United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of U.S. DEPARTMENT OF AGRICULTURE OFFICE OF THE GENERAL COUNSEL And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1106	Case No. 20 FSIP 012

DECISION AND ORDER

The U.S. Department of Agriculture (Department or USDA), Office of the General Counsel (Agency or OGC) filed a request for Panel assistance under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, concerning a dispute from negotiations over a successor collective bargaining agreement (CBA). The mission of the USDA is to provide leadership on food, agriculture, natural resources, rural development, nutrition, and related issues based on public policy, the best available science, and effective management. The Office of the General Counsel is an independent legal agency within the USDA. The OGC provides legal advice and services to the Secretary of Agriculture and to all other officials and agencies of the Department with respect to USDA programs and activities.

The American Federation of Government Employees, Local 1106 (Union) represents a nationwide bargaining unit consisting of 171 professional and non-professional employees that work in the OGC. The employees mostly encumber attorney positions. The parties' CBA went into effect in 2010 for a term of five years. Thereafter, it continued to roll over in one-year increments. On March 28, 2017, the Agency exercised its right to terminate the agreement.

BACKGROUND AND PROCEDURAL HISTORY

From April 2017 to June 2017, the parties bargained over ground rules for a successor CBA. On July 31, 2017, the parties initiated negotiations over the successor CBA. The parties engaged in 26 bilateral negotiations from July 2017 to September 2017.

On September 18 and 19, 2017, October 11 and 20, 2017, and April 25, 2018, the parties engaged in mediation with Federal Mediation and Conciliation Service (FMCS) Mediator Randy Mayhew. During the April 25 mediation session, the Agency informed the Union that, because the parties were not making progress on the articles still in dispute, it intended to submit its final offers to the Union in accordance with the parties' ground rules for negotiations of a successor

CBA.[1] On June 4, 2018, the Agency provided the Union its final offers and informed the Union that if it did not accept the final offers by June 15, 2018, the Agency would seek the Panel's assistance. On June 15, 2018, without a release from the FMCS Mediator and no acceptance of its offers from the Union, the Agency asserted that the parties were at an impasse on the remaining articles that they failed to reach agreement over and notified the Union that it would file a request for assistance with the Panel.

On June 25, 2018, the Agency filed its first request for Panel assistance in Case No. 18 FSIP 064. On July 18, 2018, the parties agreed to return to mediation in an effort to try and resolve, or at least narrow the issues in dispute. So, on July 23, while the case was pending Panel investigation, the parties participated in an in-person mediation session with Mediator Mayhew for a few hours, but the parties were unable to resolve any of the remaining issues in dispute.

On August 24, 2018, the parties advised the Panel that they had reached an agreement on all articles in dispute in their successor CBA. On September 7, 2018, the parties executed an agreement-in-principle. On September 9, 2018, the Agency withdrew its request for Panel assistance in 18 FSIP 064.

On October 4, 2018, the Union President informed the Agency that the Union membership did not ratify the agreement and was prepared to resume negotiations over the successor CBA. However, the Agency refused to return to the bargaining table with the Union. Instead, on October 12, 2018, the Agency filed a second request for Panel assistance over the parties' entire CBA in Case No. 19 FSIP 004. On April 10, 2019, the Panel determined that the Union had advanced a colorable argument that the Agency may have violated the parties' ground rules by refusing to return to negotiations after the agreement-in-principle failed ratification. Therefore, because the Panel could not determine whether the parties were at impasse, it declined to assert jurisdiction over the case.

On April 18, 2019, the Agency requested to resume negotiations with the Union. The Agency sent the Union its proposals on May 23, and the Union sent its proposals to the Agency on June 13. The parties participated in negotiations from June 18 to 20; from July 22 to 25; on July 25; from July 29 to 31; and from August 1 to 2. Thereafter, the parties engaged in mediation with FMCS Mediator James Albano on September 18 and 19, 2019. On October 15, 2019, the Agency provided the Union its last best offers. On October 17, 2019, Mediator Albano released the parties from mediation. On October 24, 2019, the Union provided the Agency its last best offers. On November 8, 2019, the Agency filed its third request for Panel assistance in the instant case. During the time that the parties resumed negotiation and mediation efforts, they were able to reach agreement on 32 articles, but 18 articles remained in dispute.

On February 3, 2020, the Panel asserted jurisdiction over the Agency's request for assistance pertaining to the 18 articles in the parties' successor CBA, except for three proposals

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1 The parties' ground rules agreement states, "[b]efore declaring an impasse on any issue, each party must present its final offer, in writing, to the other party."

in which it declined jurisdiction over due to colorable duty-to-bargain arguments.[2] The Panel ordered that if the parties mutually agreed, to resume negotiations for up to 30 days with the assistance of FMCS. If they did not mutually agree, the Panel ordered the parties to provide written submissions to the Panel on the remaining issues in dispute.

On February 7, the parties agreed to participate in mediation with FMCS Mediator Albano. Those sessions occurred on February 26 and 27 and March 4 and 5, 2020. On March 5, the Mediator released the parties. The parties reached agreement on two articles during mediation: Article 13, Union Dues Withholding and Parking at Agency Facilities, which was an unnumbered article. Therefore, in accordance with the Panel's procedural letter, the parties were ordered to submit their written positions along with any evidence in support of their arguments by March 20, 2020. The parties were granted an extension of time to submit their positions by March 30. Both parties timely provided their statements of position. The Union argues that the Panel does not have jurisdiction for the same reasons articulated during the investigation of this case. The Panel considered and rejected all of the Union's objections prior to asserting jurisdiction over this case. The Union's reasserted objections remain unpersuasive. Therefore, the Panel will once again reject them.

PROPOSALS AND POSITIONS OF THE PARTIES

There are parts or all of 16 articles that the parties could not reach agreement over: Article 3 (Effective Date and Duration); Article 6 (Management Rights); Article 10 (Partnership); Article 11 (Taxpayer Funded Union Time); Article 15 (Midterm Bargaining); Article 31 (Hours of Work); Article 32 (Telework); Article 38 (Evaluation of Employee); Article 41 (Grievance and Arbitration); Article 45 (Voluntary Relocations and Reassignments); Article 46 (OneUSDA OneOGC Communications); Article 47 (Continuing Supervisory Education); Article 48 (Employee Feedback on Supervisory Performance); Article 49 (Furloughs); Article 50 (OGC Rotational Program); and one new article entitled, "Promotions for Senior Counsel." Due to the sheer number of issues in dispute, the parties' proposals will not be set forth in this memo. Rather, they are attached to this document and will be referenced as appropriate.

1. Article 3 – Effective Date and Duration

I. Agency Position

The Agency proposes a contract duration of four years with one-year rollover periods thereafter. In light of the substantial amount of money (approximately $484,000) and time it has taken the parties to negotiate the new CBA (five years), the Agency asserts that a contract duration of four years is reasonable. The Agency states that the Union has offered a proposal of 11 months, which would require the parties to bargain a successor agreement immediately. The

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2 The Panel dismissed jurisdiction over the following proposals: Article 13, Union Dues Withholding, "All deductions of Union dues withholding will be automatically terminated the first full pay period that occurs three years from the date the Union or employee submitted the Standard Form 1187 unless, within 60 calendar days of the start of this period, the employee signs and submits the Standard Form 1187;" "The Union shall not file unfair labor practice charges solely over implementation prior to completion of bargaining;" and "Disputes regarding whether these exclusions apply to a particular grievance."

Agency contends that its proposal best serves the parties by ensuring a period of stability following the nearly five-year period of protracted negotiations, as well as saves the taxpayers substantial costs.

II. Union Position

The Union states that its proposal in this Article accepts the bulk of the Agency's language, but differs in two respects: it retains the duration originally agreed to by the parties nearly three years ago; and removes superfluous and confusing language concerning the conditions under which supplementary agreements outlast the CBA. The Union states that the Agency first chose and advocated for the agreement to expire in February 2021, to ensure that a new administration would have a chance to terminate any CBA and renegotiate working conditions. The Union acceded to this demand nearly three years ago. The Union states that positions were adopted, concessions were made, and trade-offs by both parties were premised on the understanding of the timeframe that the agreements being made were to be binding on the parties. The Union contends that to allow the Agency to now extend the duration for three and half years more years without re-opening all the other agreed upon provisions would undermine the entire bargaining process.

Further, the Union states that the Agency, as noted in the Union's jurisdictional brief to the Panel, imposed many conditions on the bargaining unit illegally in March of 2017, and has maintained them in the intervening three years, despite orders from an Arbitrator to return to the status quo. Thus, the Union states that the Agency has already had three years of its preferred, working conditions in place. The Union contends that to extend the agreement for another four years would simply be rewarding the Agency for its illegal actions and would deprive the bargaining unit of any timely remedy through the statutory bargaining scheme.

III. Analysis and Recommendations

The Panel will impose the Agency's Article 3. The main disagreement centers around the duration of a new contract. The Union argues that the Panel should not impose the Agency's proposal because of an Arbitrator's award that found the Agency engaged in bad faith bargaining. Specifically, an Arbitrator found that the Agency unilaterally terminated 11 articles in the parties' current CBA and imposed new conditions of employment on the bargaining unit without negotiating with the Union. The Arbitrator ordered the Agency to return to the status quo that existed prior to the Agency terminating the 11 articles. Of the 11 articles that the Agency unilaterally terminated, there are four articles that the parties are at impasse over: Article 6; Article 10; Article 31; and Article 32. Despite the Arbitrator's order, the Agency refused to return to the status quo and instead filed exceptions with the Federal Labor Relations Authority (FLRA).

The Arbitrator's award over the parties' current agreement does not impact the Panel's jurisdiction over the parties' proposals for their successor CBA. The Panel's focus is on helping the parties resolve the proposals that they offered each other during negotiations for their new agreement. Both parties presented each other with proposals over these four articles during the negotiations over a successor CBA and were unable to reach agreement over those proposals. As

such, the Panel has jurisdiction over the parties' successor agreement proposals and is not prevented from asserting jurisdiction over the four articles that are subject to the arbitration award.

Next, the Union argues that because the parties made a tentative agreement over the duration of the successor CBA during negotiations, the parties should abide by that tentative agreement. That argument is unconvincingly. That tentative agreement, among others, was rejected by the Union during ratification. Once an agreement fails ratification, there is no statutory restriction on the scope of bargaining; only the parties themselves may restrict the scope of bargaining, through, for example, ground rules.[3] Reviewing the parties' ground rules agreement does not reveal that they restricted the scope of negotiations. Further, the parties tentatively agreed to a contract duration of four years had they executed a new CBA. Thus, the Agency's proposal for a four-year contract is actually consistent with the tentative agreement reached by the parties during negotiations.

On the merits, the parties' long and drawn out negotiations over a new CBA, along with the evidence presented by the Agency over the cost it has incurred to negotiate a new CBA demonstrates that the parties would be better served by a contract with a duration of four years. A longer duration will provide the parties stability, save on Agency expenses, and taxpayer dollars. The Panel has consistently noted that the parties must negotiate in an effective and efficient and the best way to accomplish this is by saving agencies and taxpayer dollars consumed during protracted and perpetual negotiations. As such, the Panel will impose the Agency's Article 3, which implements a four-year contract.

2. Article 6 – Management Rights

I. Agency Position

In its proposal, the Agency seeks to reserve the right to terminate permissive subjects upon the expiration of the successor CBA. The Agency states that the Union submitted revised proposals on March 19, 2020, wherein it indicated it would accept the Agency's Article 6. Therefore, because the Union has agreed to the Agency's offer, the Agency requests that the Panel impose the Agency's proposal.

II. Union Position

On March 19, 2020, the Union emailed the Panel that it has withdrawn its proposal for Article 6.

III. Analysis and Recommendations

Based on the Union withdrawing its proposal, the Panel will impose the Agency's Article 6 offer.

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3 *See, e.g., Dep't of the Air Force,* 25 FLRA 579 (1987).

3. Article 10 – Meetings and Committees

I. Union Position

Despite explicit contractual provisions demanding two meetings between Agency and Union leadership per year, the Union argues that the Agency has refused to meet with the Union as specified by the current contract since at least March of 2017. The Union states that the Agency's proposal will permit the OGC to continue this practice. In contrast, the Union states that its proposal sets out reasonable expectations, without overly impinging on management's rights.

The Union's proposal calls for information sharing, and two annual meetings as a default, but subject to alteration by the parties' agreement. The Union contends that it does not impose undue costs on the Agency because the meetings can be held remotely. While either side can choose to call for a face-to-face meeting, if the Union does so, it must pay for its representatives' travel and per diem. If the Agency demands the Union's presence in-person, it must pay for those costs.

II. Agency Position

In accordance with Executive Order (EO) 13812, Revocation of Executive Order Creating Labor Management Forums (2017), the Agency states that it does not propose an article that provides for any standing or ad hoc committees. The Agency contends that the former Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services (2009) consumed considerable managerial time and taxpayer resources, but did not fulfil the goal of promoting collaboration in the Federal workforce. In addition to being consistent with current law and EOs, the Agency's states that its proposal ensures that when both parties find it necessary to address an issue of mutual concern, the parties may then meet and discuss those matters.

The Agency points to *Dep't of Veterans Affairs and National Federation of Federal Employees*[4] for support. The Agency states that the Panel agreed with the agency that labor-management forums without demonstrable and tangible benefits are inconsistent with the EO 13812. The Agency contends that the Union has failed to provide evidence in support of any tangible benefits associated with its proposed committee language.

III. Analysis and Recommendations

The Panel will adopt the Agency's Article 10. In EO 13812, the President instructed Federal agencies to take steps to abolish labor-management forums, councils, and committees. As the Panel explained in *Dep't of Veterans Affairs and National Federation of Federal Employees,*[5] the EO requires demonstration of "tangible benefits" to the taxpayer in order to justify the continuation of these meetings. The Union has failed to demonstrate the tangible benefits associated with such meetings. The Agency's article effectuates the President's EO, but

4 2019 FSIP 024 (September 2019).
5 *Id.*

still offers a commitment to discuss issues of mutual concern, with each party bearing their own travel costs, if any.

4. Article 11 – Taxpayer Funded Union Time

I. Agency Position

The Agency asserts that the Panel should adopt the Agency's proposed language in its entirety because it is consistent with EO 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, and because it is fully supported by data concerning the actual amounts of representational activity. In this respect, the Agency proposes a bank and a cap of official time of no more than one-hour per bargaining unit employee annually. The Agency states that the Union's proposal, which potentially provides an unlimited amount of official time, is not consistent with the intent of the EO. The Agency contends that the Union's proposal to maintain the status quo amounts to 15.5 hours per bargaining unit employee based off of the 171 bargaining unit employees currently at the Agency.

In support of its proposal, the Agency states that between FY 2015 and 2020, the Union cumulatively filed no more than 20 grievances; at least one information request; and three unfair labor practice (ULP) charges amounting to 1787 total official time hours in FY 2017; 1119 total hours in FY 2018; and 576 total hours in FY 2019. Based on the decreasing amounts of official time used by the Union, the Agency contends its proposal will provide the Union a sufficient amount of official time to represent the bargaining unit. In contrast, the Agency states that the Union's proposal would limit the amount of Agency work that it may assign Union representatives because the Union's proposal offers no cap on the amount of official time used by a single bargaining unit employee.

II. Union Position

The Union states that the Agency's proposal seeks to impose EO 13837 in its entirety. The Union notes the Agency's proposal was made during a period when EO 13837 was enjoined. The Union questions the legality of many of these provisions, including the restriction on official time to a time rate of one-hour per bargaining unit employee, as well as no use of official time for the representation of grievances. The Union states that the Panel is not bound by the EO. In this respect, the Union states that Panel precedent makes clear that it may set aside the provisions of the EO, particularly in regard to union time rate.[6] In contrast, the Union contends that its proposal parallels the Statute, makes significant concessions to the Agency from the current contract, and was signed and agreed to by the Agency.

Currently, the Agency has 171 bargaining unit employees, but the Union states that the size of the bargaining unit does not correspond to the complexity of the issues presented to its representatives. Historically and contractually, the Agency afforded the Union President as much as 36 hours weekly for official time so long as such was required by activities authorized under the Statute; lesser times were authorized for other Union officers. When this time was not

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6 *U.S. Dep't of the Air Force, Seymour Johnson and National Association of Independent Labor, Local 7,* 2019 FSIP 028 (November 2019).

required for statutory authorized activities, the Union states that its officials simply returned to their Agency work. The Union argues that a union time rate that would limit all Union officials to approximately 171 hours a year and bar representation of grievances is insufficient.

The Union states that Panel ordered mediation in the instant case alone required the Union President to expend four full work days, to travel for a four more work days, and to spend an additional two days revising proposals and responding to requests of the Agency, Mediator, and Panel. Just to comply minimally with the processes of the Panel ordered in this single instance, the Union states its President expended 112 hours, which would equate to over 60% of the Agency's authorized union time rate. The Union contends that this does not account for the mediation preparation, the efforts of other Union officers, or the time to prepare the current filing.

Similarly, the Union asserts that the prior year has seen the Union in multiple mediation sessions, extended negotiations, proceedings before the Panel and the FLRA, as well as several grievances and ULP filings. For the past fiscal year, the Agency reported over 719 hours of official time utilized by Union representatives employed by the Agency to the Office of Personnel Management (OPM) and the Union states that this does not account for the many additional hours that Union officers perform representational duties on their own time due to the Agency either denying official time or refusing to modify work assignments to make official time available.

III. Analysis and Recommendations

The Panel will adopt the Agency's Article 11. The parties' primary dispute is over the total number of hours of official time available for use by Union officials on an annual basis. The Agency has proposed a bank and cap on the Union's official time use under section 7131(a), (c), and (d), which corresponds to the number of employees in the bargaining unit. As of January 2020, this would equate to 171 hours of official time for this fiscal year and would fluctuate each successive year depending on the number employees in the bargaining unit. The Agency also proposed that the time the Union spends performing official time each year will be limited to 25 percent of their duty hours. Employees who exceed that rate will continue to receive official time under section 7131(a) and (c), and even (d) time, which would count against the next year's bank and cap on official time.

In contrast to the Agency's proposal, the Union proposed that it receive "reasonable" time to engage in its representational duties under the Statute. The Union again argues that the parties agreed to "reasonable" time during negotiations; therefore, that agreement should apply here. The Union's argument again overlooks the fact that after an agreement fails ratification, either party, unless it was agreed otherwise, may renegotiate the terms of the tentative agreements made. That's what the Agency has done here.

The Union asserts that the Panel is not bound to follow EO on official time use. The Union's argument is correct; however, the Panel has stated that the President's May 25, 2018, EOs serve as "an important source of public policy that the Panel will choose to implement."[7]

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7 *HHS and AFGE, Local 3601*, 2019 FSIP 031 (2019).

Further, the Panel noted that the official time agreements that do not exceed the 1 hour per bargaining unit employee recommendation in EO 13837 would ordinarily be considered reasonable, necessary and in the public interest.[8] And that the party moving for such time has the burden to demonstrate that their requested time is reasonable, necessary, and in the public interest.[9] The Union has failed to meet that burden.

The Union also argues that the Agency's proposal likely violates the Statute and was offered when the EO on official time use in the federal sector was enjoined. The EO has been implemented and is now in effect. The OPM has advised all federal agencies, as of October 4, to begin implementing provisions in their CBAs consistent with the requirements and guidance contained in the EOs. The Union points to no authoritative source that says otherwise. Similarly, the Union points to no case law to suggest that the Agency's proposals violate the law.

On the merits, the Union argues that in the current CBA, the Union President is authorized to 36 hours of official time per week, its Vice Presidents up to 5 hours per week, and its remaining officers reasonable time, thereby making the Union's offer for official time reasonable. However, the Union failed to demonstrate support for its proposal. The Union did not provide any data demonstrating that the representational activities the Union engaged in during each fiscal year warrants its proposal for "reasonable amounts of official time." Instead, the Union argues that the relatively small size of its bargaining unit does not speak to the complexity of the issues its representatives encounter without further elaboration on those issues.

The Union also contends that it has spent a considerable amount of time bargaining and preparing for these impasse proceedings. Now that the parties have concluded bargaining the Union should have much more free official time to spend on other representational activities. Further, the Panel has imposed a four-year contract on the parties, which means that the Union does not need to expend all of its resources negotiating a new contract.

In contrast to the Union, the Agency actually demonstrated support for its proposal through an affidavit of the Director of Administration and Resource Management for OGC who supervises the administration of time and attendance and travel vouchers. He stated that from FY 2015 to FY 2020, the Union filed no more than 20 grievances and three ULP charges; yet, it amounted to the Union using 1787 hours of official time in FY 2017; 1119 hours in FY 2018; and 576 hours in FY 2019. The Union disputes that this time is accurate, but offers nothing in support of its position. Thus, because the Union has not established that the Panel should exceed the policies established in EO 13837, the Panel will impose the Agency's Article 11.

5. Article 15 – Midterm Bargaining

I. Agency Position

The Union withdrew its proposed Article 14 in lieu of its revised Article 15. Therefore, the parties will now address midterm bargaining, as well as notification and response times (which was previously under Article 14), in Article 15. The Agency states that its Article 15

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8 *Id.*
9 *Id.*

contributes to government efficiency of operations and aligns with EO 13836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining by streamlining timeliness and procedures for midterm bargaining. The Agency asserts that its proposal provides clarity in roles and responsibilities to avoid disputes about "major" and "non-major" issues, which is characterized in the Union's proposal. Finally, the Agency states that its proposal sets a reasonable impact and implementation negotiation period with standardized time periods for opening and closing matters.

Specifically, the Agency states that its proposed language will allow it to change matters covered by the agreement following the implementation of a new statute, rule, or regulation, or changes resulting from the introduction of new technology. The Agency argues that the Union seeks to limit this right and impose a 21-day advance notice requirement, including specified criteria for notice that is not practicable. The Agency states, as an example, it has had to deal with the ongoing and daily changes experienced by its clients that require legal guidance as a result of the impact of COVID-19. The Agency contends that a notice requirement to the Union would be untenable during each time it needed to make a change as a result of the impact stemming from the virus. The Agency states that the Union's proposal fails to address the need for post-implementation bargaining procedures. The Agency contends that the Union's proposal seemingly invites the parties to engage in conflicts over when the Agency may implement. As a result, the Agency argues that it would be unable to align its practices with current law, compromising the Agency's ability to deliver its mission.

II. Union Position

The Union asserts that its proposal complies with the law, acknowledging the necessity to adapt the contract to statutory changes, but requires the Agency to properly bargain the impact and implementation of necessary changes prior to implementing them. The Union contends that its proposal includes reasonable, non-burdensome timeframes to ensure that the Agency provides adequate notice prior to implementing changes, as well as minimally burdensome requirements for such notice to provide adequate information about the changes so that the Union may make proposals concerning implementation and bargain effectively.

The Union argues that the Agency's proposal provides no certainty of timely notice prior to the Agency implementing change: notice provided "once the Agency decides to make a change." The Union states that the Agency's proposal contains no assurance that the notice contains adequate information; dramatically shortens the Union's time to respond to any proposed changes (allowing only 10 days total to respond); curtails the length of any negotiations (allowing only 10 days total); and allows the Agency to implement any changes prior to completing or even initiating bargaining. The Union contends that these changes are unnecessary, unwise, and in some cases of illegal. In this respect, the Union argues that the Statute calls for bargaining before changes, at least over implementation and impact procedures, even in situations in which changes are mandatory. The Union states that the Agency seeks to avoid this obligation and simply allow itself to implement changes.

Further the Union states that the Agency's proposal conflicts with other portions of the CBA. Specifically, the Union contends that both Article 3, section 3 and the parties' ground rules agreement indicates that the ground rules will be used for both future renegotiations of the

agreement, for re-openings of particular articles, and mid-term bargaining. The Union states that the Agency presents a proposal in conflict with the already signed portions of the agreement, specifically calling for negotiations in direct conflict with those already agreed to in Appendix A. The Union asserts that its proposal in contrast, sets out only the necessary information for the initiation of Agency changes, and then refers the parties to the agreed upon rules in Appendix A.

III. Analysis and Recommendations

The Panel will impose the Agency's Article 15, with modification. The parties disagree over the procedures and arrangements surrounding midterm bargaining. The Agency proposes that the matters covered by the new CBA will not be subject to change except for changes mandated by statute, rule, or regulation, or from the introduction of new technology. The Agency's refusal to follow a provision that is contrary to law is permissible under the Statute.[10] However, the Agency's proposal that permits it to invalidate a provision of the CBA if a later issued rule, regulation, or change to technology conflicts with the CBA is contrary to the Statute.[11] While the Union can voluntarily agree to such a provision as a permissive matter, it cannot be compelled to negotiate away a right provided to it under Statute. Thus, the Panel will modify the Agency's proposal to remove that language, which is contrary to law.[12]

The parties also disagree over the notification procedure that the Agency will follow before making changes to conditions of employment. The Agency's proposal requires it to provide the Union with notice before making such changes once the Agency has decided to implement the change. The Union argues that the Agency's proposal does not provide it with any certainty of when the notices will be issued; however, the Agency's proposal provides it the flexibility to determine when to issue the notice, so that it may properly inform the Union of the necessary information about the change.

The Agency's proposal also requires the parties to adhere to bargaining timeframes, such as permitting the Union five days to advise the Agency after a notice of a change, whether it would like to bargain over the change and five days to provide proposals thereafter. The proposal also requires the parties to attempt to reach an agreement within 10 days after initiating the negotiations, and that the parties are to pay for their own bargaining expenses. These timeframes will keep the parties focused during the bargaining process with a goal of reaching an agreement over the issues. The Agency's proposal will keep both parties motivated to negotiate in an effective and efficient manner.

The Union argues that the Agency's proposal permits it to illegally implement a change prior to completing the bargaining process. After an impasse in negotiations has been reached, an agency is required to afford a union sufficient notice of when a change will be implemented in order to provide the union with a reasonable opportunity to timely invoke the services of the Panel.[13] The Agency may not unilaterally implement a change in conditions of employment in most circumstances unless the implementation of the change was necessary for the functioning

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10 *See, e.g., Office of the Adjutant Gen., Ga. Dep't of Defense, Atlanta, Ga.,* 54 FLRA 654 (1998).
11 *See e.g., Dep't of Health and Human Services, Health Care Financing Administration* 39 FLRA 120 (1991).
12 *See parties' disputed proposals.*
13 *See HHS, SSA,* 35 FLRA 940 (1990).

of the agency.[14] The Agency's language acknowledges the latter circumstance under section 4 of its proposal, but not former. As such, the Panel will modify the Agency's proposal to include the requirement to maintain the status quo for a reasonable period of time to permit the Union to seek assistance with the Panel.

Lastly, the Union argues that the Agency's proposal conflicts with the parties' ground rules agreement and tentatively agreed upon terms that the parties negotiated during bargaining. A review of the ground rules agreement indicates that the parties agreed to use the procedures established in the ground rules if they agreed to renegotiate one or more articles of the new CBA. A review of section 3 of the Article 3 indicates the same – that if the parties agree to renegotiate, they shall use the ground rules agreement for the negotiation's procedures. Neither the ground rules, nor Article 3 indicates that the ground rules will be used to negotiate midterm bargaining matters. It appears that the Agency's proposal, which spells out the procedures that the parties will follow for midterm bargaining is permissible based on the parties' ground rules agreement. Thus, for the aforementioned reasons, the Panel will adopt the Agency's Article 15, with the above modifications.

6. Article 31 – Hours of Work

I. Agency Position

a. Hours of Work

The Agency states that the OGC consists of five Washington, D.C. Headquarters Divisions, four regional offices, and eight branch offices. Collectively, the five OGC divisions and four regional offices cover nine time zones – four in the contiguous U.S., and the additional times zones of Alaska, Hawaii, Guam, American Samoa, and the Northern Mariana Islands. The Agency's first proposal is centered around the OGC's core hours. Given the OGC's national law practice and structure, the Agency seeks through its proposal to ensure adequate office coverage for all subject matters during normal business hours. In short, the Agency's proposal provides that employees may not use leave without pay to work a part-time schedule and establishes core hours from 9:30 a.m. to 4:00 p.m., with a start time no earlier than 7:30 a.m. and an end time no earlier than 4:00 p.m.

The Agency asserts that OGC advises its clients over areas including, but not limited to trade programs, farm loan and subsidy programs, rural housing and business development programs, food and nutrition programs, outreach and agriculture extension programs, law enforcement and fire suppression programs, and land management and stewardship programs in every state and numerous U.S. territories. The Agency states that its clients require the availability of competent counsel in every time zone, throughout the day and evening. The Agency contends that its proposal is reasonable, while still maintaining a great deal of flexibility for employees that include working flexible and compressed work schedules, as well as telework options.

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14 *See, e.g., Dep't of Justice, Immigration and Naturalization Service,* 55 FLRA 892 (1999).

The OGC Deputy General Counsel attests to the difficulty experienced by having offices in different time zones. He states that the Agency's core hours proposal allows a period of overlap in normal business hours during the late afternoon in San Francisco, which provides an opportunity for direct communications between the OGC San Francisco Office and clients in Guam. However, he states that if attorneys in the San Francisco Office complete their workday at 2:30 p.m. pacific time, which would be permitted under the Union's proposal, that would be 7:30 a.m. or 8:30 a.m. in Guam, so the window of overlap in normal business hours with Guam would be eliminated.

In addition, the Deputy General Counsel states that the reduction of overlapping hours is also noteworthy for client matters in Hawaii, where a 2:30 p.m. pacific stopping time would be mid-day - 11:30 a.m. or 12:30 p.m. - in Hawaii. The OGC San Francisco personnel completing their workday at 2:30 p.m. local time would therefore significantly reduce the normal business hours in which they may speak with clients or counsel in Hawaii. Similarly, he states that if the Portland Office attorneys were to complete their workday at 2:30 p.m. local time, they would no longer be at work if an Alaska client needed to speak to them after 1:30 p.m. Alaska time. The Agency asserts that its proposal ensures that the OGC maintains a sufficient level of customer service to carry out its mission and enables its attorneys to provide responsive and competent service to its clients.

In most pending matters, the Agency contends that there is often no substitute for the attorney assigned to the matter who may have been working on the issue for months or years. The Agency states that absent advance and time-consuming preparation for coverage on these matters, an "on call" attorney as the Union proposes would not be able to provide competent advice. The Agency states that the Union's proposal of one attorney providing office coverage during critical hours simply does not guarantee the sufficiency of expertise required to provide legal support on the wide range of matters for which coverage is necessary. The Agency further argues that the Union's proposal conflicts with the right of the Agency's Head to establish the specific hours OGC offices will be open to the public and to determine the employee's regularly scheduled workweek.

b. Credit Hours

Under the current contract, credit hours are earned completely at the employee's own discretion without supervisory approval or even proof of the necessity for working extra hours. The Agency states that allowing employees, rather than management to determine the need for earning credit hours has resulted in a demonstrably negative impact to the Agency's operations, as employees have left the offices without subject matter coverage during times of critical need. The Agency concluded that supervisors should have more explicit guidance on the restrictions on credit hours.

The Agency further states that the authorization or denial of credit hours is considered an assignment of work covered under section 7106(a)(1)(B). Moreover, under 5 U.S.C. § 6122(b), the Agency states that "an agency may establish limitations on how credit hours are earned and the number of credit hours that may be earned." The Agency contends that modifying the current contract language to include a requirement for supervisory approval before employees work credit hours and setting a limitation on the number of credit hours an employee may accrue

would allow supervisors to better manage the work to be performed by employees, eliminate the ambiguity in the current contract provisions that has generated grievances, and still give employees a measure of control over their workloads by allowing them to initiate requests for earning credit hours.

IV. Union Position

a. Hours of Work

The Union argues that the Agency's proposal seeks to force on the bargaining unit restrictive schedules and core hours that were illegally imposed prior to any bargaining in 2017. The Union contends that the Agency's assertions concerning its determination that prior core hours and schedules had an adverse impact on Agency operations and service to its clients are fictitious and have been found to be entirely unfounded by an Arbitrator. The Union further states that the Agency's actions not only violated the CBA, but both the Statute and the Flexible Schedules Act; both of which call for bargaining before any such changes can be imposed. The Union contends that the Agency has been ordered by the Arbitrator to restore the employees' core hours and schedules and to compensate employees for losses experienced by rescinding their schedules.

On the merits of core hours, the Union states that there is no standard work time or workday among either OGC's client agencies, or the public they serve. The Union contends that many employees, including in the Washington D.C. Office, begin their workdays at 6 or 6:30 am to avoid traffic, or to split parenting obligations and be home in time for children returning from school. The Union states that the idea that OGC attorneys and other legal staff, whose job descriptions and performance standards require them to work independently and to be responsive to client needs, can only perform their duties in a narrow time band from a set location simultaneously with all of their colleagues, simply defies the reality of both the work and the means by which it is accomplished—through writings, emails, phone calls, and all the other modern communicative and productive technologies.

The Union states that the Agency has enforced restrictive schedules for the past three years to no demonstrable increase in client service or efficiency, but with demonstrable negative impact on the morale, recruitment, retention, and satisfaction of the employees, as amply evidenced by the Federal Employee Viewpoint Survey results. Therefore, the Union proposes an office coverage system that assures at least one attorney will be available from 9:00 a.m. to 4:30 p.m., and proposes core hours from 10:30 a.m. to 2:30 p.m., with a tour of duty from 6:00 a.m. to 7:30 p.m. The Union states that its proposal also retains the approval mechanism always available to management to address schedule issues or lack of coverage: supervisors have approval over any individual or group of schedules to ensure that both individually and collectively, schedules provide for adequate coverage throughout the day.

b. Credit Hours

On credit hours, the Union argues that the Agency's proposal also seeks to effectively eliminate an important schedule flexibility that has been available to OGC employees for over twenty years. By requiring advance permission for any variation from scheduled hours to

accommodate alterations in the workday, the Union states that the Agency unduly restricts employees from accomplishing the Agency's mission. The Union argues that it is simply not compatible with the assigned duties of OGC's employees to seek out and obtain a supervisor's advance permission to complete a conference call which runs past an employee's scheduled workday end or to seek advanced permission to begin work prior to one's scheduled start time when traffic conditions allow for a shortened commute and one arrives prior to a supervisor. The Union contends that these situations, common to OGC's independent legal work, are best addressed with the flexibilities provided for by a workable credit hour system.

The Union states that the Agency's proposal also runs afoul of the law by demanding that employees work without compensation ("work performed in increments of less than 30 minutes will not earn credit hours") and forbidding teleworking employees from earning credit hours (credit hours may only be earned "at the conventional work site"). Further, the Union states that the Agency has many bargaining unit employees that are barred from earning compensatory time due to statutory limitations and for whom the Agency's proposed cap of 24 credit hours earned per year is insufficient. Similarly, the Union states that any claims by the Agency of absences by employees due to "unilateral accrual of credit hours" are unconvincing since the contract already provides that supervisors have approval authority over all use of leave.

The Union contends that its proposal addresses the Agency's concerns over credit hour accumulation by substantially lowering the amount to be accumulated (from the statutory cap of 24 to 8) without specific supervisory input, but still retains an element of flexibility necessary to the work of independent attorney professionals. The Union states that its proposal also provides adequate supervisory control without the needless layers of permission required by the Agency. It does so by having supervisors approve the use of credit hour leave, just as with any other leave. The Union states that this level of discretion, combined with the lowered cap of eight hours of credit accumulation ensures that the Agency cannot experience unapproved absences as a result of credit hour accumulation.

II. Analysis and Recommendations

a. Hours of Work

The Panel will adopt the Agency's proposal on hours of work. Under the current contract, the employees' tour of duty is from 6:00 a.m. to 6:30 p.m. and core hours are from 10:00 a.m. to 3:00 p.m. In March 2017, the Agency provided the Union notice it was terminating the current CBA's hours of work and provided the Union notice that the new tour of duty would be from 7:30 a.m. to 6:30 p.m., with core hours from 9:30 a.m. to 4:00 p.m. As discussed above, the Union filed a grievance challenging, in part, the Agency's unilateral rescission of the employees' hours of work and imposition of the new working hours. An Arbitrator found in favor of the Union and ordered, in part, a status quo ante remedy and that the parties' current CBA would remain in effect until the parties agreed upon a successor CBA. Instead of implementing the award, the Agency filed exceptions, which are pending before the FLRA. The Union again argues under this article that the Agency illegally imposed conditions of employment on its bargaining unit without bargaining and that the parties cannot be at impasse over articles that are involved in litigation. The Panel already considered and rejected

the Union's objections prior to asserting jurisdiction over this matter, and the Panel addressed those arguments again under Article 3. The Panel will continue to deny the Union's arguments.

On the merits, the Agency offers better support for its proposal to modify the Agency's core hours. The Agency's clients are located in nine different time zones and in order to best accommodate its clients, the Agency's proposal offers better attorney coverage to its client while being minimally invasive to its employees. This was supported by an affidavit provided by the Deputy General Counsel who attested to the challenges that OGC faces to accommodate its clients located in the different time zones.

He stated that the Union's proposed core hours from 10:30 a.m. to 2:30 p.m. could mean that an attorney in the San Francisco Office might complete their work day at 2:30 p.m. pacific time, which would be 7:30 a.m. or 8:30 a.m. in Guam, diminishing their availability to clients in Guam. The Deputy General Counsel demonstrated the same problems that OGC could face under the Union's proposal with its clients in Hawaii and Alaska. To alleviate this issue, the Union proposed that at least one attorney would be in the office from 9:00 a.m. to 4:30 p.m., but as the Agency noted, its attorneys work on a wide variety of subject matters and are specialized in specific areas of the law. Having only one or two attorneys available when the Agency's client might need expertise from another attorney does not contribute to efficient and effective Agency operations.

The Union points to the Employee Viewpoint Survey to state employees' morale, recruitment, retention, and satisfaction are down based on the restrictive schedules that the Agency has imposed and is looking to impose for another three years. While the employees' morale is important, the mission of the Agency must be prioritized, and the Agency's proposal best does that. The Union argues that the Agency's proposals violate the Statute and the Flexible and Compressed Work Schedules Act, but it offers no authoritative support for its argument. Thus, on balance, the Agency's proposal best ensures that its clients' needs are met, while still providing the employees a relatively early start and end time to their work day. As such, the Panel will adopt the Agency's core hours proposal. Because the Panel adopts the Agency's proposal, it's unnecessary to address their management rights argument.

b. Credit Hours

The Panel adopts the Union's credit hours proposal, with modification. The next area of disagreement is over credit hours. In accordance with OPM guidance, credit hours are hours in excess of an employee's basic work requirement (e.g., 40 hours a week) which the employee elects to work to vary the length of a workweek or a workday.[15] Agencies may limit or restrict the earning and use of credit hours. The Agency proposes that credit hours require supervisory approval prior to employees working the hours because it has experienced a negative impact to its operations. The Deputy General Counsel attested to this by asserting one employee accrued and used 323 credit hours, and as a result, was absent from work more than 40 workdays in a year without using annual leave. He stated that these absences disrupted the office because managers needed to reassign work to other employees. While this employee may have utilized

15 OPM Pay & Leave, Work Schedules: https://www.opm.gov/policy-data-oversight/pay-leave/work-schedules/fact-sheets/credit-hours-under-a-flexible-work-schedule/.

credit hours to the detriment of the Agency, one employee's misuse does not illustrate a pervasive practice of employees abusing the use of credit hours.

The Agency further asserts that the authorization of credit hours is considered a management right, and it may establish limitations on the number of credit hours earned. Notwithstanding, the Union's proposals do not remove the Agency's discretion to approve credit hours. In fact, the Union's proposal requires supervisors to approve employee credit hour requests. Thus, aside from the Agency making these conclusory assertions, the Agency did not provide support for its argument.

Similarly, the Agency has not offered any evidence demonstrating the employees' ability to earn credit hours should be limited to only their conventional worksite. The Agency did not provide support for the requirement that employees are to earn credit hours in increments of 30 minutes, but then use credit hours in increments of 15 minutes. Typically, employees may earn credit hours in increments of 15 minutes and use the credit hours in the same increments. Employees are also normally permitted to carry over 24 credit hours per pay;[16] however, the Agency is proposing that an employee only be permitted to carry over eight hours per pay period and that an employee only earn a total of 24 credit hours for the year. The Agency did not provide evidence which indicates that more than one employee is abusing the use of credits hours, which would justify the Agency's severe limitation on the credit hours earned.

Accordingly, the Panel impose the Union's credit hours proposal, which will permit employees to earn up to two credit hours per day, but limits the employees ability to earn credit hours to no more than eight credit per pay period; permit employees to carry over a total of 24 hours per pay period; earn and use the credit hours in increments of 15 minutes; and leave it up to the supervisor to authorize an employee's use of credit hours. To the latter point, the supervisor can always deny an employee's request for credit hours and require the employee utilize leave if the supervisor thinks the employees request is not appropriate. The Panel will modify the Union's section 4(d) to remove the requirement that Senior Counsels are permitted to earn more than eight credit hours per pay period, since the Union did not provide justification for this proposal. Because the Panel is adopting the Union's credit hours proposal, it's unnecessary to address its legal arguments.

On a final note, neither party explained their section 5 proposals that address employee breaks. Notwithstanding, the Panel adopts the Agency's section 5 language because it aligns with the Agency's core hours proposal, which was adopted by the Panel.

7. Article 32 – Telework

I. Agency Position

The Agency states that its proposal is consistent with the USDA-wide Departmental Regulation on telework and the Telework Enhancement Act of 2010 (Act). Departmental Regulation (DR) 4080- 811-002, states that employees shall telework "no more than 2 days a pay period," and the Agency believes that this policy is consistent with its need for attorneys and

16 5 U.S.C. 6126.

staff to be in the physical office four days per week. To that end, while the Agency states that the Act makes clear that telework is not an employee right, the Departmental Regulation nevertheless provides that employees approved to participate in telework, may telework up to two days per pay period. The Agency asserts that its proposal preserves the OGC's ability to meet its mission and provide consistent customer service, which often requires in-person meetings with high-level officials, clients, customers, and other stakeholders, as well as on-site collaboration with colleagues. The Agency states that this is particularly important for OGC offices that are co-located with client offices, where the possibility of "drop in" client visits or short-notice on-site meetings enhances the Agency's client services. The Agency contends that those benefits are also undermined by telework schedules that severely restrict the number of days when all attorneys are present in the office.

Because OGC employees currently have wide latitude for their schedules such that they interact with one another substantially less and are less invested in their work and work relationships, the Agency states that it has found a demonstrable and significant decrease in collaboration and teamwork as a result of the current telework program. For example, with the current policy of four days telework per pay period, the Agency states that some employees only overlap in the office one day per week; and efforts at teambuilding and visits to local and remote field office clients are negatively impacted by the lack of consistent availability of employees. Finally, the Agency states that an independent audit of USDA's telework program found that it had little supporting data to justify the claimed benefits of telework.[17] By linking its telework policy directly to the Departmental Regulation, the Agency's states that its proposal aligns with the telework programs of its client agencies and ensures that attorneys will be available in the office to resolve unexpected client concerns, to meet with other litigators for discovery and other litigation conferences, to quickly address exigent and emergency circumstances, and to provide a consistent level of service to all of the agencies and offices that OGC serves.

Under the Union's proposal, the Agency contends that managers have no way of knowing whether an employee will be in the office each day without communicating with the employee before and after hours daily. The Agency further states that the Union's proposal essentially allows employees to set the hours of their work and permits employees to avoid the office and their clients if they choose. Consequently, the Agency states that the Union's proposal interferes with management's rights to direct employees, and "assign and determine the personnel by which agency operations shall be conducted" under 5 U.S.C. §7106(a)(2)(A) and (B).

II. Union Position

For the prior two decades, the Union states that OGC argued that the legal work of the Agency was sufficiently different from that of the broader USDA, such that its telework rules had to be negotiated individually and separately and need not follow Departmental Regulations. As a result, for twenty years, the Union contends that the USDA Telework Policy was more generous to employees in both the amounts of telework available and the procedures for implementing telework than the corresponding conditions offered to OGC's bargaining unit

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17 U.S. Government Accountability Office, GAO-16-551, Federal Telework: Better Guidance Could Help Agencies Calculate Benefits and Costs at 9-12 (July 2016): https://www.gao.gov/assets/680/678465.pdf.

employees. Now, the Union contends that the Agency insists that the OGC adopt the limitations of the USDA Departmental Regulation.

Currently, the Union states that over 40% of OGC attorneys have telework agreements allowing for a second day of telework per week that the Agency proposes to rescind. The Union states that there has been no demonstration of any negative impact of the Agency's current telework policy, which permits employees to telework up to four days a pay period, on the efficiency of the Agency. Many of the Agency's nationwide offices are not co-located with client agencies making in-person meetings a rarity that can be accommodated as the need arises. As a result, many OGC employees spend in excess of 90% of their workday on the phone or computer - tasks that the Union states can just as easily and efficiently be performed remotely. The Union states that the Agency also ignores the benefits of telework both on efficiency through concentration without distraction, relief from ever increasing commuting stress and waste, as well as employee morale and satisfaction. Finally, the Union contends that the Agency's proposal also introduces an undefined term of "unsatisfactory performance" to limit an employee's ability to telework when that term is not used in the Agency's performance evaluation.

The Union asserts that its telework proposal is fully compliant with the Departmental Regulation. The Union, however, asks for three alterations from the Agency's proposal. First, when the Departmental Policy changes, that the Agency implement new telework agreements to comply with the new policy. In other words, both parties should be bound to follow Departmental Regulation. Currently, while the Agency insists the Departmental Regulations must be adhered to, its proposal makes future adherence optional on the Agency stating only that it may alter telework when the regulation changes.

Second, the Union asks that the Agency allow employees 90 days rather than 30 days for those whose employees who telework exceeds the new restrictions on telework, to arrange their schedules to come into compliance. Third, that OGC employees, with the agreement of their supervisors, be allowed to telework up to 12 hours per week so long as they appear at the office on 4 days per week. The Union argues that this allowance has been approved by the Department in several CBAs including for the Forest Service, the largest subcomponent of USDA (and one with which several OGC field office share office space).

III. Analysis and Recommendations

The Panel will impose the Agency's Article 32. The parties disagree over the number of days that employees may be permitted to telework within a two-week pay period. The parties' current telework agreement permits employees to telework up to two days per week, four days per pay period. The Agency has proposed that the employees may be permitted no more than two days of telework per pay period, while the Union's proposal is for up to 12 hours of telework per week.

The Agency supported its proposal by providing an affidavit from its Deputy General Counsel who stated that it's important that employees are in the office more often if a client stops by on short notice. The Deputy General Counsel further stated that he has found that the current telework arrangement contributed to a significant decrease in collaboration and

teamwork. The Deputy General Counsel acknowledged the Agency's increased use of telework due to the current circumstances surrounding COVID-19; however, he stated that maximized telework cannot be sustained. The Panel credits the Deputy General Counsel and finds his statement compelling.

The Panel also does not believe that the Union has demonstrated support for its proposal. The practical effect of the Union's proposal would require an employee to work a half-day in the office and a half-day out of the office. This proposal would not be an effective and efficient use of telework, since it would create a required work stoppage in the middle of an employee's workday, or might require the employee to take leave to ensure that he or she could travel to work. The employee might then work later into the day, which would not contribute to one of the goals of the Telework Enhancement Act:[18] enhancing work/life effectiveness and balance. The Agency's proposal, which permits employees to telework for full days better aligns with the intent of the Telework Enhancement Act. Further, as referenced by the Agency, the U.S. Government Accountability Office (GAO) conducted an audit in July 2016, of telework in the Federal government to calculate the benefits and costs of telework.[19] The GAO report did not notice increased productivity in work when employees teleworked; one of the most important objectives to the Telework Enhancement Act. As a result, the Panel finds that the Unions' proposal is not supported by the Telework Act, while the Agency's proposal contributes to an effective and efficient government. Because the Panel is adopting the Agency's proposal, it's unnecessary to address its management rights argument.

8. Article 38 – Employee Evaluations

I. Union Position

The Union argues that the Agency fails to make any proposal governing a necessary and critical subject that has been in the parties' agreements for the preceding twenty years: the evaluation of employee performance. Contrary to the Agency's assertion, the Union states that the subject matter is not adequately covered by the Department's Regulation, which does not deal with the specifics of OGC's legal work or the standards by which it is to be evaluated. The Union contends that employees are entitled to understand the standards and provisions under which their performance will be evaluated and to have those protections and understandings be contractually enforced.

The Union argues that its proposal embodies significant concessions to the Agency's concerns by agreeing to a 60-day demonstration period for those on Performance Improvement Plans (PIPs). The Union states that this is the minimum amount of time necessary to demonstrate improvement given the complex nature of the Agency's legal work. The Union further states that its proposal does not conflict in any way with the language of EO 13839 or any other EO.

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18 5 U.S.C. §§ 6501, et. seq.
19 GAO report at 9-12: https://www.gao.gov/assets/680/678465.pdf.

II. Agency Position

The Agency has no proposed article on Employee Performance. The Agency believes that the comprehensive Departmental Regulation on performance management, applicable to all non-Senior Executive Service employees of USDA governs the evaluation of employee performance with the Agency. The Agency states that the Departmental Regulation requires the Agency to issue annually an individual performance plan and to engage employees during the process of establishing and documenting performance plans to ensure employees understand what is expected of them. For potential performance issues, the Agency states that the Departmental Regulation and EO 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles provide that a demonstration opportunity of 30 days is sufficient.

The Agency argues that the Union's proposal simply restates the contents of the Departmental Regulation, but adds performance improvement measures and additional commentary. In this respect, it includes a provision for a PIP of 60 days rather than the 30 days directed by EO 13839. The Union's proposal also includes a formalized requirement for discussion on performance measures that the Agency states is unnecessary for employees' understanding of performance expectations and does not serve the needs of most employees.

III. Analysis and Recommendations

The Panel will impose the Union's Article 38, with modification. The parties disagree over whether there should be an article in the CBA that addresses the evaluation of employee performance. The Union argues that it is important for the parties to memorialize the employees' performance standards in the CBA, so that employees know and can understand the guidelines under which they are rated. Therefore, the Union proposed to include language that details the performance appraisal process. The Agency disagreed that the parties should maintain the performance evaluation process in the CBA because the Department's Regulation 4040-430 sufficiently addresses the Union's concerns. The Agency points to section 10(a) of the Regulation; however, that section only indicates generally that the rating official will establish individual performance plans and communicate those expectations to employees. The Agency did not indicate that any other source provides the employees this detailed information.

The CBA is meant to act not only a legal instrument explaining employee rights and employer obligations, but act as a source of information for employees. There might not be any more important source of information to the employees than their performance expectations and standards. It's beneficial that they know and understand the performance evaluation process because that will determine whether they are performing at an acceptable level to obtain a performance award or even maintain their employment. The Agency simply argued that the Union's proposal is unnecessary and not needed, but did not actually provide support for its position. The Agency further did not indicate that the performance evaluation process detailed in the Union's proposal does not apply to the employees. As such, the Panel will impose the Union's Article 38, with the below modification.

For the issue that pertains to the length of time that an employee will be placed on a PIP, the Panel will modify the Union's proposal to limit the time period to 30 days consistent with

Executive Order 13839, section 4(c). The Union argued that the EO does not require a 30-day demonstration period. The Union is correct that the Executive does not mandate and only recommends a 30-day PIP period; however, the Panel has now consistently written that the President's EOs on labor relations matters are an important source of public policy that the Panel has found appropriate to give weight to the principles espoused in those EOs.[20]

The Union claimed that a 60-day improvement period is necessary because of the complex nature of the employee's work; however, the Union did not provide any supporting data to conclude that a 30-day period would not be sufficient, e.g., the number of employees placed on a PIP during the term of the parties' contract and time needed for each employee to demonstrate improvement. In the absence of supporting information, the Panel will provide weight to the EO 13839, section 4(c) and require the Union to modify its PIP period to 30 days.

9. Article 41 – Grievance and Arbitration

I. Agency Position

The Agency's proposal provides language ensuring consistency for both Union and non-Union members. In its proposal, the Agency seeks to exclude matters appealable to the Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC) from the negotiated grievance procedure. The Agency argues that this serves to streamline the grievance procedure in the CBA by avoiding restatements of the law and ensures consistency in how such matters are handled. The Agency states that where there are robust statutory procedures available to employees, it is not a benefit for the Agency to use resources on the additional, unnecessary procedures and remedies that the Union's proposal would impose.

For the proposed exclusions related to removals and performance ratings, the Agency notes that EO 13839, section 3 calls for agencies to endeavor to exclude the aforementioned items from a negotiated grievance procedure. In this regard, the Agency contends that it has attempted to fulfill the EOs request. In its proposal, the Agency seeks to exclude removals and performance ratings because management believes that flawed arbitration decisions negatively impact the workforce, especially given the relatively small size of the bargaining unit. The Agency also states that it seeks to exclude performance ratings because parties and personnel spend substantial amounts of time presenting and preparing cases with little to be reviewed or decided. The Agency contends that employees already have much more effective options for disputes involving performance reviews, including the use of the USDA's internal EEO process administered by the Office of the Assistant Secretary for Civil Rights. The Agency states that this process includes appeal rights to the EEOC, MSPB, and federal district court. In light of such robust remedies, the Agency argues that the additional layers of procedure are unnecessary and inefficient.

II. Union Position

The Union contends that the parties have agreed to all aspects of this article other than the Agency's insistence on excluding many areas of concern to the bargaining unit entirely from the

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20 20 FSIP 043 (November 2019).

grievance procedures. The Union states that the prior versions of the parties' contract excluded a number of topics from the grievance procedure in accordance with the statutory governing language. The Union contends that the Agency has presented no evidence of deficiencies in the former exclusions, or over-zealous pursuit of grievances by the Union or individual bargaining unit employees.

The Union argues that Panel has noted that the Statute calls for robust grievance procedures to be available to federal employees and for exclusions from such to be carefully scrutinized.[21] In the instant case, the Union argues that the Agency has failed to carry out this burden. The Union states that the Agency seeks to insulate itself from grievances over "letters of counseling, warning, and/or instruction" when the current contract already excludes preliminary warnings or notices. The Union requested examples of these items and the Agency refused or was unable to provide any. The Union argues that employees should not be subject to undefined, arbitrary discipline or counseling, without review or recourse.

Next, the Union states that the Agency seeks to exclude from the grievance procedures all aspects of performance evaluation - not just final ratings, but the frequency, timing, and procedures used for performance reviews, as well as any decisions concerning PIPs or the contents and requirements thereof. By excluding these matters from grievance, the Union argues that the Agency subjects employees to arbitrary actions that may violate both the contract and Departmental Regulations with no opportunity for review or remedy. The Agency also seeks to exclude from the grievance procedures disputes concerning its interference with the Union's ability to perform its statutory representational duties: all disputes concerning the use of official time; and all disputes concerning the exercise of management rights, are no longer subject to the grievance and arbitration procedures. Thus, there is no contractual review or remedy from the Agency disallowing appropriate use of official time for representation, including participation in statutory mandated procedures, such as the Panel process. By so doing, the Union contends that the Agency makes even its own proposed article concerning the use of official time unenforceable, because no mechanism exists for a Union official or member to bring a complaint if the Agency violates its own standards.

The Union also states that the Agency adds any management decisions concerning the use of leave, or any automatic terminations of Union dues withholdings to its list of exclusions. The Union states that the Agency presented no argument for the necessity of either. In this respect, the Union contends that there is no record that these subject areas have been costly to the Agency, and there is no reason to exclude them from the grievance procedures. The Union argues that if these subjects were excluded from grievance, it would effectively make other contractual provisions ineffective and unenforceable.

III. Analysis and Recommendations

The Panel will impose the Agency's Article 41, with modification. The parties' disagreement is over the subject matters that will be excluded from the Grievance and Arbitration Article. The parties agree on a several exclusions, which include a preliminary warning or notice of potential action, such as a proposal of disciplinary or adverse action; an

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21 *Social Security Administration and AFGE*, 19 FSIP 019 (May 2019).

action terminating a temporary promotion; disapproval of quality step increases or any other kind of discretionary award; and performance-based and disciplinary or adverse actions to name a few. The parties, however, do not agree on the remaining exclusions that the Agency proposes to exclude from the grievance procedure. Since this dispute involves the exclusion of topics from the parties' negotiated grievance procedure, the Panel is bound to follow the framework established on this topic in *AFGE v. FLRA (AFGE).*[22]

In *Social Security Administration and AFGE,*[23] the Panel recognized federal court precedent in *AFGE* that holds that a proponent of a grievance exclusion bears the burden of justifying that exclusion. A party proposing a grievance exclusion must "establish connivingly that in [its] particular setting, its position is the more reasonable one."[24] The Union here, argues that the Agency's arguments do not satisfy this burden. The Panel finds that the Union's argument has merit.

The Agency has not established "convincingly" in this particular setting that most of its proposed grievance exclusions are warranted. The Agency proposes excluding the granting or denial of official time or leave without pay for Union activities; disputes related to grants of authority under the management rights in section 7106 of the Statute; the termination of an allotment of Union dues; disputes regarding a management decision related to approval or denial of leave; and disputes over performance progress reviews and PIPs. The Agency provides no support for any of these exclusions by way of data or explanation for the need to exclude these matters. The Panel will deny these exclusions.

The final grievance exclusions that the Agency proposes are performance ratings and removals.[25] Under section 3 of the EO 13839, an agency "shall endeavor" to exclude grievances involving removal actions in a negotiated grievance procedure "[w]henever reasonable in view of the particular circumstances." Regarding performance ratings, under section 4 of that that EO 13839, it states, that "no agency shall subject to grievance procedures or binding arbitration disputes concerning the assignment of ratings of record." The Agency defends its performance ratings and removals exclusion by stating that the parties have spent considerable resources on these matters, which have resulted in flawed arbitration decisions. However, the Agency did not present the Panel with any data depicting the amount of time or money that was spent by the Agency litigating removals, nor did it provide the Panel with any of these "flawed" arbitration decisions to support its position. The Panel will deny the Agency's proposed removal actions exclusion.

For performance ratings, because the language under section 4 of the EO mandates agencies remove these matters from the grievance procedure, the Panel has adopted agency proposals that rely on this section where the opposing party does not rebut the agency's arguments. The Union argues that by excluding these matters from grievance, the Agency subjects employees to arbitrary actions that may violate both the contract and Departmental

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22 712 F. 2d 640 (D.C. Cir. 1983).
23 19 FSIP 019 (May 2019).
24 *Id.*
25 The Agency did not include language in its proposals that reflect these two exclusions; however, based on the Agency's position, it is clear that it intended that language to be included in their proposals.

Regulations with no opportunity for review or remedy. However, the Union failed to cite to specific portions of the parties' contract or regulations that this proposal may violate. As such, the Panel will impose the Agency's performance rating exclusion.

10. Article 45 – Voluntary Relocations and Assignments

I. Agency Position

The Agency's current proposal provides that employees may request voluntary reassignments to other divisions, offices, or geographical areas within the Agency. The Agency states that its proposal ensures divisions and regions are staffed and employees are managed in accordance with management's rights under the Statute. The Agency's proposal further provides that, if the Agency concludes that the employee's work cannot be adequately performed from the requested alternate location, that adequate facilities are not available at the requested location, or that allowing the relocation would have an adverse effect on the accomplishment of the Agency's mission, the Agency will notify the employee. The Agency's proposal also states that management will provide full consideration to any request for relocation or reassignment. Finally, the Agency's proposal excludes decisions made on reassignments and relocations from the grievance process.

The Agency argues that the Union's proposal in section 2 would permit employees to relocate anywhere with no change in work assignments. In this respect, the Agency states that the Union's proposal provides employees with a right to transfer at the election of the employee and would create imbalanced staffing levels in OGC's offices. Therefore, the Agency states that the Union's proposal would effectively result in the loss of the Agency's ability to consent to employee moves. The Agency argues that the Union's proposal effectively undermines the right to assign work and direct employees.

The Agency further states that the Union's proposal permits an employee to request a reassignment outside of his or her job category or grade, which is unworkable for the Agency. The Union's proposal also does not provide any assurances that an attorney with the appropriate expertise is available to USDA clients. Finally, the Agency states that the Union's proposal appears to offer employment "preferences" that potentially contravene merit system principles and statutory protections for veterans in employment. Because the Agency's proposal ensures management's ability to assign work based on the Agency's priorities at any given time, preserves control over where employees are assigned, and safeguards merit system principles, the Agency argues that the Panel should adopt the Agency's proposal in full.

II. Union Position

The Union argues that the Agency's proposal fails to recognize the difference between reassignment and relocation. The Union contends that both situations are familiar to the Agency which has allowed each to occur, but without any process that assures fair and equal treatment of employees. The Union argues that the Agency's proposal provides no transparency and no process employees can rely on: retaining sole discretion; maintaining a list in the Office of the General Counsel, rather than relying on the Agency's administrative professionals; refusing to solicit requests from the employees to be on such a list; restricting relocation to instances when a

vacancy is created rather than when the relocation can be accommodated; and providing the employees no rights other than to be considered when a vacancy occurs - rights already provided to them under the law.

The Union asserts that the Agency's proposal is also unenforceable since it excludes any grievances even if the Agency refuses to adhere to its contractual commitments. The Union contends that the Agency's proposal also interferes with the Union's representational rights by refusing to provide the Union with the appropriate information to represent employees. In this respect, the Union states that the Agency proposes to withhold the list of employees desiring transfer, specifically their names and their office locations.

The Union states that its proposal specifically recognizes the discretionary nature of these actions and the Agency's right to assign all work, but it provides a description of a fair and open process so that employees can be treated equally. The Union states that its proposal specifically accommodates the Agency's concern - the proposal specifically allows the Agency to determine whether the employee's work can be performed from an alternate location and allows the Agency to consider other factors beyond the employee's individual circumstance in making its determination. In all, the Union asserts that its proposal offers both the employees and the Agency more: more information, more standards, more fairness, more allowance for individual circumstance, more potential accommodation, improved morale and retention as a result, and it does so without any impingement on management rights.

III. Analysis and Recommendations

The Panel will adopt the Agency's Article 45, with modification. The parties disagree over voluntary reassignments and relocations. Reassignments are defined as a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion.[26] Relocations are a transfer of an employee from one official work site to another.[27] The Agency proposes that it have sole discretion and that it *may* offer voluntary reassignments and relocations. The Union recognizes that the Agency has the right to reassign and relocate employees under the Statute, but it proposes that the Agency *will* offer voluntary reassignments and relocations. The Agency's proposal achieves the same goal as the Union's, while also recognizing management's rights under the Statute.

The Union argues that the Agency's proposal interferes with the Union's right to information, specifically the names of the employees requesting reassignments along with the offices where the employees work. However, the Union is not entitled to this information as a matter of course. The Union must establish a particularized need for information under the Statute. The Union has not established that it's entitled to this information under the Statute, but the Agency also has not demonstrated that the Union should not receive it. As such, the Panel will impose the Agency's Article, but modify the proposal by removing the language which states that the information "will not contain the names of the employees or identify the offices in which they work." The Panel will also remove the Agency's grievance exclusion language, as it

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26 5 C.F.R. 210.102(b)(12).
27 GSA Handbook for Relocating Federal Employees, p. 7:
https://www.nae.usace.army.mil/Portals/74/docs/HR/New%20Employees/GSA_Relocating_Federal_Employees.pdf

did not establish "convincingly" that relocations and reassignments should be excluded from the parties' grievance procedure.

11. Article 46 – OneUSDA OneOGC Communications

I. Union Position

The Union's proposal calls for the OGC leadership to inform appropriate staff of major initiatives at OGC's client agencies to the extent they are known, so that OGC staff may enhance their understanding of their client agencies and their needs for legal services. The Union's proposal also asks that the Agency inform employees of its own initiatives that may affect their work and working conditions. Such was the prior practice at OGC for years, but this has been abandoned. The Union contends that employees are left without current information about plans and decisions that affect their work and lives.

II. Agency Position

The Agency argues that the Union's proposal, which requires the Agency to notify employees of major initiatives is superfluous and unnecessary. The Agency asserts that the parties do not need an article stating that the Agency will notify employees in advance of initiatives. In this respect, the Agency states that supervisors will inform employees of major policy initiatives at the Department to the extent such initiatives impact the work of the employee. Additionally, the Agency contends that its proposed Article 10, Agency and Union Meetings, already fully addresses any meetings between the Agency and the Union. The Agency further argues that the Union's proposed article is inconsistent with EO 13812. In the EO 13812, the President instructed Federal agencies to take steps to abolish labor forums, councils, and committees. The Agency stated that it is obligated to follow this instruction and not to create a separate forum for meetings concerning leadership initiatives.

III. Analysis and Recommendations

The Panel will adopt the Agency's proposal for Article 46 and order the Union to withdraw its proposal. The Union's proposal creates a contractual right to grieve communications from the Agency regarding "major developments" affecting the USDA, OGC, its clients. This right would create a subjective standard that arbitrators would have to resolve. Rather than create more litigation over a less than clear standard, the Panel finds that Agency's proposal, to not create unnecessary contract language is the better approach. The Panel has consistently been unwilling to restrict the speech of unions. The Panel will take the same approach here for the Agency. As such, the Panel orders the Union to withdraw its proposal.

12. Article 47 – Continuing Supervisory Education

I. Union Position

The Union states that it proposes reasonable conditions concerning the training of OGC employees in preparation for managerial duties, and the ongoing training of supervisors. The Union contends that the proposal does not seek to represent supervisors; as the proposal states

the intent is to ensure a well-trained supervisory and managerial team for the benefit of the bargaining unit. The Union asserts that Federal Employee Viewpoint survey shows that many OGC bargaining unit employees believe their OGC supervisors lack the training and skills to properly perform their duties. The Union responds to this identified need with the current proposal, which covers subjects not found in any other provision of the contract. Additionally, the Union states that many OGC bargaining unit employees are stymied in career advancement by the specific lack of supervisory experience afforded to them. Therefore, the Union contends that its proposal is designed to enhance bargaining unit employees' potential competitiveness for supervisory positions to both the benefit of the employees and of the OGC.

II. Agency Position

The Agency argues, as it did under Article 46 that the Union's proposal is superfluous and unnecessary. It states that the CBA should not govern employee behavior outside of the bargaining unit. The Agency asserts that it follows the Departmental Regulation for issues involving the continuing training of supervisors.[28] The Agency contends that the Federal Employee Viewpoint Survey that the Union provided as part of its evidence indicates that 72 percent of employees feel that their supervisor is doing a good job.

The Agency asserts that Article 22 of the parties' tentative agreement already provides that the employee and the supervisor shall meet to discuss training and career development annually, or at regular intervals. Typically, the Agency states that this discussion will occur during the employee's annual performance evaluation or when training funds are allocated for the upcoming fiscal year. At any time, the Agency states that an employee may request a conference with the supervisor to discuss training and career development. Additionally, in Article 16 of the parties' tentative agreement, the Agency has agreed to implement an Agency-wide procedure for the timely distribution of competitive training, vacancy, and detail opportunities to employees. Accordingly, the Agency states that the Union's proposal should be rejected in full.

III. Analysis and Recommendations

The Panel will adopt the Agency's proposal for Article 47 and order the Union to withdraw its proposal. The Union proposes an article that is centered around training for employees, supervisors, and labor relations officials. The Union argued that it is important the Agency's supervisors are well-trained for the benefit of the employees. While that may be true, the Union's proposal likely is nonnegotiable.[29] Further, the Agency already has a Department Regulation, 4040-412-002 that establishes policy on training and development for supervisors.

The Union also proposed that the Agency consider providing employees, who request it, supervisory training so that they can enhance their opportunities for future supervisory positions. The parties have tentatively agreed to language in Article 22, Training and Career Development that requires supervisors and employees to meet at least annually to discuss the employee's training and career development goals. Finally, the Union requests that labor and management

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28 *See also* 5 C.F.R. § 7103(a)(10).
29 *See e.g., NFFE, Local 1482,* 45 FLRA 640 (1992).

representatives will attend training on labor-relations matters at least annually. While this proposal is certainly beneficial to the parties, and the parties should endeavor to obtain labor-management training, the Union has not demonstrated that the Panel should require the parties to attend such training. Thus, the Panel will impose the Agency's proposal, which will remove this article from the CBA.

13. Article 48 – Employee Feedback on Supervisory Performance

I. Union Position

Currently, the Union states that OGC employees are not afforded a consistent annual opportunity to provide anonymous feedback on the performance of their first and second level supervisors. The Union contends that many OGC employees are never consulted on the performance of their immediate or second level supervisors. The Union asserts that the General Counsel's Office affords no such opportunity. The Union contends that many OGC supervisors, particularly first level supervisors, are not SES employees; therefore, they are not subject to 360-degree evaluating,[30] which provide an opportunity for employee feedback. Even among those who are, the Union states that such evaluations are only performed triennially and do not include second level reportees.

II. Agency Position

The Agency has no corresponding article to Article 48 because the General Counsel has instituted an open-door policy and employees are free to avail themselves of the opportunity to provide feedback. Although most OGC supervisors receive continuous feedback from their employees, including in 360 evaluations for Senior Executives and other informal opportunities, all managers receive annual appraisals. The Agency states that employee feedback is not excluded from such appraisals. Further, the Agency asserts that employees also have several avenues available should there be legitimate concerns regarding supervisor behavior: the Agency's grievance process, the MSPB appeals system, the Office of Special Counsel whistleblower process, and the EEO complaint system are available to employees who raise issues involving employment matters.

III. Analysis and Recommendations

The Panel will adopt the Agency's proposal for Article 48 and order the Union to withdraw its proposal. The parties' dispute is over whether to include an article in their CBA designed to allow employee feedback on supervisory performance. The Union argues it is important that employees are provided an opportunity to provide anonymous feedback on the performance of their first and second level supervisors; however, the Union has not demonstrated the need for an entire article dedicated to such matters. Conversely, the Agency demonstrated that it offers employees several venues to provide feedback, such as Department Regulation 4740-003. Specifically, section 6(d) indicates that "[e]ach executive with supervisory

30 This new leadership assessment tool provides feedback to Federal supervisors, managers and executives. The purpose of the instrument is to help Federal managers identify their leadership strengths and development needs. OPM Data, Analysis, and Documentation, Employee Surveys: https://www.opm.gov/policy-data-oversight/data-analysis-documentation/employee-surveys/buy-services/opm-leadership-360/.

responsibilities will complete a 360-degree assessment at least once every three years to gather feedback from their supervisor, peers, and employees." Further, should the employees feel the need to anonymously comment on a supervisor's performance more frequently, they are always free to consult with the Union who may communicate the employee's concerns to management on his or her behalf. As such, the Panel will adopt the Agency's proposal, which will remove this article from the CBA.

14. Union Article 49/Agency Article 45 – Furloughs

I. Agency Position

The Agency asserts that its proposal provides a clear roadmap for employees regarding the procedures and policies that take place during furloughs. The Agency states that its proposal strictly follows guidance provided by the Office of Management and Budget (OMB) and the Department of Justice.[31] During a furlough, the Agency states that it is required by law to wait to execute an orderly shutdown until the Director of OMB does the following: (1) directs agencies to operate in accordance with the contingency plans that agencies have prepared under OMB Circular A-11, section 124; and (2) apportions the necessary amount of funds for obligations required to carry out agencies' contingency plans. The Agency argues that the Union's proposal requires that, during such exigent circumstances, the Agency instead use its resources to fulfill certain notice requirements and other communications that are not feasible. To the extent that employees need further guidance regarding furloughs, the Agency states that it has contingency plans published on its public website.

II. Union Position

The Agency and Union each propose an article governing the conduct of the Agency during furloughs. The Union states that only its proposal is in accordance with the law, and only the Union's proposal contains provisions concerning appropriate timely notice prior to furloughs of employees. Conversely, the Union argues that the Agency's proposal is flawed in not taking measures to protect its employees, and in a number of other ways.

The Union states that the Agency's proposal is internally inconsistent, suggesting simultaneously that the Agency has complete authority and responsibility for all decisions concerning furloughs including their length (section 1c) and that circumstances beyond the control of the Agency may compel a furlough (section 1b). The Union states that section 1b is accurate while 1c is not. The Union argues that the Agency misstates the law in regard to pay once appropriations are restored (section 4d). The Union further argues that the Agency's proposal lacks any standards for its notice obligations to the Union or to employees concerning furloughs and offers no protections to bargaining unit employees.

The Union asserts that its proposal was crafted to address concerns based on the experience of the bargaining unit during recent furloughs. In this respect, the Union states that its proposal also ensures that the Agency solicits volunteers for various cost saving measures prior to furloughing employees and provides employees the necessary information to assist the

31 OMB Circular A-11, §124: https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf.

employees during a furlough (section 2). The Union states that its proposal also includes provisions recognizing the legal limitations on employees' utilization of government equipment during a furlough and recognizes the legal standards for exempting employees from a furlough. The Union also states that its proposal provides a clear system when furloughed employees are required to work on emergency matters (section 3). Finally, the Union states that its proposal articulates reasonable standards for returning employees to work after a furlough (section 4).

III. Analysis and Recommendations

The Panel will adopt the Agency's Article 49, with modification. The parties disagree over the appropriate policy and procedures that will apply in the event of a furlough. A furlough is the placing of an employee in a temporary nonduty, non-pay status because of lack of work or funds, or other non-disciplinary reasons.[32] There are two types of furloughs. The first is an "administrative furlough," (the Agency calls it "save money furloughs"), which is a planned event by an agency designed to absorb reductions necessitated by downsizing, reduced funding, lack of work, or any budget situation other than a lapse in appropriations.[33] Furloughs that would potentially result from sequestration would generally be considered administrative furloughs.[34] The second is a "shutdown furlough," also called an emergency furlough, which occurs when there is a lapse in appropriations, and can occur at the beginning of a fiscal year if no funds have been appropriated for that year, or upon expiration of a continuing resolution if a new continuing resolution or appropriations law is not passed.[35] In a shutdown furlough, an affected agency would have to shut down any activities funded by annual appropriations that are not excepted by law.[36] The OMB, who is charged with developing and executing the budget across the Executive Branch, requires agencies to develop and maintain plans for an orderly shutdown in the event of a lapse in appropriations.[37]

The parties each argue that their respective proposals comply with the law and OPM directives and guidance. The parties' proposals are largely the same, except the Agency's proposal details language which provides it "complete authority and responsibility with respect to all decisions about furloughing employees, including the specific employees furloughed; days, dates, and times of the furlough; and duration." The Union argues that this language is inconsistent with another proposal from the Agency, which states, "[c]ircumstances beyond the control of the Agency may compel the Agency to furlough employees." However, the Union's argument is misplaced. If an administrative furlough occurs, it is because of circumstances beyond the control of the Agency, such as due to sequestration. In that scenario, the Agency maintains the discretion to determine such matters as the number of employees to be furloughed and the duration of the furlough.[38] Similarly, if a shutdown furlough occurs, which again is due

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32 OPM, Pay and Leave, Furlough Guidance: https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-administrative-furloughs.pdf
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 OMB Circular A-11, §124: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/s124.pdf
38 OPM, Pay and Leave, Furlough Guidance: https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-administrative-furloughs.pdf.

to circumstances beyond the control of the Agency because funds are not available through an appropriations law or continuing resolution, the Agency determines which employees are designated as "excepted" and "non-excepted" based on the law from the furloughs.[39]

For administrative furloughs, the Union's proposal requires the Agency to first solicit volunteers to be placed in a leave without pay status and solicit volunteers for details before the Agency may solicit volunteers to work reduced hours. The Union's proposal also details several requirements that the Agency must follow when faced with a furlough, including informing employees of the number of days they may be furloughed, and also requires the Agency to adhere to strict timelines that provide the employees notice of the furlough. Looking into alternative options to furloughing employees and providing employees as much information as possible is certainly beneficial, but there must be a degree of flexibility involved due to the uncertainty surrounding the events of a furlough. The Agency's proposal achieves that because it allows the Agency to determine the best approach to take during a furlough, based on operational needs. The Agency's language still ensures that employees are made aware of the furlough by providing employees notification and information about it as soon as possible, but is not so rigid in its requirements (e.g., requiring the Agency to adhere to strict parameters over the notification of a furlough to employees). Further, OPM guidance states that each agency will determine the method and timing of notifying employees of the furlough.[40]

The Union is also concerned about whether employees that are on leave when a furlough occurs remain on leave in a paid status. The Union, along with the Agency, proposes several scenarios for when an employee may be allowed to do so. The parties have also offered proposals detailing the effect of employees in a leave without pay status during a furlough. Rather than spell out in the CBA every possible scenario in which an employee may be entitled to different types of leave, the Panel orders the parties to follow OPM guidance on leave during shutdown furloughs and administrative leave furloughs.[41] OPM offers two comprehensive guides that establish the parameters around the types of leave that employees may take during furloughs. The Panel believes that trying to capture every situation will either result in missed language, or litigation by the parties. The Agency can determine, based on OPM guidance, whether the circumstance at issue warrants the type of leave in question. This will also provide the Agency more flexibility.

Lastly, the Union argues that the Agency's proposal over pay during a shutdown furlough mischaracterizes the law; however, the Union does not provide any authoritative source on the topic. During a shutdown furlough, agencies will incur obligations to pay for services performed by excepted employees during a lapse in appropriations, and those employees will be paid after Congress passes and the President signs a new appropriation or continuing resolution.[42]

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39 OPM, Pay and Leave, Furlough Guidance: https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf.
40 *Id.*
41 OPM Pay & Leave Furlough Guidance: https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Overview.
42 OPM Pay & Leave Furlough Guidance: https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf.

Congress will determine whether furloughed or non-excepted employees receive pay for the furlough period.[43] The Agency's proposal corresponds with this guidance.

Notwithstanding, rather than insert itself into a legal dispute, the Panel will require the Agency to withdraw this proposal in section 4(d), and instead order the Agency to follow the applicable law governing employee pay with respect to furloughs. Thus the Panel will adopt the Agency's proposal, but with the referenced modifications because it will better ensure that the Agency has the appropriate latitude to operate effectively during a furlough and is in compliance with applicable rules, regulations, and the law.

15. Union Article 50 – OGC Rotational Program

I. Union Position

On March 19, 2020, the Union emailed the Panel that it has withdrawn its proposal for Article 50.

II. Agency Position

The Agency states that it is not currently operating a formal rotational program for any of its attorneys and there are no plans to operate such a program. On March 19, 2020, the Union submitted a revised proposal wherein it withdrew its proposed Article 50 - OGC Rotational Program. Therefore, the Agency states that the Panel should adopt the Agency's position and order that there be no article on this subject in the parties' CBA.

III. Analysis and Recommendations

The Panel will accept the Union's withdrawal and order that the parties' CBA does not contain an OGC Rotational Program.

16. Article 30A – Senior Counsel

I. Union Position

The Union states that the Agency's proposal eliminates an important benefit to the bargaining unit that has delivered over 60 Senior Counsel positions to bargaining unit employees over the course of the contract. In contrast, the Union contends that its proposal does not bind the Agency's hiring authorities or interfere with management rights. The Union further states that it does not interfere with competitive hiring or Agency flexibility. Instead, the Union states that its proposal provides an avenue for those who are doing GS-15 level work to have such work evaluated according to the law (section proposal b), and to receive the lawful compensation for the work they are performing. The Union states that its proposal also leaves the Agency broad discretion to advertise GS-15 Senior Counsel positions in accord with the agreed upon Vacancy Announcement Article of the CBA. Finally, the Union states that its proposal addresses

43 *Id.*

bargaining unit concerns by requesting the Agency seek to balance opportunities across mission areas and geographic locations.

II. Agency Position

The Agency states that the Union's proposal unnecessarily binds the Agency to a process that does not and cannot anticipate the Agency's needs for Senior Counsel positions and has the potential to severely constrain or impact the Agency's ability to manage its own budget. The Agency also contends that the Union's proposal implies that such positions are "promotions" that all attorneys should have access to, regardless of the establishment of such a position in any particular office or division. In a fiscal year such as the current one, the Agency states that the Union's proposal for automatic promotions could cause an Anti-Deficiency Act violation because the Agency lacks funds to promote employees to higher grade levels. In times of extremely competitive hiring for government attorneys, the Agency states that it must have flexibility to hire and retain the best candidates for positions the Agency determines it needs. The Agency further states that an employee who believes he or she is performing at the GS-15 level can always appeal the classification of their position with OPM.

III. Analysis and Recommendations

The Panel will adopt the Union's Article 30A, with modification. The parties' disagreement is over the announcement of a Senior Counsel position and the promotion of employees to such a position. The Union offered a proposal that would permit non-supervisory GS-14 attorneys to pursue a classification appeal with OPM, a right that the employees have outside of this contract.[44] The Union requests that in the event OPM finds that the employee is performing work at the GS-15 level, the Agency promote the employee, which the Agency is obligated to do anyway.

Although these rights are provided to employees outside the parties' contract, the Agency did not support its position for why it cannot agree to the Union's proposal. The Agency claims that the Union's proposal has the potential to severely constrain the Agency's budget, may violate the Anti-Deficiency Act, and creates an automatic promotion of the employee. However, the Union's proposal does none of those things. Instead, it simply requires the Agency honor a decision from OPM over an employee's classification appeal of their position.

The Union also proposed that when the Agency announces vacant positions, it shall limit applications to those currently employed by the Agency and then open the announcement up to the public if the Agency determines that none of the applicants are qualified. The Union's proposal, however, does not provide the Agency with the flexibility to attract the most highly qualified candidates for a position. The Agency should be permitted to determine whether it will open the vacancy announcement to only the bargaining unit or expand that to include the public.

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44 An employee may appeal the classification of his or her position by filing a classification appeal with OPM. OPM will review the work assigned to the position, the qualifications required to perform the work, and the proper application of the classification standards. Once OPM decides the appeal, it is binding on the agency. OPM Classification Appeals, Employee Fact Sheet: https://www.opm.gov/policy-data-oversight/classification-qualifications/appeal-decisions/fact-sheets/mso-98-3.pdf.

As such, the Panel will adopt the Union's Article 30A, but remove this limiting language (section c) from the Union's proposal.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.

Mark A. Carter
FSIP Chairman

May 21, 2020
Washington, D.C.

ATTACHMENTS

- Parties' Proposals

Article/Section	Agency Proposal	Union Proposal
1. Article 3, Effective Date and Duration	S2: This Agreement shall remain in effect until May 31, 2024. The Agreement shall remain in effect for additional 1-year periods after May 31, 2024 unless, during the month of May 2024 or a May of any subsequent year S4: A supplemental agreement between the Parties that has become a part of this Agreement shall terminate at the same time as this Agreement, unless the Parties agree otherwise in writing or the Agency has a compelling need for the regulation, rule, policy, or directive as authorized by 5 U.S.C. § 7117(b).	S2: This Agreement shall remain in effect until February 28, 2021. The Agreement shall remain in effect for additional 1-year periods after February 28, 2021 unless, during the month of February 2021 or a February of any subsequent year S4: A supplemental agreement between the Parties that has become a part of this Agreement shall terminate at the same time as this Agreement, unless the Parties agree otherwise in writing.

Article/Section	Agency Proposal	Union Proposal
2. Article 6 – Management Rights	*In its proposal, the Agency seeks to reserve the right to terminate permissive subjects on expiration/termination of the contract and to determine the nature and extent of negotiating on permissive subjects at the time the parties are negotiating any such agreement. On March 19, 2020, at 6:36 p.m. EST, the Union submitted revised proposals, wherein it indicated it would accept the Agency's proposed Article 6. Att. 4, Union's March 19, 2020 Email & Att. 5, Union's Revised Best and Final Offer. Therefore, because the Agency's proposal is the most reasonable, and because the Union does not object, the Panel should adopt the Agency's proposal in its entirety.*	

Article/Section	Agency Proposal	Union Proposal
3. Article 10, "Meetings"	Title: Agency and Union Meetings By mutual agreement of the parties, the Agency and the Union may agree to discuss issues of mutual concern. To the extent any costs are associated with such meetings (e.g., travel) each party is to bear their own costs.	Title: Meetings and Committees S1: a. The Parties are committed to maintaining a cooperative labor-management relationship and are mindful of the Secretary's direction that labor management relations are as "covenants we hold between us" rather than a purely contractual matter. b. Such a cooperative relationship calls the Parties to share information in a timely fashion, establish means for a continuing dialogue, and work to achieve mutual interests in service of the Agency's mission. S2. Meetings. a. The Parties agree to meet periodically. Such meetings will include: i. the Union President and the designated Agency management official; ii. Up to an additional 3 Union representatives designated by the Union President, and up to an additional 3 Agency representatives designated by the General Counsel. b. The Parties may by mutual agreement invite others, including members of the bargaining unit or outside experts to meetings involving particular issues when their expertise would be useful to the Parties' discussions.

Article/Section	Agency Proposal	Union Proposal
		c. These meetings shall be held semi-annually or more or less frequently by mutual agreement of the Parties. The Union President and the designated Agency management official shall determine the dates and times for the meetings. Meetings shall be held by conference call or video tele-conference, except that at the election of either party one meeting per year will be in person at a designated location. d. The agenda for each meeting shall be set by the Union President and the designated Agency management official cooperatively. e. If the Union elects to request an in person meeting, it will bear the costs (travel and per diem) of its representatives' participation. If the Agency elects to request an in person meeting it will bear the costs (travel and per diem) of the Union representatives' participation. S3. Committees, a. The Agency may desire from time to time to establish ad hoc committees to study and review specific topics concerning working conditions and make recommendations to the General Counsel.

Article/Section	Agency Proposal	Union Proposal
		b. If the Agency decides to establish any such committee it shall contact the Union President as the exclusive representative of bargaining unit employees. The designated Agency management official and the Union President will collaboratively establish the agenda for the committee and the constituent members. The committees shall be co-chaired by the General Counsel's designee and the Union President's designee. Section 4. Training. A labor-relations training program is essential to an effective labor-management relationship. The Union President and designated Agency management official shall determine what training is necessary, and, to the extent funds are available, the Agency shall pay for the training. Whenever possible, the Parties shall use the low-cost or no-cost resources of the Federal Labor Relations Authority, the Federal Mediation and Conciliation Service, the Department of Labor, and others. Employees shall be entitled to official time for Agency-approved labor-relations training.

Article/Section	Agency Proposal	Union Proposal
4. Article 11, Taxpayer Funded Union Time	Title: Official Time and Leave without Pay for Federal Labor-Relations Activities. S1: Definitions. Section 1. Definitions. For purposes of this Article, "Official time" means taxpayer-funded union time and leave without pay for the purpose of labor-relations activities, granted to an employee pursuant to 5 U.S.C. § 7131. The term "union time rate" shall mean the total number of duty hours in the fiscal year that employees used for taxpayer-funded union time and any other official time granted to Union representatives to perform non-agency business, divided by the number of employees in the bargaining unit. S2: Governing Law. Governing Law. Federal law allows some Federal employees to represent labor organizations while being paid by American taxpayers (taxpayer-funded union time). The use of taxpayer-funded union time shall be governed by this Article and by statutes, government-wide regulations, departmental regulations, and Executive Orders in	Title: Official Time. S1: Governing Law. The use of official time for labor-relations activities shall be governed by this Article and by statutes, government-wide regulations, departmental regulations, and EO in effect at the time an employee request or uses official time. S2. Use of Official Time. Employees will utilize and the Agency will I authorize official time, which is limited to the time an employee would otherwise be in a duty status, only for the following purposes: a. When required by law, or b. When the Parties agree that the use of official time is reasonable, necessary, and in the public interest.

Article/Section	Agency Proposal	Union Proposal
	effect at the time an employee requests or uses taxpayer-funded union time.	
	Section 3. Use of Taxpayer-Funded Union Time for Federal Labor-Relations Activities. The Agency may authorize employees to use taxpayer-funded union time, which is limited to the time an employee would otherwise be in a duty status, only when required by law for purposes covered by 5 U.S.C. §§ 7131(a) and 7131(c), or when the Parties agree that the use of taxpayer-funded union time is otherwise reasonable, necessary, and in the public interest under 5 U.S.C. § 7131(d).	S3. Unauthorized Use of Official Time. Employees shall not use official time for internal Union business, including internal Union business conducted during Union membership meetings, or any other activity that is not specified in Section 2.
	Section 4. Standards for Reasonable and Efficient Use of Taxpayer-Funded Union Time. The Agency shall not authorize the use of taxpayer-funded union time under 5 U.S.C. § 7131(d), unless the use of this time is reasonable, necessary, and in the public interest. Ordinarily, the use of taxpayer-funded union time under § 7131(d) in a manner that would cause the union time rate in the bargaining unit to exceed	Section 4. Designation of Union Officials. The Union shall provide the designated Agency management official and the Agency's Director of Administration and Resource Management witl1 the names of all Union officers and stewards, and promptly notify the Agency of any changes in assignments.

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	1 hour shall not be considered reasonable, necessary, and in the public interest, or to satisfy the "effective and efficient" goal set forth in 5 U.S.C. § 7101(b). Section 5. Use of Taxpayer-Funded Union Time under the Negotiated Grievance Procedure. Employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against the Agency under the Grievances and Arbitration Article of this Agreement, except where such use is otherwise authorized by law or as follows: a. To the extent consistent with law, an employee may use taxpayer-funded union time to prepare for, confer with an exclusive representative regarding, and present a grievance brought on the employee's own behalf, or to appear as a witness in a grievance proceeding; and b. An employee may use taxpayer-funded union time to challenge an adverse personnel action taken	Section 5. Official Time Reporting and Requests. a. Employees shall request official time from their supervisors in advance and shall specify the anticipated number of hours to be taken. If any scheduling conflicts arise that cannot be resolved by the employee and the supervisor, the Union President and the designated Agency management official shall attempt to resolve the dispute informally. b. all use of official time must be recorded on the official time and attendance reports.

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	against the employee in retaliation for engaging in federally protected activity, as defined by the Office of Personnel Management. Section 6. Unauthorized Use of Taxpayer-Funded Union Time for Labor-Relations Activities. Employees shall not use taxpayer-funded union time for: a. internal union business in violation of 5 U.S.C. § 7131(b), including internal Union business conducted during Union membership meetings; b. lobbying activities in violation of 18 U.S.C. § 1913, except in their official capacities as an employee; c. political activities in violation of subchapter III of chapter 73 of title 5, United States Code; or d. any other activity that is not specified in Sections 2 to 4 of this Article. Section 7. Annual Limitations on the Use of Taxpayer-Funded Union Time.	Section 6. Misuse of Official Time. Employees using official time without the advance Agency authorization described in this Article, in contravention of the requirements contained in this Article, or for purposes not specifically authorized by the Agency, may be subject to disciplinary action.

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	a. Except as provided in paragraph (b) of this section, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing Agency business or attending necessary training (as required by the Agency). b. Employees who have spent one-quarter of their paid time in a fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by 5 U.S.C. §§ 7131(a) and 7131(c). c. Any time in excess of one-quarter of duty hours used to perform non-agency business in a fiscal year shall count toward the limitation set forth in paragraph (a) of this subsection in subsequent fiscal years. Section 8. Use of Leave without Pay for Federal Labor-Relations Activities. The Agency may permit employees to take leave without pay to perform representational activities under chapter 71 of title 5, United States Code, including for purposes covered by 5 U.S.C. § 7121(b)(1)(C).	

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	Section 9. Designation of Union Officials. The Union shall provide the Designated Agency Management Official and the Agency's Director of Administration and Resource Management with the names of all Union officers and stewards, and promptly notify the Agency of any changes in assignments. Section 10. Taxpayer-Funded Union Time and Leave without Pay for Federal Labor-Relations Activities Reporting and Requests. a. Employees may not use taxpayer-funded union time and/or leave without pay for federal labor-relations activities without advance written authorization from the Agency, except where obtaining prior approval is deemed impracticable pursuant to regulations or guidance adopted pursuant to statutes, government-wide regulations, departmental regulations, and Executive Orders in effect at the time an employee requests or uses such time. Employees shall request taxpayer-funded union time and/or leave	

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	without pay for federal labor-relations activities from their supervisors using the form found at Appendix B. A request for the use of official time or leave without pay for labor-relations activities must be made in advance and shall specify the number of hours to be taken and the specific purposes for which official time and/or leave without pay for labor-relations activities shall be used. c. All use of official time and/or leave without pay for labor-relations activities must be recorded on the official time and attendance reports. Section 11. Preventing Unlawful or Unauthorized Expenditures. Any employee using tax payer funded union time and/or leave without pay for labor-relations activities without the advance Agency authorization described in this Article, or for purposes not specifically authorized by the Agency, shall be considered absent without leave and subject to appropriate disciplinary action. Repeated misuse of taxpayer-funded union time and/or leave without pay for labor-relations activities may	

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	constitute serious misconduct that impairs the efficiency of the Federal service. In these instances, the Agency shall take appropriate disciplinary actions to address the misconduct. Section 12. Conflicts. If there is a conflict between this Article and any other Article in this Agreement, the terms of this Article shall govern.	
5. Article 14, Notification and Response Times	*On March 19, 2020, at 6:36 p.m. EST, the Union submitted revised proposals, wherein it withdrew its proposed Article 14 in lieu of its revised Article 15. Therefore, because the Agency proposes one Article—its Article 15 (Below), to govern these topics, and because the Union does not object to one Article to govern this topic, the Panel should adopt the Agency's proposal 6 – Article 15, Midterm Bargaining, which is more than reasonable.*	

Article/Section	Agency Proposal	Union Proposal
6. Article 15, Midterm Bargaining	Section 1. Introduction. Except for changes mandated by statute, ~~rule, or regulation, or changes resulting from the introduction of new technology,~~ the matters covered by this Agreement will not be subject to change during the term of the Agreement, absent mutual consent of the Parties. If there is a need to reopen existing articles or add new articles because of mandated changes ~~or the introduction of new technology~~, the Parties will follow the procedures in this Article. The procedures in this Article will also be used when the Agency wishes to make a non- mandatory change in conditions of employment and no other article in the Agreement applies. Neither the Union nor the Agency waives any statutory rights during this process.	Section 1. Introduction. Except for changes mandated by statute, the matters covered by this Agreement will not be subject to change during the term of the Agreement, absent mutual consent of the Parties. If there is a need to reopen existing articles or add new articles because of statutorily mandated changes, the Parties will follow the procedures in this Article. The procedures in this Article will also be used when the Agency wishes to make a non-mandatory change in conditions of employment and no other article in the Agreement applies. Neither the Union nor the Agency waives any statutory rights during this process.

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	Section 2. Notification Procedure. Before making changes to employees' conditions of employment, the Agency shall provide the Union President with written notice of the proposed change. This notice may be provided to the Union President by mail, hand delivery, e-mail or facsimile. The Union President will provide the Agency with any response in a similar manner. Specific procedures to be used pursuant to this Article are as follows: The Agency will provide written notice to the Union President of the Agency's intent to make a change in conditions of employment, which are not otherwise covered by another Article in this Agreement, once the Agency has decided to implement the proposed change.	Section 2. Notification Procedure. Before making changes to employees' conditions of employment, the Agency shall provide the Union President with written notice of the proposed change. This notice may be provided to the Union President by mail, hand delivery, e-mail or facsimile. The Union President will provide the Agency with any response in a similar manner. Specific procedures to be used pursuant to this Article are as follows: The Agency will provide written notice to the Union President of the Agency's intent to make a change in conditions of employment, which are not otherwise covered by another Article in this Agreement, at least 21 days in advance of the proposed change. The notice will contain all information necessary for the Union President to evaluate the proposed change and to make proposals in response to the change. The Agency's notice will include the proposed change, the reasons for the proposed change including whether the change is permissive mid-term bargaining or a mandatory change based on a change to one or more statutes, the proposed

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		implementation date, the likely effects of the proposed change, and estimating the number of employees potentially affected by the proposed change.
	b. The Union President will have five calendar days to advise the Agency, in writing, of the Union's desire to negotiate over procedures and appropriate arrangements regarding the change pursuant to 5 U.S.C. §7 106. Thereafter, the Union will have five additional calendar days to provide the Agency with any proposals relating to the impact and implementation of the proposed change. Negotiations between the Parties shall begin within seven business days of the Agency's receipt of the Union's proposals.	The Union President will have 7 calendar days to advise the Agency, in writing, of the Union's desire to negotiate over procedures and appropriate arrangements regarding the change pursuant to 5 U.S.C. §7 106. Thereafter, the Union will have 14 additional calendar days to provide the Agency with any proposals relating to the impact and implementation of the proposed change.
	c. During the course of the negotiations, the Union may request additional information regarding the proposed change and/or seek clarification of the reasons for the proposed change. This information may be provided in writing or in a discussion between the Agency and Union.	
	Section 3. Bargaining Procedure. Negotiations between the Parties will be conducted in accordance with applicable law and this Agreement.	Section 3. Bargaining Procedure. Negotiations between the Parties shall be conducted in accord with the ground rules attached at

Article/Section	Agency Proposal	Union Proposal
	a. The negotiations may be conducted by telephone or VTC, or at the Agency's Washington office b. The Union will be authorized the same number of bargaining representatives on official time as the Agency has representatives participating in the negotiations. The Agency will not pay for any travel expenses incurred by the Union during the negotiations. c. Either Party may have a subject matter expert present during the negotiations who can provide information necessary for the successful completion of the negotiations. The Agency may grant official time to the Union's subject matter expert in accordance with applicable law and the Official Time Article of this Agreement. The Agency will not pay for any travel expenses incurred by the Union's subject matter expert. d. Negotiations shall take place as soon as practicable, but no more than seven business days after the Agency receives the Union's proposals, unless the Parties agree	Appendix A of this Agreement.

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	to extend the period. Negotiations will occur during regular duty hours, unless otherwise agreed to by the Parties. The Parties will attempt to reach agreement and conclude negotiations within 10 business days from the start of negotiations, but that period may be extended by agreement of the Parties. If the Parties do not reach agreement during the allotted negotiation period, the Agency may implement the change if it determines that the change is for the necessary functioning of the Agency. Otherwise, the Agency will permit the Union a reasonable period of time to invoke FSIP assistance. The post-implementation bargaining procedures contained in Section 3 of this Article will apply if the Parties are unable to reach agreement before the implementation date declared by the Agency. e. The Union may raise no additional proposals or subjects of bargaining after submission of its initial proposals, except by agreement of the Parties, or under the post-implementation bargaining procedures contained in Section 3 of this Article.	Section 4. Agency Head Review. Any supplemental agreement between the Parties that modifies this Agreement must be submitted for Agency Head review.

Article/Section	Agency Proposal	Union Proposal
	Section 4. Post-Implementation Bargaining Procedures.	

Article/Section	Agency Proposal	Union Proposal
	a. Definition. Post-implementation bargaining is the bargaining of procedures and appropriate arrangements after the Agency has implemented a change in conditions of employment. When the Agency determines that a change is necessary or appropriate in accordance with a statute, rule, regulation, or Executive Order and that the change must be implemented by a certain date, post-implementation procedures will apply if the Parties are unable to reach agreement prior to the implementation date of the change. b. Post-Implementation Bargaining Procedure. The Union will be afforded the opportunity to submit bargaining proposals concerning the change for up to 20 business days following the date the Agency implemented the change. However, the Union reserves all other rights it may have pursuant to applicable laws. Once Union proposals have been submitted to the Agency, the procedures in Section 3.d. above will apply.	

Article/Section	Agency Proposal	Union Proposal
	Section 5. Agency Head Review. Any supplemental agreement between the Parties that modifies this Agreement must be submitted for Agency Head review.	
7. Article 31, Hours of Work	Section 1. The basic work requirement for full-time employees is 80 hours per pay period (not including an employee's unpaid lunch periods). The basic work requirement for part-time employees is 32-64 hours per biweekly pay period (not including an employee's unpaid lunch periods). Employees may not use leave without pay to work a part-time schedule. An employee must select a work schedule set forth in this Article. Section 2. a. The Agency's core hours are from 9:30 a.m. to 4:00 p.m. Except for employees working an alternative work schedule, all employee schedules shall have a starting time of no earlier than 7:30 a.m., and ending no earlier than 4:00 p.m. An employee with an alternative work	Section 1. The basic work requirement for full-time employees is 80 hours per pay period. The basic work requirement for part-time employees is 32-64 hours per biweekly pay period. An employee must select a work schedule set forth in this Article. Section 2. a. The Agency's core hours are from 10:30 a.m. to 2:30 p.m. All employees shall have a starting time of no earlier than 6:00 a.m. The stopping time for all employees for all days shall be no later than 7:30 p.m.

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	schedule specified in Section 3(b)(i) ("5/4/9") may have a starting time that shall be no earlier than 7:00 a.m., for those days the employee is scheduled to work 9 hours and no earlier than 7:30 a.m. for the day the employee is scheduled to work 8 hours. An employee with an alternative work schedule specified in Section 3(b)(ii) ("4/10") may have a starting time that shall be no earlier than 6:30 a.m. An employee working a flexible work schedule specified in 3(b)(iii) may, with supervisory approval, vary a starting and stopping time beginning no earlier than 7:00 a.m. and ending no earlier than 4:00 p.m. b. All schedules shall provide that a full-time employee must work between 9:30 a.m., and 4:00 p.m. The scheduled ending time for all employees for all days shall be no later than 6:30 p.m. c. Work schedules shall provide that:	b. Work schedules in each Regional Office, Field Office, and Washington Office Division will be arranged such that at all times from 9:00 a.m. to 4:30 p.m. Monday through Friday ("office coverage hours"), at least one attorney will be at work in the office. At the supervisor's election, teleworking attorneys may provide office coverage. c. All Alternative work schedules in Section 3(b) shall provide that:

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	Section 4. Credit hours are hours, in addition to the basic work requirement, that eligible employees may, with prior supervisory approval, elect to work, and accumulate. For purposes of this Article, an eligible employee is an employee who is working pursuant to a flexible work schedule specified in section 3(b)(iii). b. With prior supervisory approval, an eligible employee may earn credit hours only on a regularly scheduled workday, only at the conventional work site, up to a maximum of one credit hour per day. Variation from this policy requires advance approval of the Deputy General Counsel or the General Counsel. c. Credit hours shall be earned in increments of 30 minutes and may be used in increments of 15 minutes. Work performed in an increment of less than 30 minutes will not earn credit hours. d. For eligible employees, no more than eight credit hours may be earned per pay period and no more than eight credit hours may be available for use at any time, unless otherwise approved in advance by a Deputy General Counsel or the General Counsel. Credit hours may be carried forward for 26 pay periods.	Section 4. Credit hours are hours, in addition to the basic work requirement that employees working a Flexible Work Schedule may elect to work, accumulate, and use so as to vary the length of a workday or a work week. b. An employee may earn credit hours only on regularly scheduled work days, within the time bands set forth in Section 2a up to a maximum of two credit hours per day. c. Credit hours shall be earned in increments of 15 minutes and may be used in increments of 15 minutes, except that the initial increment for earning credit hours will be 30 minutes. d. ~~For employees other than Senior Counsels,~~ no more than eight credit hours may be accumulated and no more than eight hours may be available for use at any time unless accumulation of more than eight credit hours is approved in advance by the employee's supervisor.

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	e. The maximum number of credit hours that an eligible employee may earn in a leave year is 24 hours, unless otherwise approved in advance by a Regional Attorney, Associate General Counsel, Deputy General Counsel or the General Counsel.	e. The maximum number of credit hours that may be carried forward from pay period to pay period is 24.
	f. The maximum number of credit hours that may be earned in a leave year by an attorney who is precluded from earning Compensatory Time due to their grade and step shall be forty hours, unless approved in advance by a Deputy General Counsel or the General Counsel.	f. A supervisor shall approve an employee's use of credit hours as provided for in Article 35 (Leave) of this Agreement.
	Section 5. a. Lunch. Employees must take a lunch break if they work six or more hours in a day. An employee's lunch period is unpaid, and the employee's scheduled hours are adjusted accordingly to correspond to the length of unpaid lunch time selected by the employee. The lunch-period time band shall be from 11:00 a.m. until 2:00 p.m. each workday. An Employee may not forgo a	Section 5. a. Lunch. As specified by OPM standards, employees must take an unpaid lunch break of at least 30 minutes if they work six or more hours in a day. An employee's scheduled hours are adjusted accordingly to correspond to the length of the lunch break selected by the employee. The lunch-period time band shall be from 11:00 a.m. until 2:00 p.m. each workday.

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	lunch period as a means of a late arrival or early departure time. Employees shall have the option of scheduling a lunch time of at least 30 minutes and no more than 90 minutes. b. Breaks. Breaks are paid duty time. The purpose of breaks is to permit the employee a break from a continuous work effort. The Agency shall recognize one 15-minute break during each four full hours worked. In a typical work day, one break will be taken before lunch and one break will be taken after lunch. An Employee may not use breaks in conjunction with the employee's lunch period, or as a means of a late arrival or early departure time. c. if a supervisor determines that an employee's work schedule has an adverse impact on the Agency's operations, the supervisor may suspend or terminate it.	b. Breaks. Breaks are paid duty time. The agency shall recognize one 15-minute break during each four full hours worked. In a typical work day, one break will be taken before lunch and one break will be taken after lunch. The purpose of breaks is to permit the employee a break from a continuous work effort and so breaks may not be combined with the employee's lunch, or as a means of a late arrival or early departure. c. if a supervisor determines that an employee's work schedule has an adverse impact on the Agency's operations, the supervisor may suspend or terminate it. If the supervisor decides to terminate or suspend a schedule the supervisor will notify the employee and meet with the employee to determine if they can agree on a schedule. If requested, the Union shall be given and opportunity to be present, either in person or by telephone, at the meeting.

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	h. Supervisors may schedule meetings or other "all in days" and employees shall be physically present at the work site to attend such meetings and participate in other work that requires their presence, even if doing so means that they cannot take advantage of the alternative work schedules provided for in this article, a scheduled telework day, or must reschedule a regular off day. If an employee is required to work on a scheduled day off, the employee shall be given the opportunity to select an alternative day off within the same pay period, or to earn compensatory time as appropriate.	h. Employees shall modify their work schedules as necessary to attend meetings and participate in other work that requires their involvement. If the modified schedule requires the employee to work on a scheduled day off, the employee shall be given the opportunity to select an alternative day off within the same pay period, or to earn compensatory time as appropriate. i. To the extent feasible, the Agency will give employees as much advance notice of in-office meetings and events as possible. j. Supervisors' schedules will be posted or otherwise readily available to those they supervise.

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8. Article 32. Telework	S1: When there is a change in Departmental policy, all telework agreements may be revised to reflect the change in policy. S2. Employees shall be ineligible for participation in the telework programs if the Agency determines that any one of the following circumstances is applicable to the employee: iii. The employee's most recent performance is unsatisfactory; Section 4. Employee schedules not currently in compliance with the Department's official telework policy will be given thirty days after this agreement becomes effective to transition to comply with the Department's policy. Section 5. Employees must be physically present in the office four days a week, unless the absence is authorized under the applicable leave policy. Teleworkers may participate in some flexible and	S1: When there is a change in Departmental policy, all telework agreements will be revised to reflect the change in policy subject to any negotiated transition period. S2. Employees shall be ineligible for participation in the telework programs if the Agency determines that any one of the following circumstances is applicable to the employee: iii. The employee's most recent performance rating is less than fully successful; Section 4. Employees with Telework Agreements not currently in compliance with the Department's official telework policy will be given 90 days after this agreement Section 5. Employees must be physically present in the office four days a week, unless they use approved leave. Telework Agreements may authorize up to 12 hours of telework per week. Teleworkers may participate in flexible and compressed work schedules, or other flexible work

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	compressed work schedules, or other flexible work arrangements in combination with a telework agreement. However, all employees must work from the official worksite location four days per week. Supervisors may exercise discretion to authorize employees with telework agreements to be outside of the official workstation more than one day a week in infrequent, exigent circumstances and to achieve the Agency's mission.	arrangements in combination with a telework agreement so long as they work from the official worksite location four days per week. Supervisors may exercise discretion to authorize employees with telework agreements to be outside of the official workstation more than one day a week in infrequent, exigent circumstances and to achieve the Agency's mission.

Article/Section	Agency Proposal	Union Proposal
9. Article 38 – Evaluation of Employee Performance (Union)	The Agency has no Article on Employee Performance. The Agency believes that Departmental Regulation 4040-430, *Performance Management*, dated Feb. 2019 governs evaluation of employee performance with the Agency. The DR provides that a demonstration opportunity of 30 days is sufficient.	Provides for a Performance Improvement Plan (PIP) period of no less than ~~60~~ 30 days Includes a provision on performance measures

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10. Article 41 – Grievance and Arbitration	Section 4. Exclusions. The following matters are excluded from the coverage of the grievance procedure: a. a preliminary warning or notice of potential action, such as a proposal of disciplinary or adverse action; b. letters of counseling, warning, and/or instruction;	Section 4. Exclusions. The following matters are excluded from the coverage of the grievance procedure: a. a preliminary warning or notice of potential action, such as a proposal of disciplinary or adverse action including letters of counseling, warning or instruction; b. an action terminating a temporary promotion within a maximum period of 2 years and returning the employee to the position from which the employee was temporarily promoted, unless the termination would constitute a prohibited personnel practice under 5 U.S.C. 2302(b);

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	c. performance progress reviews including the timing of the review or any rating assigned by the supervisor; d. the language contained in a performance improvement plan, and the Agency's decision to initiate a plan; e. an action terminating a temporary promotion within a maximum period of 2 years and returning the employee to the position from which the employee was temporarily promoted; f. approval or disapproval of workers' compensation claims; g. non-selection from a group of properly ranked and certified candidates h. disapproval of a quality-step increase, or any other kind of honorary or discretionary award, except that allegations of improper use of procedures, or violation of law, Agency and Department policies, or this Agreement in processing awards may be grieved; i. Termination of probationary or excepted service employees serving a trial period. j. reductions-in-force	c. approval or disapproval of workers' compensation claims; d. non-selection from a group of properly ranked and certified candidates; e. disapproval of a quality-step increase, or any other kind of honorary or discretionary award, except that allegations of improper use of procedures, or violation of law, Agency and Department policies, or this Agreement in processing awards may be grieved; f. termination of probationary employees or excepted service employees serving a trial period; g. reductions in force; h. the filling of any position outside of the bargaining unit; i. life insurance and health insurance claims; j. retirement; k. any examination, certification, or appointment;

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	k. the filling of any position outside of the bargaining unit; l. life insurance and health insurance claims; m. retirement; n. any examination, certification, or appointment; o. prohibited political activity, except, for discrimination based on political political affiliation under 5 U.S.C. § 2302(b)(1)(E); p. national security suspensions or removals; q. classification of any position that does not result in the reduction in grade or pay of an employee; r. decisions regarding incentive pay for relocation, recruitment and retention; s. disputes regarding the granting or denial of official time or leave without pay for union activities related to union representational activities; t. disputes related to grants of authority under the management rights section of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7106); u. expiration or other termination of an allotment of union dues under	l. prohibited political activity, except for discrimination based on political affiliation under 5 U.S.C. § 2302(b)(1)(E); m. national security suspensions or removals; n. classification of any position that does not result in the reduction in grade or pay of an employee; o. decisions regarding incentive pay for relocation, recruitment and retention, except that allegations of improper use of procedures, or violation of law, Agency and Department policies, or this Agreement in processing such incentive pay may be grieved; p. performance- based actions appealed under another statutory procedure; q. disciplinary or adverse actions appealed under another statutory procedure.

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	the terms of this Agreement; v. performance-based actions appealed under another statutory procedure; w. disciplinary or adverse actions appealed under another statutory procedure; and x. disputes regarding a management decision related to approval/ disapproval of leave.	

Article/Section	Agency Proposal	Union Proposal
11. Article 45. Voluntary Relocations and Reassignments (Union Proposed)	Section 1. General. The Agency may, in its sole discretion, offer voluntary relocations and voluntary reassignments to its employees.	Section 1. General. The Parties agree that it enhances the Agency's mission to retain experienced employees and to provide employees with the opportunity to relocate as necessary throughout their careers with the Agency, which is a nationwide employer. Further, some employees may desire for reasons of professional growth or personal satisfaction to change the focus of their professional portfolios over the course of their careers. In order to accommodate these values the Agency will offer Voluntary Relocations and Voluntary Reassignments to its employees.
	Section 2. Voluntary Reassignments. Employees may request voluntary reassignments to other divisions, offices, or geographical areas within the Agency. The Agency shall maintain, within the immediate office of the General Counsel, a permanent, confidential list of these employees and their preferences for reassignment. Upon request, the Agency shall provide the Union President with a copy of the confidential list, ~~except that the copy given to the Union President will not contain the names of the employees or identify the offices in which they work.~~ Whenever a division or office	Section 2. Retained Management Rights. Nothing in this Article shall be construed as an impingement on the Agency's right to assign work or direct employees. All Relocations or Reassignments are discretionary actions by the Agency. The Agency agrees to comply with the processes specified in this Article but not to grant any individual request for relocation or reassignment.

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	of the Agency is authorized to fill an available vacant position, the immediate office of the General Counsel shall provide the division or office head with the names of employees who have expressed an interest in reassignment to that division or office. The Agency shall give those employees full consideration for reassignment in filling the available vacant position. If the available vacant position is filled by a voluntary reassignment that requires relocation, the Agency is not obligated to pay relocation expenses. ~~Section 3. No Grievances. Decisions made by the Agency pursuant to this Article are excluded from the grievance procedure set forth in the Grievances and Arbitration Article of this Agreement.~~	Section 3. Voluntary Relocations. Employees may request to relocate from one Agency office to another, with no change in the employee's work assignments. The Agency shall maintain, exclusively within the Office of Administration and Resource Management, a permanent, confidential list of these employees and their preferences for relocation. The Agency shall provide the Union President with a copy of the confidential list and any changes or updates to it. Whenever the Agency concludes that the employee's work may be performed from an alternate Agency office location, and that the alternate Agency office location has adequate

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		facilities to accommodate the employee, and that the relocation would not otherwise have an adverse effect on the accomplishment of the Agency's mission, the Agency will allow the relocation. The Agency is not obligated to pay relocation expenses. If the Agency concludes that the employee's work cannot be adequately performed from the alternate location, or that adequate facilities are not available at the requested location, or that allowing the relocation would have an adverse effect on the accomplishment of the Agency's mission the Agency will notify the employee and at the employee's request provide a written explanation of the factors justifying its decision. Section 4. Voluntary Reassignments. Employees may request voluntary reassignments from one position to another within the Agency. The Agency shall maintain, exclusively within the Office of Administration and Resource Management, a permanent, confidential list of these employees and their preferences for reassignment. The Agency shall provide the Union President with a copy of the confidential list and any changes or updates to it. Whenever a Division, Regional or Field Office of

Article/Section	Agency Proposal	Union Proposal
		the Agency is authorized to fill an available vacant position, or creates a new position, prior to advertising the position, the Office of Administration and Resource Management shall provide the Division, Regional, or Field Office head with the names of employees who have expressed an interest in reassignment. The Agency shall give those employees preference for reassignment in filling the available vacant position. If the Agency decides, after full consideration of Reassignment requests, to advertise the position, all those requesting reassignment will be informed and be placed in the applicant pool and compete fully for the position. If the available vacant position is filled by a voluntary reassignment that requires relocation, the Agency is not obligated to pay relocation expenses.

Article/Section	Agency Proposal	Union Proposal
12. Article 46- Communications of Agency and Department Initiatives	The Agency has no corresponding Article, believing that this topic is already discussed in Article 10. See Agency proposed Article 10. By mutual agreement of the parties, the Agency and the Union may agree to discuss issues of mutual concern. To the extent any costs are associated with such meetings (e.g., travel) each party is to bear their own costs.	The Parties acknowledge that an informed and motivated workforce benefits the Agency in the accomplishment of its mission. OGC employees should be informed of major developments affecting the Department, the Agency, and its major client agencies. The Agency will inform its employees of all major initiatives of the Department that may affect their work, including policy initiatives, mission changes, realignments, and regulatory efforts affecting OGC's client agencies. The Agency will communicate its own initiatives to its employees in a timely fashion, including but not limited to information concerning the Agency's budget, training opportunities, staffing plans, ~~realignment of the Agency's~~ realignment of Agency mission priorities, new client service teams or efforts, or any other matters of broad affect throughout OGC.
13. Article 47 – Continuing Supervisory Education	The Agency has no Article 47. Compare to Article 22, Training and Career Development (Agreed upon by the Parties on 8/1/19) Compare also to Article 16 (Agreed upon by the Parties on 9/19/19)	Section 1. General. The Parties acknowledge that few factors are as important in the day to day satisfaction of the bargaining unit workforce than a well-trained supervisory team. Supervision and management require unique skills not necessarily cultivated in the work performed by the Agency's non-

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		supervisory employees. Section 2. Supervisory training for Non-supervisors. During annual reviews the Agency will assess non-supervisory employees' desires to prepare for available future management positions. The Agency will identify suitable Aglearn courses and other resources to prepare bargaining unit employees for supervisory positions. The employees may use work time to take courses approved by the Agency. Employees may propose outside courses or other activities to the Agency they believe would be valuable in acquiring supervisory experience and skills. If the Agency agrees the employee may use work time for the courses or activities and may request training funds for any necessary fees. If the Agency does not agree, upon the employee's request the Agency will supply a written explanation of its reasons. Section 3. Continuing Management training for Supervisors. All Agency Supervisors shall take a minimum of eight hours a year of Aglearn or other courses specifically dealing with management and supervision of personnel. Periodically, the Union may identify courses it believes would benefit Agency managers

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		individually or collectively. If the Agency agrees the Agency and Union may split any enrollment costs for such courses. Section 4. Labor Management Training. The Designated Agency Management Official will annually take at least one training course provided by the Federal Labor Relations Authority specifically related to the requirements of the Federal Service Labor Management Relations Statute. At any time, the Agency may request that the Union fund additional courses provided by the FLRA for other Agency management officials, including those designated to collectively bargain on behalf of the Agency, or to resolve grievances under this Agreement.
14. Article 48 – Employee Feedback on Supervisory Performance	The Agency has no Article 48 because the General Counsel has instituted an open door policy and employee's are free to avail themselves of the opportunity to provide feedback through a variety of extant means.	At least once a year between September 1 and September 30, the Agency shall solicit feedback on its managers' performances from bargaining unit employees supervised by each manager, either directly or as a second level supervisor (for example, all bargaining unit employees in a Region would provide feedback on their immediate supervisor and on the Regional Attorney). This information shall be solicited by anonymous online survey. The questions will be modeled on

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		those used in the Federal Employee Viewpoint Survey with additional opportunities for participants to provide significant written commentary. The results of the survey shall be provided to each supervisor and his or her reviewing official and shall be utilized in the assessment of the supervisor's performance.		
15. Article 45 (Agency). Article 49 (Union): Furloughs	Section 1. General Provisions. a. This Article addresses: (1) the policy and procedures for implementing (i) "shutdown furloughs", sometimes called "emergency furloughs," but herein called "emergency/shutdown furloughs" and (ii) "save money" furloughs; and (2) the adverse effects of these furloughs. b. Circumstances beyond the control of the Agency may compel the Agency to furlough employees. c. The Agency has complete authority and responsibility with respect to all decisions about furloughing employees,	Section 1. General Provisions. • Circumstances beyond the control of the Agency may compel the Agency to furlough employees. • The Agency shall implement furloughs in accordance with the law and directives and guidelines issued by the Office of Management and Budget and the Office of Personnel Management at the time of the furlough. The Agency will make every effort to publish such directives and guidelines to its employees both in advance of and during any furlough. • Upon receiving notice of a potential furlough, the Agency shall notify the Union of the following:		

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	including but not limited to, the specific employees furloughed, the days, dates, and times of the furlough, and the duration of the furlough	i. Whether the furlough is due to a lapse in appropriations or is necessitated by Agency efforts to conserve budgetary resources; • In cases of furloughs due to lapses in appropriations notice will typically be at least seven days in advance; and • In cases of furloughs due to Agency efforts to conserve resources notice will typically be at least 21 days in advance • The expected beginning date of the furlough; and • The expected duration of the furlough, if known.		
	d. The Agency shall implement furloughs in accordance with the law and directives and guidelines issued by the Office of Management and Budget and the Office of Personnel Management at the time of the furlough.	d. For every furlough, the Agency will compile a list of excepted employees (that is, those employees not subject to the furlough). When the list is finalized, the Agency will provide the Union President with a copy at or about the same time it provides the information to the excepted employees. To the extent it is able to ascertain employees that are likely to be repeatedly excepted, the Agency will maintain a list of such employees and notify them and supply the Union President with a copy of the list.		
	e. Upon receiving official notice of a potential furlough, the Agency shall	e. During a furlough, and unless contrary to law, leave status will		

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	notify the Union as soon as practical of the following: i. Whether the furlough is an emergency/ shutdown furlough or is a save money furlough; ii. The expected beginning date of the furlough; and The expected duration of the furlough.	handled as follows: i. Annual leave, sick leave, military leave, credit hours, and compensatory time shall be suspended during the term of the furlough. All properly scheduled and approved leave that falls outside the furlough remains in effect. For example if a furlough ends during a period in which an employee had approved use of annual leave, the employee is not required to resume duties until the termination of the scheduled annual leave. ii. Employees on approved leave without pay (LWOP) shall remain on LWOP for the approved duration of the leave. iii. Employees on Continuation of Pay (COP) status shall remain on COP status. iv. Employees on LWOP under the Family Medical Leave Act (FMLA) during the furlough will continue to be charged LWOP and the time will count towards the 12-week entitlement to family medical leave, as required by applicable law. However, employees on FMLA but in a pay status shall be placed on furlough instead, and the furlough		

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		time will not reduce the 12-week entitlement to family medical leave.		
	f. For every furlough, the Agency will compile a list of excepted employees (that is, those employees not subject to the furlough). When the list is finalized, the Agency will provide the Union President with a copy at or about the same time it provides the information to the excepted employees.	f. The Agency may adjust Performance Plans to account for the length of a furlough.		
	~~g. During a furlough, and unless contrary to law, leave status will handled as follows:~~ ~~i. Annual leave, sick leave, military leave, credit hours, and compensatory time shall be suspended during the term of the furlough.~~ ~~ii. Employees on approved leave without pay (LWOP) shall remain on LWOP for the approved duration of the leave. Employees on Continuation of Pay (COP) status shall remain on COP status.~~ ~~iii. Employees on Continuation of Pay (COP) status shall remain on COP status.~~	. The running of any time period within which the Agency or Union may or must act pursuant to the terms of this Agreement shall be suspended for the duration of a furlough.		

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	h. The Agency may adjust Performance Plans to account for the length of a furlough. i. The running of any time period within which the Agency or Union may or must act pursuant to the terms of this Agreement shall be suspended for the duration of a furlough. j. Employees may accept outside employment while on furlough, provided that the outside employment does not pose a conflict of interest with their official duties. Employees wishing to engage in outside employment should refer to the USDA Office of Ethics website at www.usda.gov/ethics. Section 2. Save Money Furloughs.	h. Employees may accept outside employment while on furlough, provided that the outside employment does not pose a conflict of interest with their official duties. Employees wishing to engage in outside employment should refer to the USDA Office of Ethics website at www.usda.gov/ethics. Section 2. Agency initiated Furloughs to conserve Budget Resources.		

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	a. If the Agency must furlough employees as a means of addressing a budget shortfall, the Agency may solicit volunteers to be placed in extended Leave Without Pay status; or b. If the Agency must furlough employees as a means of saving or reducing expenditures, the Agency shall: i. Solicit volunteers to work reduced hours in conjunction with the use of LWOP; and ii. Allow affected employees to choose which work days shall serve as their furlough days, with advanced approval of a supervisor and in accordance with the Agency's leave request requirements. c. The Agency may deny an employee's request for LWOP and, upon request by the employee, will state the reason for the denial. d. If an insufficient number of employees volunteer for LWOP and the Agency must furlough employees, the Agency shall furlough employees by reverse seniority, where the least	If the Agency must furlough employees as a means of addressing a budget shortfall, the Agency first shall solicit volunteers to be placed in extended Leave Without Pay status and solicit volunteers for Details to client agencies if any such may be available, and make every other effort to reduce expenditures without resort to furloughing unwilling employees. If after the steps identified in paragraph a fail to fully relieve the Agency's budget shortfall, the Agency may furlough employees as a means of saving or reducing expenditures. . The Agency shall: i. Solicit volunteers to work reduced hours in conjunction with the use of LWOP. In so doing the Agency will inform employees and the Union of the approximate total number of furlough days required to address the budget shortfall, so that employees may be encouraged to contribute and can plan for the disruption to their work and budgets.		

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	senior employees are the first employees furloughed. In determining an employee's seniority, the Agency shall use an employee's retirement service computation date. Section 3. Emergency/Shutdown Furloughs. a. Within a reasonable time period after an emergency/ shutdown furlough is announced, the Agency shall provide non-excepted employees with instructions and information available to the Agency. b. Unless the Agency directs them to do otherwise, non-excepted employees shall report to work at the beginning of the first regularly	Section 3. Furloughs due to lapses in appropriations. a. Within a reasonable time period after the Agency is aware of the possibility of a furlough due to a lapse in appropriations, the Agency shall provide non-excepted employees with information available to the Agency concerning the potential furlough. At least seven days prior to any deadline in which the Agency may suffer a lapse in appropriations, the Agency will distribute to employees instructions concerning potential shutdown activities and employee conduct during the furlough. In compliance with law, the instructions will specifically inform employees of their obligations to refrain from government work and from the use of all government equipment during the furlough. b. Unless the Agency directs them to do otherwise, non-excepted employees shall report to work at the beginning of the first regularly		

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	scheduled business day during the emergency/shutdown furlough for the lesser of either: (1) a period of four hours, or (2) as long as is required for them to complete the tasks necessary to implement the suspension of normal Agency business operations in an orderly manner. c. During the period of an emergency/ shutdown furlough, an employee shall be regarded as in furlough status during the employee's normal Tour of Duty and work schedule. d. As often as practical, the Agency shall keep employees apprised of the status of the furlough. Excepted employees will be paid for time worked during the furlough period once a continuing resolution or appropriation is enacted. Non- excepted employees will be paid for furlough time only to the extent	scheduled business day during the furlough due to a lapse in appropriations for the lesser of either (i) a period of four hours, or (b) as long as is required for them to complete the tasks necessary to implement the suspension of normal Agency business operations in an orderly manner. c. During the period of an emergency/ an employee shall be regarded as in furlough status during the employee's normal Tour of Duty and work schedule. Employees shall refrain from all government work and from using government equipment. To the extent it is necessary to monitor for an end of the furlough employees shall do so through monitoring local or national media without using government equipment. d. The Agency shall keep employees apprised of the status of the furlough through employees' personal contact information (phone, email or text). e. If it becomes necessary to summon non-excepted employees back to work during a furlough due to lapsed appropriations, the Agency will provide the employees		

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	authorized by Congress.	as much warning as possible under the circumstances. To the extent possible given the circumstances the Agency should solicit volunteers if the work assigned could be capably accomplished by a number of Agency employees. In any case for each employee summoned back to work during the furlough, the employee's supervisor will provide a written statement concerning the work to be done and the rationale why the work is of such nature as to be excepted from the furlough. Immediately upon accomplishment of the assigned tasks, the employees will return to furlough status. No non-emergency work will be assigned during a furlough due to lapsed appropriations. f. Employees will be paid for the furlough period once a continuing resolution or appropriation is enacted. Section 4. Post Furlough Activities a. The Agency will inform employees of the resumption of normal Agency operations through their personal contact information (phone, email or text). The Agency will also mail a hard copy notification to all employee home addresses.		

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		b. If normal operations resume with less than 24 hours-notice being afforded to employees, employees will be granted up to 8 hours of administrative leave if they fail to return to their work stations at the mandated resumption of duties. c. Supervisors should liberally grant requests for annual leave, sick leave, or leave without pay, as appropriate, if employees need additional time to resume their duties after a restoration of appropriations.		

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16. Article 30A. Senior Counsel	Section 1. Senior Counsel Positions. Non-supervisory attorneys employed at the GS-15 level will be designated as "Senior Counsel." Section 2. Vacancy Announcements. The Agency may announce open and/or vacant Senior Counsel positions. Section 3. Relocation. Nothing requires the Agency to pay re-location costs for any employee. Section 4. Exclusion from Grievance. Decisions and declinations for Senior Counsel positions shall not be grievable. Employees may pursue a classification appeal or a desk audit with the Office of Personnel Management.	a. Non-supervisory attorneys employed at the GS-15 grade level will be designated as Senior Counsel. b. At any time, a non-supervisory GS-14 attorney that believes they are performing work at a GS-15 attorney level may pursue a classification appeal (or "desk audit") with the Office of Personnel Management to seek promotion to the GS-15 level. In the event the Office of Personnel Management finds that the attorney is in fact performing work at a GS-15 level, the Agency shall promote that attorney to the GS-15 level. ~~c. The Agency shall announce, from time to time and as they become available, open and vacant Senior Counsel positions. The Agency shall create and post these Vacancy Announcements in the normal course, and shall (in the first instance of posting) limit application to those currently employed by the Agency. The Agency shall strive, in the creation of and selection for such Senior Counsel positions, to balance opportunities across Mission Areas and without regard to geographical~~

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		~~locale. If the Agency determines that none of the applicants for the position(s) were qualified after the application period has closed, the Agency may then post a new Vacancy Announcement open to applicants not employed by the Agency.~~