

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 07 FSIP 92

DECISION AND ORDER

The National Treasury Employees Union (Union or NTEU) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Homeland Security (DHS), U.S. Customs and Border Protection, Washington, D.C. (Employer, CBP or Agency).

Following an investigation of the request for assistance, arising from negotiations over the Foreign Language Awards Program (FLAP),^{1/} the Panel asserted jurisdiction and directed the parties to return to the bargaining table with the assistance of the Federal Mediation and Conciliation Service (FMCS) during the 30-day period following the issuance of the Panel's procedural determination letter. Thereafter, should any issues remain unresolved, the parties were directed to submit their final offers and written statements of position with supporting arguments and evidence; they were also advised that the Panel would resolve the impasse through the issuance of a binding decision by selecting from between the parties' final offers on a package basis, to the extent they otherwise appear

^{1/} Under FLAP, Customs and Border Protection Officers (CBPOs), Agriculture Specialists, and non-bargaining unit employees who are proficient in and utilize a foreign language in the performance of their official duties are entitled to receive cash awards.

to be legal.

Pursuant to the Panel's procedural determination, the parties met with the assistance of FMCS and reached agreement on most of the 15 issues raised in their negotiations. Subsequently, the parties submitted their final offers and supporting statements of position on the issues that remained. The Panel now has considered the entire record, including additional submissions from both parties concerning jurisdictional issues that are addressed in detail further below.

BACKGROUND

CBP's mission is to prevent terrorists and terrorist weapons from entering the United States. It also is charged with the interdiction of drugs and other contraband, and the prevention of individuals from illegally entering the country. The Union represents a newly-consolidated nationwide unit consisting of approximately 21,000 CBPOs, Agriculture Specialists and other employees in various support staff positions, at grades GS-5 through -12.^{2/} Until an initial collective-bargaining agreement (CBA) between the Union and CBP is effectuated, the parties generally are following the provisions of the agreements that existed between the unions and the legacy agencies that pre-dated the creation of DHS.

FLAP is authorized only for employees under the Customs Officer Pay Reform Act (COPRA), which initially was designed as a compensation system for Customs Officers employed at the Customs Service. In 2004, CBP created the CBPO position and put CBPOs who formerly worked at INS, and Agriculture Specialists who formerly worked at AQIS, under COPRA. At the time, only the approximately 11,000 employees who formerly worked at the Customs Service were eligible for awards under FLAP through a Memorandum of Understanding (MOU) between the Customs Service and NTEU negotiated in 1996 (referred to herein as the "1996

^{2/} The Federal Labor Relations Authority (FLRA) certified the Union as the exclusive representative of the nationwide consolidated unit on May 18, 2007. The unit consists of employees who previously worked for the U.S. Customs Service, the Immigration and Naturalization Service (INS), and the Department of Agriculture, Agriculture Quarantine and Inspection Service (AQIS), and those who were hired after DHS was created in 2003.

MOU"). On March 22, 2007, prior to the certification of NTEU as the exclusive representative of the bargaining unit, CBP notified all three unions who represented its employees at that time, the American Federation of Government Employee's National Immigration and Naturalization Service Council (NINSC), the National Association of Agriculture Employees (NAAE), and NTEU, of its intent to implement a "unified" CBP FLAP on April 22, 2007. According to the Employer, the revised policy was designed and developed to create a standard Agency-wide procedure for the administration of the program which would be consistently applied to all CBPOs and CBP Agriculture Specialists. CBP reached agreements with NINSC and NAAE, with NAAE designating NTEU to negotiate with CBP on behalf of the Agriculture Specialists it represented. Currently, former NINSC, NAAE, and non-bargaining-unit employees are covered under CBP's "unified" 2007 FLAP. Only those employees represented by NTEU prior to May 18, 2007, the date the FLRA certified NTEU as the exclusive representative of bargaining-unit employees within CBP, are covered under the 1996 MOU.

ISSUES AT IMPASSE

In addition to whether the Panel should retain jurisdiction over this dispute, the parties disagree on: (1) the percentage of basic pay that employees eligible under FLAP should receive at various foreign language proficiency levels^{3/}; and (2) whether the Panel should resolve the impasse by imposing only an MOU that clarifies how CBP will effectuate its implementation of FLAP for unit employees, or an MOU and a CBP FLAP Directive.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union proposes that unit employees with a proficiency level of S2+ receive an annual award of 2 percent of basic pay and those at S3+ receive an award of 4 percent of basic pay. Under its approach, the Panel's decision would be imposed through an MOU that includes a background section stating that FLAP "recognizes . . . that the use of a foreign language by

^{3/} Among other things, the parties agree that employees at the S2 proficiency level should not receive awards, those at the S3 level should receive an award of 3 percent of basic pay, and those at the level of S4 or above should receive an award of 5 percent of basic pay.

[CBPOs] and Agriculture Specialists enhances CBP's ability to meet its multiple missions." The MOU also would contain the following provision: "This [MOU] and attached CBP Directive applies to all eligible bargaining unit employees in the NTEU bargaining unit as certified by the [FLRA] on or about May 18, 2007."

In its supporting statement, the Union contends that a provision specifying that the MOU and FLAP Directive apply to the current bargaining unit is necessary given CBP's illegal position that the parties' FLAP negotiations involve only those CBPOs covered by the 1996 MOU. In this connection, it repeats an argument made during the initial investigation of its request for assistance that the Employer's insistence to impasse on this issue "constitutes an unfair labor practice" under FLRA case law. The Union supports its position by citing the requirements of section 7114(a)(1) of the Statute, which states that "a labor organization [that] has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective-bargaining agreements covering, all employees in the unit," as well as two FLRA decisions.^{4/} For the first time, the Union also alleges that it is legally entitled to insist that bargaining over the FLAP only occur during the parties' upcoming CBA negotiations.^{5/} In this regard, the Union states that "term bargaining is open. NTEU has asked to bargain this matter at

4/ It also asserts that the legal defect in the Employer's position:

[I]s not rectified in the event that CBP at this late date now argues to the Panel that it is sufficient for it to unilaterally decide to apply the results of the instant Panel [Decision and Order] in 07 FSIP 92 to NTEU's current bargaining unit. Leaving aside the fact that CBP at some future date may decide to rescind this decision, NTEU is entitled to a negotiated agreement that specifically applies to NTEU's entire bargaining unit.

5/ The Panel recently resolved the parties' impasse over the ground rules governing those negotiations in Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C. and National Treasury Employees Union, Case No. 07 FSIP 108 (March 4, 2008), Panel Release No. 488.

that table. Neither the Panel nor the Agency is free to impose something other than what permissively NTEU offered."^{6/}

In a subsequent unsolicited statement submitted on January 14, 2008, the Union refers to an attempt it made via email on January 4, 2008, urging the Employer to join it in withdrawing the FLAP impasse so the matter can be taken up in term negotiations. The Employer apparently did not respond to the Union's email, so the January 14 submission states that:

Inasmuch as CBP has apparently decided to force the Panel to issue a Decision and Order on this permissively negotiable issue, an Order that in NTEU's view may be illegal, depending on what the Panel decides, NTEU hereby requests that the Panel decline to [retain] jurisdiction over the parties' dispute and impasse.

On January 17, 2008, the Union submitted another statement in which it contends that "inasmuch as this coverage issue is a threshold issue, it requires the dismissal of the entire dispute." It also states that:

Even if the Panel decided to remedy CBP's conduct by acknowledging that NTEU has no obligation to negotiate a FLAP policy that only covers a portion of our bargaining unit, it would be highly inappropriate for the Panel to proceed to the merits of the dispute. Such an approach, aside from triggering NTEU litigation, would reward CBP for its piecemeal bargaining approach by imposing no meaningful consequences for its insistence on taking a permissive subject to impasse.

According to the Union, the only decision the Panel can reach over FLAP that would potentially be viable is "one that accepts both NTEU's coverage and reimbursement formula, *i.e.*, if NTEU's final offer is accepted in all respects."

On the merits of its final offer, the Union's proposal "contains generous cost concessions." The percentages of basic

^{6/} The Union cites private sector decisions involving the National Labor Relations Board (NLRB) as grounds for its contention that "National labor policy supports placing all substantively negotiable issues on one term table."

pay at various proficiency levels are lower than what the 11,000 legacy Customs Officers are currently receiving under the 1996 MOU. Based on 2003 FLAP test scores provided by the Employer, the Union calculates that its proposal will save CBP approximately \$1.43 million for every 1,975 employees tested. The Union also provides statistics regarding what other law-enforcement-type positions currently receive for foreign language skills which show that its proposal would make CBP a more attractive employer in the labor market within which it competes. This is particularly significant given that CBP suffers from "abysmal 'employee satisfaction and engagement' scores and increasingly alarming attrition levels." In addition to harming "a workforce already in a morale crisis," the Union argues that the Employer's proposal would have a disparate impact on minority national origin groups, and create "the very real potential of the minority employees charging the Agency with illegal discrimination." Nor should the Panel be persuaded by any management argument for internal comparability with the previous FLAP agreements covering AFGE and NAAE legacy employees. If CBP's goal is to align the legacy Customs employees with the FLAP terms accepted by AFGE and NAAE, "it should have adopted the long-standing [1996 MOU] for the other two groups" rather than violating NTEU's right to insist that this "should be done at the term contract table where all other alignment discussions will occur."

In deciding the merits of the dispute, the Panel "may not consider any management arguments or evidence related to budgetary constraints or the need for cost reductions because management has refused to provide[] NTEU with requested budgetary information in a particularized need statement." In any event, "management has failed to demonstrate that with a budget in excess of \$9 billion it cannot find other ways to save \$1 to \$2 million." If the Panel imposes "anything more than a nominal modification to NTEU's final offer," the Union will file "a ULP over the denial of information and the Panel's acceptance of the Agency's insistence on bargaining to impasse on whether NTEU will waive statutory rights." Finally, on the issue of whether the impasse should be resolved by imposing an MOU and a CBP Directive, the Union's approach should be adopted because the Employer acquiesced in negotiating over the actual Directive. In addition, "CBP has unfettered discretion to apply the same FLAP terms to non-bargaining unit employees, or to implement a different FLAP agreement for non-bargaining unit employees."

2. The Employer's Position

Under the Employer's final offer, unit employees with a proficiency rating of S2+ would receive an annual award of 1 percent of basic pay and those at S3+ would receive an annual award of 3 percent of basic pay. The impasse would be resolved through the issuance of an order adopting an MOU that clarifies how CBP will effectuate its implementation of FLAP for employees represented by NTEU that refers to specific sections of CBP's FLAP Directive. In addition, the background section of the Employer's proposed MOU would state:

In an effort to unify its inspectional workforce, U.S. Customs and Border Protection's (CBP) Office of Field Operations will apply the provisions of the Agency's 2007 Foreign Language Awards Program (FLAP) to employees covered by COPRA and the negotiated 1996 National Treasury Employees Union (NTEU) and U.S. Customs Service FLAP Memorandum of Understanding (MOU) effective November 8, 2007. This MOU supersedes the 1996 MOU.

During the initial investigation of the Union's request for assistance, the Employer asserted that:

There is no statutory provision that requires CBP to set aside the negotiated agreements on FLAP between NINSC and NAAE and effectively renegotiate those provisions with NTEU since they did not represent all of the CBP personnel impacted by the new FLAP at the time of notification.

In its supporting statement, among other things, the Employer continues to insist that "the current scope of the management-initiated change only impacts [CBPOs] covered by the 1996 FLAP agreement between the former [Customs Service] and NTEU." In its view, "NTEU does not retain the right to unilaterally set aside previously negotiated agreements already reached by an exclusive representative." To void the AFGE and NAAE FLAP agreements, the parties would have to "mutually agree" to negotiate a new CBA on behalf of the entire unit.

On January 22, 2008, the Employer submitted a response to the Union's latest jurisdictional statements in which it urges the Panel to retain jurisdiction and resolve the impasse on the merits arguments the parties set forth in their supporting statements of position. In addition, however, it states that:

Despite the bargaining history related to the change initiated by management prior to NTEU's certification as the representative of this new unit, and in the interest of resolving this long-standing impasse, the Agency hereby voluntarily agrees to apply the Panel's decision in this case to the bargaining unit currently represented by the NTEU.

Thus, the Employer maintains that it is entitled to determine whether a Panel decision on the merits of the dispute should apply only to the 11,000 legacy Customs Officers, or the entire current 21,000 member bargaining unit.^{7/} Consistent with this position, it has exercised its discretion by agreeing to apply the Panel's decision to the current bargaining unit, which it believes clears the path for a Panel decision on the merits of the parties' final offers regarding employee award payout percentages.

Adopting the Employer's proposed award payout percentages would bring all CBP employees under the "unified" 2007 FLAP that it implemented in April 2007. Given that the Union "agreed to the provisions of the unified program for another unit [NAAE], [it] has yet to provide a persuasive reason as to why the Agency should agree to a different set of FLAP parameters for the smaller number of impacted NTEU covered employees." Additionally, when CBP unified the inspectional workforce, the number of employees eligible to participate in FLAP "dramatically increased." The unified FLAP also provides for a "broader testing mechanism" for Spanish proficiency which has "increased the potential for employees who are proficient to achieve significantly higher test scores and awards for their foreign language use." This is demonstrated by comparing the FY 2003 test scores of legacy Customs Officers under the 1996 FLAP with the more recent test scores of those under the "unified" 2007 FLAP. Only 27 percent of employees received an S4 or higher under the 1996 FLAP, while 75 percent of employees received an S4 or higher under the 2007 FLAP. In fact, CBP awarded in excess of \$5 million to employees covered by the 1996 MOU in FY 2006, and a total of over \$12 million in FY 2007 to employees under both the 1996 MOU and the "unified" 2007 FLAP.

^{7/} According to the Employer, of the approximately 11,000 legacy Customs Officers, about 2,300 are currently participating in FLAP under the terms of the 1996 MOU; and, in FY 2007, there were over 3,900 CBPOs and CBP Agriculture Specialists participating in the "unified" FLAP that CBP implemented in April 2007.

Thus, the Employer's proposed award percentages are "consistent with [CBP's] need to recognize those employees who achieved a greater level of proficiency." Finally, the Union's proposal to grant employees at the S3 proficiency level 3 percent of basic pay, and those at the S3+ level 4 percent of basic pay, is unwarranted because "the differences between those levels are not specific or specific enough to make a substantial impact in achieving CBP's anti-terrorism mission."

CONCLUSIONS

We turn first to the jurisdictional issues raised by the parties. Preliminarily, when the Panel asserted jurisdiction over the Union's request for assistance in this case the parties were advised that, if a complete settlement was not reached during their resumed negotiations, the Panel would resolve any remaining issues by selecting between the parties' final offers on a package basis "to the extent they otherwise appear to be legal." Our procedural determination was designed to provide the flexibility to modify a final offer to ensure that its imposition could withstand legal scrutiny. Accordingly, we conclude that the Employer's contention that it is entitled to restrict the application of FLAP only to the employees covered by the 1996 MOU is without merit. In this regard, it has cited no basis in the Statute or FLRA case law to support its claim. Section 7114(a)(1) of the Statute, however, clearly entitles a union that has been certified as the exclusive representative of a bargaining unit to "negotiate collective bargaining agreements covering[] **all** employees in the unit" [emphasis added]. Thus, in agreement with the Union, to be legally sufficient a Panel order resolving the merits of the issues at impasse in this case must apply to all eligible CBP employees in the NTEU bargaining unit as certified by the FLRA on May 18, 2007.

We also reject the Union's jurisdictional argument that the Panel has no authority to resolve the merits of the issues at impasse because the Union has the right to insist, even at this late date, that bargaining over FLAP only occur in the context of the parties' term negotiations. The Union relies on NLRB precedent that is not binding on the FLRA or the Panel, and has cited no basis in the Statute or FLRA case law to support its claim. Nor has independent research uncovered any cases where the FLRA has ruled that it is an ULP to attempt to force a party to bargain an issue "piecemeal," *i.e.*, outside the context of

term negotiations, as the Union contends.^{8/} Therefore, there are no legal impediments to retaining jurisdiction over this case provided the Panel's decision applies to the bargaining unit certified by the FLRA on May 18, 2007. As the parties have clearly exhausted voluntary efforts to reach agreement, the Panel is required to exercise its authority under the Statute and resolve the merits of the impasse over FLAP.

Having carefully considered the evidence and arguments presented by the parties in their supporting statements of position, consistent with the requirements of the Panel's procedural determination, we shall order the adoption of the Employer's final package modified to ensure that the FLAP MOU applies to the bargaining unit certified by the FLRA on May 18, 2007. As stated in previous decisions, on the key issue in this case the Panel is reluctant to impose restrictions on an employer's prerogatives in the area of pay for performance where it has not chosen to do so voluntarily.

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 following:

The parties shall adopt the Employer's proposed MOU with the exception of the following wording, which shall replace the second sentence of the background section:

In an effort to unify its inspectional workforce, U.S. Customs and Border Protection's (CBP) Office of Field Operations will apply the provisions of the Agency's 2007 Foreign Language Awards Program (FLAP) to employees covered by COPRA and all eligible CBP bargaining-unit employees in the NTEU bargaining unit

^{8/} Moreover, the rules governing Federal sector bargaining are significantly different from those in the private sector. Among other things, it is well settled that either party in the Federal sector may insist on negotiations over a mandatory subject of bargaining, such as FLAP, provided the matter is not "contained in or covered by" an existing CBA.

as certified by the Federal Labor Relations Authority
on or about May 18, 2007.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

April 11, 2008
Washington, D.C.