE-selected location outside of Washington, D.C., and the Union's team has at least three (3) team members traveling to that location, either party may elect to have up to two (2) team members not stationed in the selected city participate by phone. Additional participants by phone may be permitted by mutual agreement.

The Panel will also drop language from Management's proposal stating that space may be used for negotiations and will be provided to the Union if it is "available and such use will not disrupt Agency operations." As noted above, the Agency's overall proposal for this Article is premised on Management securing Agency facilities for bargaining. The foregoing quoted language is inconsistent with that goal. That is, it is not clear why Management is simultaneously claiming it needs to secure its own facilities but also claiming it cannot guarantee the availability of space within those facilities. Moreover, the Agency does not explain where negotiations would occur if space is not "available." Thus, that quoted language will be dropped from Management's final proposal.

3. Article 5-Matters Related to Negotiations

I. Management Proposal

During weeks the parties are not at the negotiating table, they may caucus and perform research. The Parties will meet with each other by telephone, video

² See, e.g., *NLRB and NLRBU*, 2018 FSIP 017 (April 2018); *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 2017 FSIP 031 (September 2017).

teleconference, or other virtual means on each Tuesday and Thursday of these weeks, from 10:30 a.m. to 3:30 p.m. Eastern time. One thirty-minute lunch break may be taken during this time. Each party will determine who will attend for each side, and the parties may mutually agree that a meeting is not required. The purpose of these meetings will be to consult subject matter experts, exchange information, perform language cleanup, and other housekeeping activities to streamline the in-person negotiations. Each party may invite subject matter experts to these joint sessions to more fully explain specific proposals, policies, or procedures. Subject matter experts will not serve as team members. Counters may be exchanged by virtual means with the mutual agreement of the Parties.

II. Union Proposal

During weeks the parties are not at the negotiating table, they may caucus and perform research. The Parties may meet with each other by telephone, VTC or other virtual means as needed during the weeks that the parties are not at the negotiating table. The Parties may invite subject matter experts during off weeks to more fully explain specific proposals, policies, or procedures. Subject matter experts will not serve as team members but will be provided official time for these sessions.

III. Management Position

The purpose of the Agency's proposal is to facilitate continuation of the bargaining process by requiring the parties to meet twice a week on weeks when they are not in bargaining sessions. The Union often comes to negotiations unprepared, this proposal will ensure the Union's preparation. Previously, the Union objected because the Agency's proposal left no time for lunch; the Agency remedied this objection during Panel ordered mediation and offered a 30-minute lunch break. Thus far, the Union has not claimed this break period is illegal. The Agency's proposal should be adopted.

IV. Union Position

The Union's proposal differs from that of Management's because it makes the aforementioned meetings optional. The Union believes that the Agency's proposal would interfere with the Union's preparation time for CBA negotiations. The proposal would also prevent the Union from performing other representational functions. Management's attempt to dictate how the Union spends its times goes beyond the spirit of ground rules negotiations and also interferes with the purpose of the Statute. Accordingly, the Panel should reject Management's proposal.

V. Conclusion

The Panel will adopt Management's proposal. Given the parties' lengthy history of negotiations for their existing CBA, requiring the parties to remain focused on negotiations even when they are not at the bargaining table would be a good idea.

Moreover, the Agency's language permits the parties to cancel their regularly scheduled meetings by mutual agreement. The Union believes that the Agency's language would curtail its abilities to perform other representational duties, but the Union offers nothing more than speculation in support of this position. Additionally, the Union does not explain why other non bargaining team Union representatives could not handle those representational duties. Thus, on balance, the Agency's proposal makes the most sense.

4. Article 6-Official Time

I. Management Proposal

- A. **GENERAL STATEMENT:** In accordance with 5 USC 7131(a), members of the Union negotiating team will receive official time (code 35) for the purpose of negotiating the successor agreement during the time the employees would otherwise be in a duty status. For the purpose of computing time charged to official time, negotiations include negotiation sessions, caucuses during those sessions, travel time required for these activities, and mediation and impasse resolution. When appropriate, credit hours may be requested by either party.
- B. The Union will notify the Agency no less than once per pay period of names of employees who will need to use official time to participate in the negotiations, or prepare for the negotiations, and the number of hours each employee is requesting. Upon receipt of timely notification, management will make efforts to reassign work in order to permit the identified representatives to be released from their regular duties to attend the negotiation session or to prepare for negotiations. Management will make every effort to adjust workload demands and deadlines in order to grant such official time. If a Union bargaining team member cannot be granted official time due to workload demands, Management will provide the Union's Chief Negotiator as much advance notice as possible. The Union may select an alternate or substitute bargaining unit member subject to terms of 2(A) above to attend the negotiations in the employee's place. Negotiations will proceed as scheduled unless both parties agree otherwise. No official time will be granted in relation to the negotiations for periods when an employee union representative is teleworking.
- C. Bargaining team members will adjust their work schedules to bargain within the hours shown herein, or otherwise agreed upon by the parties.
- D. Reasonable amounts of official time will be authorized for team members to prepare counter proposals, such as during meetings between the parties when the parties are not at the negotiating table as described above in Section 5(A); as well as to prepare for Federal Mediation and Conciliation Service (FMCS) or Federal Service Impasses Panel (FSIP) proceedings. This time will be granted under 5 U.S.C. §7131(d) and is only available during the

time the Union bargaining team member/employee would otherwise be in a duty status. This time is separate from official time authorized under the existing CBA.

II. Union Proposal

- A. **GENERAL STATEMENT:** In accordance with 5 USC 7131 Members of the Union negotiating team members will receive official time (code 35) for the purpose of negotiating the successor agreement during the time the employees would otherwise be in a duty status. For the purpose of computing time charged to official time, negotiations include the entire process including research, preparation of proposals and counterproposals, actual negotiations, caucuses during those sessions, travel time required for same, and mediation and impasse resolution. When appropriate, credit hours may be requested by either party.
- B. **MEMBERS OF THE UNION NEGOTIATING TEAM:** Members of the Union negotiating team will be authorized official time for such negotiations in addition to and separate from official time authorized under the current CBA. Negotiations will not extend beyond the employees' regular tour of duty. Management will notify the supervisors of Union bargaining team members that they must ensure these employees are relieved of all duties and have their workloads adjusted accordingly, while conducting duties as part of negotiations. Management will not attempt to influence the Union's selection of bargaining team members by restricting their release from duties. In addition, no employee will be negatively impacted due to the participation in the negotiation process.
- C. **REPRESENTATIONAL OFFICIAL TIME:** Official time for representational purposes that would otherwise be used by a Union representative participating in these negotiations may be transferred to another union representative.
- D. **ALTERNATIVE WORK SCHEDULES:** Employees who alter their alternative work schedule (AWS) to participate in negotiations may return to their AWS following conclusion of negotiations. Employees on an AWS who participate in negotiations shall not be limited to any number of changes per quarter under current AWS contract provisions.
- E. **OFFICIAL TIME:** Employee Union team members are authorized official time for the time spent at the bargaining table in direct negotiations as well as caucuses on the days of direct negotiations. Additionally, each Union-selected negotiator will be given 68 hours of

official time per month to prepare for negotiations during the time direct negotiations are not taking place.

III. Management Position

The Agency's proposal is intended to balance the Union's need for official time with the Agency's need to utilize its employees to fulfill its mission. Thus, the proposal provides official time for negotiations as guaranteed under 5 U.S.C. §7131(a); however, it also limits official time for preparation purposes to what would be considered "reasonable." Moreover, employees would have to receive advance approval for using official time. For the prior term negotiations, Management's data establishes that the Union used 28,646 hours of official time, which translates to roughly \$1,647,142 in salary. These figures are not conducive to effectuating the Agency's mission and, thus, need to be curtailed. Management's proposal will help facilitate this goal.

IV. Union Position

The Union's proposal requires Management to grant the Union unlimited official time for negotiations *and preparation*. However, the proposal also mandates that each member of the bargaining team receive 68 hours of preparation time a month. The proposal also requires Management to release employees from their regular duties to participate in negotiation related activities, and it further requires negotiations to end at the conclusion of the regular duty day. The Union believes that the Agency is attempting to control who may participate at the bargaining table on behalf of the Union even though collective bargaining is actually in the public interest. Thus, the Union's limitation-free language should be adopted. Management will have unlimited duty time to prepare its proposals and it will be able to secure whoever it needs to participate in negotiations. The Union should receive similar treatment.

V. Conclusion

The Panel adopts the Agency's proposal. It provides a better balance for meeting the needs of both parties than the Union's proposal. The Union essentially requests a "blank check" guaranteeing official time with few limitations. The Union believes it will be hampered if it has to select other individuals to participate in negotiations because its primary individuals cannot be released from work. However, this is speculation on the Union's behalf. And, although the Union is correct to note that the Statute states that collective bargaining is in the public interest,³ it cites no authority for the proposition that such an interest requires the full time participation of the Union's preferred team members.

5. Article 7-Proposals

I. Management Proposal

³ 5 U.S.C. §7101.

- A. The Parties will exchange proposals on the successor CBA no later than twenty-one (21) calendar days prior to the date of the first bargaining session. Each party's CBA proposals will identify the articles in the existing CBA that the party proposes to modify and identify all changes being proposed to the existing CBA. This will include identification of any supplements or MOUs the party proposes to carry over from the existing CBA. Up to ten (10) weeks of negotiations will occur if, combined, twenty (20) articles or fewer are opened for renegotiation; up to fourteen (14) weeks of bargaining will occur if, combined, thirty (30) or fewer articles are opened; up to eighteen (18) weeks of bargaining will occur if thirty-one (31) or more articles are opened. At the conclusion of the applicable timeframe, either party may extend negotiations by up to one week. Further extensions are permitted by mutual agreement. Absent further extensions, either party may request mediation assistance from the Federal Mediation and Conciliation Service (FMCS) or assistance for Federal Services Impasses Panel (FSIP) for all remaining articles on which the parties have not reached agreement.
- B. All proposals will be provided in electronic format and hard copy to the designated Chief Negotiator. Proposals will be identified as either Union or Agency. As each proposal is taken up, the party offering that proposal will explain it, and will, at a minimum, provide the meaning and objectives of the proposed language. The parties understand that counter proposals that represent a regression from the previously exchanged counterproposals being negotiated are counterproductive, discouraged, and not permitted during the negotiations without mutual agreement of the parties. The parties agree to limit the number of counterproposals on each article to no more than three (3) per party prior to facilitated bargaining or mediation.
- C. **Memorializing Agreements On Proposals:** During negotiations the parties will verbally state each conditional agreement on each section. When an entire article is fully negotiated and the tentative agreement is reached on the article, each party will initial each page of the article and sign and date the last page of the article. No signed article may be reopened without mutual consent of both parties.

II. Union Proposal

- A. Thirty days prior to the initial bargaining session, the parties will exchange a list of all articles in the current CBA they seek to reopen for negotiation. Twenty-one (21) days prior to the first bargaining session the parties will exchange a list of any new articles to be

added to the successor CBA. The party proposing to reopen an article will provide initial proposals on that article one week prior to the commencement of the bargaining session on the article. The parties will continue to bargain in good faith until a full negotiation has taken place. There will be no arbitrary constraints or timeframes on the completion of bargaining, but the length of the entire negotiation of the new CBA will be determined by the number of articles selected, the breadth of issues in dispute for each article reopened by either party, the complexity of the issues being negotiated and any changes in policy, law or regulation that have resulted in the party's decision to renegotiate or reopen an article. When negotiations on all articles have been completed, the Parties will jointly prepare a list of MOUs and supplements that will be carried over to the new CBA.

- B. All proposals will be provided in electronic format and hard copy to the designated Chief Negotiator. Proposals will be identified as either Union or Agency. As each proposal is taken up, the party offering that proposal will explain it, and will, at a minimum, provide the meaning and objectives of the proposed language. There will be ample opportunity for questions and answers, additional information, and other discussion related to the proposal. The parties will follow this procedure for all proposals in a good-faith effort to reach agreement. If a party fails to complete the presentation of its proposal, then such proposals will not be considered as presented for discussion and bargaining.
- C. **Memorializing Agreements On Proposals:** During negotiations each party will verbally state each conditional agreement on each section. Upon request of the Chief Negotiator or their designee, the parties will memorialize conditional agreements by highlighting or setting the agreed-upon language in boldface in the working document of each article. When an entire article is fully negotiated and tentative agreement is reached on the article, each Chief Negotiator or their designee will initial each page of the article and sign and date the last page of the article. No signed article may be reopened without mutual consent of both parties. No article shall become effective until the entire agreement is executed by the parties consistent with the Statute and this MOU.

III. Management Position

The Agency proposes time limitations for negotiations that turn on the number of Articles opened by the parties for term negotiations. In this regard, it suggests up to ten (10) for a combined twenty (20) articles or fewer, up to fourteen (14) weeks of bargaining for thirty (30) or fewer articles, and up to eighteen (18) weeks of bargaining if thirty-one (31) or more articles are opened. At the conclusion of the applicable timeframe, either party may extend negotiations by up to one week, and additional extensions are permitted by mutual agreement.

The Agency's suggested timeframes are borne out of the parties' lengthy bargaining history for their prior CBA. Nothing about the Agency's proposed timeframes indicate an intention to negotiate in bad faith. Indeed, this Panel has rejected similar arguments in other ground rule disputes.⁴ Moreover, the Agency's proposed time limits are lifted from a Mediation-Arbitration imposed decision.⁵ After bargaining is completed, either party may request the assistance of FMCS or the Panel.

Finally, another key feature of Management's proposal is the prohibition of the parties exchanging regressive proposals before seeking mediation/Panel assistance. This feature is intended to ensure that negotiations continue to move forward. For that reason, the Agency also proposes that there shall be no more than 3 exchanges of Articles prior to mediation or Panel assistance.

IV. Union Position

The Union does not propose a time limit, nor does it contain any limitation on the number of proposals that may be exchanged. It omits Management's language concerning regressive bargaining, but does include language stating that no part of the agreement will go into effect until the entire agreement is negotiated and executed. There is also no language concerning contacting FMCS or the Panel. It also includes language requiring the parties to exchange a list of Articles to be opened 1 week prior to commencement of negotiations.

The Union rejects Management's proposal because it places an arbitrary limit on time for negotiations, and such limits were rejected by the United States District Court for the District of Columbia in *AFGE V. Trump*, 318 F.3d 370 (D.D.C. 2018) (*Trump*).⁶

⁴ Citing *OPM and AFGE, Local 32*, 18 FSIP 036 (August 2018).

⁵ Citing *NTEU and DHHS*, 16 FSIP 113 (January 2017).

⁶ In this decision, Judge Ketanji Brown Jackson concluded numerous sections of three Executive Orders concerning Federal sector collective bargaining were illegal and, thus, enjoined Federal agencies from enforcing those sections. The United States has since appealed that decision.

Similarly, the Union believes placing a limit on the number of times an Article may be exchanged is arbitrary and also consistent with the rationale of *Trump*.

V. Conclusion

The Panel adopts Management's proposal with a modification dropping the Agency's language concerning regressive bargaining. The main area of dispute between the parties is their disagreement over establishing a timeline for negotiations. The Union believes that *any* timeline is illegal. However, it cites nothing in the *Trump* decision or other precedent that establishes such a broad rule. Accordingly, that argument should be rejected. Because the Union offers no timeframe in response, the Panel will impose Management's proffered language.

Despite adopting Management's language, the Panel drops the Agency's language concerning "regressive bargaining." The FLRA has never offered an official position on whether such bargaining is acceptable under the Statute.⁷ The Agency's proposal tacitly takes such a position. In order to avoid offering a potential decision on that unsettled topic, the Agency's language should be dropped. Further, because there is no precedent defining what constitutes "regressive bargaining," it is possible that the parties may find themselves locked in debate and litigation over whether proposals fall in this category. This would undercut Management's stated desire to progress negotiations with minimal delay. Moreover, the adopted limitation on 3 proposals should assist with ensuring that the parties remained focused on moving negotiations forward. Thus, the following language should be dropped from the Agency's proposal:

The parties understand that counter proposals that represent a regression from the previously exchanged counterproposals being negotiated are counterproductive, discouraged, and not permitted during the negotiations without mutual agreement of the parties.

6. Article 8-Negotiations

I. Management Proposal

- A. The parties will begin negotiations 4 weeks after execution of the ground rules. The parties will meet to bargain as frequently as necessary, but at least every other full five (5)-day workweek after the first week of bargaining, unless mutually agreed otherwise by the parties. When travel will be required to attend bargaining, scheduling will be subject to the Department's travel budget (e.g., delays may occur during a continuing resolution). During each

⁷ See *AFGE, Local 3937 and SSA, Baltimore, Md.*, 64 FLRA 17, 22 n.9 (2009) (FLRA declined to comment on ALJ's conclusion that Respondent committed a ULP by engaging in regressive bargaining but noted that withdrawing a proposal has not been found to be such bargaining).

week of scheduled in-person negotiations, the parties will bargain from 1:30 p.m. to 5:30 p.m. local time on Monday; at least from 9:00 a.m. to 5:00 p.m. local time on Tuesday through Thursday; and 8:30 a.m. to 12:30 p.m. local time on Friday. This schedule will repeat for the duration of bargaining. The parties may mutually agree to schedule a one-hour lunch break and to begin and end at different times. The parties will not bargain on Federal holidays. The parties will complete negotiations as expeditiously as possible. In order to accomplish this goal, the parties may extend by mutual agreement the daily hours identified above.

- B. The party selecting the location will be responsible for any costs associated with providing appropriate space (i.e. a room large enough to accommodate both negotiating teams and a caucus room large enough to accommodate one negotiating team; the caucus room will be a conference room or other private meeting space within reasonable proximity to the negotiation room). The Union may select HUD space as provided above in 4(A) (if space is available and such use will not disrupt agency operations). The party selecting the location will also be responsible for any costs associated with providing appropriate equipment (a telephone with a speaker in the negotiation room; a computer with Internet connection, a printer, and toner, ink, and paper that will be accessible to both teams). Each party may provide its own negotiators with additional office supplies.

- C. Caucuses will be at the request of either party. If a caucus will extend beyond fifteen (15) minutes, the other party must be notified and given an estimate of the caucus time needed. The parties agree to minimize the number and length of caucuses to a reasonable amount of time in the interest of expediting the completion of negotiations. Caucuses will not be used for activities unrelated to the negotiations. Neither party will caucus for more than one hour at a time, or more than two hours cumulatively each day, without the consent of the other party. Should either party exceed these limits, the daily negotiation schedule in 8(B) must be extended by that same amount of time. If the excess caucusing occurs on the last scheduled day of negotiations that week, then the time will be added to the next scheduled day of negotiations.

II. Union Proposal

- A. The parties will begin negotiations 4 weeks after execution of the ground rules. The parties will negotiate every other week until negotiations are completed, however, no negotiations will be scheduled during a week in which there is a federal holiday or the following religious holidays (Good Friday, Christmas, Yom Kippur, Rosh Hashanah, Passover and Hanukah). Management will restore any forfeited use or lose leave for any Union negotiating team member who is unable for personal or other reasons to utilize annual leave prior to the completion of negotiations. When negotiations take place in person, negotiating sessions will normally be held from 9:00 am to 4:00 pm, with a one-hour lunch break. Sessions may be abbreviated, extended, terminated or rescheduled by mutual agreement of the Chief negotiators. The parties will travel to the site of negotiations on Monday of each negotiating week, to permit Union negotiators who represent locals on the West coast to travel to East coast negotiation locations. Similarly, Monday will be a travel day for East coast negotiators to travel to West coast negotiation locations. Negotiations begin the next day and will continue for the next three (3) consecutive workdays. The parties will return home on Friday. However, if negotiations are conducted by telephone, the parties will negotiate 5 days per week, from the hours of 11:00 am to 5:00 pm, to accommodate the time differences of negotiators calling in from different parts of the country. The Chief Negotiators will set the final dates for negotiations in order to accommodate scheduling conflicts, weather contingencies and other unforeseen events as detailed in Section 4(a).
- B. Negotiations will be held in a suitable meeting room provided by the Host. The host will also furnish a caucus room, such as a conference room or other private meeting space which is in close proximity to the negotiation room. The host will also provide customary and routine office equipment, supplies such as pens, pencils, highlighters, paper, staplers and binders, and services including but not limited to computers with Internet access, telephone(s) with speaker phone and long distance capability, desks and/or tables and chairs, office supplies, and access to at least one printer, scanner, fax machine and one photocopier with the ability to accommodate the quantity of copies needed.

- C. Each team Chief Negotiator or their designee is responsible for calling caucuses. The Party requesting the caucus will leave the negotiation room to caucus in an alternate location. The number and length of the caucuses will be reasonable and consistent with good faith bargaining under the Federal Labor Statute.

III. Management Position

The Agency provides “commonsense measures” designed to progress negotiations and minimize delays. So, it reiterates that on bargaining weeks negotiations will occur for 5 days, but it also establishes the hours of bargaining for each day. These proposed hours are designed to ensure maximum time is devoted at the table. The Agency’s proposal also limits how much time the parties may spend in caucus sessions per day. The Union’s proposals allow for delay and, thus, should be rejected. For example, the Union limits negotiations to Tuesday through Thursday and also forbid negotiations on religious holidays. However, the parties have already agreed to language in the ground rules that allow for the parties to substitute alternates, so the Union’s concern is unnecessary.

Management also objects to Union language that would require Management to restore “use or lose” leave. The Agency claims this proposal could run afoul of 5 C.F.R. §630.305⁸ and “the Panel’s decision” in *AFGE, Local 1943 and Dep’t of the Navy*, 13 FSIP 067.⁹ Similarly, Management rejects Union language requiring the parties to sign a “statement” when there is a “meeting of the minds.” Management claims the parties have already agreed to such language in Article 11, “Ratification and Execution” (although Management does not cite the language it relies upon). Finally, Management does not agree to a Union proposal that would combine term and mid-term bargaining during the course of successor negotiations. The parties already have mid-term language in Article 49 of the CBA and, as such, the proposal would not promote effective and efficient bargaining.

⁸ “Before annual leave may be restored under 5 USC 6304 the determination that an exigency is of major importance and that therefore annual leave may not be used by employees to avoid forfeiture must be made by the head of the agency or someone designated to act for him or her on this matter. Except where made by the head of the agency, the determination may not be made by any official whose leave would be affected by the decision.”

⁹ In this decision, Panel Member Hartfield relied upon the foregoing regulation to reject a proposal that would extend the period for “use or lose” annual leave because the head of the Agency had decided not to extend the period. This decision, however, was an individual Mediation-Arbitration and *not* a Panel decision as the Agency erroneously claims.

IV. Union Position

The Union offers a different bargaining timeframe than what Management has put forward. Negotiations will be 3 days a week with travel occurring on Monday and Friday. Further, the parties will spend fewer hours per day at the bargaining table. The Union also requests the restoration of use or lose leave that is lost as a result of participation in negotiations. Additionally, the Union does not want to limit caucus time. Finally, the Union requests that the party hosting a negotiation session provide space for bargaining and caucuses.

The Union argues that its proposals are necessary because some of its members are in Washington state and Oregon. Flying during “duty hours” is very difficult under Management’s proposal, and telephone participation will be equally challenging due to time zone differences. Nor does the Union believe it is fair to limit caucus time as it does not believe that Management has proved that the Union abused such time in the past. The Union maintains that the Agency’s proposal is an attempt to force employees into working overtime, and the proposal may run afoul of the Fair Labor Standards Act. Finally, it is only fair that the Agency should provide bargaining space if it is going to host bargaining.

V. Conclusion

The Panel adopts a modified Management proposal dropping only language concerning the securing of facilities in order to remain consistent with Article 4. Management’s proposal ensures that the parties spend more hours per day and more days per week negotiating their contract. This process, as opposed to that offered by the Union, will facilitate a quicker resolution to negotiations. The Union’s primary concerns appear to be travel and telephone during duty hours for employees on the west coast. However, we are unaware of any *requirement* to schedule negotiations around time zone differences. The Union’s claims concerning overtime ring hollow because Federal courts have already concluded that employees are not entitled to overtime when they perform official time tasks beyond the duty day. Thus, on balance, the Agency’s overall proposal is more appropriate.

Despite the foregoing, the Panel will drop language from Management’s proposal stating that the Union may select negotiation space “if space is available and such use will not disrupt agency operations.” The Panel has already dropped this language from Article 4, so removing this language in this section will ensure internal consistency. As discussed in Article 4, it should fall upon Management to secure bargaining space if it is going to request use of certain facilities for negotiations.

7. Article 10 – Mediation and Impasse Proceedings

I. Management Proposal

When an impasse exists, the services of the FMCS may be requested by either party. If the services of the FMCS fail to resolve the impasse, either party may request the FSIP to consider the matter. The parties agree to abide by the procedures of the FMCS and FSIP. After the Parties have been bargaining for five (5) months, the Parties will engage a full-time mediator/facilitator. The Parties will evenly share the cost of the mediator/facilitator, if costs exist.

II. Union Proposal

If, during the course of negotiations, an issue develops that result in an impasse or negotiation dispute, the item will be set aside for further attempts to resolve the matter by the parties. In the event the parties are unable to reach agreement, the services of the Federal Mediation and Conciliation Service (FMCS) must be jointly requested to provide assistance. The services of the FMCS will not be requested until all articles not in dispute have been finalized. If the services of the FMCS fail to resolve the impasse, then the parties agree that they shall jointly refer the issue(s) under impasse to the Federal Service Impasse Panel for resolution in accordance with Title VII, Sub-Chapter 11, Section 7119 of the Civil Service Reform Act. Absent mutual agreement, no provisions of the agreement will be implemented until all impasse issues are resolved.

III. Management Position

The Agency's proposal is intended to help the parties timely seek the assistance of FMCS and the Panel, as necessary. Thus, for example, if the parties spend upwards of 5 months in negotiations, they may seek out assistance as necessary. By contrast, the Union's proposal limits the parties' ability to seek third party assistance and also allows the Union to engage in dilatory tactics. Management's proposal should be adopted so that negotiations over the CBA may be resolved within a reasonable timeframe.

IV. Union Position

The Union believes its proposal is fairer because Management is seeking to impose an "arbitrary" time limit on negotiations. The Union contends that the Agency is seeking to follow Section 5(a) of the Bargaining Order even though that section was stricken by the District Court's decision in *Trump*. Moreover, the Union alleges that the Agency is improperly attempting to define "impasse." This term should be defined by "all of the circumstances and the parties' bargaining history" as "a matter of law."

V. Conclusion

The Panel orders adoption of a modified version of the Agency's proposal. Once again, the Agency offers a defined timeframe and the Union declines to accept

any time limitations. However, establishing a timeframe will allow for negotiations to proceed in an orderly and reasonable fashion. Thus, it is appropriate to accept Management's proposal.

Despite the foregoing, the Panel believes that the Union raises a salient point concerning confusion over when an impasse may be properly declared. The Agency proposes that when "an impasse exists," either party may request the services of FMCS. However, parties must seek third party mediation *before* an impasse exists.¹⁰ Thus, the Panel includes language that reflects this framework (new language in bold):

When **appropriate under applicable law**, the services of the FMCS may be requested by either party. If the request for services of the FMCS fails to resolve the **dispute**, either party may request the FSIP to consider the matter. The parties agree to abide by the procedures of the FMCS and FSIP. If the Parties have **bargained** for five (5) months **without reaching a contract**, the Parties will engage a full-time mediator/facilitator. The Parties will evenly share the cost of the mediator/facilitator, if costs exist.

8. Article 11 – Ratification and Execution

I. Management Proposal

If the Agreement is not ratified, the Parties will complete any renegotiations, including requisite mediation assistance, required by disapproval of any portion of the initialed agreement within thirty (30) days from the date that the results of nonratification are known by the Union. If the parties are at impasse on any provisions at the end of this thirty (30) day period, they will jointly request the services of the FSIP.

II. Union Proposal

If the Agreement is not ratified, the parties will return to negotiations with a list of Articles for further negotiations which it proposes to modify within thirty (30) calendar days. Following any further negotiation, the Union may submit any subsequently negotiated agreement to its membership for ratification.

III. Management Position

The Agency's proposal balances the Union's desire for ratification with the public's interest in bringing collective bargaining efforts to a conclusion within a reasonable amount of time. Thus, the parties must complete negotiations within 30 days of the Union learning that its membership has not ratified any portions of the agreement. By contrast, the Union's proposal allows for "unlimited" negotiations

¹⁰ See 5 U.S.C. §7119(b); 5 C.F.R. §2470.2(e).

following non ratification. For the existing CBA, the ratification process lasted roughly 6 months. Management believes that there is no need for a repeat performance.

IV. Union Position

The Union believes its proposal should be adopted because Management is once again seeking to impose an “arbitrary” time limit on negotiations. The Agency’s proposal ignores “the number of articles to be renegotiated, the complexity of the issues to be resolved or any other objective criteria.” Additionally, Management’s proposal potentially endangers “productive negotiations” following non ratification. The Agency’s proposal is not “good faith bargaining,” and is, therefore, illegal.

V. Conclusion

The Panel orders adoption of a modified version of the Agency’s proposal. The Union objects to the Agency’s proposal, in part, on the grounds that it fails to take into consideration a number of complex factors that could arise following non ratification. However, the Union’s argument is based upon numerous assumptions that may or may not come true. Moreover, the Union is unwilling to offer any time limit whatsoever. Thus, it is unclear when negotiations would end.

Accordingly, the Panel imposes Management’s proposal. However, the Panel adds two revisions in order be consistent with the above Article concerning mediation and impasse. First, the Panel adds language clarifying that impasse must arise in accordance with established law. Second, the Panel imposes language indicating that either party may request the assistance of the Panel, as opposed to the Agency’s suggested language that the parties will “jointly” request such assistance. These revisions will bring Article 10 and Article 11 in alignment.

If the Agreement is not ratified, the Parties will complete any renegotiations, including requisite mediation assistance, required by disapproval of any portion of the initialed agreement within thirty (30) days from the date that the results of nonratification are known by the Union. If the parties are at impasse **within the meaning of applicable law** on any provisions at the end of this thirty (30) day period, **either party may** request the services of the FSIP.

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. Article 1 – The Panel orders the parties to adopt a modified Union Proposal.

2. Article 4 – The Panel orders the parties to adopt a modified Management Proposal.
3. Article 5 – The Panel orders the parties to adopt Management's Proposal.
4. Article 6 – The Panel orders the parties to adopt Management Proposal.
5. Article 7 – The Panel orders the parties to adopt modified Management's Proposal.
6. Article 8 – The Panel orders the parties to adopt modified Management Proposal.
7. Article 10 – The Panel orders the parties to adopt modified Management Proposal.
8. Article 11 – The Panel orders the parties to adopt modified Management Proposal.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

February 14, 2019
Washington, D.C.

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