United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of NATIONAL PARK SERVICE, INDEPENDENCE NATIONAL HISTORICAL PARK And FRATERNAL ORDER OF POLICE FIRST FEDERAL LODGE	Case No. 20 FSIP 090

DECISION AND ORDER[1]

BACKGROUND

This case, filed by the National Park Service, Independence National Historical Park (Agency or Management) on September 28, 2020, concerns seven articles in the parties' successor collective bargaining agreement (CBA) and was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). The mission of the Agency is to preserve the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations. This park houses two national icons, Independence Hall and the Liberty Bell, five historic landmarks that are significant to the founding of the country and the ideas of democracy and liberty, and many less-famous historic buildings and artifacts dating from Revolutionary America. The Fraternal Order of Police, First Federal Lodge (Union) represents 21 law enforcement officers. The Agency terminated the parties' CBA in July 2017 in accordance with the provisions of the agreement.

BARGAINING HISTORY

The parties had twelve negotiation sessions between June 2020 and August 2020. With the assistance of the Federal Mediation and Conciliation Services (FMCS), the parties had 2 mediation sessions in August and September 2020. As a result of their efforts, the parties reached agreement on 16 articles. But, they continued to disagree

[1] Member Gilson did not participate in this matter.

on 7 articles after mediation. Accordingly, on September 21, 2020, the Mediator released the parties from mediation. The Agency subsequently filed this request for Panel assistance on September 28. On November 10, the Panel voted to assert jurisdiction over all issues in dispute and to resolve them through a Written Submissions process with an opportunity for rebuttal statements. By way of Order dated November 12, 2020, the Panel ordered the parties to provide their initial arguments by December 2nd and any rebuttal statements by December 14th. The parties timely provided their submissions.

PROCEDURAL ISSUES

In its rebuttal statement, the Union raises three procedural objections/issues.[2] Specifically, the Union:

- Requests that the Panel conduct a hearing to resolve this dispute rather than utilize a Written Submissions procedure. It alleges that the Agency's submissions demonstrate a number of misleading statements that are not supported by evidence.

- Requests that the Panel postpone resolution of this manner until the upcoming inauguration on January 20, 2021. The Union alleges that President-Elect Biden has vowed to rescind the May 2018 President Trump Executive Orders and, as such, it would be inappropriate to move forward with a framework that relies upon those Orders.

- Requests that the Panel postpone issuing a decision until Union membership has had an opportunity to hold a ratification vote pursuant to Article 17 of the parties' ground rules agreement. The Union claims it wants to be able to inform its membership about the nature of Management's offers prior to any binding decision from the Panel.

The Agency did not respond to any of the above arguments. **But, none of the Union's objections will be sustained:**

- As part of the Panel's investigation, the Union requested a hearing in lieu of Written Submissions and the Panel rejected the Union's request. The only basis

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[2] Prior to its submission of its rebuttal statement, the Union also objected to the Agency's initial Written Submission because the Panel's November 12th Order limited initial submissions to 20 pages and the Union claimed that the Agency's submission exceeded that number. However, the Panel immediately informed the Union that the Agency's submission was 20 pages on the dot. **The Union never responded to that clarification but, to the extent that the Union's objection is still pending, it is denied.**

the Union provides for reconsideration is that the Agency allegedly provided "misleading" information in its initial written statements. But, as noted above, the parties were granted an opportunity to file rebuttal statements. So, the Union had an opportunity to respond to the Agency's claims.

- The Statute's procedures for resolution under 5 U.S.C. §7119 grants the Panel full authority to resolve impasses as they deem appropriate. Nothing in that language suggests that a Panel must halt all proceedings as it awaits an incoming administration.

- The parties' ground rules do not bind the Panel. Moreover, the parties' ground rules do not appear to discuss how the parties are supposed to address proposals that have been submitted to the Panel. Further, the Union raised this objection for the first time on December 14, 2020; this dispute has been pending before the Panel since September 28, 2020. If the Union were truly interested in a ratification vote, it could have done so at any time in the preceding 4 months.

MERITS ISSUES

As already noted, 7 articles remain in dispute. Many of the disagreements revolve around three May 2018 Executive Orders on labor and personnel issues.

After the parties in this dispute submitted their arguments to the Panel, and on December 23, 2020, the FLRA issued a negotiability appeal decision involving a ground rules dispute and two of the three Executive Orders. In *Patent Office Professional Association and U.S. Patent and Trademark Office, Alexandria, Va.*, 71 FLRA 1223 (2020)(*PTO*) the PTO alleged that 7 proposals were non-negotiable because they conflicted with parts of Executive Orders 13,836[3] and 13,837.[4] The union – the Patent Office Professional Association (POPA) – disagreed. A majority of the FLRA held that President properly issued these Orders pursuant to his statutory authority to "regulate the Executive Branch."[5] Because the President acted under this authority, the FLRA concluded that the Executive Orders have the full force and effect of law.[6] Moreover, the FLRA rejected several POPA arguments that various parts of the aforementioned Orders conflicted with the plain language of the Statute. Based on the foregoing, the

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3 "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining."

4 "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use."

5 *PTO*, 71 FLRA at 1224 (citation omitted).

6 *See id.*, 71 FLRA at 1224-25. The Panel notes that the FLRA majority did not cite or specifically address Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles."

FLRA held that all of the Union proposals at issue in *PTO* were non-negotiable because they conflicted with portions of the relevant Orders.

Article 9, Scheduling and Shifts

I. Agency Position

The Agency desires to modify the existing CBA article to provide Management with more scheduling flexibility in light of its security-based mission. There are numerous sections and subsections that remain disputed between the parties.[7] Management identifies some of the key areas of disagreement as follows:

- The Agency rejects existing contract language that would limit the area of coverage to the Philadelphia area. Management has the occasional need to deploy its workforce to other parks under its jurisdiction. The foregoing language would hamstring that ability and would also arguably be inconsistent with the Agency's right to assign work under 5 U.S.C. §7106(a).

- Management is seeking to modify the current definition of "seniority." Currently, it is defined as tenure with the Agency; Management wishes to change this to tenure with the Federal service. The current definition has led to key shifts being staffed by inexperienced personnel who are unfamiliar with the Agency's operations. Moreover, the status quo has led to experienced applicants shunning the Agency because they are concerned about losing external seniority.

- The Agency opposes existing language that would allow employees the ability to skip an unpaid meal period. Under Agency policies, shifts with unpaid meal breaks are in place to ensure appropriate coverage by rested employees. Additionally, employees have come to believe that they can take *paid* meal breaks and eat during tours of duties. The current CBA language limits Management's ability to utilize unpaid meal periods.

- The Agency wishes to impose new language that would reiterate its statutory ability to assign work and to make classification decisions. According to Management, granting employees the contractual ability to challenge any of the foregoing – as the Agency contends is the case with Article 9, Section 12 – would violate the foregoing and would create an inefficient work force.

- Finally, the Agency is opposed to CBA language in Article 9, Section 13 that would define "leads" for shifts. Again, Management needs the flexibility to manage its work force as it deems fit. The existing definition of seniority is

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[7] *See* Comparison Document at 1-4.

commonplace amongst police departments, and a departure would create strife and chaos for long-tenured Agency employees.

II. Union Position

The Union largely seeks to retain the status quo as it believes Management has not done enough to demonstrate a need to modify the CBA. The Union maintains that this article is the most pivotal article to the bargaining unit, and, in response to the points above:

- The Union argues that the parties have a historical understanding that the Agency's primary worksite is located in Philadelphia and that assignments of work to other locations may be handled via traditional existing processes. Moreover, at comparable facilities, assignments to other stations are usually voluntary and "true" emergencies are handled by local law enforcement. The Union also maintains that the Agency's efforts to staff multiple posts would result in reduced service and an overloaded workforce. The Union filed a grievance in 2014 arising from what it maintained was the Agency's improper decision under the existing CBA language to assign employees to another area 100-miles away and prevailed.

- The Union wishes to retain the existing definition of "seniority" because it provides employees with much need work-life balance. Changing the definition now, the Union contends, would create strife for long-tenured employees. Moreover, the existing definition of seniority is one that is common amongst police forces.

- The Union believes granting employees the option to work shifts that feature unpaid meal periods is an incentive to attracting qualified employees. Moreover, it still allows employees proper rest. The Union also claims that the parties never bargained or mediated over the Agency's proposal concerning unpaid meal periods.

- The Union otherwise rejects the Agency's remaining proposals. It maintains the Agency did little during negotiations to demonstrate a need for its language or to try and reach a common ground with the Union. Instead, according to the Union, Management chose to rely heavily upon President Trump's May 25, 2018, Executive Orders. The Union notes that the Panel should not rely upon these Orders because the impending administration has signaled its intent to disavow them.

III. Conclusion

The Panel will impose Management's language. This dispute turns largely upon Management's ability to assess the staffing needs of its operations. To be sure, an individual's work-life balance is important. But, said balance cannot come at the expense of the operations of the Agency that employs those individuals. Given the security functions that the Agency performs in service of the United States, the Panel should defer to the Agency's stated security rationale and accept Management's language. If the changes do indeed harm the Agency's ability to attract qualified individuals, as the Union claims, the parties are free to explore revisions when the agreement is bargained anew.[8]

In addition to deferring to the Agency's security rationale, the Union's language could potentially run afoul of the Agency's right to assign work under 5 U.S.C. §7106(a). This potential conflict serves as an independent basis for rejecting the Union's proposal. However, even without this rationale, the Agency's language still prevails for the reasons stated above.

Article 12, Disciplinary Actions

I. Agency Position

Consistent with Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (Removal Order), the Agency seeks to exclude all matters from the parties' negotiated grievance procedure that involve statutory appeal options.[9] Not only is this approach consistent with the Removal Order, the Agency notes that such matters are *already* excluded from the parties' CBA.

In addition to the above, the Agency wishes to clarify that an employee's acceptance of a last chance agreement (LCA) requires that employee to waive any appeal rights. The Agency believes this is necessary to reinforce the significance of an LCA and to motivate an employee to improve their conduct and performance. Finally, Management proposes that, when an employee faces an adverse action, they will receive notice and appeal rights information; relatedly, the Agency declines to accept limitations upon its ability concerning administrative leave in disciplinary contexts. Both of the foregoing will allow for effective and efficient Agency operations.

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[8] The Union claim that Management's language about unpaid meal breaks was never negotiated appears unsupported by the record. In this regard, the Union's own proposal has language about unpaid meal periods. *See* Union Initial Argument at 3. This appears to dispel the Union's notion that the parties never negotiated this topic.

[9] *See* Comparison Document at 4-5.

II. Union Position

As noted above, the Union opposes the Agency's reliance upon any of the 2018 Workforce Executive Orders. The Union would also like the opportunity for individual employees to pursue actions before an impartial arbitrator if that employee so wishes. Relatedly, the Union requests that the Agency provide more information in its notice of adverse actions so that an employee can make a more fully informed decision. As to LCA's, the Union proposes the inclusion of language indicating that a proposed adverse action will be held "in abeyance" pending completion of the LCA.[10] The Union believes this language is necessary to protect an employee in the event that Agency "oversight" causes the conditions of the LCA to go unfulfilled or if the Agency elects to rescind the proposed discipline.

III. Conclusion

The Panel imposes a compromise proposal. Turning first to the issue of grievance exclusions, the Panel has made clear that both the Removal Order and the Federal court decision in *AFGE v. FLRA*, 712 F.2nd 640, 649 (D.C. Cir. 1983)(*AFGE*), provide a basis for resolving disputes over proposed grievance exclusions. The former provides important policy and the latter holds that a proposed exclusion should be rejected unless the proposing party demonstrates that their position is the more "reasonable" one under the attendant circumstances. The Panel has imposed grievance exclusion language when such language already exists in an existing CBA and the non-moving party has not demonstrated a need to alter that arrangement.[11]

In these circumstances, the Agency argues it is appropriate to exclude all matters that involve a statutory right to appeal because they are already excluded by the existing agreement. In its arguments for Article 17, supra, the Agency seemingly quotes the applicable language from the existing CBA which states: "Excluded from th[e grievance] procedure are provisions of law, regulations of the Department of the Interior or the National Park Service, or regulations of appropriate authorities outside the Department *and all complaints for which a statutory appeals procedure exists*."[12] Despite the apparent quote, the Union disputes that the current agreement excludes these matters. Troublingly, neither party provided the actual CBA in the record. As such, the Panel cannot ascertain which position is accurate. Moreover, although the Removal Order instructs agencies to exclude several matters from a grievance procedure, all disputes involving a statutory appeal process is not one of those

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10 *See* Union Initial Position at 9.

11 *See Dep't of the Air Force, Fairchild Air Force Base and Ass'n of Civilian Technicians, #138*, 19 FSIP 070 (January 2020).

12 Agency Initial Argument at 15 (emphasis added).

matters.[13] Given the foregoing, it is inappropriate to conclude that the Agency has demonstrated that its position is the more "reasonable" one to adopt. **Accordingly, the Union's language for Article 12, Section 8 will be imposed.[14]**

The Agency's remaining proposals are reasonable. A requirement to waive appeal rights as part of an LCA is a common one. Moreover, nothing in the Agency's language suggests that Management lacks the ability to rescind the LCA in the event of some error. Additionally, there appears to be little substantive distinction in the parties' proposals between the types of information that is to be provided to an employee facing discipline. **Accordingly, the remainder of Management's language will be imposed.**

Article 16, Official Time and Union Representation

I. Agency Position

The **Agency** proposes official time language that it maintains is consistent with the best utilization of tax payer funds, Executive Order 13,837 " Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order), and historical usage of official time. Based on the foregoing, the Agency proposes a number of alterations to existing contract language involving official time.

- In its Section 3.A, the Agency limits the use of official time to its facilities or approved third-party litigation facilities. Management maintains it has a "right" to know where its employees are. It also needs the ability to quickly contact and deploy employees for potential security related reasons.[15]

- Management's Section 3.B prohibits the use of official time for grievances unless they are related to whistleblowing or FLRA-related activities. Management does not believe authorizing the use of taxpayer funds to initiate litigation against the Agency is prudent.

- In Section 4.A, the Agency seeks to limit official time activities to primarily matters enumerated under 5 U.S.C. §7131 because it believes such limitations are consistent with efficient budgetary reasons as well as the Official Time Order.

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[13] *See* E.O. 13,839, Sections 3 and 4; *see also, e.g., FCC and NTEU*, 20 FSIP 054 at 9 (September 2020)(rejecting proposals seeking exclusion of matters from grievance procedure where Agency argued only that they should be excluded because statutory options for appeal were available).

[14] *See* Comparison Document at 6.

[15] *See* Agency Initial Position at 10.

The Agency rejects the idea of official time for training purposes, noting that the parties have already tentatively agreed to such a prohibition.[16]

- Management's Section 4.B limits official time under 5 U.S.C. §7131(d)[17] to 1 hour per bargaining unit employee per year (which will amount to around 20 hours). In addition to consistency with the Official Time Order, the Agency notes this figure is consistent with historical usage. The Union used under 23 hours and 20 hours of official time in 2018 and 2019, respectively.[18] Official time for other activities under 5 U.S.C. §7131 would come out of this bank, and employees would not be able to spend more than 25% of their annual duty time in official time status.

- Management will permit employees to request Leave Without Pay (LWOP) to perform Union activities, but that time is still subject to the 25% cap discussed above. LWOP would not come out of the official time bank that Management proposes.

- The Agency also proposes the use of an official time request form that must be filled out, and approved by Management, prior to the use of official time.[19]

II. Union Position

The Union proposes simply striking most of the Agency's proposal. The Union does not address all of the Agency's language, but it does raise umbrage with several proposed sections.

- The Union does not believe there should be a limitation on the location of official time use. In the Union's view, if a Union official is on official time they are, by definition, "unavailable." So, essentially, their location is irrelevant.

- The Union argues that it is inappropriate to bar official time use for grievances because 5 U.S.C. §7121(b)(C)(i)[20] guarantees the right to exclusive representative representation in grievances. Moreover, the Union contends that §7101 reiterates the importance of collective bargaining. Finally, the Union notes

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16 *See id.* at 11.

17 As discussed below in greater detail, 5 U.S.C. §7131(d) authorizes official time for all other matters not specifically addressed by §7131 in any amount that parties to a contract agree to be reasonable, necessary, and in the public interest.

18 *See id.*

19 *See* Comparison Document at 11.

20 5 U.S.C. §7121(b)(C)(i) states that any negotiated grievance procedure must ensure that an exclusive representative has the right to process a grievance on behalf of the representative or the aggrieved bargaining unit employee.

that permitting experienced representation for grievances actually saves taxpayer funding because those representatives can provide more efficient services.

- The Union would prefer more general language for LWOP in order to emphasize that it would simply governed by applicable law.[21]

- The Union proposes its own form that would offer slightly less specificity in terms of information a Union representative would have to provide. Additionally, the Union's form would allow the employee receiving Union representation to remain anonymous if they so wish.[22]

III. Conclusion

The Panel imposes the Agency's proposal. The emphasis of the dispute over this article concerns restrictions on the use of official time. In particular, the parties disagree over what, if any, limitations should be placed on usage that falls under 5 U.S.C. §7131(d).

The Union is statutorily entitled to official time under 5 U.S.C. §7131(a) and (c).[23] In *Social Security Administration and AFGE*, 19 FSIP 019 (May 2019) (*SSA*), the Panel acknowledged that 5 U.S.C. §7131(d) provides for official time in any amount parties agree to be "reasonable, necessary, and in the public interest." However, the Panel also noted that it has authority to impose amounts when the parties cannot reach agreement. When imposing such decisions, the Panel clarified that it expects all parties to justify their proposed language on official time as "reasonable, necessary, and in the public interest." In the absence of such justification, the Panel has authority to impose a different amount.

Since the issuance of *SSA*, President Trump's May 25, 2018, Executive Orders that concern, among other topics, Federal-sector collective bargaining have gone into effect. These Orders provide an important source of public policy that the Panel may or may not implement. Notably, Section 3(a) of the Official Time Order states that official time granted under §7131(d) should not be considered reasonable, necessary, and in the public interest if it exceeds 1 hour per bargaining unit employee. This figure, however, must also account for the size of the bargaining unit and "the amount of [official] time anticipated to be granted under sections 7131(a) and 7131(c)" of the Statute.[24] In *SSA*, the Panel held that a party requesting an amount of time that

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21 *See* Union Initial Argument at 10.

22 *See* Union Initial Argument at 10, 18.

23 These sections of the Statute grant official time for collective bargaining and FLRA-related matters, respectively.

24 Executive Order 13,837, Sec. 3(a).

differed from the Official Time Order has to demonstrate that their requested time is reasonable, necessary, and in the public interest.

As already discussed above, the FLRA in *PTO* held that the Official Time Order has the full force and effect of law.[25] Based on this conclusion, the FLRA went on to conclude that several proposals conflicted with various parts of this Order and, therefore, were illegal and non-negotiable. With all of the foregoing discussed, the Panel turns to examining the issues involved in Article 16.

Management's Section 4.B proposes a bank of 1 hour of §7131(d) time per bargaining unit employee per year which, given the size of the bargaining unit, would amount to around 20 hours per year. The Agency offered unrebutted data that it submitted to OPM that shows the Union has used around 20 hours of official time *total* for each of the past 2 years.[26] Thus, regardless of the policies expressed by the Official Time Order, the Union's official time usage already hews closely to 1 hour per employee per year. So, from a purely historical usage standpoint, it is appropriate to conclude that the Agency's proposed bank is reasonable, necessary, and in the public interest within the meaning of §7131(d).

The Agency's language in its Section 3.B that prohibits official time for most grievances and arbitrations should also be adopted because such a proposal was present in *PTO*. The Agency justifies this prohibition due to budgetary concerns, but it did not provide any concrete supporting data. Nevertheless, this limitation is lifted directly from the Official Time Order.[27] And, in *PTO*, the FLRA rejected a union proposal that would have permitted the use of official time for grievances and arbitration because the proposal conflicted with the plain language of the Order.[28] In *Commander, Carswell Air Force Base*, 31 FLRA 620 (1988)(*Carswell*), the FLRA clarified that the Panel may not resolve negotiability issues but it may apply existing precedent if that precedent involves "substantively identical" proposals. Consistent with the foregoing, it is appropriate to reject the Union's opposition to Management's language to this proposal and accept Management's proposal. **Similarly, Management's language involving a 25% cap is appropriate for imposition because *PTO* also held that such a proposal is non-negotiable.[29]**

The rest of Management's language is appropriate to impose in full for the following reasons:

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25 *See PTO*, 71 FLRA at 1224-25.

26 *See* Agency Initial Argument at 11 (citation omitted).

27 *See* Executive Order 13,837, Section 4(a)(v).

28 *See PTO*, 71 FLRA at 1229-30.

29 *See PTO*, 71 FLRA at 1228.

- The Agency's location restriction for official time in Section 3.A is appropriate because these bargaining unit employees perform security functions that can be tied to their specific locations. The Union's suggestion that Union representatives on official time are "unavailable" is a tenuous one.

- Rejection of Union language that requires official time for training is appropriate. The Union did not rebut the Agency's claim that the parties have already tentatively agreed to prohibit such official time.

- The Agency's language on LWOP in its Sections 4.C and 6, and related limitations, are appropriate because they more clearly define the expectations and parameters for employees who elect to rely upon LWOP.

- The Agency's official-time request form is most appropriate because it calls for more specificity and would, therefore, ensure that approving officials are able to make a more fully informed decision.

Article 17, Negotiated Grievance Procedure

I. Agency Position

The Agency seeks to exclude a number of items from the negotiated grievance procedure, including those items excluded under 13,839, Sections 3 and 4. But, the Agency also proposes to exclude a number of other items, including matters that have statutory appeals available, informal personnel actions (e.g., oral reprimands), Department of the Interior/National Park Service regulation violations, and violations involving "regulations of appropriate authorities outside" of the Agency.[30] In support of these exclusions, the Agency argues:

- A National Park Service manual already provides a basis for challenging performance ratings;[31]

- The Removal Order is clear that certain items "shall" be excluded from a grievance procedure. Relatedly, grievances involving awards and other forms of incentive pay raise "budgetary" concerns;

- Removal actions are time consuming and require expenditure of Agency resources that are unjustified;

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30 *See* Comparison Document at 13.

31 *See* Agency Initial Argument at 13.

- "Informal" personnel actions at the Agency are not intended to be punitive, they are intended to be a constructive dialogue. So, permitting grievances would hinder that process.

- The Agency claims that its proposal is also consistent with the following language that has appeared in the parties' contract since 2004: "Excluded from this procedure are provisions of law, regulations of the Department of the Interior or the National Park Service, or regulations of appropriate authorities outside the Department and all complaints for which a statutory appeals procedure exists."[32]

The Agency also proposes reiterating that official time for grievances will be governed by the parties' official time article. Finally, the Agency proposes a new section explaining that Management will deny a grievance if it fails to include a litany of information pertaining to the underlying cause of action.[33] Management argues that this information represents "technical" deficiencies that could defeat a grievance and does nothing more than reiterate grievance limitations that the parties have agreed to elsewhere in the agreement.[34]

II. Union Position

The Union opposes Management's exclusions and believes that employees should have the option to grieve various matters if they so choose. As to informal personnel actions, the Union notes that such actions can remain on an officer's personnel file and be used by "defense" attorneys in other actions.[35] The Union rejects the remainder of the Agency's language as the Union believes its language is more consistent with the Statute and allows employees the ability to bring forth meritorious matters.

III. Conclusion

The Panel imposes a modified version of the Agency's proposal. Much of the dispute over this article turns on grievance exclusions and, in turn, the principles of the Removal Order and the Federal court decision in *AFGE*. Having considered the parties' positions and the applicable framework, it is appropriate to reach the following conclusions:

- The Agency's language for Section 2.B – which appears to require the Union to pursue ULP's through only the negotiated grievance procedure – is rejected. The Agency demonstrated no need for such language and nothing comparable appears in the Removal Order.

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32 *See id.* at 15.

33 *See* Comparison Document at 14-15.

34 *See* Agency Initial Position at 16-17.

35 *See* Union Initial Position at 11.

- Management's Section 2.D is stricken. This language prohibits grievances over violations of Agency and Department of Interior regulations and, according to the Agency, is carryover language from the contract. But, as already discussed above, the record is unclear on this point. And, this is another item that is not addressed in the Removal Order. As such, the Agency has not satisfied its responsibility under *AFGE.*

- Management's Section 2.C.1 – concerning performance appraisals – will be imposed. Existing Agency policies provide a process for challenging concerns over appraisals. Accepting Management's position provides a unified system for the workforce. Separately, Section 4 of the Removal Order calls for the exclusion of these matters.

- Management's Section 2.C.2 – concerning incentive pay – will be imposed because it interferes with Management's inherit decision-making ability to reward, or not reward, performance. And, again, Section 4 of the Removal Order relatedly calls for limitations on this topic.

- Management's Section 2.C.3 – involving informal personnel actions – will be imposed. The Agency has persuasively argued that these actions are intended to establish a remedial dialogue between supervisor and employee. The Union argues that these items can be used in the future by "defense" attorneys, but it is unclear what the Union is referencing. The Agency's position, then, is "reasonable" as described in *AFGE.*

- Management's Section 2.C.4 – concerning removals – will be stricken. The Agency argues that removals constrain the Agency's resources, but it provided no supporting data. Thus, the Agency has not demonstrated that this exclusion is "reasonable" within the meaning of *AFGE.* Section 3 of the Removal Order does say that agencies should strive to exclude removal actions involving misconduct or performance, but only when "reasonable."[36] And, again, *AFGE* grants the Panel authority to make this assessment. So, it is appropriate to reject the Agency's language here.

Based on the above, Management's language for Article 17, Sections 2.B, 2.D, and 2.C.4 will be stricken. The remainder of the Agency's language for Section 2 will be imposed.

The Agency's language about official time will be imposed as it does nothing more than refer the parties back to the parties' article on official time. The Agency's Article 17, Section 9 should be stricken. The Agency argues

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[36] *See* Executive Order 13,839, Section 3.

this language states "technical" justifications for denying grievances and does nothing more than capture other items that the parties have agreed to elsewhere in the agreement. Given that these items are already agreed upon, there appears to be little need to bring them up again. Indeed, doing so might create further confusion. As such, it it rejected.

Article 18, Arbitration

I. Agency Position

There are two issues in dispute. In Management's Article 18, Section 1, the Agency proposes the following:

> [Article 18] governs arbitration of grievances as processed under Article 17, Negotiated Grievance Procedure. Arbitration shall only be used to decide unresolved grievances. This Article is not applicable to negotiation impasses, negotiability disputes, non-grievable issues, or other labor-management disputes not specifically provided for herein unless mutually agreed otherwise.[37]

Management argues this language is necessary because it provides "educational" value to all parties involved. The Agency claims this language is consistent with the Removal Order and existing contract language.

The other issue is that Management proposes a fee sharing scheme for arbitration. Management believes such a proposed scheme is equitable and would deter frivolous arbitration. The Agency maintains that the Union has attempted to create a multi-tiered scheme for arbitration fees that is unworkable.

II. Union Position

The Union opposes the Agency's language for Article 18, Section 1 because that language prohibits various Union grievances. The Union also proposes a "loser's pay" scheme for arbitration fees in order to deter frivolous arbitrations.

III. Conclusion

The Panel imposes the Union's language. Management claims its Article 18, Section 1 is necessary in order to "educate" parties. But, the Agency's language largely does nothing more than reiterate the non-controversial proposition that the grievance procedure should be used to resolve grievances. It also lists items that legally cannot be

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[37] Agency Comparison Document at 16.

arbitrated, such as bargaining impasses. As Management's language appears to do no more than reiterate requirements under the law, it is unnecessary.

Turning to the issue of arbitration fees, the parties agree that the language governing the payment of fees should discourage frivolous litigation. But, the Panel believes that requiring a losing party to pay *all* fees would be a greater deterrence to meritless arbitrations. So, the Union's language is most appropriate.

Article 19, Use of Official Facilities and Communications

I. Agency Position

The Agency proposes allowing Union fair-use rent for office space instead of free space. Management could use the Union's office area for storage purposes or to provide educational services for children. The Agency's language is meant to strike a balance, then, between the parties' interests. And, Management's position is consistent with E.O. 13,837, Section 4(iii).[38] The Agency acknowledges that it offers free space to an AFGE unit, a charitable trust, and contractors. But, the Agency is looking to negotiate changes with AFGE, the trust raises money for the Agency's operations, and the contractors support the Agency's mission.[39] Management is also willing to rent computers to the Union; Management cannot allow the Union to use external computers because they could create safety issues with the Agency's network.

The Agency proposes that it will inform the Union about new employee orientations and will allow the Union an opportunity to provide information to such employees so long as the Union representative is a non-duty status. Whenever there is an orientation, on average there is only one new bargaining-unit employee. So, Management believes that establishing a formal orientation process would be inefficient.

The final issue in this article concerns meeting space, and Management proposes that the Union will have to go through the Agency to arrange such space (which could involve costs). This proposed arrangement would grant the Agency the ability to properly manage its space. Although the Agency acknowledges no such arrangement exists under the current agreement, the Agency argues that the Union has a history of

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38 "No employee, when acting on behalf of a Federal labor organization, may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems."

39 *See* Agency Rebuttal at 8.

holding meetings in Agency office space on duty time without Management's knowledge.[40]

II. Union Position

The Union requests the continued use of free office space. Management has underutilized space on its campus, and the Union is willing to relocate. An AFGE unit has free space as does a trust and a contracting company. The Union argues that dedicated office space benefits the Agency's operations because it provides employees with a safe space for working out their problems with Management.

As to orientation meetings, the Union argues that a "dedicated" presentation time allows the Union an opportunity to discuss its function within the context of the Agency's operations. It will also allow the Union a chance to discuss the foregoing with any non-officer bargaining unit employees.

Finally, as to meeting space, the Union requests the availability of space because that represents the status quo. In the past, it has been understood that the Union could use such space as long as they left the space in a suitable condition afterwards; the Union never had any problems meeting these conditions. The Union was able to provide its members with important updates thanks to the availability of space.

III. Conclusion

The Panel imposes Management's language. As to Union office space, Management has offered credible arguments demonstrating that the current space could be utilized for a wide variety of activities. As such, the Panel believes that charging the Union rent is appropriate. The parties agree that, aside from the Union, other non-government entities have free office space use. But, at least two of those entities – the trust and contractors – contribute to the Agency's operations. And, the third – an AFGE unit – is being reevaluated as part of the Agency's ongoing negotiations with that unit. Accordingly, the availability of free-use office space to those entities is not dispositive.

Moreover, the issue of office space usage is one that is also governed by the Official Time Order. Section 4(iii) states:

> No employee, when acting on behalf of a Federal labor organization, may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or

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40 *See* Agency Initial Argument at 19.

> meeting space, reserved parking spaces, phones, computers, and computer systems.[41]

This plain language prohibits free-office usage, which is what Management also proposes.

As to the issue of employee orientation, Management's language calls for the Agency to notify the Union of new bargaining-unit employees.[42] The Union does not dispute that, on average, orientation meetings include only 1 bargaining unit employee. Moreover, given that the unit is a small one – only around 20 employees – the Union should not be hindered by an inability to have immediate access to employees during duty time orientations. Accordingly, Management's language is appropriate.

Finally, as to meeting space, the Agency has offered an unrebutted argument that the Union has utilized such space for duty time meetings that are not coordinated with the Agency. Such meetings could potentially hamper the Agency's ability to accomplish its mission. Moreover, meeting space is another item that is limited by the Official Time Order. Accordingly, it is appropriate to impose Management's language that requires the Union to coordinate the use of meeting space with the Agency.[43]

Article 22, General Provisions

I. Agency Position

The Agency is opposed to Union language that would permit bargaining unit employees the ability to wear Union insignias with their work uniforms. Management wants to foster comradery and esprit de corps amongst its work force. The Agency fears that Union insignias could create unintended differences in the work force. Moreover, national guidance governs what may and may not be worn with the uniform. Finally, the Agency notes that the United States Court of Appeals for the Fifth Circuit has provided an analysis on this topic that controls the resolution of this dispute.[44]

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41 Executive Order 13,837, Section 4(iii).

42 *See* Agency Comparison Document, Agency Article 19, Sec. 5 at 18.

43 *See* Agency Comparison Document, Article 19, Sec. 6 at 18. The Panel notes that the Agency argues that its proposal would allow for a proper allocation of costs for meeting spaces to be charged to the Union. See Agency Initial Argument at 19. However, nothing in Management's language for Article 19, Section 6 specifically mentions the issue of costs for meeting space. *Compare* Management's Article 19, Sec. 1 (discussing rental fees for Union office space). There is only a mention of the Union working with the Agency's public relations office to secure meeting space.

44 *Citing DOJ, INS, Border Patrol v. FLRA,* 955 F.2d 998, 1001-07 (5th Cir. 1992)(*INS*).

The other issue in this article is seniority. The Agency relies upon the same proposal and arguments as discussed in Article 9.

II. Union Position

The Union proposes that its members have the optional ability to wear a Union insignia on their uniform. The size of the Union's pin is small (about the size of a quarter), so it would not be a distraction. And, other unions that fall under the jurisdiction of the Fraternal Order of Police wear this pin as well. The Union also notes that the Agency's has a "liberal" tattoo policy.[45] Finally, the Union contends that the FLRA has held that union insignias do not detract from the workforce.[46] This case law, the Union contends, is "binding."

On seniority, the Union relies upon the same language and arguments discussed in Article 9.

III. Conclusion

The Panel imposes a compromise proposal. As discussed in Article 9, the Panel has already imposed the Agency's proposal for seniority. Thus, the Agency's language on for Article 22, Section 4 will be adopted.

Concerning insignias, the Agency argues that barring Union insignias is important to establishing uniformity in the workplace. However, the Union has offered the FLRA's decision in *AFGE, Local 1613* as a rejoinder.

In *AFGE, Local 1613*, the FLRA held that an agency committed a ULP when it prohibited bargaining unit employees from wearing union insignias with their work uniforms. The FLRA concluded that the wearing of uniforms is within management's right to determine the means of work under 5 U.S.C. §7106(b)(1). However, it also concluded that employees have a statutory right to wear these insignias under 5 U.S.C. §7102 unless special circumstances exist.[47] The FLRA explained that "special circumstances" would depend upon the "factors" present in each case.

In response to the foregoing case, the Agency cites the Fifth Circuit's decision in *INS*. There, the court faced the same issue in *AFGE, Local 1613*: whether the barring of a union insignia on a uniform constituted an ULP. The court held that it did not in that case. Specifically, it concluded:

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45 *See* Union Rebuttal at 10.

46 *Citing U.S. DoJ, INS and AFGE, Local 1613*, 38 FLRA 701 (1990)(*AFGE, Local 1613*).

47 *See AFGE, Local 1613*, 38 FLRA at 716.

> We further hold that, when a law enforcement agency enforces an anti-adornment/uniform policy in a consistent and nondiscriminatory manner, a special circumstance exists, as a matter of law, which justifies the banning of union buttons.[48] Therefore, in the instant case, the [employees] do not have the statutory right to wear union lapel pins. Consequently, the INS has not committed any unfair labor practices by enforcing its policy or docking an employee's appearance rating for a violation of that policy.

Based on the foregoing, it appears that the parties in this dispute have provided the Panel with a framework for resolution of the insignia issue that the Panel lacks the authority to apply. In this regard, as explained in *AFGE, Local 1613*, employees have a statutory right to wear insignias with their uniform unless the factors in a particular case demonstrate the existence of "special circumstances." The Fifth Circuit concluded that such circumstances existed in *INS*. Yet, it appears that the existence of special circumstances is a mixed question of law and fact that the Panel cannot resolve. Indeed, in the decisions offered by the parties, the decision makers are ALJ's, the FLRA, and the courts. Nothing in those decisions state that the Panel has any role in making the foregoing assessment.

Based on the foregoing, it appears that the parties have various rights associated with insignia wear. But, the Panel lacks the ability to assess those rights. Accordingly, it is appropriate to impose language that recognizes the rights that are available to the parties.[49] The following language for Article 22, Section 3 will be imposed:

> **The Agency may prohibit Union insignias from being worn by a bargaining unit member so long as such action is consistent with applicable law.**

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[48] *INS*, 955 F.2d at 1004. The court also went on to hold that the agency's actions did not violate the First Amendment.

[49] Despite offering the Fifth Circuit decision discussed above, the Agency did not specifically argue the existence of "special circumstances" in its Panel submissions. The Agency did note that it has permitted temporary wearing of other insignias in the past, however. *See* Agency Initial Argument at 20. In any event, as noted above, the Panel likely lacks the authority to apply the legal framework involved here.

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 opinion.

Mark A. Carter
FSIP Chairman

January 17, 2021
Washington, D.C.