United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEFENSE LOGISTICS AGENCY And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1148	Case No. 18 FSIP 034

DECISION AND ORDER

As the nation's combat logistics support agency, the Defense Logistics Agency (DLA) manages the global supply chain - from raw materials to end user to disposition - for the Army, Navy, Air Force, Marine Corps, Coast Guard, 10 combatant commands, other federal agencies, and partner and allied nations. DLA supplies 86 percent of the military's spare parts and nearly 100 percent of fuel and troop support consumables, manages the reutilization of military equipment, provides catalogs and other logistics information products, and offers document automation and production services to a host of military and federal agencies.

DLA Land and Maritime (headquarters in Columbus, OH) (Agency) is the center of operations for DLA's Land and Maritime Supply Chains with over 2,500 employees in 37 locations around the world. It manages 1.9 million items, and supports more than 15,000 customers throughout the military services, civil agencies and other Department of Defense organizations. DLA Land and Maritime awards over 660,000 contracts annually, supports more than 2,000 weapon systems, and handles more than 9 million orders annually, with FY16 sales topping $3.4 billion.

The American Federation of Government Employees (AFGE) is the exclusive representative of DLA employees in a nationwide

bargaining unit, including employees in DLA Land and Maritime in Columbus, OH. AFGE, Council 169 is the bargaining agent for AFGE with respect to representing employees in DLA and AFGE, Local 1148 (Union) is the agent of AFGE, Council 169 with respect to DLA employees at Land and Maritime in Columbus, OH.

The Agency filed a request for assistance, under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119, with the Federal Services Impasses Panel (Panel) to consider a negotiations impasse over a provision that had been disallowed on Agency Head Review (Article 20 C.2.a). The Union was also seeking assistance with additional provisions in the parties' Article 20 that was not in agreement between the parties.

Following an investigation of the Agency's request for assistance, the Panel determined that it would assert jurisdiction over the dispute concerning Article 20 C.2.a. Under 5 C.F.R. §2471.6 (a)(2) of its regulations, the Panel determined that it would resolve the impasse through a Written Submission procedure, with opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which may include issuance of a binding decision. The parties were also advised that the Panel declined jurisdiction over the remaining provisions in Article 20 presented by the Union. The Panel has now considered the entire record, including the parties' final offers, written submissions, and the rebuttal statements.

BACKGROUND

In February 2016, the parties finalized and signed the ground rules for negotiating the local supplemental agreement over several opened articles. The parties agreed to negotiate a local supplemental agreement concerning eight (8) Articles in the AFGE Master Labor Agreement: 13-Merit Promotion; 20-Hours of Duty; 21-Overtime; 22-Administrative Leave; 24-Annual leave; 25-Sick Leave; 31-RIF; and 41-Union Dues.

In November 2016, the parties agreed on the language for Article 20. In accordance with the Ground Rules, the Local Article was submitted to the AFGE Council and the DLA Labor Program Office for final approval. In a memorandum, the Agency Head disapproved Article 20 on Agency Head Review. If a union

and an agency reach, or the FSIP imposes, a written agreement, then, under the Statute, the parties must submit that agreement to the agency head. The agency head then determines whether, in his or her opinion, the agreement is consistent with law. If the agency head determines that one or more of the provisions in the agreement is contrary to law, then he or she will disapprove the entire agreement in writing. If the agency head timely disapproves the agreement (within thirty days of the agreement's execution), then the union must file its petition for review with the Authority within fifteen days of service of the disapproval. A union's petition for review initiates the negotiability process with the Authority.

In this case, the parties reached a procedural ground rules agreement on what would happen if a provision is disapproved on Agency Head Review. The parties agreed that they would not renegotiate the entire agreement (as provided by the Statute), but that they would limit follow-up bargaining to just that provision that was disapproved.

In January 2017, the negotiation teams met again to re-negotiate the areas identified as problematic in the Agency Head Review. The parties came to agreement and Article 20 was again signed by the Chief Negotiators. Article 20 was resubmitted to the Agency Head and the AFGE Council. In February 2017, the Agency Head again disapproved Article 20 based on the inclusion of a new negotiated sentence in Section C.2.a. In March 2017, the parties had a telephone conversation concerning removing the offending sentence in Section C, Para 2.a. They reached tentative agreement; however, the Union President advised they would need to coordinate the change with the members of their team and their Chief Negotiator. In April 2017, AFGE submitted a completely revised Article 20 to the Agency. The Agency responded to AFGE that the Ground Rules specifically state that the parties will only re-negotiate the sections disapproved by Agency Head or Council 169; in other words, the only portion of Article 20 that may be re-negotiated is the identified Section C.2.a.

The Union could have chosen to file a negotiability petition challenging the disapproval under the Statute, but instead chose to return to the bargaining table to negotiate revised language. The Union attempted to expand the negotiations when they returned to the bargaining table, offering a number of provisions in Article 20, arguing that the Statute provides for broad re-negotiations. In April 2017, the parties met for re-negotiations. Both parties agreed there was

no common ground and the session ended. In August 2017, the parties met with the assistance of the Federal Mediation and Conciliation Services (FMCS). The mediation session ended with no agreement. In February 2018, the Agency filed this dispute with the Panel. The Parties were ordered to submit their written submissions concerning Article 20, Section C.2.a by April 19, 2018 to each other, as well as to the Panel. The Parties were also ordered to submit rebuttals by April 25, 2018 to each other, as well as to the Panel. The Agency submitted to both the Union and the Panel in a timely fashion[1]. The Union did not provide their submission timely[2] to the Agency, while they did provide their submission timely to the Panel.

With regard to the remaining issues in Article 20, the Panel determined that the dispute came down to the interpretation of the parties Ground Rules agreement; a dispute that should be resolved by a third party (e.g. Arbitrator) vested by the parties with the authority to address their rights under their negotiated agreement. As the Panel does not have the authority to resolve rights disputes, the Panel declined to assert jurisdiction over the remainder of the Union's proposals for Article 20.

ISSUE

The Provision agreed upon by the parties and disallowed on Agency Head Review:

Section C. Maxiflex[3],

---

[1] The Agency's written submission was received by the Panel and the Union by email on April 19, 2018. The Agency's rebuttal was received by the Panel and the Union by email April 25, 2018.

[2] The Union's written submission was received by the Panel by email April 19, 2018, but not sent and received by the Agency representative until April 20, 2018. The Union's rebuttal was received by the Panel and the Agency by email on April 25, 2018.

[3] Maxiflex Schedule is a type of flexible work schedule that contains core hours (9:00 am - 11:00 am and 1:00 pm - 3:00 pm) in which a fulltime employee has a basic work requirement of 80 hours for the biweekly pay period, but which an employee may vary the number of hours worked on a given workday or the number of hours per week within the limits established by the organization (6:00 am - 7:00 pm). Under this Article 20, the parties have agreed that all positions not assigned to a

2.a. - An employee may elect to work and accrue credit hours, with management approval, for daily, weekly, or projected period. **In rare circumstances when a manager is not available and mission requires continued work, the employee will notify the supervisor as soon as possible on the next workday.** (emphasis added)

POSITIONS OF THE PARTIES

Union Position

An employee may elect to work and accrue credit hours, with management approval, for daily, weekly, or projected period. In rare circumstances when a manager is not available and mission requires continued work, the employee will notify the supervisor as soon as possible on the next workday.

The Union is seeking to create a contractual right for an employee to be able to continue working on credit hours without supervisory approval. In support of its position, the Union states that its language should be ordered by the Panel because it was already agreed to in good faith by the parties and it is not inconsistent with law, rule, or regulation (i.e., it should not have been overturned on Agency Head Review). In its submission, the Union argues that the Agency Head Review determination is invalid. The Union argues that the basis for the disapproval was not because the provision violated law, rule or regulation, but instead because the provision violates OPM guidance, which is not law, rule or regulation and, therefore, the Union argues that the guidance cannot be used to supersede or overturn negotiated language.[4] Essentially, the Union is

---

standard tour of duty or an established shift are eligible to work a maxiflex schedule. If an employee works beyond the 80 hours for the biweekly pay period, the employee would be granted credit hours.

[4] The Union cites the *National Air Traffic Controllers Association, Air Route Traffic Control Center, Olathe, Kansas*, 2005 (61 FLRA 336). That case provides that if a permissive subject is negotiated, the Agency cannot overturn the matter on Agency Head Review as a violation of management rights under §7106. To support the Union's argument, the Panel also reviewed *National Treasury Employees Union and U.S. Customs Service*, 21 FLRA 6 (1986), which states that Government-wide issuances that

attempting to pursue their negotiability claim before the Panel. However, that argument is being raised in the wrong forum. In its rebuttal, the Union reasserted its argument regarding Agency Head Review, arguing that the language was improperly overturned.

Agency Position

> An employee may elect to work and accrue credit hours, with management approval, for daily, weekly, or projected period.

The Agency is seeking supervisor pre-approval in order for an employee to work credit hours. In support of its position, the Agency states that its language should be ordered by the Panel because it allows for the supervisors to manage assignments and workload and is consistent with OPM guidance. In its written submission, the Agency asserts an unsupported claim that the Union's provision, allowing an employee to work credit hours without the supervisor's approval, is a violation of management's right to assign work, arguing that supervisor approval authority is necessary in order to maintain the workload. The Union responded in its rebuttal that the parties have negotiated a permissive subject under §7106 and, therefore, the negotiated provision is appropriate, and as such the Agency's argument is neither persuasive nor supported.

The Agency also argues that, as noted in the Agency Head review disapproval, use of credit hours must be consistent with the OPM guidance, arguing the need for supervisor pre-approval. The OPM Guidance defines credit hours as "hours that an employee elects to work, **with supervisor approval**, in excess of the employee's basic work requirement under a flexible work schedule…" (emphasis added).

Next, the Agency argues that the "rare circumstances" language (language that the Agency had previously agreed to before disapproval on Agency Head Review) creates confusion because it could result in an employee earning hours that would need to be used in the next pay period (because they are over the maximum 24 hours allowed to be carried over), and that would

---

merely state advice or guidance, such as the OPM guidance that the Agency is relying upon, do not bar negotiation of a proposal. In other words, the OPM guidance does not supersede or invalid a negotiated provision.

force the supervisor to allow the employee to take earned leave the next pay period. The Agency argues that those types of considerations belong to the supervisor. The Agency also argues that overtime (additionally compensable hours) is covered by another Article (i.e., Article 21) and has been addressed there by the parties; essentially arguing that this provision should not be adopted because it is inconsistent with Article 21. In determining negotiability, the FLRA has held that parties are free, under the Statute, to alter or modify the terms of their collective bargaining agreement. See, e.g., *United States Dep't of Defense, Defense Logistics Agency, Defense Distribution Region West, Tinker AFB, Okla.*, 53 FLRA 460, 463 (1997). Accordingly, the Agency's claim that an additional provision under Article 20 that addresses credit hours or additionally compensable hours is a basis for an Agency Head disapproval of the provision is unsupported, therefore, it could be imposed by the Panel, if the Panel so chose.

Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, the Panel has determined that both parties' proposals are in agreement with the first sentence of the provision, indicating that, under most circumstances, all can agree with the expectation that additionally compensable hours should be approved in advance by the supervisor. As for the remaining second sentence proposed by the Union, the Union did not present a timely or a persuasive argument for a need for an exception to the normal expectation, nor did they present examples of what those "rare circumstances" would be. The proposing party did not define when that ambiguous language would apply, leaving no clear guidance on how that language would be effectuated by the parties or enforced by an arbitrator. The Panel prefers to avoid imposing ambiguous language. Based on the foregoing, the Panel imposes the Agency's proposal.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the parties to adopt the following to resolve the impasse:

> An employee may elect to work and accrue credit hours, with management approval, for daily, weekly, or projected period.

By direction of the Panel.

Mark A. Carter
FSIP Chairman

June 5, 2018
Washington, D.C.