

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF THE ARMY  
HUMARN RESOURCE COMMAND

And

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2302

Case No. 20 FSIP 084

**DECISION AND ORDER**

**BACKGROUND**

This case, filed by the U.S. Department of the Army, Human Resource Command (Agency or Management) on September 1, 2020, pursuant to the Federal Service Labor Management Relations Statute (the Statute) concerns two proposals in the ground rules agreement for bargaining their successor collective bargaining agreement with the American Federation of Government Employees, Local 2302 (Union). The Agency conducts distribution, strategic talent management, information technology, soldier programs and services Army wide in order to enable the Army to deploy, fight and win our nation's wars. The Union represents over 1,300 bargaining-unit employees in mostly administrative positions. The parties executed a collective bargaining agreement in September 2017 with a 3-year term. As discussed below, the parties disagree about whether the agreement remains in effect.

**BARGAINING HISTORY**

The parties had 3 days of bilateral negotiations between June and September 2020. They had 1 three-hour mediation session with the Federal Mediation and Conciliation Services (FMCS) on September 1, 2020. Although the parties made progress on several issues, they could not resolve two items. Accordingly, the Mediator released the parties on the same day in Case No. 202011500101.

The Agency subsequently filed a request for assistance with the Panel on September 10, 2020. On November 10, 2020, the Panel asserted jurisdiction over this matter and ordered it to be resolved through a Written Submissions process with an opportunity for rebuttal statements. The parties submitted arguments.

## ISSUES

The parties have only 2 proposals that remain, and both involve the status of the current CBA and Executive Order 13,837 "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order or Order). As relevant, this Order prohibits exclusive representatives from cost-free use of Federal agency resources and facilities unless these items are granted to other non-Federal entities on a cost-free basis as well.

In addition, Article 37, Section 2 of the parties' CBA states as follows:

This Agreement will renew automatically beginning on the 3rd anniversary of its effective date, and annually thereafter, unless either Party gives written notice at least sixty (60) calendar days prior to the anniversary date. Upon receipt of this written notice, the Parties shall meet within thirty (30) calendar days to begin negotiations on ground rules.

The **Agency** reads this language as meaning that, so long as one party provides "written notice at least sixty [ ] calendar days prior to the anniversary date," the entire CBA is terminated. And, upon termination, the Agency believes the parties turn to bargaining ground rules for negotiating a successor agreement. However, the **Union** maintains that receipt of the aforementioned notice does nothing more than trigger the start date for negotiations. According to the Union, the CBA remains in place while the parties engage in the bargaining process.

Consistent with the above interpretations, on May 4, 2020, the Agency provided the Union with timely notice of renegotiations and also claimed that the CBA was terminated. As a result, the Agency began implementing President Trump's May 2018 Executive Orders, including the Official Time Order. In September 2020, for example, it informed the Union that it had to vacate the Union's office space (which the Union did) and

that the Union was now subject to the FLRA's new dues regulation, 5 C.F.R. §2429.19, that went into effect in August 2020. Although the Union engaged the Agency in bargaining over ground rules to govern negotiations of a new contract, it disagreed with the Agency's claim that the agreement was terminated. The foregoing backdrop provides context for the below discussion.

## **I. Effect of Government-Wide Regulations**

### **A. Agency Proposal and Position**

The Agency offers a proposal that establishes the following principle: the CBA has expired and all government-wide regulations take precedence over this expired contract where any conflicts exist. Citing the above-quoted language from Article 37, Section 2, the Agency argues that it had to provide the Union with notice of termination 60 days prior to the anniversary date of the CBA, i.e., September 20, 2020.<sup>1</sup> So, according to the Agency, it had to provide notice no later than July 22, 2020. The Agency states it is undisputed that it provided notice on May 4, 2020. As such, the Agency argues that it properly terminated the parties' CBA.

Because the CBA has been properly terminated, the Agency argues that government-wide regulations, such as the May 2018 Executive Orders, control over conflicting CBA provisions.<sup>2</sup> As such, the Agency offers a proposal that allegedly does nothing more than reiterate the foregoing legal principle:

Effective 20 September 2020, any Articles in the [parties'] CBA dated 19 September 2017, that are in conflict with or contradict existing Government Wide Regulation will no longer be in effect.<sup>3</sup>

### **B. Union Proposal and Position**

The Union's primary argument reiterates what it believes to be the status quo, i.e., that the CBA remains in effect. The Union maintains that the Agency's interpretation of Article 37, Section 2 is mistaken. According to the Union, the Agency cannot lawfully terminate the parties' CBA because the Union actually remains in effect while the parties bargaining a successor

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<sup>1</sup> See Initial Argument at 3.

<sup>2</sup> See *id.* at 4 (citations omitted).

<sup>3</sup> See Agency Final Offer at 1.

agreement. Relatedly, the Union contends that a ground-rules agreement is not the appropriate vehicle for resolving issues concerning the status of the CBA. Based on all the foregoing, the Union proposes that the Agency simply withdraw its proposal(s). Alternatively, the Union offers the following language:

Effective 20 September 2020, any Articles in the [parties'] CBA dated 19 September 2017 [t]hat are in conflict with or contradict existing Government-Wide Rules and Regulations will no longer be in effect. All conflicting government-wide rules or regulations which are subsequently rescinded which affected Articles of the current (2017) [parties'] CBA dated 19 September 2017 will be put back into effect by operation of law effective immediately.

### C. Conclusion

**The Panel will order the parties to withdraw their proposals.** This issue concerns one topic: whether government-wide regulations that conflict with the CBA must now go into effect. The parties do not disagree that, under existing FLRA precedent, contract language that conflicts with a government-wide regulation does not control when that contract language has expired.<sup>4</sup> However, in this dispute, the parties vigorously dispute whether the CBA *has actually expired*. Resolving this disagreement would require the Panel to interpret Article 37, Section 2 of the parties' contract. The Panel has no such interpretive authority. Thus, it would be inappropriate for the Panel to reach a conclusion on the merits of this topic.

Based on the foregoing, the Panel will order the parties to withdraw their competing proposals. Any disagreement they continue to have over whether the CBA has expired can, and should, be resolved in other forums suited to resolve issues involving contract interpretation. In reaching this conclusion, the Panel offers no position of the merits of either party's position concerning the status of the CBA.

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<sup>4</sup> See, e.g., *U.S. Dep't of Defense, Defense Contract Audit Agency, Central Region and American Federation of Government Employees, Local 3529*, 37 FLRA 1218, 1228 (1990).

## II. Use of Agency Facilities

### A. Agency Proposal and Position

The Agency believes that the CBA has been terminated properly and that government-wide regulations now supersede conflicting portions of the contract. It further maintains that the Official Time Order is a government-wide regulation. As this Order generally prohibits exclusive representatives from freely using Agency equipment for representational purposes, the Agency proposes that the Union will not be permitted to rely upon Agency equipment during successor negotiations, e.g., computers, printers, etc. Indeed, the Agency has already directed the Union to vacate the office it had used on government property. Based on the foregoing, the Agency offers this language (bolded language is disputed):

When negotiations are held face to face, the Agency will provide a conference room suitable for negotiations and a conference room suitable for caucuses. The Agency will ensure that the location provides for access to a telephone. **Each party is responsible for providing their own computer, internet access, printer/photocopier and fax machine.** If required, all parties will wear face mask, either cloth, N95, or surgical.

### B. Union Proposal and Position

As discussed previously, the Union maintains that the current CBA remains in effect. Under the CBA, the Union is to be provided with office space, equipment, and a phone line.<sup>5</sup> The Union argues that the Agency is without authority to deviate from these requirements. So, the Union essentially proposes a modified version of the status quo that attempts to account for potential changes in government-wide regulations.

When negotiations are held face to face, the Agency will provide a conference room suitable for negotiations. The Union will caucus at the Union Office currently located at 565 Knox Blvd, Radcliff, KY 40160, unless Agency agrees to provide an area with equipment, internet, telephone, copying and printing capabilities. All conflicting government-wide rules or regulations which are subsequently rescinded

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<sup>5</sup> See Union Initial Argument at 4.

which affected Articles of the current (2017) HRC CBA dated 19 September 2017 will be put back into effect by operation of law effective immediately.

### C. Conclusion

**The Panel imposes a compromise proposal.** As with the prior issue, this issue revolves almost entirely around whether the CBA has expired. The Agency argues that the Official Time Order is a government-wide regulation and that it now controls this matter because the CBA has expired. The relevant Executive Order prohibits the free use of Federal agency facilities and equipment for unions unless it is offered to other non-government entities. Based on this standard, Management believes that it is appropriate to deny the Union in this case access to office space and equipment (other than a phone line and meeting space). The Union disagrees with all the foregoing because it maintains that the CBA remains in effect and the existing CBA grants the Union the right to Agency office space and equipment.

Once again, the parties' arguments are ones the Panel cannot resolve because they concern issues of contract interpretation. Accordingly, the Panel will impose the below language to resolve this dispute (new language in bold). That new language will preserve the parties' ability to raise whatever issues they deem necessary in other appropriate fora.

When negotiations are held face to face, the Agency will provide a conference room suitable for negotiations and a conference room suitable for caucuses. The Agency will ensure that the location provides for access to a telephone. **The availability of computers, internet access, printers/photocopiers and fax machines will be determined by applicable law.** If required, all parties will wear a face mask, either cloth, N95, or surgical.

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 in the above Panel majority opinion.



Mark A. Carter  
FSIP Chairman

December 20, 2020  
Washington, D.C.