In the Matter of

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

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 10 FSIP 10

ARBITRATOR'S OPINION AND DECISION

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), Bureau of Customs and Border Protection, Washington, D.C. (Employer or CBP).

After an investigation of the request for assistance, which arises from negotiations over the parties' first collective bargaining agreement (CBA), the Panel directed the parties to: (1) meet in joint sessions with the Panel's Staff and a mediator from the Federal Mediation and Conciliation Service (FMCS) for additional mediation assistance, as necessary; and (2) present any issues that were not resolved through the aforementioned mediation process to the undersigned, Panel Member Martin H. Malin, for arbitration. The parties also were informed that, if the Arbitrator was required to resolve the impasse through the issuance of an Opinion and Decision, he would do so by adopting either party's final offers on an article-by-article basis, to the extent they otherwise appear to be legal. Accordingly, the parties met with the Panel's Executive Director, H. Joseph Schimansky, and FMCS Commissioner Lynn Sylvester for 3 days in April 2010 and 2 additional days in July 2010, but none of the issues at impasse were resolved through the mediation process. Consequently, I conducted an arbitration hearing with the parties' representatives from July 26 - 30, 2010, at the Panel's offices in Washington, D.C. In reaching this decision, I have considered the entire record in this matter, including the

parties' final offers and post-hearing briefs addressing jurisdictional matters and the merits of their positions.

BACKGROUND

The Employer's mission is to prevent terrorists and terrorist weapons from entering the U.S. 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 consolidated nationwide unit consisting of approximately 24,000 employees, grades GS-5 through -12, who work primarily as Customs and Border Patrol Officers (CBPOs). On May 18, 2007, the Federal Labor Relations Authority (FLRA) certified NTEU as the exclusive representative of a consolidated unit that consists of employees from other bargaining units within the former U.S. Customs Service, the Immigration and Naturalization Service and the Department of Agriculture, Agriculture Quarantine and Inspection Service. The parties implemented a partial CBA in May 2010 containing all of the articles over which they reached agreement, referred to as Phase I. On the articles at impasse resolved through this decision, the parties have been abiding by the provisions of the agreements that existed between the unions and the legacy agencies that pre-dated the creation of DHS.

ISSUES AT IMPASSE

The parties disagree over parts of 19 articles with the following titles: (1) Access to Facilities and Services; (2) Adverse Actions[1/]; (3) Attire and Appearance; (4) Awards and Recognition; (5) Bid, Rotation and Placement, Part B: Bid & Rotation and Work Preferences for Positions Other Than CBP Officers and CBP Agriculture Specialists Reassignments to Other Duty Stations; (6) Disciplinary Actions; (7) Duration; (8) Employee Rights; (9) Equal Employment Opportunity; (10) Firearms (Union)/Use of Force & Firearms (Employer); (11) Holidays (Union)/Holidays and Religious Observances (Employer); (12) Leave and Excusal; (13) Merit Promotion and Other Competitive Selections (Union)/Merit Promotion (Employer); (14) Permanent Reassignments to Other Duty Stations (Union)/Reassignments (Employer); (15) Preclearance; (16) Safety and Health; (17) Scheduling; (18) Training and Employee Development (Union)/Employee Development (Employer); and (19) Union

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1/ In the text that follows, the Adverse Actions and Disciplinary Actions articles are combined because the issues in dispute are identical.

Representatives and Official Time (Union)/Official Time (Employer).[2/]

POSITIONS OF THE PARTIES[3/]

Introductory Statement/Overview of the Union's Position

The Statute may not specifically list standards that the parties, the Panel or interest arbitrators are to apply, "but standards unquestionably are there," among them: (1) collective bargaining is to strive for "amicable settlements," which clearly suggests a Congressional desire that the interests of both parties be balanced (5 U.S.C. 7101(a)(1)(C)); (2) work practices should be "modern and progressive" (5 U.S.C. 7101(a)(2)), "which seems to condemn the traditional 'command and control' management approach" and "requires comparisons with the comparable community of employers not at the table"; and (3) bargaining should be "consistent with the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)), *i.e.*, "a contract provision must work with little red tape and after-the-fact fallout." While efficient and effective criteria are "subjective," they can be "objectified" to a large extent. Proposals that substantially expose an employer "to litigation and controversy," or cause a large amount of disruption, are not efficient or effective solutions, absent clear evidence to the contrary. In this regard, the 1996 contract between the Customs Service and NTEU may no longer be a good current measure of progressive practices in some matters yet, at a minimum, "it is the best benchmark for measuring whether a proposal will work rather than disrupt operations." Sixty percent of the employees who originally made up the current bargaining unit when it was certified in 2007 were from the Customs Service. Consequently, "CBP has had to follow the practices created by that contract for the majority of its workforce," and if they were disruptive the objecting party should provide evidence of that. Indeed, "evidence should anchor each party's presentation, no matter what the argument." At several points throughout the hearing, management argued that it needed "consistency, transparency, and clarity" in future contract provisions but offered no explanation of how that goal is met by a "management will

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2/ The full text of the parties' final offers on each article are attached as Appendix A (Union) and Appendix B (Employer).

3/ All quoted material is taken from the parties' post-hearing submissions.

consider," "management may" or even a "management will absent just cause" clause.

Private sector labor law has long been considered a guide for federal sector law,[4/] and the Union urges the Panel to be guided by the private sector principles enunciated in *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997) in breaking federal sector impasses. Although National Labor Relations Board (NLRB) doctrine cannot be imported as is, "given that the federal sector does not allow strikes or lockouts, much less rely on them to break impasses," there are more elements of that doctrine that the FLRA and Panel "should incorporate into the federal sector than are recognized today." The private sector impasse doctrine permits parties to unilaterally implement changes in working conditions once they have bargained over them to impasse. The intent is that "unilateral change will break the impasse and lead to an agreement, not that it should lead to permanent working conditions." Over the last two decades, however, the NLRB and the courts have placed a substantive limit on what kind of changes may be made unilaterally by an employer as part of its impasse strategy. In *NLRB v. McClatchy*, the private sector impasse doctrine, which had allowed unrestricted implementation of last best offers, was altered to bar employers from unilaterally implementing, as part of its impasse-breaking strategy, a proposal that is "standardless," permits the employer to "initially set and repeatedly change the standards, criteria, and timing," and contains no "definable objective procedures and criteria."[5/] The federal sector parallel to employer implementation is, at a minimum, "execution of any Panel decision adopting a standardless proposal." Practically speaking, "even asking the Panel to impose such a working condition should be considered enough to violate law" because, if it is adopted "there is a final and binding decision which the employer must follow and to which it can point to defend its actions." This dispute between

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4/ The Union cites *INS, Washington, D.C. and National Border Patrol Council*, 55 FLRA 69 (1999), as an example of a Federal Labor Relations Authority (FLRA) decision that supports its statement.

5/ The Union cites *The Edward S. Quirk Co. v. NLRB*, 241 F.3d 41 (1st Cir. 2001) and *Raven Services v. NLRB*, 315 F.3d 499 (5th Cir.2002) as examples of other Circuit Courts of Appeals that have adopted the principles adopted by the Court of Appeals for the District of Columbia Circuit in *NLRB v. McClatchy*.

NTEU and CBP "requires the Panel to address the role that *NLRB v. McClatchy* should play in federal sector impasses because management's last best offer is filled with proposals on major working conditions that meet all the *McClatchy* criteria" and it should "use this decision to announce the incorporation of the *McClatchy* criteria in its reasoning." In fact, the Panel cannot ignore *McClatchy* "without stepping outside its jurisdiction as proscribed by the good faith bargaining rules from which *McClatchy* flows." This would be tantamount to authorizing the employer, via a Panel decision, "to do what the law prohibits it from doing."[6/] The adoption of a management proposal that "flies in the face of *McClatchy*" could lead to the Panel's decision being overturned or rendered unenforceable either through exceptions to a Panel arbitration decision or a refusal to comply with the Panel decision, either of which "is not a result that the Statute strives for."

In this particular dispute, the Arbitrator should refuse to adopt, "as a matter of jurisdictional principle," any management proposal that conflicts with the *McClatchy* concept. Because the Arbitrator must resolve the impasse through final-offer selection on an article-by-article basis, he is required "to reject management's entire proposal in the Employee Development article, where management proposes to unilaterally cease to reimburse tuition costs and unilaterally decide when to reinstate reimbursement; the Appearance and Attire article, where management proposes that the Panel grant it unilateral authority to set uniform reimbursement rates; the Scheduling article, where management proposes to unilaterally change shifts without bargaining; the Merit Promotions article, where management "has given itself unilateral, non-grievable discretion to make or not make what are probably over 10,000 promotions a year" by refusing to include any standard for career ladder promotions; the Sick Leave article, where management proposes that it be given unfettered discretion to determine which employees must justify every instance of sick leave with a medical certificate; and the Reassignments article, where management proposes that it be given unfettered discretion to determine which employees will be voluntarily relocated. Finally, the Union's argument "is being made as an alternate

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6/ *Department of Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio and AFGE, Council 214*, 36 FLRA 524 (1990) and *U.S. Department of Justice, Executive Office for Immigration Review, New York, New York*, 61 FLRA 460, 471-72 (2006) are cited by the Union in this connection.

objection to the Arbitrator or Panel imposing a clause which waives the union's right to some statutory entitlement." If the Arbitrator decides that a proposal is not an outright waiver, then it should be considered "against the *McClatchy* standard."

Introductory Statement/Overview of the Employer's Position

The Panel has an "extensive history of resolving labor-management impasses in a manner consistent with the purpose" of the Statute, particularly in relation to the Congressional intent described in 5 U.S.C. § 7101. As the Arbitrator evaluates which party's article should be adopted, the Employer would remind him of his obligation to select the proposal which best: (1) safeguards the public interest; (2) contributes to the effective conduct of public business; (3) facilitates and encourages amicable settlements of disputes between employees and the employer involving conditions of employment; and (4) supports the adoption of the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of operations of the government. In this regard, "the public's interest can be found in the law passed by Congress on November 19, 2002," establishing DHS and bringing together the components of CBP (Homeland Security Act of 2002, Title 6 of the United States Code). CBP's mission is to serve as "the guardians of our Nation's borders", "America's frontline", and to "protect the American public against terrorist[s] and instruments of terror." In evaluating the parties' proposed articles, the Arbitrator "must select the one that best safeguards, supports and does not interfere with the effective and efficient accomplishment of this important national security mission."

The Arbitrator also must adopt the proposed article that ensures the effective and efficient accomplishment of the Agency's operations. This includes taking "great care to avoid adopting articles that contain administrative processes and burdens that would unnecessarily detract from Agency operations." In addition, the parties recognize they have a "strained relationship" that is "littered with the results of more than 7 years of posturing and litigation," and are looking toward the establishment of their first CBA "as a means for reducing conflict and a guide for managing our future relationship in a more productive and amicable manner." The Arbitrator must adopt the proposed article that best fulfills the parties' stated goal of establishing a single set of work rules that "are transparent, applied with reasonable

uniform[ity] across the bargaining unit, and are most easily understood by the parties, including employees."

Reformation of the civil service by Congress in 1978 "reflected the public's desire to improve government operations through the creation of a statutory base for improved labor-management relations." In the instant impasse, this means that the Arbitrator must order the adoption of the proposed article that furthers the goal of more efficient government operations, while also striving to deliver improved working conditions to the bargaining unit and enhanced institutional benefits for the Union. Given the disparities contained in the existing "patchwork set of working conditions," many of which are codified in multiple negotiated agreements and "ancient past practices," the importance of unification, standardization, clarity and understandability cannot be underemphasized. Moreover, because the bargaining unit "is still in its infancy, with the majority of employees having never been subject to a [CBA]," the Arbitrator has the opportunity to consider the adoption of more modern processes, procedures and practices "without disrupting those typically created by contractual obligations made in years past." The Employer has approached the development of its proposals by evaluating the existing set of working conditions as reflected by current practices and/or codified in inherited agreements between its legacy agencies and unions. Its last best offers represent a continuation of CBP's best practices, with proposed improvements to those that were inadequately serving the interests of either party, "as well as new provisions providing solutions to legitimate problems currently facing the parties."

1. Access to Facilities and Services

a. The Union's Position

The Union "is willing to deviate from nearly 50 years of unbroken practice" requiring the Employer to print a paper copy of the CBA for every employee but believes it is unwise "to follow the electronic age to the extreme, where the only way an employee can read the contract is if he or she logs onto the Employer's web site and forever makes a record of reading the contract." That would have a chilling effect "akin to the illegal practice of putting a camera outside the Union office to see which employees consult the Union." Therefore, if management wants to avoid paper printing costs it should nevertheless provide employees a version of the contract on CD ROM that can be reviewed privately. Merely making the contract

available on-line, as the Employer proposes, "boosts the chance of employees printing out their own versions on paper via management printers" and would be far more costly than professionally printing the entire contract for everyone. Moreover, because the CBA "will contain the vast majority of the CBP employment conditions," the Employer has an interest in making it readily accessible to employees. While the Union is willing to move away from printed paper copies of the agreement, it also wants to protect itself against management printing paper copies only for non-unit employees. Consequently, NTEU proposes that, if management decides to print paper copies for supervisors and other non-unit employees, they should be provided to everyone.

On the issue of employee personnel data, the Union is proposing to roll over the existing contract wording found at Article 34, Section 9.B of the NTEU-Customs National Agreement (NA), with minor changes. Under its proposed wording, CBP would be required to provide the Union information concerning the make-up of employees in the bargaining unit, including name, grade, position, and whether they are full or part time. CBP has proposed, "without support," to change the *status quo* by requiring the Union to inform management of the geographic locations covered by each NTEU Chapter, after which CBP would provide some of the information it already has been providing for years. The Employer also proposes to change the *status quo* by providing the Union with less information than it has previously provided, such as changing the long-standing practice of identifying where bargaining unit employees work. This information is necessary to assist the Union in determining whether its members are represented by the appropriate chapter, are paying dues to the correct chapter, and to help identify which chapters have high Union membership. The Union's proposal is no different than what the parties have already implemented, with no reported problems, in Article 25, Section 4G of the Phase I agreement. The Union "is merely requesting in this Article a continuation of the long-standing practice of also informing NTEU of the employee's 'port/equivalent location' – *i.e.*, the post of duty, where the non-members, but unit employees, work." The Employer has provided no evidence or argument for abandoning this practice.

On the final issue of Union office space, given that the CBA will involve the Union in "hundreds of employment condition matters," employees are entitled to know where they can find the Union quickly. Management has refused to allow anyone to carry personal cell phones, so "establishing an office where the Union

can be found regularly is the next best way to ensure quick and/or efficient contact between employees and their representatives." The Union also needs an on-site place to store records, file cabinets, laptops, etc. But "most important, employees need a place to meet with a Union representative in private." Sitting in a break room or temporarily available interview room, as the Employer proposes, does not provide the necessary privacy to discuss a myriad of sensitive matters. The Union's proposal on this matter would "trigger the office obligation whenever there is at least one full-time Union representative allowed in a Chapter on official time." It is only logical that an employee who is not going to be given a workstation to report to every day be given his or her own work area to do Union work. The adoption of anything less than its proposal "will create a constant irritation between the local parties."

b. The Employer's Position

As the Employer now "agrees to NTEU's last best offer proposal [in] section 19.A.," the parties' disputes in this article concern the distribution of the contract, employee personnel data, and the size of guaranteed office space for full-time Union representatives. While the parties have agreed in Section 7.A. that the CBA will be posted on CBP's intranet site with hyperlink ability, the Union is also "demanding unnecessary 'add-ons'" to this approach, including the requirement that over 25,000 CD ROMs be created and distributed to bargaining unit employees and NTEU National. The Employer's proposal should be adopted because it provides the more effective approach and "would avoid the mandated individual distribution of the contract to every employee via CD ROM when there is no certainty every employee will even view the contract in this manner." It also is consistent with the distribution procedure already agreed to by the parties in multiple mid-term bargaining agreements, as well as the articles implemented in Phase I, and the Union "has failed to demonstrate the need for and variance from the *status quo* for distributing this Agreement." In addition, Section 7.D. of the Union's proposed article attempts to place upon the Agency the burden of printing and distributing hundreds of copies of an internal Union "employee guide" whose contents are "grossly inaccurate." The Agency should not be required to link itself to "an internal piece of anti-management propaganda."

After the Arbitrator asked clarifying questions during the hearing concerning the parties' proposed sections for the

release of employee personnel data, the Employer "modified its proposal in its last best offer in an attempt to meet both parties' interests." In this regard, the Union made it clear that their primary interest in obtaining the data in Section 9 is "for monitoring and policing changes to employee data and addressing internal Union matters." To meet this interest, while also meeting CBP's desire not to disclose aggregate end-strength staffing data at smaller locations, the Employer submitted a proposal that provides the routine data the Union is requesting for each employee by organizational office and NTEU chapter. The "significant difference" in the two proposals is that the Employer is asking the Union to share a "nominal responsibility in obtaining the data - *i.e.*, providing CBP with the geographic locations covered by each chapter." Its proposed article section should be adopted "as the adequate trade-off in meeting each others expressed interests."

Concerning the allocation of office space to full-time Union representatives, the Arbitrator should consider the entire article when analyzing the reasonableness of the Union's proposal. Among other things, the Employer's article provides the Union with meeting space during non-duty hours and official hours of business in areas occupied by the Employer; adequate office space and equipment at a CBP worksite or other approved facility, including, at a minimum, a desk, four chairs, and a telephone; and, in the event meeting space is not available, the Employer would make necessary arrangements to reserve meeting space as soon as it becomes available. Thus, there are "numerous safeguards" built into its proposed article that ensure the Union is provided office space and necessary equipment for Union activities. NTEU's proposed article, on the other hand, includes a guarantee that CBP will provide an office of no less than 250 square feet for chapters with one-full time representative. The Union "has never demonstrated a need for additional mandated office space at that size." Moreover, CBP's operations are "diverse by nature - airports, land borders, sea ports, historic customs houses, etc." The adoption of a standard size would create "an undue responsibility on CBP to ensure specific office sizes are located in the myriad of locations within CBP that may not have the space." Nor has the Union demonstrated how it or the bargaining unit has been hampered by the Employer's existing practice of providing adequate space in accordance with the law. Finally, rather than resolve disagreements over whether or not provided space is adequate through the grievance process, the Employer's proposal provides a "more constructive resolution process by delegating

local management to bargain over the matter with NTEU, through impasse if necessary."

CONCLUSION

Having considered the parties' positions on this article, I am persuaded that the Employer's final offer should be adopted to resolve the impasse. In reviewing the parties' proposals, the two determinative issues involve whether the Employer should be required to: (1) provide office space of at least 250 square feet for Union representatives on 100-percent official time; and (2) create and distribute over 25,000 CD ROMs in lieu of printing the contract. On the first issue, the Union argues that designated offices would provide a place for representatives on 100-percent official time to perform their functions and eliminate the on-going need to find temporary space that affords Union officials and employees the necessary privacy to discuss sensitive matters. In its introductory overview, however, it urges the Arbitrator to consider the 1996 Customs Service-NTEU contract as the best benchmark for measuring whether a proposal will work rather than disrupt operations, and to require the party wishing to change the practices created by that contract to provide evidence that continuing those practices would be disruptive. Applying this standard, it appears that the Employer's final offer is more consistent with the practices created by the Customs-NTEU contract than the Union's,[7/] and that the evidence in the record is insufficient to support the conclusion that a continuation of that practice would be disruptive. To the contrary, a requirement that such offices be at least 250 square feet may be difficult to meet in some locations, particularly because no matter which party prevails in the Union Representatives and

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7/ In this regard, Section 17.A. of Article 34, Access to Facilities and Services, of the Customs-NTEU contract, provides as follows:

> When a Chapter qualifies for full-time representation in accordance with Article 33, Section 3.F., the Employer will provide the Union with adequate office space and equipment at a Customs worksite or other approved facility, in accordance with government-wide regulations on space management. Alternatively, the Union may choose to rent/lease its own commercial space. In the latter case, the leased space shall be centrally located and readily accessible.

Official Time article, a significant number of Union representatives will be on 100-percent official time. Thus, the adoption of the Union's final offer is far more likely to be disruptive than the Employer's. In addition to being more consistent with the practices established in the Customs-NTEU contract, the Employer's final offer has the advantage of permitting local negotiations over office space if a chapter believes the amount provided is inadequate. Finally, on the second determinative issue, requiring the Employer to create and distribute over 25,000 CD ROMs in lieu of printing the contract would be burdensome and wasteful, particularly where unit employees will have access to the Agreement on CBP's intranet and internet sites. If any employee may access the Agreement on CBP's internet site, just like anyone else anywhere in the world, the Union's argument that employees will have to log in and thereby tip off the Employer whenever they consult the contract loses all of its force. Requiring the Employer to burn CDs, just like requiring it to print the contract, is unnecessarily wasteful in light of the development of the technology since the 1996 Customs contract. Accordingly, the parties shall be ordered to adopt the Employer's final offer on this article.

2. Adverse Action and Disciplinary Actions

a. The Union's Position

In Section 3 of these articles, unlike the Employer, the Union "has abandoned any effort to attach modifiers, limitations or conditions" to what both parties agree is an obligation that discipline be timely, and proposes only that discipline will be "administered in a timely manner." Its proposal is the more reasonable one because the former NTEU-Customs contract contained the same timeliness standard without any limitations such as management's modifying parenthetical, so it "is the more accurate continuation of the NTEU-Customs contract that still applies to thousands of CBP employees who were previously in that unit." Thus, by adopting management's proposal, the Arbitrator would be "taking a current protection away from employees." Moreover, the NTEU-Customs contract should be considered a legitimate comparable in this matter because the terms and conditions it established remain as practices today for the largest number of employees in the unit. In addition, the Union has presented evidence showing that there is a "continuing problem with management taking discipline untimely." In this regard, less than a year ago the Employer took disciplinary action 3 to 4 years after an incident, "only to

have an arbitrator reverse the action because he felt that it had ignored 'one of the most important tenets of discipline'," *i.e.*, that discipline must be timely. It also has presented evidence showing that when management places an obligation on employees to do something timely, it does not include any limitations or modifiers on the concept. Nor does the Employer's last best offer in Section 8.E. of the Merit Promotion article include any modification or limitation to the "timely" concept, *i.e.*, "Selecting officials will make selections in a timely manner." These should be treated as "internal comparables that support the Union's position." Finally, even if management's proposed limitation on the timely concept is "legitimate," it appears to have been taken "from thin air." Consequently, if the parties had to adopt it, it would require that they begin the process of creating a new interpretation history to guide its implementation, which would be "wasteful when a long history exists behind the words of the NTEU-Customs contract" that the Union proposes be continued.

In Section 5.B.(a)7. of the Adverse Actions article, the Union is holding to its original position that all oral replies be transcribed. This is primarily because adverse actions, "whether they be suspensions, demotions or terminations, are appealable not just to arbitrators or the MSPB, but also to the Federal courts." If the law considers such matters serious enough to allow courts to review the record, then a transcription "will boost the quality of the record." Given that these appeals are filed with the circuit and Supreme courts where there are no witnesses, the record is crucially important. In Section 5.B.(2)(a)7. of the Disciplinary Actions article concerning disciplinary suspensions of 14 days or less, however, the Union has modified the offer it had on the table at the hearing, where it asked that all oral replies be transcribed, and is now proposing that: (1) only those management discipline proposals of suspensions of more than 5 work days require an oral reply transcript; and (2) the practice where transcripts are currently used for all oral replies be continued. In its view, this more appropriately balances the parties' interests than the prior proposals, where management gave itself total discretion to transcribe or summarize and the Union demanded that all disciplinary suspension oral replies be transcribed. Thus, under the Union's proposal, "management can balance any burden of a transcript with the length of the proposed suspension," and "if it wants a longer suspension, it obligates itself to a transcript."

Another substantial reason for adopting the Union's proposals in these two articles is that management's "is a litigation breeder." By giving itself the power to decide when to transcribe and when to summarize, it runs the risk of unintentionally creating a past practice in local offices throughout the country. That, in turn, creates a liability for management should it ever deviate from that practice. It does not promote "efficient and effective" government to draft personnel rules that create litigation liabilities. The Union's proposals also should be adopted because of management's recent decision to record/transcribe all employee investigatory interviews conducted by the CBP Internal Affairs office. If it is "an acceptable burden and cost" to record and transcribe every internal affairs interview then "any management argument that it is too costly lacks credibility." In any event, the Employer never introduced evidence at the hearing about the cost and burden of transcribing oral replies, "undermining any claim it may make in its closing brief." A final reason for adopting the Union's proposals is that "summaries are notoriously unreliable." An oral reply can involve sophisticated arguments that someone untrained in such matters could easily misunderstand or miss altogether and, if not summarized properly, "higher-level managers not at the reply who are reviewing a proposed suspension could easily make an error." Therefore, the proposal helps management avoid that potential error, as well as disagreements about the accuracy of the summary "when the employee and Union are given the opportunity to review it."

b. The Employer's Position

The areas of disagreement in the Adverse Actions and Disciplinary Actions articles are essentially identical, "with the only exception being the Union's proposal [in the Adverse Actions article] would require transcripts for all oral replies." Thus, the parties' disputes essentially involve: (1) the standard by which adverse and disciplinary actions will be considered timely taken or administered; and (2) the method by which oral replies by employees, following receipt of a notice of proposed adverse action or discipline, are documented. Based on the parties' election to recognize the Customs-NTEU practice in the areas of adverse and disciplinary actions as best, consistent with Panel precedent, "it is incumbent upon the party desiring a change from the practice to demonstrate the need for the change it proposes." On the issue of timeliness, the Union's latest proposed wording in both articles is similar to what is in the corresponding Customs-NTEU contract article,

"namely, that '[d]iscipline [and adverse actions] will also be administered in a timely manner'." These subsections must be read in conjunction with the wording in subsection 3.A. of the articles, which is consistent with the Employer's proposals and require adverse and disciplinary actions to be taken "in a manner that is fair and impartial." The only difference is that the Employer proposes to define the term "timely" as "so as not to create an unreasonable delay that materially prejudices the employee," which is the standard adopted by the Merit Systems Protection Board (MSBP) and the U.S. Supreme Court. Without clarification, such terms as "fair", "impartial" and "timely" are vague and ambiguous. It should be noted in this regard that the parties previously spent "an excruciating amount of time and energy" negotiating over the meaning of the terms "fair and impartial," which resulted in a separate contract article specifically devoted to these terms.

The Union's Section 3.B. proposals "provide[] nothing to guide the parties, or ultimately an arbitrator in the event" it elects to challenge the timeliness of an action taken under the procedures contained in the article. Leaving the "third prong" of the standard for disciplinary actions undefined is inconsistent with the demonstrated intent of the parties elsewhere in the contract. It would be "irresponsible to leave this matter unaddressed and therefore immediately ripe for grievance arbitration on the same day it is implemented." Furthermore, given the size and scope of the bargaining unit, such litigation will likely occur in multiple locations and result in varying decisions and interpretations by different arbitrators. Given that its proposal identifies a standard consistent with that adopted by the U.S. Courts and MSPB, and the Union offers no standard, "the Employer's proposal is clearly the more reasonable."

Regarding the documentation of oral replies, under the Customs-NTEU contract, after receiving a notice of proposed disciplinary action, the affected employee may elect to respond to the charges contained in the notice by providing a written reply, an oral reply, or both. The Employer then prepares a summary of any oral reply and provides the employee a reasonable amount of time to make corrections. During negotiations, the Union indicated an interest in having oral replies transcribed at Agency cost. In an effort to reach a compromise, the Employer's last best offer permits management to document the oral reply through a summary or transcription services. In both circumstances, the employee is provided reasonable time to review and make corrections to the documentation. The Union's

latest proposals mandate the use of transcription services for oral replies in certain circumstances. This is unnecessary because there is no evidence in the record that an employee has been harmed through the documentation of an oral reply in summary form, or that any changes to a summary were rejected by the Agency. Nor has the Union identified a single instance where a summary or transcript of an oral reply was used as the basis for overturning a disciplinary action through grievance arbitration. Moreover, the decision to provide an oral reply is an employee and/or Union representative election, and does not prohibit the employee and/or Union representative from submitting a more formal reply in written form in addition to, or in lieu of, an oral reply. Finally, transcription services are costly, and requiring CBP "to expend its financial resources in this manner without reasonable justification is neither prudent nor appropriate." For these reasons, the Union's proposals on this subject are not reasonable and should not be adopted.

CONCLUSION

At this point, the parties have narrowed their dispute to the relatively minor issues of whether: (1) the articles should define "timely" as "so as not to create an unreasonable delay that materially prejudices the employee"; and (2) absent mutual agreement, the Employer should be required to provide a transcript of any oral reply to the affected employee and/or his/her designated representative in the case of all adverse actions and disciplinary actions involving suspensions of more than 5 workdays. After careful consideration of the arguments and evidence presented by both sides, I do not find the first issue to be determinative of which parties' final offer should be adopted. Under the Supreme Court's decision in *Cornelius v. Nutt*, 472 U.S. 648 (1985), arbitrators are bound to apply the same substantive rules that the MSPB would apply in reviewing appeals of adverse actions. Thus, even though the Employer contends that its definition of "timely" has been adopted by the MSPB and the Supreme Court, there appears to be no practical difference between the parties' positions, that is, even without an express definition of "timely," an arbitrator would be obligated to apply MSPB case law. On the issue of whether oral replies should be transcribed, however, the Union's proposals would provide a benefit that is not contained in the expired NTEU-Customs agreement. Thus, it has the burden of demonstrating why a change in the *status quo* is necessary. In this regard, rather than presenting evidence that employees previously have been harmed because their oral replies were not

transcribed, the Union relies primarily on speculative arguments. Ultimately, the employee and Union determine whether the employee will offer an oral reply and they have the opportunity to correct any summary of the oral reply that the Employer prepares. Absent specific evidence, I am unable to conclude that these safeguards are inadequate. Accordingly, I shall order the adoption of the Employer's final offers to resolve the parties' disputes concerning these articles.

3. Attire and Appearance

a. The Union's Position

The Arbitrator should reject the Employer's arguments that the Union's proposals in Sections 2.A. and 2.C. are not within its duty to bargain and order the adoption of the Union's proposed article. In *National Treasury Employees Union and United States Department of Homeland Security, Bureau of Customs and Border Protection,* 62 FLRA 267 (2007), the FLRA determined that a proposal that "officers will be neat, clean and professional in attire and appearance at all times while on duty" is a negotiable appropriate arrangement, and that numerous modifications to the CBP Personal Appearance Standards addressing, among other things, the length of hair and fingernails and the wearing of rings, bracelets, watches and tattoos, also are negotiable. In *National Treasury Employees Union and United States Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C.,* 63 FLRA 309 (2009), the FLRA, on remand from the U.S. Court of Appeals for the D.C. Circuit in *National Treasury Employees Union v. Federal Labor Relations Authority,* 550 F.3d 1148 (D.C. Cir. 2008) also found a proposal negotiable permitting employees to wear beards and other facial hair, as long as they are neatly trimmed and groomed, clean, and no longer than ½ inch to 1 inch in length, except where there is a reasonable likelihood that an officer will need to use a respirator or other device in the performance of his job duties and the device requires a cleanly shaven face.[8/] Thus, based on the above-referenced FLRA decisions, "the subject NTEU proposal [Section 2.A.] has already been found to be negotiable by the [FLRA]" and, in accordance with the guidance provided by the FLRA to the Panel and interest

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8/ Upon a CBP motion for reconsideration, in *National Treasury Employees Union and United States Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C.,* 64 FLRA 395 (2010), the FLRA sustained its previous decision in 63 FLRA 309.

arbitrators in *Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364*, 31 FLRA 620 (1988) (*Carswell*) and *U.S. Department of the Interior, Bureau of Reclamation, Lower Colorado Region, Yuma Arizona and National Federation of Federal Employees, Local 1487*, 41 FLRA 3 (1991) (*Yuma*), "NTEU's proposal can be addressed by the Panel on the merits."

With respect to the negotiability of its proposal in Section 2.C. that suspenders and a camel pack hydration system be added to the uniform program as voluntary wear items, FLRA precedent establishes that: (1) an agency is not free of any evidentiary burden when alleging a union proposal violates management rights[9/]; (2) an agency assertion that it has no duty to bargain must be supported by more than a bare assertion that the union's proposal violates management rights[10/]; and (3) an agency's failure to explain a discriminatory application of its management rights serves to prevent the agency from relying on such management rights when refusing to bargain over the union's proposal.[11/] During the arbitration hearing, the Employer "presented no evidence to support its instant position that it has no duty to bargain over NTEU's proposal that suspenders and a camel pack hydration system should be added to the CBP uniform program." In fact, CBP's failure to explain why some non-bargaining unit employees are permitted to wear suspenders, but not unit employees, and why some unit and non-unit employees, but not all employees, can use a camel pack hydration system, "defeats any CBP argument that a management right(s) renders NTEU's proposal non-negotiable." The Union, on the other hand, presented an abundance of evidence establishing that employees want the option to wear suspenders and to use a camel pack hydration system to address the adverse impact of CBP's exercise of its management rights. In the face of NTEU's evidence of the

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9/ In this regard, the Union cites *Social Security Administration, Chicago Region, Cleveland Ohio, District Office, University Circle Branch and AFGE, Local 3348*, 56 FLRA 1984, 1088-89 (2001) (*SSA*).

10/ To support this proposition, the Union cites *U.S. Department of Veterans Affairs, Medical Center, Coatesville, PA and NAGE, Local R3-35*, 56 FLRA 966 (2000) (*VAMC*).

11/ The Union cites *National Treasury Employees Union and U.S. Department of Homeland Security, Bureau of Customs and Border Protection*, 61 FLRA 48 (2005).

benefits of its appropriate arrangement proposals, and CBP's failure to present evidence during the arbitration hearing that allowing employees the option to wear suspenders and to use a camel pack hydration system violated any management right set forth in the Statute, "NTEU submits that its proposals are within CBP's duty to bargain."

Concerning the merits of the parties' proposals in this article, the issue of personal appearance standards (*i.e.*, "grooming standards") "stands out above the others in significance and should determine which party's proposal is adopted." In this regard, the grooming standards set forth in Article 25 of the NTEU-Customs labor agreement represents the *status quo* "based upon CBP's illegal implementation of its proposed grooming standards in October of 2004."[12/] A comparison between those grooming standards and the Union's proposal in Section 2.A. demonstrates that, "for the most part," its proposal "tracks the *status quo* while tightening up some of the hair length and jewelry requirements." In conjunction with its respirator proposal discussed in the Health and Safety article, the Union's proposal recognizes employee safety, does not interfere with the performance of the CBP mission, and will improve employee morale by treating employees as adults with the ability to make reasonable personal grooming decisions.

The Arbitrator should consider Article 25 of the NTEU-Customs labor agreement as the *status quo* because two grievance arbitrators have ruled that CBP's implementation of the current standards is illegal. In this regard, when CBP notified NTEU on August 3, 2004 that, "for the first time in the 200+ year history of Customs/CBP, it was proposing to implement military-styled grooming standards for the uniformed workforce," it admitted that it did not consider any studies, reports, or surveys in developing its proposed grooming standards. Six years later, CBP has yet to identify what problem it was trying to fix, what future circumstances it was anticipating that required the new grooming standards, or how the professed goals of the new grooming standards were not met by the existing

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12/ According to the Union, at the time the CBP grooming standards were "illegally implemented," as discussed further below, NTEU represented over 60 percent of the employees in the new CBP bargaining unit. In addition, legacy Agriculture employees were not subject to the "military-styled grooming standards" at the time they were reassigned into CBP.

standards.[13] Instead, it adopted the grooming standards of law enforcement officers and military personnel even though "CBP does not consider its uniformed workforce to be law enforcement officers within the meaning of Public Law 104-28 and as a result has refused to subsidize the cost of their professional liability insurance as it does for its law enforcement officers, supervisors and management officials." Because it was unwilling to risk a decision by the Panel on the merits of its proposal, CBP engaged in surface bargaining and immediately implemented its proposal. On October 14, 2005, however, a grievance arbitrator determined that CBP had violated the NTEU-Customs agreement and applicable provisions of law by unilaterally implementing the grooming standards and ordered that they be rescinded.[14] On March 19, 2008, another grievance arbitrator sustained a second grievance concerning the same grooming standards filed by the Union on behalf of its expanded bargaining unit, concluding that they were illegal because, as an "employment practice," they had not been validated to show "the rational relationship between the standards and the performance in their position by uniformed employees."[15]

CBP employees were and are "appalled and disgusted with the implementation of the grooming standards and the decision by CBP to ignore two arbitration decisions to return to the *status quo*." Hundreds of employees attested to this when they signed the petitions that were placed into the arbitration record.

13/ The Union states that "these professed goals were: ensuring that officers present a neutral image, assure employee safety, establish a professional image, promote positive relations with other agencies, maintain order, discipline, *esprit de corps* and bolster self-confidence."

14/ The arbitrator's decision was upheld by the FLRA in *United States Department of Homeland Security, United States Customs and Border Protection and National Treasury Employees Union*, 62 FLRA 263 (2007). On January 17, 2008, CBP informed NTEU that it was refusing to comply with the FLRA's decision requiring it to implement the award.

15/ After the record in the instant impasse was closed, the FLRA upheld the second arbitrator's decision in *United States Department of Homeland Security, United States Customs and Border Protection, Washington, D.C. and National Treasury Employees Union*, 65 FLRA 113 (September 29, 2010) (*DHS,CBP*).

These sentiments "undoubtedly contributed to recent findings that determined that CBP employees ranked CBP as 178th out of 216 federal agencies in the Best Places to Work survey based on survey data from the Office of Personnel Management [OPM]." The grooming standards proposed by the Union in Section 2.A. "largely track the standards proposed by CBP while offering the same clarity and consistency sought by the Agency." The proposals differ in the area of permissible hair length, facial hair and the wearing of necklaces and earrings. NTEU's proposed grooming standards are more reasonable than those proposed by CBP because they recognize CBP employees "as adults" and respect their ability "to make individual determinations concerning their appearance while on duty." CBP, however, has failed to meet its evidentiary burden to change the *status quo*. The only evidence that it could produce that its military grooming standards should be implemented was an article entitled *Studying Public Perceptions of Police Grooming Standards* that actually supports the argument the Union has been making, *i.e.*, "it is not the particular grooming standards but the CBP uniform, firearm and CBPO conduct that establishes their authority, credibility and respect from the public." Nor did the Employer provide evidence establishing the benefits of its imposed grooming standards over the past 6 years compared to the prior 200-year history of the Agency under the prior standards.

With regard to the merits of its proposals in the parties' other areas of disagreement in this article, the Union seeks to continue the *status quo*, as established in Article 25, Section 10 of the NTEU-Customs contract, whereby a union-management work group engages in pre-decisional activities related to changes to the existing uniform program. That article was implemented during the Clinton presidency pursuant to the Clinton-era Executive Order on Partnership. Similarly, NTEU's current proposal, if implemented, would be consistent with President Obama's Executive Order 13522, "Creating-Management Forums to Improve Delivery of Government Services," that also calls on federal agencies to engage in pre-decisional involvement with their unions. The Employer's proposal, on the other hand, "would depart from the *status quo*" by limiting employee input to occasional consultation with the Union. It also does away with the work group concept that "is generally more responsive to employee input and better able to conduct the studies and analysis that will lead to a more professional and up-to-date uniform program."

During the arbitration hearing, NTEU presented evidence to support its position that suspenders should be added to the CBP

uniform program as a voluntary wear item. Among other things, the Union established that CBP employees carry the following items on their gun belt: pistol and holster, magazines, one or more pouches, a baton, OC spray, handcuffs (one or more sets), a taser, a radio, a PRD radiation pager, a glove pouch, a flashlight, a knife and/or multi-tool, probes, panel poppers and screw drivers for vehicle inspections. It also established that CBP Marine Instructors wear the auto-inflate PFD suspenders and heavy duty rain pants with suspenders, that the U.S. military uses load-bearing suspenders, that there are suspenders with a breakaway snap designed to help defeat grabbing, and that a heavy gun belt can cause damages to a nerve in the thigh resulting in *meralgia paresthetica* that could be alleviated by wearing suspenders. The Employer, however, presented no evidence during the arbitration hearing "to rebut the evidence establishing the benefits to employees from being able to wear suspenders." As the Union related during the arbitration hearing, currently, when CBPOs ask management for the right to wear suspenders they are often told that perhaps they need to take a fitness-for-duty examination. A "more enlightened approach" would be to recognize that, by loading down the employees' gun belt with the above-described equipment, CBP has created a health and safety concern for many officers by straining their hips and backs. Suspenders would help reduce this adverse impact, and are regularly used by the U.S. military, police departments and non-bargaining unit CBP employees.

The Union presented a wealth of evidence during the arbitration hearing to support its proposal that a camel pack hydration system should be added to the CBP uniform program. For example, many CBPOs work in hot weather in dark blue uniforms wearing body armor. The camel pack hydration system would allow them to stay hydrated without having to come off the line or walk around with a water bottle in hand. In addition, CBPOs must drink enough water in hot weather to urinate every 20 minutes to comply with CBP policy. The camel pack system would accomplish this while avoiding heat exhaustion or stroke. Some CBP ports permit the use of camel pack hydration systems while others do not. Camel pack hydration systems are used by the military and law enforcement organizations to prevent dehydration which could lead to heat or sun stroke, and CBP agents, CBP Border Patrol and CBPOs assigned to special teams are issued camel packs. In summary, "employees want the option to wear camel pack hydration systems to address the adverse impact of working in hot climates while wearing a dark blue uniform." Just like suspenders, camel pack hydration systems

are an accepted tool used by the military, police organizations, non-unit CBP employees and even CBP employees that are fortunate enough to be assigned to work on special CBP teams such as ATCET. There is no reason why non-unit CBPOs and some bargaining unit CBPOs can be issued such hydration systems but others cannot. On the other hand, the Employer presented no evidence to rebut the Union's evidence concerning the benefits of camel pack hydration systems, and "would have to agree that keeping employees regularly and fully hydrated benefits both employees and the mission." In terms of CBP's proposal, "given the decided benefits" of these systems and their use today by bargaining and non-bargaining unit CBP employees, there is no need to revert to the recommendation stage of making policy, even if preceded by a union-management work group that the Union would support in most other situations. The "time for hydrating CBP employees is now."

The Union's proposal in Section 3.D.2. would provide employees assigned to duties on a regular basis that are traditionally performed by uniformed employees, at their request, with individual uniform items to protect their clothing on an as-needed basis. It arises in response to a mid-term agreement the parties reached in February 2007 over the Import Specialist Redesign Plan under which CBP determined that it would assign more cargo examinations to non-uniformed Import Specialists on a regular or semi-regular basis, a function traditionally performed by uniformed CBPOs, by establishing "dedicated teams of Import Specialists to conduct cargo examinations" in some locations. The proposal should be adopted because "employees working in the cargo environment get dirty" and it is reasonable to provide the Import Specialists with individual uniform items to protect their clothing and persons as long as they perform duties that heretofore had been performed by uniformed officers. Existing provisions, such as the parties' agreement in this article at Section 3.D.1. that provide protective clothing on a group and not individual basis for sporadic rough duty work, is insufficient when applied to employees performing such work on a regular basis. The proposal also "advances CBP's interest in providing a safe and healthy workplace to minimize the transmission of germs and disease" by preventing employees from sharing the same protective clothing "worn day in and day out when working in the cargo environment."

Finally, CBP proposes in Section 1.G.5. that if the maximum uniform allowance permitted by law is increased, it may, but would not be required to, increase the uniform allowance for its uniformed employees. If CBP's proposal were included in the

contract and it chose not to raise the employee uniform allowance despite a change in the maximum uniform allowance permitted by law, it might raise a covered-by defense when the Union requested to bargain to increase the employee allowance. While "CBP would be wrong, it would necessarily lead to more litigation." Rejecting CBP's proposal would remove the risk of future litigation that would result if CBP refused to recognize NTEU's request to bargain, in the event that the government-wide uniform allowance was raised, and CBP refused to raise the allowance in response.

b. The Employer's Position

The Employer alleges that it has no duty to bargain over the Union's proposal on grooming standards for its uniformed personnel (Section 2.A.), or the Union's proposal to add suspenders and a camel pack hydration system to the uniform program as voluntary wear items (Section 2.C.). To support its allegations concerning the non-negotiability of the grooming standards proposal, the Employer provided evidence during the arbitration hearing that its Personal Appearance Standards "are intrinsically linked to the Agency's Use of Force Continuum, which is the primary enforcement tool used by its uniformed workforce." It also provided evidence that the adoption of less stringent standards "would likely result in the erosion of public trust in the unformed workforce and the Agency, as well as increase risks to officer safety and mission accomplishment." Thus, the Employer has demonstrated that the proposal constitutes a method of performing work under 5 U.S.C. § 7106 (b)(1),[16/] and it reaffirms its election not to bargain over the proposal.[17/] By requiring the Employer to provide employees "unfettered discretion to modify the manner in which they carry their service-issued firearm and other use of force devices by adding any type of suspenders they desire to their authorized

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16/ The Employer acknowledges that the FLRA addressed a previous Agency assertion that the standards constituted a means of performing work in *NTEU and CBP,* 64 FLRA 395 (2010), but points out that the FLRA "declined to answer whether it constituted a method."

17/ The Employer also has filed an unfair labor practice (ULP) charge against the Union with the FLRA's Washington Regional Office regarding Sections 2.A. and 2.C. because of its "insistence on taking [] non-mandatory subject[s] of bargaining to impasse over the Agency's objection."

duty belt," that portion of the Union's Section 2.C. proposal excessively interferes with managements right under 5 U.S.C. § 7106 (a)(1) to determine its internal security practices.[18/] In addition, to the extent that portion of the Union's proposal addresses the means of performing work, it is a permissive subject of bargaining, under 5 U.S.C. § 7106 (b)(1), that the Employer chooses not to negotiate.[19/] The Union's Section 2.C. proposal would also provide employees the unfettered ability to use a hydration system while in their uniforms. Based on its "plain wording and the description and explanation provided by NTEU," the proposal also constitutes a method and means of performing work and, therefore, is a permissive subject of bargaining under 5 U.S.C. § 7106 (b)(1).

Turning to the merits of the issues in this article, the Agency's Personal Appearance (*i.e.*, "grooming") Standards for its uniformed personnel "is at the center of the Panel's decision on which of the parties' articles should be adopted." Uniformed employees are currently subjected to strict personal appearance standards that have been in place since 2004. While the Union was successful in challenging the manner in which these standards were implemented for the former Customs-NTEU bargaining unit, it "does not dispute that for the overwhelming majority (more than 70 percent) of the new bargaining unit, these standards were legally implemented and constitute a legitimate practice." Thus, the Union has failed to demonstrate the need for a change to the Agency's current standards. During the hearing, the Union presented no relevant evidence supporting its position, but instead relied on outdated information that has no relationship to the validity or appropriateness of the standards it has proposed. In this connection, the copies of petitions it submitted from former employees of the Customs-NTEU

18/ The Employer cites the FLRA's decision in *CBP and NTEU*, 59 FLRA 978 (2004), where it found that the Agency established a reasonable connection between the authorization of equipment used to carry and support a firearm that could prove dangerous to the agency's personnel, operations, and general public, and its right to determine internal security practices found in 5 U.S.C. § 7106 (a)(1), to support its contention.

19/ The Employer cites the FLRA's decision in *AFGE Local 1917 and Dept. of Justice, INS*, 55 FLRA 228 (1999) to support its allegation that this portion of the Union's proposal involves a permissive subject of bargaining, under 5 U.S.C. § 7106(b)(1).

bargaining unit, expressing dissatisfaction with the change in standards, are more than 5 years old. At most, they are "representative of a unit that has since been abolished," represents less than 30 percent of the current bargaining unit, and "contains a significant number of individuals who are no longer employed by the Agency." In addition, an undated photograph the Union provided from what it alleged was the Agency's recruitment web site actually was taken from an internal web site containing historical photographic archives. Because the employees in the photograph are not in compliance with the established Personal Appearance Standards, it probably was taken prior to the implementation of the current standards in 2004 and "should be considered irrelevant to the merits of the Agency's standards."

CBP's current standards, on the other hand, "are clear, unambiguous, and establish understandable examples (with pictures)," an approach the Panel has preferred in a previous case.[20/] The Employer also has demonstrated its standards "are inextricably linked to the widely recognized use of force continuum." Its proposed article should be adopted, therefore, because it "best safeguards the public interest, contributes to the effective conduct of public business, furthers the accomplishment of the Agency's mission, and supports the highest standards of employee performance." While the Union expended significant time trying to establish the negotiability of its proposals, it "made no arguments, nor presented any evidence refuting these facts," nor did it provide any evidence demonstrating that its proposed standards were appropriate. In contrast, the Employer provided: (1) evidence of the connection and importance of strict appearance standards to the accomplishment of the Agency's work and safety of its employees; (2) the results of studies and public surveys regarding the impact, including public perception, of adopting more relaxed standards; and (3) evidence that its current standards are consistent with the standards adopted by Federal and other organizations performing similar functions through the submission of policies from not less than 10 other law-enforcement organizations across the United States. Accordingly, the Arbitrator should order the adoption of the Employer's proposed article in its entirety.

20/ Department of the Air Force, Air Education and Training Command, Tyndall AFB, Florida and Local 3240, AFGE, AFL-CIO, Case No. 07 FSIP 5 (March 27, 2007).

CONCLUSION

Having carefully reviewed the parties' positions on this article, I believe that the Union's final offer provides the more reasonable basis for resolving the dispute.[21/] The key issues concern grooming standards and whether unit employees should have the option of wearing suspenders and using camel pack hydration systems. On the first issue, the Employer essentially argues that the current standards should be considered the *status quo* regardless of how they were implemented. It is understandable why the Employer would downplay the importance that should be placed on the practices that developed under the expired Customs-NTEU contract and during the 200-year history of the Customs Service, particularly given the adverse decisions it has received from grievance arbitrators on this matter. In my view, however, the Employer

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21/ On December 10, 2010, the Union requested that the Arbitrator find he "lacks the authority to order the inclusion of any [grooming standards] in the parties' contract," citing, among other things, the FLRA's decision in *DHS, CBP*, 65 FLRA 113 (see footnote 15). It its view, because neither party's proposed grooming standards have been validated by a job analysis "as required by law," the Arbitrator's imposition of any such standards "would be contrary to law and therefore unenforceable." In its response on December 14, 2010, the Employer argued that the Union's request should "be summarily rejected as untimely and not considered in making a decision on the information and evidence" before the Arbitrator. The Union's request is hereby denied. In addition to the fact that the record in this case had been closed for over 3 months before the Union's request was submitted, its reliance on *DHS, CBP* is misplaced. The grievance-arbitrator's underlying award in that case was based on a factual finding that CBP had been using the existing grooming standards as an "employment practice" in selection and promotion decisions. Contrary to the Union's contention, there is no reason to assume on the basis of the record created by the parties in the instant case that either of their final offers on grooming standards will be used as an "employment practice." Rather, the evidence and arguments presented by the parties lead to the conclusion that whatever grooming standards are ultimately imposed would only be used to take disciplinary actions.

has the burden of demonstrating why permitting employees, among other things, to wear facial hair of between ½" to 1" in length, and hair that is "neat, trimmed and properly groomed," would adversely impact its ability to accomplish its mission. The scholarly articles it submits concerning the importance of law enforcement officer appearance do little to support its position. "Offenders' Perceptual Shorthand," by Anthony J. Pinizzoto & Edward F. Davis, *Law Enforcement Bulletin* (June 1999), at 1, does not address grooming standards at all. It speaks to the role of police officer body language, manner of speaking and other indirect messages in deterring attacks on officers.

In "Studying Public Perceptions of Police Grooming Standards" by Paul N. Tinsley *et al.*, *The Police Chief* (November 2003), the authors surveyed members of the Canadian public. The respondents overwhelmingly agreed that deviation from strict grooming standards reduced respect for police, but they also overwhelmingly approved male officers wearing mustaches, something the Employer's proposal would prohibit. Moreover, the authors' experiment seemed to contradict the general survey results. The authors used six questionnaires which contained a computer-manipulated photo of a police officer in a uniform depicting various grooming styles (e.g., shaved head, goatee, pierced ear, etc.); the seventh did not contain a photograph. Although the authors concluded that, "generally speaking, respondents believe that relaxing [grooming] standards would erode confidence in the police," they also stated that "regardless of the pictured grooming style associated with the questionnaire, very few respondents gave the officer a low rating." The authors indicate that one explanation of this "unexpected result[]" is that "displaying a male in uniform may have biased the results" because "the police uniform represents a powerful clue to a person's authority, capability, and status." The authors suggested, consistent with prior studies of the power of the police uniform, "one might conclude the respondents rated the qualities of the individuals in the pictures according to their existing perception of uniformed police officers and their satisfaction with the local police department, disregarding the grooming styles in the pictures." Thus, the study suggests that civilians place greater emphasis on the uniform and other indicia of authority rather than uniform grooming when evaluating law enforcement officers. Although the authors advocate maintaining strict grooming standards as opposed to an "anything goes" approach, neither party before me is advocating an anything goes approach. In any event, while the article suggests that citizens want "strict

grooming standards," it does not define that term, let alone provide an answer to the question of which of the conservative grooming styles proposed by the parties in this case should prevail.

The Employer's examples of law enforcement departments that forbid facial hair is also unpersuasive given the limited nature of its survey and that it only appears to have selected those that support its position. But the most telling aspect of the Employer's case on this issue is that it has offered no evidence that facial hair caused any problems when it was permitted under the Customs-NTEU contract. Unlike grooming standards, however, on the issue of whether employees should be permitted to wear suspenders and use camel pack hydration systems, it is the Union that bears the burden of demonstrating why employees should have these options. Here, I credit the testimony of the Union's witness regarding the health benefits CBPOs would derive from their use and the Employer's failure to refute the Union's contention that these items are already used selectively by employees in CBP.

Thus, on the key issues in this article I favor the Union's position on the merits. The Employer, however, has raised jurisdictional arguments that must be addressed to ensure the legal sufficiency of any merits decision on these matters. With regard to grooming standards, the Union has cited an FLRA decision where a substantively identical proposal previously was found negotiable, *National Treasury Employees Union and United States Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C.*, 63 FLRA 309 (2009), so ordering the adoption of its final offer on this issue is consistent with the guidance the FLRA provided the Panel and interest arbitrators in *Carswell*. The Employer's contention that the FLRA did not address its more recent argument that the proposal constitutes a method of performing work, under 5 U.S.C. § 7106(b)(1), is unavailing. Under the FLRA's decision in *Yuma*, except in circumstances not involved here, the Panel and interest arbitrators need not defer to the negotiability forum merely because the Employer raises a new argument not addressed in the prior FLRA decision.[22/]

22/ As the FLRA stated in its *Yuma* decision:

> To hold that an interest arbitrator exceeded his or her authority by resolving an impasse whenever an agency raised a "new" negotiability argument could, in our view, also undermine the collective

Such is not the case, however, concerning the Union's suspenders and camel pack hydration system Section 2.C. proposal. Under *Carswell*, an interest arbitrator cannot legally adopt a proposal on the merits where a duty-to-bargain question has been raised unless the FLRA previously has found a "substantively identical" proposal negotiable. The Union has not cited, nor has independent research uncovered, a previous FLRA decision where a substantively identical proposal has been found negotiable.[23/] Accordingly, I shall order the adoption of the Union's final offer on this article with the exception of Section 2.C., which shall be withdrawn.

4. Awards and Recognition

a. The Union's Position

There are 18 open issues in this article, but 6 "stand out above the others in significance and should determine which party's proposal is adopted," *i.e.*, the issues addressed by the Union's proposals in Sections 2.A., 5.B.6., 5.C.1., 5.C.1.a.1., and 7. In Section 2.A., the Union has presented two documents to show the reasonableness of its request that 1.25 percent of annual salary be distributed as performance awards at the beginning of the next full fiscal year, rather than 1 percent, the "long-established past practice" the Employer proposes be continued. The first document, which is the latest OPM analysis of how much various agencies spend on performance awards as a percentage of their total budget, "demonstrated that agencies maintaining a workforce of similar size – *i.e.*, those agencies

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> bargaining process. Agencies could be encouraged to raise novel, even frivolous, negotiability arguments so as to impede impasse resolution. We find no basis in the Statute, or in *Carswell*, for imposing such mechanical restrictions on an arbitrator's authority.

23/ While the Union urges the Arbitrator to find the proposal within CBP's duty to bargain because, among other things, the Employer failed to present evidence during the arbitration hearing that allowing employees the option to wear suspenders and to use a camel pack hydration system violated any management right set forth in the Statute, consistent with the guidance provided in *Carswell* and *Yuma*, that argument must be presented to the FLRA in the first instance.

employing between 20,000 and 50,000 employees - distributed 1.83 [percent] and 1.88 [percent] in the study year." CBP even falls short in comparison to the entire DHS - 1 percent to 1.18 percent. In addition, NTEU's contract with the IRS calls for 1.75 percent of total salary to be distributed. Given that "the only objective evidence before the Panel points in the direction of a figure substantially above management's 1 [percent]," the Union "has met any burden it might have to show the superior reasonableness of its proposal."

On the issue of how committees should decide whether to recommend someone for an award, the Union proposes that they require only a 50-percent vote (Section 5.B.6.), while the Employer would require a majority vote. Management's proposal would actually require a two-thirds majority (4 of 6 committee members), and would prevent an employee from receiving an award if he was "out of favor" with either side of the committee. This would "set the stage for 'hostage' bargaining between sides of the table over nominations," and would mean that the deciding official would not even see the nomination where the committee is evenly split. In contrast, the Union's 50-percent rule "avoids one side being able to veto a unanimous vote of the other side, and at least moves the recommendation to the management deciding official for resolution." More nominees would get to the deciding official under the Union's proposal, but "it is not in the Union's interest to forward every nomination to the deciding official" because that would effectively remove its influence over nominations and "gives it to the deciding management official."

The Union's current proposal in Section 5.B.6. now refers to two charts, Guide Charts A and B. It developed Guide Chart A, which is modeled on the charts management's testimony focused upon during the arbitration hearing, "in an effort to attract management into a deal." The Union also has modified its earlier position that only its preferred chart be used in determining awards and now proposes that local parties can mutually agree to use a variation of the charts management focused on in the hearing. If they cannot agree, however, they will use the chart the Union presented, Guide Chart B. Guide Chart A, while similar to the one the Employer proposes, refines the wording of six key terms "so that each axis is continuous and escalating." It continues to refer to office titles that do not exist, and over which the parties do not have a shared understanding, but the Union "can live with it at the national level if the local parties see more value in this new chart"

than Guide Chart B. In the Union's view, "this approach strikes a balance between the positions of both parties."

The Union's "primary objection to management's chart is that it is nonsensical." Across the top horizontal axis, it refers to organizational titles that do not exist in CBP, e.g., a facility, a field location, an element of headquarters (HQ), a field area, and a major office. With minor exceptions, "the CBP unit has subports, ports, directorates of field operations and HQ," and it is unclear, for example, whether the two individual airport and seaport locations at the Newark port would be defined under the Employer's proposal as "facilities" or "field locations." At the hearing, even the head of the Agency-wide awards program "could only say that there are people in CBP who know the answer to that," but that she did not. In contrast, the vertical axis of the NTEU chart refers to a "localized" impact. The Newark airports and seaports would be separate, individual "localized" offices. If a CBPO at the airport "developed a new work approach that impacted just the airport, that would be enough for an award." Moreover, while the vertical axes of both parties' charts refer to "subjective terms," the Union limits its subjectivity to "exceeds" and "substantially exceeds." The Employer's chart, on the other hand, "is riddled with confusion," and its adoption "would merely launch a hundred local disagreements at ports around the country as both sides tried to determine how the chart works."

The Union's proposal in Section 5.C.1. differs from, and is superior to, management's counteroffer because it "identifies when and what will be counted to determine how much money is available." Under management's proposal, "there is no specificity about either." When arguing on behalf of its entire Awards proposal, management said it was seeking "clarity, consistency, and transparency," but failing to identify "the when and what" of a monetary formula is "the antithesis of clarity." In Section 5.C.1.a.1., the Union proposes a $3,500 annual cap on an individual's total award receipts, with increases in increments of $500 per year until it is at $3,500, while the Employer wants to continue the current cap of $2,500. Management justified its lower figure by stating that Port Directors have only been delegated the authority to award employees up to $2,500 per year. It makes no sense to entrust Port Directors to spend over $100 million a year to secure the entire ports of Miami or New York, for example, yet not provide them with the authority to approve an individual employee award of up to $3,500, particularly where three different levels of managers (supervisor, committee members, and deciding official)

believe it is deserved. The Union's proposed cap "is the same as the IRS contract award cap," and well within the $6,000 cap that the Secretary of DHS has delegated to the Commissioner of CBP. Finally, an increase from the "age-old $2,500 figure" adjusts for the impact of inflation and "reduces the chances that local parties will have to go through the trouble of recalculating everyone's award to distribute the money in excess of $2,500," as Section 4.D.1.a.1. of the Employer's proposal would require.

The final determinative issue in this article involves the granting of Quality Step Increases (QSIs). In Section 7, the Union proposes wording "which would prevent management from implementing a more generous program for non-unit employees than it does for unit employees," the justification of which "is self-evident." Its proposal also avoids "the confusion over the management criteria." For example, although CBP has a Pass-Fail rating system, management refers to "Outstanding performance," a rating level that does not exist. Management's criteria also refer to "performance significantly above," the meaning of which is also unclear. The Union proposal "should result in fewer disputes" because it "avoids those confusions by adopting all but sub-criteria (1), (2), and (3) of management's criteria."

Among the remaining issues in this article, in Section 4 the Union proposes to incorporate the text of 5 C.F.R. 451.104(a) concerning the eligibility criteria for performance awards, which "neither adds to nor subtracts from the remainder of the article." The Union "can live with" management's proposal in Section 5.A.5., although "it is demeaning to tell the over 300 CBP employees who will staff" the awards committees that they must read the awards agreement every time they meet. Its proposal in Section 5.A.6. is superior to the Employer's proposal in Section 4.A.6. because management's addresses when a Joint Awards Committee (JAC) member cannot reveal information to nominees, but says nothing about when they can, and "amounts to a life-time 'code of omerta' that is simply unrealistic." The Employer's Section 4.B.2.a. proposal "may be one of the more ridiculous and still unexplained management demands." Both parties' proposals permit an employee to nominate another employee for an award with the latter's permission or even knowledge. Under the Employer's proposal, however, "if an employee wants to nominate a team or group for an award, she not only must tell them, but get their unanimous consent." Management "was unable to offer any comparative evidence in support of this approach."

The critical difference between the Union's proposal in Section 5.B.5. and the Employer's proposal in Section 4.B.5. is that NTEU "would require the supervisor to notify the nominating and nominated employees when he or she has completed the supervisory responsibility." This would ensure that the nomination has not "fallen between the cracks" and, without this check on the process, the committee would have to create a staff to receive nominations, distribute them to supervisors for comment, and then recollect them. Management's proposal, in contrast, would create "an unnecessary bureaucracy." Finally, the Employer's proposal in Section 4.B.7. would entitle supervisory input to deference, while the Union's counteroffer in Section 5.B.7. would give it "equal weight with other information, which is the more balanced approach."

b. The Employer's Position

The areas of disagreement on the Awards and Recognition article that should be given the greatest weight by the Panel when making its merit decision are: (1) the annual awards budget; (2) the nomination evaluation criteria; and (3) the standard for determining which nominations will be recommended for approval. The Union has amended its last best offer concerning the annual awards budget, and its proposal now would permit it to reopen the agreement if management does not allocate the funds it requests. While this is a "creative proposal that attempts to alleviate the Agency's negotiability concerns," it should be rejected on its merits. In this regard, the Union has been put on notice that CBP intends to continue its practice of setting its awards budget for its bargaining units at 1 percent of employee annual salaries. Therefore, the adoption of the Union's proposal would, "with almost absolute certainty," result in the reopening of the contract article. Given the state of the bargaining unit, as well as the parties' current relationship, "to knowingly and purposefully set the stage for additional negotiations (and potential impasse proceedings) even before the contract is implemented" would not bring the level of stability the parties have demonstrated they need. The Union showed during the hearing that the wording contained in the Employer's proposal concerning its "budget election and procedures," in the event management chooses to change the election, is consistent with other contracts negotiated by NTEU. In addition, the Employer's review of current contracts the Union has negotiated with other agencies "has revealed none containing language remotely similar to the Union's instant proposal." Finally, the Union's revised proposal essentially "places a proverbial gun to the Agency's

head," *i.e.*, the Agency must comply with the Union's demands or return to the table to renegotiate. As a result, it has the same practical effect as the original proposal of "excessively interfering with management's inherent statutory right to determine its budget."

With respect to the issue of nomination evaluation criteria, during the hearing the Employer "presented clear and undisputed evidence" that the awards nominations evaluation criteria under its proposal (Section 4.C.1.) are consistent with historical best practices across the former Customs Service. In its last best offer (Section 5.B.6.), the Union has submitted a "new concept" whereby one set of criteria would be used if the awards committee is able to make a unanimous recommendation, and another set of criteria would apply if the recommendation is not unanimous but obtains at least half of the committee's support. Because this is a completely new concept, the Employer cannot "defend against, let alone adequately explain the Union's proposal." As a result, the Panel should be skeptical of the Union's proposed criteria, as well as any explanation it provides in its closing merit brief. Based on historical practice and full negotiation, on the other hand, "the parties are familiar with and have a clear understanding of the meaning and intent behind the Agency's proposed evaluation criteria." Moreover, the Union offered no evidence or arguments demonstrating any problems with its use. In addition, at one point prior to the arbitration hearing, the Union found CBP's proposed criteria agreeable but "has since failed to explain any substantive basis for its sudden change in position." For these reasons, the Employer's proposal is superior to that provided by the Union.

On the issue of committee recommendations, under the Customs-NTEU contract awards committees made award nomination decisions by consensus. While CBP proposed to continue the process of using a "simple majority," the Union rejected this approach and instead proposed that award nominations be forwarded to the deciding official if 50 percent of committee members agree. The Employer has agreed "to share its authority and power to evaluate and reward employee performance" by permitting the Union to participate in the decision-making process. The Union needs to recognize, however, that "with such power comes responsibility and accountability." In this regard, by requiring the support of a majority of the committee members, the Employer's proposal gives the committee the responsibility of fully discussing and making a joint union-management recommendation on a nomination. Under the Union's 50-percent

standard, the parties could elect "to support or not support an award nomination based on party lines," and the nomination would go forward to the authorizing official. In essence, this would allow the committee "to shirk its responsibility for conducting a merit-based evaluation of the award nomination." Its adoption could require the expenditure of significant time and resources by three senior Union and three management officials merely to sort out nominations without clearly determining which are worthy of awards. Furthermore, it "devalues" the committee's recommendations and would place a significant burden on the final approving official to re-evaluate the substance of the award nominations. The Employer's proposed compromise "goes as far as possible" to meet the Union's stated interest without undermining the awards committee process and, therefore, should be adopted.

CONCLUSION

After thoroughly examining the evidence and arguments presented by the parties on the Awards article, I am persuaded that the Employer's final offer should be adopted to resolve their impasse. While the Union has argued in other articles that the practices established under the expired Customs-NTEU contract deserve deference, here it appears to have ignored its own advice and, on at least one of the key issues, instead urges the adoption of its final offer on the basis of comparability with other federal agencies of similar size. Aside from the inconsistency of its approach, in my view two aspects of the Union's proposal are particularly problematic. First, it has changed its final offer from prior versions by including wording that would allow JAC members to explain to nominated employees why they were not recommended or selected for an award. This completely defeats the purpose of keeping JAC deliberations confidential and, without a provision for confidentiality, the JAC process is likely to be undermined. Second, the Union continues to propose that a nominee need only 50-percent support on the JAC for the nomination to move forward to the selecting official, which would permit nominees to advance on a straight "party-line" vote. Under the legacy Customs-NTEU contract, however, such decisions required consensus. The Union has failed to demonstrate why a nominee should not have the support of at least one Union member of the committee and at least one management member of the committee to be recommended to the selecting official for an award. Indeed, allowing nominations to go forward with support from only one side of the JAC defeats the very purpose of having a joint awards committee. Moreover, although the Union has conjured up a parade of horribles of

nominees being held hostage because they are out of favor with the Union or management, it has provided no evidence of any actual problems of that nature under the legacy Customs-NTEU agreement. Although there are other aspects of the Union's final offer that have merit, these defects are significant enough for me to conclude that, on balance, the Employer presents the better option. Accordingly, I shall order the adoption of the Employer's final offer.

5. Bid, Rotation and Placement, Part B: Bid & Rotation and Work Preferences for Positions Other Than CBP Officers and CBP Agriculture Specialists Reassignments to Other Duty Stations

a. The Union's Position

Both of the Union's proposals on the two open issues in this article "seek to avoid discriminating against non-uniformed employees in the bid and rotation process versus uniformed employees and other non-uniformed employees." In Section 1.A., its proposal would permit Import and Entry Specialists to participate in the bid and rotation process after they have worked in their respective occupations for at least 2 years. As such, it "tracks the bid and rotation procedures that the parties have already agreed to and implemented in Article 13, Section 1.B. that cover uniformed employees such as CBPOs and Agriculture Specialists." The Employer's proposal, on the other hand, discriminates against Import and Entry Specialists by permitting participation in the bid and rotation process only when they have reached their journeyman level, which would take 3 or 4 years depending upon whether they are hired at the GS-5 or the GS-7 level. Nor has CBP provided evidence to explain why uniformed employees, after 2 years at CBP, are permitted to "receive work assignments in accordance with their preferences" but non-uniformed employees have to wait either 3 or 4 years. Because the non-uniformed Import and Entry Specialists are "a fraction of the work force" and "CBP has significantly reduced its commitment to its trade enforcement mission," they feel "as if they are second class citizens within their own agency." Finally, as a practical matter, the adoption of NTEU's proposal meets CBP's interests since "most Specialists will also have to wait 3 years to bid and rotate by the time the next bid and rotation process is implemented."

In Section 4.B., the Union has proposed that the GS-12 Senior Import Specialists be permitted to participate in the bid and rotation process every 3 years, like all other Import and

Entry Specialists, while CBP has proposed that they participate every 4 years. Rather than raise the journeyman level for Import Specialists to the GS-12 level, CBP has created a limited number of GS-12 Senior Import Specialist positions and has assigned them team leader duties under the supervision of GS-13 Supervisory Import Specialists. Presumably, CBP will argue that "their expertise and team leader duties require that they only rotate every 4 years." Given the Supervisory Import Specialists own expertise, the supporting expertise provided by the other Specialists on the team, and the limited employee rotation whereby only one junior Import Specialist can rotate on and off the teams, "CBP has failed to explain why the Senior Import Specialist must remain on his or her team for another year" before being permitted to participate in the bid and rotation process. In addition, team leader responsibilities are performed in consultation with the supervisor and involve coordinating work assignments and reviewing the work of the team's Import Specialists. The Employer also "has not explained how these ministerial tasks require the Senior Import Specialists to remain on the team for an extra year as opposed to the other Import Specialists." Under these circumstances, where NTEU's proposal meets CBP's interest of retaining sufficient team expertise, CBP's proposal to discriminate against the Senior Import Specialists should be rejected.

b. The Employer's Position

Under CBP's proposed article, Import and Entry Specialists would need to obtain their journeyman level prior to being eligible for bid and rotation. Prior to obtaining the journeyman level, "an entry level employee is still learning the basics of the job" and periodically exposed to other teams for developmental purposes. It would be a "disservice to the employee to accommodate a transfer via bid to another team for an extended duration" before they have acquired the skills needed to effectively execute the duties of their position. This would also be "detrimental to meeting the demands and needs of the team inasmuch as the team would be gaining an unprepared employee." The Agency does not want to send a message to the other team members that they will have to "pick up the slack" until the employee is up to speed. To be eligible to participate in the "mutual benefit for management and the work force" of bid and rotation, "an employee should be fully prepared to perform all facets of the job which is one and the same with obtaining the journeyman level."

Concerning the issue of how long a Senior Import Specialist should serve on a team prior to bidding, the Union proposes that they be allowed to do so after 3 years, the same as associate Import Specialists. Senior Import Specialists, however, require "expertise in complex trade matters" and are expected to respond to legal issues, such as protests of CBP determinations when importing goods, etc. They also provide mentoring to associate level team members and assist the supervisor in distributing work assignments. Additionally, the complexities of trade issues tend to differ depending on the commodity, industry or priority trade area for the respective team. Permitting Senior Import Specialists to bid and rotate at the same 3-year interval as the associates "would make a commodity team vulnerable to situations that would certainly decrease productivity." In the same year, a team could lose its most senior associate Import Specialist and the team's Senior Import Specialist, and newly-acquired associates placed on the team via bid "would be without the needed expertise and mentoring role provided by the Senior Import Specialist for that first year on the new team." Permitting them to bid and rotate every 4 years, as the Agency proposes, "would better support the team structure," ensure that a high level of expertise is achieved, and promote a "consistent and uniform approach to the complex issues surrounding the application of the Harmonized Tariff Schedule used to classify merchandise." Overall, NTEU has failed to provide any persuasive argument to demonstrate the need for adopting its proposal while the Agency's proposal better accommodates day-to-day trade operations and better aligns with effective mission accomplishment.

CONCLUSION

Both of the remaining issues in this article involve Union proposals that would treat certain non-uniformed officers, *i.e.*, Import and Entry Specialists and Senior Import Specialists, more like uniformed CBPOs when it comes to the length of time they must wait to participate in the bid and rotation process. Unlike the Union, however, I conclude that the Employer has offered compelling mission-related reasons for treating them differently. Essentially, management argues that it takes 3 years for Import and Entry Specialists to acquire the skills needed to effectively execute the duties of their position, and that permitting Senior Import Specialists to rotate after 3 years, instead of 4, would reduce the productivity of the teams they are assigned to. The Employer's position is logical and persuasive and the Union has provided no basis to second-guess the Employer's judgment. Consequently, the parties shall be

ordered to adopt the Employer's final offer to settle their impasse.

6. Duration

a. The Union's Position

The issues in this article that should determine whose proposal is adopted involve the termination date of the contract and the ability to partially reopen the contract during its term or when management makes a mid-term management rights change that relates to a term contract article. In Section 2.A., the Union proposes that the contract terminate on a precise date while management proposes that it remain in effect for 3 years after it is eventually implemented. The Union "seeks to protect itself against any management delaying tactics that postpone a prompt implementation." By proposing a precise termination date, the Union has created a risk for both parties of a shortened contract should they attempt to delay implementation. In contrast, the Employer's proposal "rewards a delay strategy postponing for 3 years when the Union will once again have the right to come to the term table to improve on or refine the conditions set by this agreement." The Union's current proposal, which would establish approximately a 2-year agreement, "compares favorably to labor agreements in general." It also recognizes that the parties have not had a chance to add new issues to their term table discussions since June 2007. Consequently, an "October 2012 term agreement would have forced the Union to wait 5 years to add any issues to the term contract process." Finally, beyond its reasonableness and the penalty it creates for the party that seeks to delay implementation, the Union's proposal "is consistent with the NTEU-Customs contract which also set a precise date for the contract termination."

In Section 3.A., the Union proposes that either party be able to reopen two articles halfway through the term of the contract, enabling either party to "renegotiate" a contract provision that is not working. Given that thousands of newly-hired employees are coming under the contract for the first time, the continuing practices established by three prior units are being replaced simultaneously, and the national parties have a long record of conflict, "there is more than a fair chance that one or more provisions of this contract will not work as intended." Without a reopener clause, the parties will have to rely on more adversarial approaches that "fly in the face of the Statute's goal of promoting amicable settlements." The proposal

also reflects the Union's attempt to address the FLRA's instructions in a prior situation that arose between it and Customs involving management's right "to make midterm changes in working conditions that could very easily relate to how one or more of the contract articles operate."[24/] Management's proposal assumes this situation could never happen, and if it happens, "leaves the record unclear as to what rights the Union has and retains."

Among the less significant issues remaining in this article, in Section 1.A., the Union's proposal is more definitive because of its use of the abbreviation "*i.e.*," rather than "e.g.," which management proposes be used. There should be "absolutely no doubt as to what act constitutes 'execution' of the agreement," and its proposal makes clear that it is whichever of the two cited actions occurs first. In contrast, the management proposal leaves the door open for other possible acts of execution, which creates the potential for confusion. In Section 1.B.2., the Union's extra clause clarifies that, should this agreement be settled by a Panel order, consistent with case law, there will be no ratification and the date of that order serves as the execution date of the agreement, which in turn triggers the agency head's 30-day approval review. Finally, in Section 2.A., the Union proposes that the agreement be implemented on the 30th day after agency head approval. Because half of the articles of the pending term contract have already been implemented, the burden on the Employer to implement the remainder has been reduced. It sees "no need to wait any longer than 30 days," and the Employer has presented no evidence as to why the implementation should be delayed.

b. The Employer's Position

The Employer's proposals concerning the issues that remain at impasse in this article provide "a clear procedure for accomplishing the goals of a duration article" that would "better avoid any interpretation issues." Unlike the Union's proposal, anyone who reads the Employer's article will easily comprehend: (1) when the agreement is considered executed and submitted for agency head review; (2) what happens if the agreement is disapproved or the Union fails to ratify; (3) how a pending negotiability appeal impacts the implementation of the agreement; (4) how the parties deal with the option to explore

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24/ See U.S. Department of the Treasury, Customs Service, Washington, D.C. and National Treasury Employees Union, 59 FLRA 703 (February 27, 2004).

"severance"; (5) the exact timeframe when the agreement will become effective; (6) the duration of the agreement; and (7) the rules that a party must follow when seeking to renegotiate the agreement. Moreover, "CBP has clearly demonstrated that its proposal is comparable to the industry standard." In this regard, during the interest arbitration hearing the Union agreed that 3-year agreements are the norm in the federal sector. The Union's assertion that the CBP and NTEU relationship justifies the need for a much shorter duration "is unsupported by any persuasive evidence." Even if it is correct about the poor relationship of the parties, by providing greater stability the Employer's approach "is a more logical option then expeditiously sending the parties right back to what will be unavoidable impasse litigation." Given the time, resources, and funds that CBP has devoted to the negotiation of this contract, including over $400,000 that it has borne in travel and *per diem* expenses for the NTEU bargaining team, the imposition of its article is the far more reasonable solution to the parties' disagreement.

CONCLUSION

Upon reviewing the parties' positions concerning the key issue in the Duration article, I am not persuaded that the length of the parties' initial CBA should be determined on the basis of whether the Employer will attempt to delay its implementation. The record shows that the parties have been in the process of negotiating their first agreement since 2007. Under the Union's final offer, they could start renegotiating the CBA in as little as 2 years. Contrary to the Union's assertion, a 2-year duration does not compare favorably to labor agreements in general. The overwhelming practice in the federal sector, as elsewhere, is for contracts to have 3-year terms. For these reasons, I shall order the adoption of the Employer's final offer.

7. Employee Rights

a. The Union's Position

Both of the Union's proposals "afford employees accused of misconduct with a measure of due process that will help level the playing field for employees when dealing with CBP investigators and deciding officials." In Section 10.C., CBP would acknowledge its obligation to provide employees with video and audio recordings of alleged employee misconduct on a timely basis so that the employee can respond to the allegations while the events at issue are current. The Union's proposal sets no

time frame for management except for the understanding that CBP proceeds at its peril if it unreasonably delays providing such recordings before permitting the employee to respond. Under CBP's proposal, an employee would only be provided with an adverse audio/video recording when discipline is actually proposed. Responding to recorded events within 2 to 4 weeks puts an employee in a much better position than having to wait up to a year, as is often the case when discipline is finally proposed. The Union's proposal reflects a continuation of the *status quo* in terms of the basic due process right of employees to be informed of their alleged improper conduct on a timely basis so that they can provide an informed response, and is no different than what the parties have already agreed upon in Section 9 of this article, which is essentially a restatement of Article 3, Section 12, of the expired NTEU-Customs contract. The only difference between Section 9 and the Union's proposal is that "technology has [] progressed to the point where alleged employee misconduct can now be captured via CBP audio and video surveillance." While the medium has changed, the due process right of an employee to be informed of alleged misconduct on a timely basis has not.

The Union's second due process proposal, found in Section 10.D. of its last best offer, would give employees 48 hours to have their sworn investigatory interview affidavits reviewed by a Union representative prior to signature. Its proposal recognizes that sworn affidavits often are the key pieces of evidence for management in the disciplinary process and provides the employee with the opportunity to refute a particular allegation or put their behavior in context. In either case, "it is important that the affidavit be accurate and complete." In most circumstances, the CBP investigator interviews the employee at the end of the investigation after having talked to other relevant witnesses and reviewed documents. The interrogation occurs under very stressful conditions. Its proposal would allow an employee to consult with a Union representative to ensure that the affidavit is truthful, complete, and explanatory. Because management is under no time frames in the conduct of its investigation, except for the requirement that it issue discipline in a timely manner, "it is not unreasonable to allow an employee up to 48 hours to confer with their NTEU representative on what could be the most important piece of evidence for both the employee and the employer in the disciplinary process." Furthermore, CBP's witness on this matter admitted during the arbitration hearing that currently employees are permitted to confer with their NTEU representative in private at the conclusion of an investigatory

interview but before they have signed and submitted their sworn affidavit. The witness did not offer any evidence how an employee's consultation with their NTEU representative was materially different from the current practice, how it interfered with any management right, or how the implementation of NTEU's proposal would interfere with their investigation.

b. The Employer's Position

On the first issue that remains in dispute in this article, the parties already have agreed to reference the sections of the articles addressing the procedures for taking a disciplinary and/or adverse action. Specifically, Section 5.B of the Disciplinary Actions and Section 5.A of the Adverse Actions articles include agreed wording that, along with the proposal letter:

> [T]he employee will be provided, to the extent such information exists and is related to the action, a copy of those portions of all written documents which contain information or evidence relied upon by the Employer as the basis for the action, those portions of written documents that are favorable to the employee, and the investigative report. **In addition, in the event the Employer reviewed video or audio surveillance recordings in proposing the action, such recordings will be made available for review by the employee.**" (Emphasis added by Employer)

At the "eleventh hour," the Union has proposed to add wording that serves no practical purpose other than as a "litigation tactic." The Employer already has agreed in the Discipline and Adverse Action articles to propose actions in a manner that is fair, impartial and timely (*i.e.*, so as not to create an unreasonable delay that materially prejudices the employee). When combined with the parties' agreement to provide information relied upon (including video or audio recordings), the Union has failed to demonstrate why its proposal should be added to section 10.C. The Union's proposed wording also contradicts itself. In this regard, while the parties have agreed that the information relied upon will be provided at the time disciplinary or adverse action is proposed, "NTEU is suggesting that language be added [] codifying an Employer recognition that providing a recording before (or even if) a decision is made to propose such an action is vital." This would "only confuse managers and employees operating under the contract."

The Employer's other area of disagreement with NTEU's proposal concerns whether a minimum of 48 hours to review an affidavit with a Union representative is necessary. While the proposal "doesn't even contemplate an employee who may opt not to have representation," the Union has never articulated a need to change the reasonable time standard carried over to CBP from the Customs Service, such as examples where it has been subject to third-party review via the grievance procedure or ULP process. In addition, adopting the Union's "arbitrary floor" would lead to "administrative chaos" and "the potential for delaying the need to conduct rapid investigations on critical matters." The testimony of a senior official from the Office of Internal Affairs reiterated that no two investigations are the same. Some interviews require a lengthy series of questions, while others may not, but the Union's proposal would mandate 48 hours for review even if an affidavit is brief. It also does not take into account the potential need to obtain critical information from an interview faster than 48 hours and, if imposed, would contribute to the disappearance of physical evidence "and an enhanced likelihood for tailored answers would develop."

CONCLUSION

Upon careful consideration of the evidence and arguments provided by the parties on this article, I shall order the adoption of the Employer's final offer to settle the matter. In view of the many provisions that already have been agreed to in the Adverse Actions, Disciplinary Actions, and Employee Rights articles, the Union has failed to substantiate the need for further due process protections to "level the playing field" for employees accused of misconduct by the Agency. Given these safeguards, the benefits of the Union's proposal concerning video and audio recordings are marginal at best, and it has provided no examples of previous instances where employees have been harmed because recordings were supplied for the first time when discipline was actually proposed. The situation is similar with respect to its proposal to grant employees accused of misconduct a minimum of 48 hours to review affidavits with a Union representative. In this regard, the Employer's expert witness on this point was persuasive in pointing out the potential hazards of a "one-size-fits-all" approach. The Union has not shown that CBP's current practice of permitting employees a reasonable amount of time at the end of the investigatory interview to review affidavits with a Union representative, which would continue under the Employer's final

offer, has caused problems that warrant the adoption of its approach.

8. Equal Employment Opportunity

a. The Union's Position

The parties' dispute in this article "boils down to whether the parties will continue to test" a hybrid alternative "to the two current methods of challenging alleged discrimination, *i.e.*, the statutory/regulatory process administered by the [Equal Employment Opportunity Commission] and the negotiated grievance-arbitration procedure." The hybrid approach, which the Union persuaded the Panel to order the Customs Service to adopt in 1999 for a 20-case experiment,[25/] "mixes the best of each to produce a far superior alternative to either current approach" by combining "the arbitration and one-stop, broad scope elements of the grievance process with the low cost and fact-finding mechanics of the EEOC process." In the turmoil of the past decade, "the hybrid discrimination experiment got lost in the tumult," and the Union "now seeks to restart that process to determine" if the two "flawed" discrimination appeal methods can be improved. The core of the Union's hybrid approach contains: (1) the requirement for a Report of Investigation (ROI); (2) the use of an arbitrator employing med-arb techniques; and (3) a cap on union/employee costs. These are the issues that "should determine whose proposal is adopted."

Its proposal in Section 6.D. would continue the use of the ROI element of the Panel-imposed hybrid alternative required by the EEOC for the statutory/regulatory process. The ROI is a "non-adversarial, fact-gathering process conducted by an uninvolved employee representing neither side that results in what is widely considered to be an excellent factual record on which to further process the dispute." This element of an investigation over alleged discrimination should not be denied an employee simply because he or she used the negotiated grievance-arbitration process to resolve the allegation. The last EEOC study of the cost of an ROI demonstrated that it is not expensive, *i.e.*, the cost was $2,418 per ROI in 2003, down from $3,247 in 1993. The Union's proposal in Section 6.E.

25/ *Department of the Treasury, U.S. Customs Service, Washington, D.C. and NTEU*, Case No. 98 FSIP 52 (May 13, 1999).

concerns "the mechanics of the third-party neutral's involvement." The Employer's treatment of those details requires the use of EEO-experienced arbitrators, but it "never explains where they will come from." Management also proposes that the arbitrator's decision, which under the Statute is "final and binding," is subject to review by some higher management level in the agency. Any proposal "to subjugate an arbitrator's decision" to additional management approval "is an illegal demand for the Union to waive a statutory right to a 'final and binding' decision, appealable only to the FLRA."

In Section 6.F., "for a variety of reasons" the Union proposes to continue the $750 cap on the cost of arbitrating these matters imposed by the Panel. In this regard, there are about 275 formal EEO complaints at CBP each year and "if even half of them are now redirected into the hybrid process, that would be a serious financial burden on the Union." In addition, "the arbitration of discrimination disputes is generally regarded as greatly reducing employer costs overall."[26/] If employees elect to use the hybrid process, their only recourse is arbitration, and it would be unfair to them to have the merits of their cases "weighed against the local chapter's costs in determining whether the Union will move the dispute to arbitration." Finally, the Arbitrator should take judicial notice of the case law at the state level which holds that when employers require employees to defer any discrimination allegations to arbitration rather than EEOC or the courts, "due process requires that the employee's cost of doing so be capped at a reasonable figure so as not to be an effective bar to a full and fair appeal."[27/]

26/ The Union cites articles by the General Services Administration's Office of Equal Employment Opportunity, "The Cost Savings Associated with the Air Force Alternative Resolution Program"; "Using ADR to Resolve Worker's Compensation Claims" by Jeffrey Schieberl; "Alternative Dispute Resolution: A Cost Effective Solution to Litigation" by Robert Caldwell; and "The Promise of ADR in the Public Sector - A Workable Response to Sovereign Immunity" by Arnold Zack.

27/ In support, the Union cites *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000); *McCoy v. Superior Court*, 87 Cal. App. 4th 354 (2001); and *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) citing the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Of the remaining disputed issues in this article, in Section 5.D. the Union proposes that when employees allege discrimination they can also include with that "hybrid grievance" any allegation about contract infractions, regulatory violations, past practice inconsistencies, etc. This is "driven by a concern for litigation economy and the desire to avoid having multiple arbitrators deal with the same factual problem." The Employer's proposal in Section 12, on its surface, would give the Union "summary statistical data," which "could be anything." Its offer also omits data about age and suggests "a certain unpredictability and lack of comparability with the words, 'but not necessarily all the categories during the same year'." In summary, the Employer's offer should not be adopted "especially given that it puts management in the position to argue that future data requests are 'covered-by' this poorly worded clause." Finally, "there is no substantive difference between" the Union's proposal in Section 12 and the Employer's proposal in Section 13. While it "can live with either," the Union's "is the more informative" and should be adopted for that reason alone.

b. The Employer's Position

The parties' main conceptual disagreement in this article is whether the EEO Grievance Procedure contained in the former Customs-NTEU contract provided significant benefits to the parties and employees to "warrant adoption into the parties' first national [CBA]." In this regard, less than 30 percent of the current bargaining unit has had access to these, or similar procedures. The procedures "are complex and extremely challenging to navigate by the most skilled representatives and practitioners, let alone understandable to the general population expected to use them," as demonstrated by the evidence presented by the Union at the interest arbitration hearing. For example, rather than relying on the contractual wording, the Customs Service and NTEU found it necessary to issue extensive guidance on how to use the procedure. In fact, "the process described in the contract was so unintelligible" that it went practically unused for the more than 10 years of its existence. Hence, early in the negotiations the Employer proposed to defer to the Statutory EEO Complaint process for the handling of EEO claims. After extensive discussions, however, the Union was able to convince management that there may be some speculative benefit to establishing a simple, more expedient EEO Grievance procedure. As a result, CBP's last best offer is to insert the successfully negotiated and agreed upon grievance and

arbitration procedure contained in Articles 27 and 28 of the parties' collective bargaining agreement, with only slight modifications, "in lieu of the investigation and complaint processing stages of the formal statutory EEO complaint process."

Its proposal clearly meets the Union's interests "in a manner that is clear and reduces confusion." In contrast, the Union's proposal "undermines its own objective" by attempting to incorporate all of those portions of the statutory process it views as valuable, while discarding the rest. For example, in addition to the grievance procedure, the Union seeks the ROI, which contributes close to 6 months of complaint processing time. The Union's proposal is so confusing "it was not able to adequately explain its process to the Panel during the hearing with any reasonable clarity." It also failed to offer any substantive explanation as to how its proposal furthered its stated objective of reducing processing times, which in fact "will result in at least the same processing time" as the statutory EEO procedure. In addition, the Union's proposed article would not provide a clear and appropriate mechanism for addressing certain types of complaints by employees and the review of an arbitrator's decision and appeal to the EEOC. The Employer's proposed article is superior to that offered by the Union and, consequently, should be adopted by the Panel.

CONCLUSION

Having considered the parties' positions on this article I am persuaded that, on balance, the Union's final offer provides the more reasonable basis for resolving the dispute. The "hybrid" alternative to processing discrimination complaints was originally imposed by the Panel on the Customs Service and NTEU in 1999 after an extensive factfinding hearing was conducted by a Panel Member who had been a former administrative judge at the EEOC. It was recommended by the Panel Member, and adopted by the Panel to settle that case, only after he had brought to bear his considerable expertise with the statutory EEO process. While the parties offer different explanations for why it was rarely used, it is clear that the hybrid procedure, which is the Union's final offer, still has not been given a fair trial. It is also clear that the Employer could have chosen not to counter the Union's proposal but instead developed its own alternative approach to processing employee allegations of discrimination. The Employer's final offer is troubling because it includes a provision that was never adequately explained permitting agency head review of the arbitrator's decision, making it even less "final and binding" than the usual federal sector arbitration.

Given the history of how the hybrid procedure was developed, the defect in the Employer's proposal, and the constraints of the final-offer selection process, I shall order the parties to adopt the Union's final offer. Hopefully, during the term of the CBA, it can receive the trial it was originally designed to have.

9. Firearms (Union)/Use of Force & Firearms (Employer)

a. The Union's Position

Before turning to the merits on the four issues that remain in dispute in this article, the Union must address the Employer's allegations that its proposals in Sections 15.F. and 22.B. are not within management's duty to bargain. With respect to Section 15.F., the Union incorporates by reference its discussion under Attire and Appearance, Section 2.C., in support of its position that adding suspenders to the CBP uniform program as a voluntary wear item is negotiable. In this regard, CBP presented no evidence in the arbitration record that the implementation of NTEU's proposal implicates any management right. As previously noted, FLRA precedent establishes that an agency must present some evidence that a union's proposal implicates a management right and that a bare assertion is insufficient to relieve an agency from its bargaining obligation. In addition, even if it had provided more than a bare assertion, "CBP's discriminatory application of its policy concerning the use of suspenders and a camel pack hydration system" prevents it from raising a management's rights argument.

The Employer's allegation that Section 22.B. does not concern the conditions of employment of unit employees is equally misplaced. A proposal concerns a condition of employment if it pertains to bargaining unit employees and there is a direct connection between the proposal and the work situation or employment relationship of unit employees. The fact that an employment policy involves off-duty employees or relates to an off-duty situation does not necessarily disqualify it from being a condition of employment.[28/] Section 22.B., which is a roll-over provision from the 1996 contract, concerns the situation where a CBPO "is told by state or local authorities that s/he does not need permission from the state to carry a

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28/ The Union cites *DHHS, SSA, Baltimore and AFGE Local 1164*, 36 FLRA 655 (1990) and *Department of Air Force, Griffis, AFB and AFGE Local 2612*, 37 FLRA 570 (1990) to support its position.

personally-owned weapon because s/he works for CBP." As such, the proposal has a direct connection with the CBP work situation or employment relationship because it is the CBPO employment relationship *per se* that creates the circumstances requiring the assistance of CBP. It is similar to Sections 21 and 22 of the Use of Force article where the parties have already agreed to recognize the relationship of firearm carriage while off-duty with employee conditions of employment. All three provisions are designed to ensure employees understand that they have the same rights as private citizens concerning off-duty privately-owned firearm carriage but that they must nevertheless follow all related state and local procedures, and help "ensure that employees will not engage in off-duty conduct concerning the registration of firearms that might ultimately lead to discipline."

On the merits of its proposals, Section 15.D. would permit CBP, at its sole discretion, to provide CBPOs with additional remedial firearms training. Such training would assist them in qualifying with the basic firearm and intermediate use of force devices, such as batons, tasers or OC spray, and in learning how to react in a particular use of force situation. As the Union's firearms expert testified, additional firearms training improves a CBPO's performance in the use-of-force arena, reduces the potential legal liability, helps to protect the public, helps the employee avoid termination, and reflects the reality that the nation's enemies are constantly "training" with their firearms. Including the proposal in the CBA is necessary because, at present, the CBP Headquarters management style is to provide very little discretion to local managers and supervisors on most matters. Rather, "local officials are expected to follow national policy and procedures and are reticent to go beyond such procedures" and, without such authority, additional remedial training "would not be provided to the detriment of the Agency, employees and the public." The proposal meets management's legitimate interest to have a highly trained work force but allows the Agency to determine whether or not to provide the additional training.

The parties do not appear to be far apart regarding their respective proposals on Section 15.E. The Union's proposal would require CBP to provide it with data, in an Excel spread sheet, when CBPOs are injured during use-of-force training. This would permit the Union to determine which aspects of CBP's firearms training, if any, are causing employees to be injured and to engage with CBP to address such circumstances and injuries. In Section 15.F., as in the Attire and Appearance

article, the Union proposes that CBPOs be permitted to wear suspenders to support the weight of the firearms duty belt and other required equipment. During the arbitration hearing, the Union established that CBP employees carry the following items on their gun belt: pistol and holster, magazines, one or more pouches, a baton, OC spray, handcuffs (one or more sets), a taser, a radio, a PRD radiation pager, a glove pouch, a flashlight, a knife and/or multi-tool, probes, panel poppers and screw drivers for vehicle inspections. It also established that CBP Marine Instructors wear the auto inflate PFD suspenders and heavy duty rain pants with suspenders, that the United States military uses load-bearing suspenders, that there are suspenders with a breakaway snap designed to help defeat grabbing, and that a heavy gun belt can cause damages to a nerve in the thigh resulting in *meralgia paresthetica* that could be alleviated by wearing suspenders. The Employer, however, presented no evidence during the arbitration hearing "to rebut the evidence establishing the benefits to employees from being able to wear suspenders." As the Union related during the arbitration hearing, currently, when CBPOs ask management for the right to wear suspenders, they are often told that perhaps they need to take a fitness-for-duty examination. A "more enlightened approach" would be to recognize that, by loading down the employees' gun belt with the above-described equipment, CBP has created a health and safety concern for many officers by straining their hips and backs. Suspenders would help reduce this adverse impact, and are regularly used by the U.S. military, police departments and non-bargaining unit CBP employees.

As the Union stated in defending the negotiability of its proposal, Section 22.B. is a roll-over provision from the 1996 Customs-NTEU contract addressing the situation where a CBPO is told by state or local authorities that s/he does not need to comply with local firearms registration requirements for personally-owned weapons because s/he works for CBP, a federal agency. The mere fact that CBPOs work for CBP and are authorized to carry an Agency-issued firearm, however, "has nothing to do with compliance with state and local law concerning the carriage of a personally-owned firearm." As a result, the CBPO may have difficulty getting such a state or local permit without CBP assistance, and could thereafter be found in violation of law for carrying a firearm without proper authority. The proposal is related to Sections 21 and 22 of the article where the parties have already agreed to wording that recognizes the relationship of firearm carriage while off-duty with the employee's employment with CBP. All three provisions

are designed to ensure that employees understand that they have the same rights as private citizens concerning off-duty privately-owned firearm carriage but that they must nevertheless follow all related state and local firearms registration and carriage procedures. The adoption of Section 22.B. would ensure that employees "comply with local or state law concerning the registration of their personally owned firearm," and satisfies the legitimate interests of both NTEU and CBP that employees not subject themselves to discipline concerning the registration of their personally owned firearms for off-duty use. On the other hand, CBP has raised no substantive management defense or interest in opposition to NTEU's proposal.

b. The Employer's Position

The Union's proposal in Section 15.F. provides employees "unfettered discretion to modify the manner in which they carry their service-issued firearm and other use of force devices by adding any type of suspenders they desire to their authorized duty belt." As written and explained, it excessively interferes with managements right to determine its internal security practices, under 5 U.S.C. § 7106(a)(1). Also, to the extent the Union's proposal addresses the means of performing work, it is a permissive topic of bargaining under 5 U.S.C. § 7106 (b)(1) over which the Agency elects not to bargain. In this regard, the FLRA has "undisturbed precedent addressing alternate methods of carrying required equipment." In litigation involving the same parties, *CBP and NTEU*, 59 FLRA 978 (2004), the FLRA found that the Agency established a reasonable connection between the authorization of equipment "used to carry and **support** [emphasis added by Employer] a firearm that could prove dangerous to the Agency's personnel, operations, and general public, and its right to determine internal security practices found in 5 U.S.C. § 7106 (a)(1)," and it asserts equivalent arguments in response to the instant proposal. During the bargaining process, CBP use-of-force experts articulated that the use of suspenders to support the duty belt that holds agency-issued weapons would be "an unnecessary addition to the uniform that could also be used as a strangling device." This could be "fatal to [CBPOs], and dangerous to Agency operations and the traveling public," and would negate CBP's internal security measure of prohibiting suspenders because of the potential safety trepidation. Moreover, as a "means" of performing work, the Union's proposal for additional tools or devices to be used to accomplish the

Agency's national security mission also constitutes a permissive topic of bargaining under 5 U.S.C. §7106 (b)(1).[29/]

With respect to the Union's proposal in Section 22.B., as explained by the Union during bargaining, it would require the Agency to provide employees' assistance in obtaining a state issued permit to carry their personally-owned firearm during non-work hours. There is no dispute that CBP's Use of Force policy "precludes unit employees from using personally-owned firearms on duty" and "provides armed employees with the ability to carry their service-issued firearm during non-duty hours." Inasmuch as the Union has not demonstrated how its proposal has any affect on any aspect of job functions, job requirements, or any other incidents of employment of bargaining unit employees, it does not address a condition of employment, as defined in 5 U.S.C. § 7103(a)(14) and, therefore, is outside the mandatory duty to bargain. In this regard, proposals that provide agency services for non-work related purposes during non-duty time have "routinely been found not to concern a condition of employment" by the FLRA.[30/] Furthermore, the FLRA produced "identical conclusions" concerning bargaining proposals involving personally-owned weapons in *National Treasury Employees Union and U.S. Customs Service*, 58 FLRA 611 (2003). Similarly, the Union's proposal fails to meet the second prong of the FLRA's two-part test to determine if a proposal involves a condition of employment, *i.e.*, whether there is a nexus between the proposal and the work situation or employment relationship of bargaining unit employees, and is therefore outside the duty to bargain.[31/]

On the merits of the issues in this article, the parties' proposals are significantly different in two areas.[32/] The Employer's article should be adopted because "it is less cumbersome to administer, meets the realities of today's work environment, and provides the more appropriate solution to an

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29/ The Employer cites *AFGE Local 1917 and Dept. of Justice, INS*, 55 FLRA 228 (1999) to support its position on the non-negotiability of the Union' proposal.

24/ As an example, the Employer provides the FLRA's decision in *Metal Trades Council*, 18 FLRA 326 (1985).

25/ The FLRA's two-prong test for determining whether a matter concerns a condition of employment is established in *Antilles Consolidated Education Association*, 22 FLRA 235 (1986)(*Antilles*).

32/ CBP has agreed to NTEU's last best offer in Section 14.E.

issue with many unknowns." In this connection, in Section 22.B. the Union is attempting to "roll-over" a provision from the 1996 Customs-NTEU contract which requires the Agency to provide employees' assistance in obtaining a state issued permit to carry their personally owned firearm during non-work hours. CBP disagrees that the phrase "roll-over" is appropriate in analyzing this disagreement inasmuch as there is a past practice in effect of not providing such a letter. Under law, therefore, this practice "overrides" the wording in the Customs-NTEU contract and "should be viewed as the *status quo*."[33/] More importantly, employees do not need management to provide such a template letter in today's circumstances. First, the proposal "seeks to mitigate the adverse impact when there is none." The provision in the former Customs-NTEU contract addressed situations in a time when Customs Inspectors did not have the inherent authority to carry their service-issued weapon with them on a 24/7 basis in accordance with policy. Today, however, all CBPOs have the ability to carry their service-issued weapon on a 24/7 basis, including non-duty hours.

In addition, there is no demonstrated need for the proposal and it "would only serve to add a layer of unnecessary administrative burden" since the Union's article "conflicts with itself." For example, Section 21 captures the parties' understanding that anything outside the Agency's 24/7 off-duty carry authorization is addressed by the Law Enforcement Officers Safety Act of 2004, codified at 18 U.S.C. §§ 926B-926C. This law allows qualified active and retired law enforcement officers to carry concealed firearms anywhere in the U.S. In light of the 2004 legislation, NTEU has not demonstrated the need to revert back to an unnecessary 1996 contract provision concerning weapons carry. Administrative confusion would occur when attempting to comply with NTEU's proposal because employees and managers would be confronted with a situation addressed in an Agency policy that provides CBPOs off-duty carry of the service issued weapon, a law that recognizes the right for a CBPO to carry a concealed weapon under 18 U.S.C. §§ 926B-926C, and NTEU's proposal that would mandate a template letter that serves no practical effect.

With regard to its proposal in Section 15.F. that employees be given unfettered discretion to add suspenders to their

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33/ The Employer cites *American Federation of Government Employees, Local 2128 and United States Department of Defense, Defense Contract Management Agency, District West, Hurst, TX*, 58 FLRA 519 (2003) to support its contention.

authorized duty belt, the Union "has only raised vague assertions and speculative anecdote to justify such a significant change to the *status quo*." It provided a "speculative email" to support its claim that a medical epidemic exists necessitating the use of tactical suspenders, and proffered a CBP assistant Firearms Instructor to demonstrate the benefit of suspenders for the work force. The testimony and evidence, however, failed to shed any light on significant details connected to the proposal, such as whether tactical suspenders are appropriate as a tool in all CBP work environments, which brand/design/color suspenders should or should not be used, and how many CBPOs would use them. The Union's presentation was "anchored to internet chat room comments on suspenders, internet advertisements for suspenders, and Wikipedia postings on belt suspenders," but did not provide the details that should known prior to modifying "the image and tactical composition" of CBP's inspectional personnel. Thus, imposition of the Union's article would result in having an arbitrator answer the questions that should have been answered during bargaining. Nor did the Union refute CBP's use-of-force expert's testimony that suspenders "would be an unnecessary addition to the uniform that could also be used as a strangling device." The Employer's proposed article avoids these problems, "adds even more structure to the parties' joint-working group" where the parties could collaborate in answering the lingering questions surrounding tactical suspenders and, therefore, should be adopted.

CONCLUSION

After carefully reviewing the evidence and arguments presented by the parties, I shall order the adoption of the Employer's final offer on this article. The key issues remaining in dispute involve the Union's proposals to permit officers to wear suspenders and to require Port Directors to issue, upon request, a generic letter to CBPOs in connection with carrying personal firearms off duty. The Union's proposal is duplicative of its proposal in the Attire and Appearance article and, for the reasons discussed there, I lack authority to reach the merits of this issue. On the second issue, aside from the Union's dogged determination to retain a provision from the 1996 Customs-NTEU contract, I am not persuaded that the generic letter it would require Port Director's to issue would be of more than marginal benefit to employees, particularly in circumstances where the original justification for such a letter appears to have been overtaken by subsequent events.

10. Holidays (Union)/Holidays and Religious Observances (Employer)

a. The Union's Position

The Employer alleges that the Union's Section 4.A. proposal to continue "current holiday procedures" is non-negotiable because management is entitled to have "one contract," not "separate agreements," and that the Union is insisting on "a different agreement for each port or like entity." While the proposal recognizes the potential for permissive supplemental bargaining, it "is a demand to continue a 'past practice,' not a demand for a written agreement(s) embodying those practices." In addition, the practices the Union wants to continue deal with procedures, "which is not something within management's rights." Even the portion of its proposal to replace multiple local practices with a single one is not a request to negotiate but "the negotiated rule itself." The fact that the shift to one local practice may create a right to negotiate section 7106(b)(2) and (3) matters is an obligation of law, not the proposal, so it does not establish an independent contract right to bargain. The Union intends that any such negotiation occur at the national level between the two parties.

As for the Employer's allegation this might result in multiple agreements or even one agreement with different appropriate arrangement provisions unique to one or more locations, "that assertion is speculative at best." Management does not know what the Union would propose once the focus is not on the procedure to be used but the impact of, and appropriate arrangements for, the change to that procedure. Moreover, CBP has "an obligation to negotiate with the single exclusive representative when it makes a change unique to just one office of a nation-wide unit." The national Union will be that single representative, even if it advocates for different arrangements in different classes of ports, e.g., seaports, airports, small ports, large ports, etc. The only role a new or supplemental agreement would play, whether it is reached by negotiations or mutual agreement, "is IF the parties permissively decide to execute one." If one of those parties insists to impasse on negotiating one, "the other retains its right to refuse to negotiate on whatever grounds appropriate," so the proposal does not require local supplemental negotiations. Finally, it is "hypocritical" for management to allege that the Union is proposing what potentially could be multiple agreements when its own proposal recognizes locally developed mutual agreements. While an agreement reached by "mutual agreement" may not be the

product of statutory negotiations, it is a "collective bargaining agreement."

As to the merits of the parties' proposals, the most significant issue in this article deals with what holiday assignment/approval process is adopted if the local parties cannot reach agreement on a process, *i.e.*, "will it be the dominant local process in place or a new national one." With regard to the Employer's proposal in Section 3.A.5.a.-c., the Union "is perplexed as to why management proposes a separate provision for dealing with 'in lieu of' holiday assignments/approvals separate from its Section 4.A. proposal which deals with holiday assignment/approvals generally." The fact that the two proposals are nearly identical is confusing, and the proposal should be rejected for that reason. Under the Union's approach, all holiday assignment/approval issues would be addressed through its Section 4.A. process. For example, if an employee is assigned to work July 4, and thereby entitled to an "in lieu of" holiday on July 3 or 5, the parties will address that locally, "as they must have been doing for the last few years given the lack of a national policy."

Turning to the parties' Section 4.A. proposals, neither side has analyzed the local holiday practices now in effect at 300-plus ports. Consequently, it is "reckless" for management to propose to instantly replace all of those practices with a national practice. Its proposal could create "local chaos" because the first day the new contract goes into effect "a new process would be implemented in the middle of a holiday year." Any prior assignments or holiday leave approvals would suddenly be null and void until the new holiday election process was run and new assignments/approvals are made. In contrast, the Union's proposal "calls for incremental change." First, if there are a variety of local practices due to prior contracts, the parties would revert to the NTEU-Customs practices, but only as of the beginning of the next holiday assignment/approval period. That "meets the Employer's goal of reducing the number of practices in place, as well as assuring every port director would have only one procedure to implement."

The Union's proposal also permits the creation of a local agreement to do something other than adopt the local NTEU-Customs practice. Such agreement could be reached mutually or through full statutory negotiations if both parties agree to allow that on a case-by-case basis. If one of the parties insists to impasse on negotiating a local agreement, the other side "retains its right to refuse to negotiate on whatever

grounds appropriate." As stated in its rebuttal to the Employer's non-negotiability arguments, the Union's proposal does not require local supplemental negotiations but "only specifies the role of any agreement flowing from them." Finally, while the Union also wants one process at the port level where the assignment/approval decisions are made, there is "no need for every port to use the same procedure, irrespective of size, history, mission, and local demands." Nor should a pure seniority system be imposed throughout the country. While seniority provides objectivity, it leads to newer employees "never getting any of the major holidays off." Many of its chapters have developed local agreements to integrate the newer employees with senior employees so that senior employees might get New Years and July 4 and the younger employees could get Christmas. Management has offered no explanation why local understandings should be "tossed aside, nor any evidence supporting the need for a radical change capable of creating local chaos." At best, it has taken an "oxymoronic position" that there is a need for a single process if the local parties are unable to agree on their own.

b. The Employer's Position

The Union's Section 4.A. proposal would "force[] the Agency to waive its unilateral right to have one contract with the exclusive representative of the bargaining unit by insisting to impasse on piecemeal bargaining." Its response to the Employer's proposal that the article contain a standardized set of procedures and arrangements for scheduling holidays is to negotiate a different agreement with each "port or like entity" within the single bargaining unit. While a party is free to propose such a concept, neither party is obligated to negotiate over it to impasse. The FLRA has found a party engaged in bad faith bargaining when it insisted on negotiating separate agreements for different segments of one bargaining unit, and the NLRB has found this approach to be a "cancer" on the collective bargaining process.[34/]

34/ The Employer cites *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions and AFGE, Council No. 242*, 53 FLRA 1269 (1998), *Department of Defense, Department of the Army and the Air Force , Headquarters, Army and Air Force Exchange Service, Dallas, Texas*, 19 FLRA 652 (1985), and *E.I. Dupont de Nemors and Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007) to support its position.

The main issue in disagreement in this article is whether national procedures are appropriate as they relate to the scheduling of holidays and the establishment of "in lieu of" holidays. While the Union has proposed the continuance of local practices until local bargaining is completed, "the Agency has proposed the establishment of a clear and unambiguous set of national procedures, which the local parties may deviate from in narrow areas only upon mutual agreement." As its arguments in this case are no different than those it provided in the Leave and Excusal article below, the Employer hereby incorporates that explanation into this section of its brief. Based on these arguments and the information presented at the hearing, the Agency's proposed article "is far superior to that of the Union's," so "the Panel must adopt the Agency's proposal in its entirety."

CONCLUSION

After carefully examining the parties' dispute in this article, I conclude that the Union's final offer provides the better basis for resolving the matter. Reduced to its essence, the Union is proposing to continue the current holiday scheduling procedures at CBP's numerous ports of entry and, where there are conflicting local agreements, the holiday procedures in the expired Customs-NTEU agreement would govern. While the Employer alleges that the Union's version of a "continuation of past practices" provision would result in the waiving of its statutory right to have one contract with the exclusive representative of the bargaining unit, it has either misread or disregarded the Union's explanation of its proposal. Consistent with the Union's explanation, nothing in the plain wording of the proposal requires local negotiations, *i.e.*, "piecemeal bargaining," over holiday practices. Since the Employer does not also allege, nor is it apparent, that the issue of holiday practices involves any underlying management right which would otherwise render it nonnegotiable, its jurisdictional argument must be rejected.

On the merits of the parties' final offers, it does not appear that either side has actually researched local holiday practices and analyzed their impact on Agency operations. As in any situation where a party is proposing to change past practices, however, the Employer bears the initial burden of demonstrating why the adoption of national procedures is necessary. Other than forcefully expressing its preference for their establishment, and claiming that differing local procedures, among other things, cause unnecessary distractions

and disrupt Agency operations, it has not substantiated those claims on the basis of record evidence. Thus, I am not persuaded that the Employer has demonstrated the need for the change it is proposing. Accordingly, I shall order the adoption of the Union's final offer on this article.

11. Leave and Excusal

a. The Union's Position

As in the Holidays article above, management alleges that the Union's Section 2.D. proposal is non-negotiable because it is entitled to have "one contract," not "separate agreements," and that the Union is insisting on "a different agreement for each port or like entity." While the proposal recognizes the potential for permissive supplemental bargaining, it "is a demand to continue a 'past practice,' not a demand for a written agreement(s) embodying those practices." In addition, the practices the Union wants to continue deal with procedures, "which is not something within management's rights." Even the portion of its proposal to replace multiple local practices with a single one is not a request to negotiate but "the negotiated rule itself." The fact that the shift to one local practice may create a right to negotiate section 7106(b)(2) and (3) matters is an obligation of law, not the proposal, so it does not establish an independent contract right to bargain. The Union intends that any such negotiation occur at the national level between the two parties.

The Employer's assertion that this might result in multiple agreements or even one agreement with different appropriate arrangement provisions unique to one or more locations "is speculative at best." Management does not know what the Union would propose once the focus is not on the procedure to be used but the impact of, and appropriate arrangements for, the change to that procedure. Moreover, CBP has "an obligation to negotiate with the single exclusive representative when it makes a change unique to just one office of a nation-wide unit." The national Union will be that single representative, even if it advocates for different arrangements in different classes of ports, e.g., seaports, airports, small ports, large ports, etc. The only role a new or supplemental agreement would play, whether it is reached by negotiations or mutual agreement, "is if the parties permissively decide to execute one." If one of those parties insists to impasse on negotiating one, "the other retains its right to refuse to negotiate on whatever grounds appropriate," so the proposal does not require local

supplemental negotiations. Finally, it is "hypocritical" for management to allege that the Union is proposing what potentially could be multiple agreements when its own proposal recognizes locally developed mutual agreements. While an agreement reached by "mutual agreement" may not be the product of statutory negotiations, it is a "collective bargaining agreement."

The Employer has also declared that the Union's Section 10 and 11 proposals are non-negotiable because they create leave categories not found in statute or regulation. It is "attempting to bootstrap some *dicta* found in [a] prior FLRA decision[] to cast a shadow on the Union's proposal[s]" where the case had nothing to do with whether the parties can use the expressions "maternity leave" or "paternity leave" to merely describe or label the period of time an employee must be away from work in connection with the birth of a child. Moreover, its proposals would not create "categor[ies]" of leave tantamount to annual, sick, or other compensated leave benefits. The second sentences of the Union's proposals make clear that the leave period is composed solely of annual, sick or leave without pay (LWOP), consistent with FLRA precedent. Management's negotiability declarations are "reckless distortion[s] of case law [] intended merely to obstruct consideration of the substantive issues."

On the merits of the issues in dispute in this article, the Union's proposals in Sections 2.D., 3.E., and 10/11 "stand out in significance above the others." In Section 2.D., the Union proposes a continuation of "current local leave procedures." Neither party has analyzed the local leave approval practices now in effect at over 300 ports. Consequently, it is "reckless" for management to propose immediately to replace all of those practices with a national practice. As the Union demonstrated at the hearing, local leave procedures in this unit often have their own nomenclature and other unique features. For example, one of its exhibits described a local leave process built around "short draw, normal draw, and long draw" annual leave slots. The fact that neither party knew what those terms meant "affirms that local leave systems should not be changed" without "forethought and proof that the replacement system will work." The Employer's proposal, however, would require that a new process be implemented in the middle of a leave year. Consequently, it could create "local chaos" if the CBA is implemented before the end of the leave year in January 2011.

The Union's proposal, on the other hand, "calls for incremental change." First, if there are a variety of local practices due to prior contracts, the parties would revert to the NTEU-Customs practices, but only as of the beginning of the next holiday assignment/approval period. That "meets the Employer's goal of reducing the number of practices in place, as well as assuring every port director would have only one procedure to implement." It also permits the creation of a local agreement to do something other than adopt the local NTEU-Customs practice. Such agreement could be reached mutually or through full statutory negotiations if both parties agree to allow that on a case-by-case basis. If one of the parties insists to impasse on negotiating one, the other side "retains its right to refuse to negotiate on whatever grounds appropriate." As stated in its rebuttal to the Employer's non-negotiability arguments, the Union's proposal does not require local supplemental negotiations but "only specifies the role of any agreement flowing from them." Finally, while the Union also wants one process at the port level where the assignment/approval decisions are made, there is "no need for every port to use the same procedure, irrespective of size, history, mission, and local demands." Nor should a pure seniority system be imposed throughout the country. While seniority provides objectivity, "it leads to the younger employees never getting any of the most desirable leave periods off." As a consequence, many chapters have developed local agreements to integrate the newer employees with senior employees so that these are shared fairly. Management has offered no explanation why local understandings should be "tossed aside, nor any evidence supporting the need for a radical change capable of creating local chaos." At best, it has taken an "oxymoronic position" that there is a need for a single process if the local parties are unable to agree on their own.

Section 3.E. concerns the requirement for medical documentation for sick leave and sick leave restrictions. Medical documentation is an issue of substantial concern to employees because it can cost money, waste leave time, and be used to harass them, as FLRA cases attest.[35/] To substantiate a sick leave absence of 3 days of less, an employee typically would have to pay the medical provider a fee, get an appointment while ill and, "ironically, even take more time off to get the

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35/ *Department of Health and Human Services, Social Security Administration, Baltimore, MD and AFGE*, 37 FLRA 161 (September 12, 1990) is cited by the Union in this regard.

medical examination." Under the Employer's proposal, a supervisor "may" or may not impose this hardship when "determined necessary." This gives individual managers "standardless and sole discretion" to decide, on a case-by-case basis, "what kind of evidence or sick leave documentation they will require and when," and "shows no concern for the interests of the employee." It also greatly increases the risk of a successful charge of disparate treatment, union *animus*, or even unilateral implementation, as managers use this discretion repeatedly. In the interest of efficient and effective government, such litigation risk should be reduced, particularly where management "never offered any evidence or explanation of why its managers must retain individual discretion over such important matters." The Union's proposal, by only requiring documentary medical evidence for sick leave of more than 3 days or when the employee is on a restriction letter, "protects the Employer and employees in a balanced manner" and is consistent with 5 C.F.R. § 630.403.

The portion of its Section 3.E. proposal that deals with sick leave restrictions would allow management to require medical documentation for future sick leave periods of 3 days or less once it has provided certain due process protections for the employee, such as the "minimal inconvenience" of notifying the employee of the basis for suspecting abuse of leave and an opportunity to reply. The need for such protections is substantiated by documentary evidence that one employee was placed on leave restriction simply because he used 338.5 hours of annual leave "in conjunction with regular days off and on the weekend days." There is nothing abusive about that, and employees should have an opportunity to reply before restrictions are imposed. If notice and reply is not part of the process, the Agency could take action without having first heard the employee's explanation, making it liable for the cost of obtaining the medical documentation if it is wrong. The Union's proposal also is comparable to provisions in the NTEU-IRS and NTEU-Customs contracts while "management presented no evidence of provisions comparable to what it proposes."

The Union's Section 10 and 11 proposals are virtually identical to provisions that were in the prior NTEU-Customs agreement. They currently remain in effect within CBP as practices applicable to the thousands of CBP employees who came from that unit. The only substantive deviation is in Section 10, where the Union has provided the Employer with the option of either granting 6 months off or deal with providing new baby care facilities, such as a place to nurse, which will be

required by the new health care reform legislation in any event.[36/] At no time in the hearing did the Employer "provide evidence showing that one or more of the subsections did not work." This "should doom management's proposal to create entirely new words and contractual structure to deal with an issue that has worked fine for years." Additionally, by more affirmatively continuing the practice of granting 6 months of maternity leave, the Union's proposal would protect the Employer from legal liability. In this regard, the EEOC has "challenged employers that offer longer leave periods for other causes of physical incapacitation than it does for maternity periods" and the parties have already agreed that employees may be given up to 6 months leave for other physical incapacitations. Finally, the NTEU-IRS contract uses approaches much closer to the Union's Section 10 and 11 proposals.

Among the remaining issues in this article, the primary difference between the Union's proposal in Section 4.D. and the Employer's counteroffer is that LWOP would be available if a Union officer needs it to attend the Union's convention. Casting a chapter's votes at a union convention "is a statutory right." If a delegate is unable to attend, the employees he or she represents are disenfranchised, and this "should be avoided if possible." Finally, its proposals in Section 8.K.-M. come from management's leave manual and these "very important provisions" should be included in the contract "so that all employees are more aware of them." The Employer's only objection is that the issues deal with travel and should have been addressed while negotiating the Travel article. It never explained why CBP's leave manual deals with home leave travel issues, and "there is no harm to management from including these provisions in the contract."

b. The Employer's Position

The Union's Section 2.D. proposal is non-negotiable for same reasons as its Section 4.A. proposal in the Holidays article, *i.e.*, it would "force[] the Agency to waive its unilateral right to have one contract with the exclusive representative of the bargaining unit by insisting to impasse on

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36/ The Union contends that the proposal is negotiable because it gives management an option between what might be a non-negotiable choice and a negotiable. It cites *American Federation of Government Employees and Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 2 FLRA 604 (January 31, 1980) in support of its contention.

piecemeal bargaining." Its response to the Employer's proposal that the article contain a standardized set of procedures and arrangements for scheduling holidays is to negotiate a different agreement with each "port or like entity" within the single bargaining unit. While a party is free to propose such a concept, neither party is obligated to negotiate over it to impasse. The FLRA has found a party engaged in bad faith bargaining when it insisted on negotiating separate agreements for different segments of one bargaining unit, the NLRB has found this approach to be a "cancer" on the collective bargaining process.

With respect to the Union's proposals in Sections 10 and 11, the Statute provides an unambiguous requirement that parties are to bargain only to the extent that a proposal is not inconsistent with federal law, government-wide rule or regulation, or agency regulations for which a compelling need exists. Moreover, the FLRA has long held that fringe benefits are only negotiable to the extent they are not inconsistent with law, government-wide regulation, or agency regulation for which a compelling need exists.[37/] The Union's proposals, however, would establish leave categories (*i.e.*, "Maternity Leave" and "Paternity Leave") not provided for under government-wide law and regulation. OPM regulations proscribing the categories of leave (e.g., annual, sick and LWOP) are found at 5 C.F.R. § 630, and "do not provide agencies any discretion to establish additional leave categories." In addition, the FLRA has recognized that maternity leave is not a leave category, a conclusion that would also apply to paternity leave.[38/] Therefore, the Union's proposals conflict with government-wide rules and regulations and are nonnegotiable.

On the merits of the main issues that remain in this article, the Employer has made adjustments to its last best offer that address the Union's concerns on areas related to leave policy. For example, consistent with the Union's stated interest during the arbitration hearing, it has presented a new Section 6 titled "Leave for Maternity or Paternity Purposes," where employees can find an explanation of their entitlement to request annual, sick and LWOP for such purposes. As a result,

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37/ In support, the Employer cites *Local 556, SEIU and Department of the Navy, Navy Exchange, Pearl Harbor, Hawaii*, 25 FLRA 796 (1987).

38/ The Employer cites *AFGE Local 3804 and FDIC, Madison Region*, 21 FLRA 870.

the disagreement that should drive the Panel's decision on this article is whether there should be a single national procedure for requesting and approving annual leave requests. On this issue, the Employer has proposed a clear and unambiguous procedure by which employee requests will be submitted and considered. The procedure contains what is typical for all CBP locations, *i.e.*, an annual solicitation for vacation periods and procedures for considering and resolving conflicts arising from *ad hoc* requests. In contrast, the Union has proposed the maintenance of current local procedures, subject to future notice by the Employer, followed by "change bargaining (through impasse if necessary)."

The purpose of this contract is to establish a single set of clear and unambiguous work rules under which management and employees will operate. Its proposal would do that on the effective date of the contract while the Union's "fails to bring any close to the disruption and dissatisfaction caused by the statutory requirement to maintain the remnants of the conditions of employment the Agency, the Union and the employees inherited from its former Agency and union affiliations." Under the Union's proposed article, disparities in the ways employees are treated would continue indefinitely until management notified and bargained. Such differences do not support Agency operations or efficient government, nor do they contribute to improved employee performance. In fact, "the establishment of differing procedures for employees who work side-by-side cause confusion, dissatisfaction and cause unnecessary distraction" from the performance of their work. Despite the Union's failure to demonstrate why it needs unique leave procedures at each of the Agency's more than 340 locations and, potentially, within each work unit at each location, "the Employer has provided an avenue for the parties to deviate locally from the default procedures upon mutual agreement." This approach is consistent with other areas in the contract in which the parties have reached agreement.

In addition to providing employees and supervisors clear expectations about how leave requests will be submitted, reviewed and processed, "it promotes efficiency of the government by eliminating the waste of time and resources necessary to negotiate" over the same set of procedures. Furthermore, given the likely increase in relocations resulting from the enhanced employee requested reassignment procedures, it is important to have more standardized procedures to minimize disruption when employees relocate. In other words, with a core of standardized national procedures, upon approval of a request

to relocate, employees will not need to be concerned about having to learn a new set of administrative procedures associated with requesting leave, or how their requests will be considered compared to other employees at the new location. Based on the above, the Employer's proposed article is superior to the Union's and should be adopted in its entirety.

CONCLUSION

The parties' jurisdictional arguments regarding the Employer's duty to bargain over the Union's proposal to continue current local leave procedures are identical to those in the Holiday article. If that were the only significant issue remaining in dispute in the Leave and Excusal article, consistency would require the same result, *i.e.*, the rejection of the Employer's legal position and the adoption of the Union's final offer on the merits of the article. Unlike the previous article, however, the parties are at impasse over a number of other significant issues that, in my view, warrant a different outcome. In this regard, I agree with the Employer that there is no need for counseling before requiring an employee who appears to be abusing sick leave to provide medical documentation. Requiring medical documentation is not discipline yet the Union appears to treat it as such. I also agree that employees should exhaust sick and annual leave before going on LWOP, and that requests to use annual leave for illness should be made at the time of the leave request. Moreover, I find the Union's proposal in Section 4.d., concerning a Union officer's ability to use LWOP to attend the Union's convention, virtually incomprehensible. Even though the Employer has failed to meet its burden of demonstrating the need for a national procedure for requesting and approving annual leave requests, on balance, I am persuaded that the Employer's final offer provides the better basis for settling the parties' impasse over this article. For these reasons, I shall order its adoption.

12. Merit Promotion and Other Competitive Selections (Union)/Merit Promotion (Employer)

a. The Union's Position

The Employer's proposals in Sections 3.B.(10), 7.H., and 8.D. "are non-negotiable." As written, Section 3.B.(10) would allow management unilaterally to implement any new exception to competitive procedures that might be permitted by government regulation. This creates "the potential for two violations of law." First, it authorizes the Employer to override a contract

provision with a government-wide regulation. 5 U.S.C. § 7117(a)(7), however, specifies that management cannot override a contract provision merely because it conflicts with a new government-wide regulation.[39/] Second, it would authorize such implementation without first providing the Union notice and an opportunity to bargain over "at least impact and implementation" of a government-wide regulation.[40/] Sections 7.H. and 8.D would provide management with flexibility in the selection of candidates to promote diversity goals and affirmative action. There is a growing body of law, however, virtually prohibiting "employers, especially government employers, from establishing work rules in order to promote diversity or extend an extra benefit based on race." While the Union is also interested "in a discrimination-free workplace and in helping its members overcome the impact of past discrimination," if the proposed sections were adopted, "there is little doubt that [they] would be disapproved on agency head review as inconsistent with Supreme Court decisions.[41/] In accordance with the requirements of those decisions, "management never offered the Panel any evidence of a legitimate basis for writing a promotion rule to favor those covered by the 'diversity' label" or established a compelling interest to justify its proposals. For these reasons, the Union is "neither obligated nor willing to bargain over such a proposal[s]."

The Employer's allegations, on the other hand, that a number of the Union's proposals in this article are non-negotiable are without merit. Its argument that the Union's proposed wording in Section 3.A.(4) prescribes conditions of employment for non-unit employees is "reckless" because the FLRA's *Antilles* case does not mention non-unit employees or matters, nor has the case "ever been cited subsequently in any [FLRA] decision dealing with non-unit employees." Management

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39/ The Union cites the FLRA's decision in *General Services Administration, National Capital Region and Journeyman Pipefitters and Apprentices, Local 602*, 42 FLRA 121 (1991) to substantiate its claim.

40/ The Union cites the FLRA's decision in *Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia and NTEU, Chapter 210*, 46 FLRA 396 (1992) to support this contention.

41/ In this regard, the Union cites the Supreme Court's decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

also cites *Cherry Point*, 952 F.2d 1434 (1992) which, in general, applies the private sector "vitally affects" test to the federal sector and involves a proposal that affects supervisory employees. Consistent with the FLRA's subsequent application of *Cherry Point*, however, the Union's proposal is negotiable because it establishes: (1) a "procedure" that principally concerns "who gets unit vacancies"[42/]; (2) an order of consideration for unit jobs, not non-unit jobs[43/]; (3) a "merit-analysis record of what the selecting official did"[44/]; and (4) where supervisors rank in comparison to other candidates that management may have passed over for a job, thereby permitting unit employees to challenge selections.[45/]

Generally with respect to the Union's proposal in Section 3, the Employer "refers to some unspecified right in law or regulation to use competitive procedures that is not contained in this agreement." Without providing more, it has failed to meet the minimum burdens the FLRA has established "to voice a legitimate allegation of non-negotiability." Moreover, in Sections 3.B.(2) and 3.B.(3), the Union has responded to the Employer's non-negotiability concerns by altering its last proposals so that, rather than prohibiting the use of these exceptions in a specific way, it now requires management to provide the Union with specific notice of how it intends to use the exceptions and the right to bargain, if appropriate under law. Concerning Section 6.F., the Employer also has not met its burden for raising non-negotiability. In this case, it argues that the Union's proposal violates a merit system principle but "fails to overcome the long held precedent that merit system

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42/ The Union cites *NFFE, Local 1482 and Defense Mapping Agency, Louisville, Kentucky*, 45 FLRA 1132 (1992).

43/ The Union cites *National Association of Agricultural Employees, Local 39 and Department of Agriculture, New Jersey*, 49 FLRA 319 (1994).

44/ The Union cites *IFPTE, Local 35 and U.S. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia*, 54 FLRA 1377 (1998) and *National Treasury Employees Union, Chapter 83 and U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C.*, 64 FLRA 723 (2010).

45/ The Union cites *ACT, Granite State Chapter and U.S. Department of Defense, National Guard Bureau, New Hampshire Air National Guard, Concord, New Hampshire*, 55 FLRA 476 (1999).

principles are not enforceable without also alleging a prohibited personnel practice violation."[46/] In addition, while claiming that it is illegal to give one candidate a procedural advantage in the application process that another does not have, Sections 6.C. and 6.E. of the Employer's final offer in this article contain specific wording giving it the authority to extend application assistance to some applicants, but not all others. The FLRA, however, has found that, where an agency cannot explain why it applies its management rights in a discriminatory manner, it "will determine that such management rights are not implicated by the union's proposal."[47/] Thus, management has forfeited the right to raise negotiability by seeking to enforce the management right in one place, but not others.

Finally, in Section 8.A., the Union's intent is for unit applicants to be considered for selection by the selecting official before non-unit applicants. This would not prevent management from soliciting non-unit applicants or rating/ranking them at the same time as unit employees are going through those steps. Only where the promotion process reaches the selection decision would the selecting official then be obligated to first consider the unit employees and complete the selection consideration of them before moving on to consider non-unit applicants. Therefore, its first consideration promotion proposal is negotiable under FLRA precedent.[48/] In fact, the case management cited as the basis for its assertion of non-negotiability "clearly states that proposals such as NTEU has made to CBP are negotiable – something the [A]gency chose to withhold from the [A]rbitrator."

46/ In support, the Union cites *Wells v. Harris*, 1 MSPR 208, 214-15, 1 MSPB 199 (1979); *Geisinger* v. MSPB (Fed. Cir. 1995 nonprecedential No. 95-3352); and *Pollard v. OPM*, 52 MSPR 566, 569-70 (1992).

47/ The Union cites *National Treasury Employees Union and U.S. Department of Homeland Security, Bureau of Customs and Border Protection*, 61 FLRA 48 (2005) to support this claim.

48/ Among other FLRA decisions, the Union cites *Association of Civilian Technicians, Tacoma, Washington*, 57 FLRA 475 (2001); *ACT, Volunteer Chapter 103*, 55 FLRA 562 (1999); and *Laurel Bay Teachers Association, OEA/NEA*, 49 FLRA 679, 687 (1994).

Aside from the negotiability of the parties' proposals, of the 24 outstanding issues in this article, 6 "stand above the others in significance and should determine which party's proposal is adopted." They include the Union's proposals in Section 7.H. (the size of the best qualified, or BQ, list); Section 8.A. (the mechanics of the "first consideration" process); Section 8.G. (documentation of the reasons for non-selection); Section 9 (Union access to information); Section 12 (remedies); and Section 15 (the enforceability of career-ladder promotions). Before addressing the merits of its specific proposals, the Union has established both through the results of an opinion survey and one of CBP's own reports concerning discrimination complaints that "management's promotion system gets very little respect" from employees. In addition, if the promotion program that is adopted "leaves the government widely exposed to litigation risk, the [Panel's] decision will fall far short of safeguarding the public's interest and contributing to the effective conduct of public business." Rather than being clear, consistent and transparent, the Employer's proposal would leave managers and the Agency "exposed to charges of discrimination, unintentional formation of past practices, and unilateral deviations from practices without bargaining" that "will breed litigation."

In Section 7.H., the Union proposes to limit the BQ list to the top four candidates, consistent with the NTEU-IRS and NTEU-Customs contracts. If an employer is going to rely on a merit system to select candidates for promotion, it should use the product of that decision in making its selection rather than being permitted "to select the 12th highest rated candidate." Its proposal is still more flexible than typically is allowed in state and local civil service selections, which require that the top scoring candidate be selected. Management should also be interested in selecting from a small number of candidates "to limit its liability under the *McDonald-Douglas prima facie* test," which focuses on whether the selecting official "passed over" higher ranked candidates. As explained above in connection with the Employer's non-negotiability allegations, the Union's Section 8.A. proposal is intended to provide unit applicants consideration for selection before non-unit applicants. This "should boost general employee morale and respect for the promotion system." It also avoids the "pitfalls of the simultaneous consideration system management proposes," among them, selecting a new college graduate instead of an equally talented bargaining unit applicant "lest she not be available for the next vacancy," or avoiding having to replace a unit employee through another promotion action, or deciding "to

gamble on the outside applicant" because, "even though the unit person sits atop the BQ list, he has a minor flaw that management is hoping the outsider does not." Further, providing "first consideration" to unit employees also gives the Employer another defense to a charge of discrimination from a non-unit applicant.

The Union's proposed wording in Section 8.G. would require management "to identify something more than a vague and conclus[ory] feeling to explain non-selection" if the selecting official has passed over the higher merit-rated BQ candidates." The Union has taken its criteria from the courts,[49/] and its proposal "merely reiterates and publicizes management's pre-existing statutory obligation to explain a factual basis for its decision when it passes over higher rated candidates." Its Section 9.A. proposal has been modified so that management's only obligation is to make "all reasonable attempts" to grant the Union "routine user" access to promotion files. This would give it faster access to promotion files because management would not be required to sanitize information as it does now under the Privacy Act and makes management's burden to provide the Union with information easier to meet. In Section 9.D., the Union proposes that management regularly provide it with "seven data elements" that constitute "a standard package of information on every promotion." While the parties could simply rely on the statutory right to information, it is more efficient to adopt the Union's approach, which ultimately could save management considerable money in back pay. This is also consistent with the information formerly provided the Union and employees in the NTEU-Customs contract and, as the practice at IRS confirms, "need not be a burden on management" because the data can merely be posted on an electronic site to which the Union is given access, thereby saving the cost of mailing, copying, etc.

In Section 12, the Union proposes "a fairly standard remedy clause," particularly in comparison to the provisions in the former NTEU-Customs and current NTEU-IRS contracts. While the parties could give arbitrators "no guidance as to how to fashion remedies for improper promotion actions, that would serve no purpose." Under the proposal's "mainstream demand," priority

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49/ The Union refers to *Patrick v. Ridge*, 394 F.3d 311 (5th Cir. 2004); *Chapman v. AI Transp.*, 229 F.3d 1012 (11th Cir. 2000); *EEOC v. Target Corp.*, 460 F.3d 946, 957-58 (7th Cir. 2006); and *Steger v. Gen. Elec. Co.*, 318 F.3d 1066 (11th Cir. 2003), to support its statement.

consideration would be granted to employees who failed to receive proper consideration in a generic vacancy announcement; candidates would be entitled to receive priority consideration for each time they failed to receive proper consideration; and priority consideration would be given using the procedures contained in the article, but be expanded to provide for identification of one additional locational preference per employee. The Union's proposal in Section 15 concerns career-ladder promotions, which employees are entitled to only if they have met a certain performance standard. Consequently, "there is substantial potential that an employee could be denied the next promotion because his supervisor does not believe he has met the standard." Because CBP "has not publicized any standard, much less an objective one," the risk of an incorrect decision falls solely on the employee. To remedy this inequity, its proposal would establish a "nondiscretionary obligation" permitting an employee to obtain a retroactive promotion and back pay if management has denied a career-ladder promotion even though all of the requirements were satisfied. It is "modeled on the many FLRA decisions over the years" about what constitutes such a nondiscretionary obligation,[50/] and is similar to provisions in the NTEU-IRS and the former NTEU-Customs contracts. In contrast, management's proposal "makes it virtually immune from judgment" and "may be its most calloused act yet in these negotiations" because its adoption would result in employees losing the non-discretionary rights to these promotions they have today based on their old contracts.

On the remaining issues in this article, because the Union's proposal in Section 3.A.1. links management's obligation to make a temporary promotion through competitive procedures to cumulative days throughout a year, rather than consecutive days, it "conforms to federal regulation" found at 5 C.F.R. 335.103(c)(ii), while the Employer's does not. Its Section 3.A.4. proposal should be adopted because it would require that, before management can reassign a non-unit employee into a unit position, it must make the non-unit person compete for the position with unit employees who have applied to be promoted to the position. By forcing management "to operate in the open," unit employees would be given a chance to compete for a desirable vacancy, and once the selection is made, the proposal would provide "an audit trail to determine whether the decision

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50/ In support of its contention, the Union cites *NFFE, Local 2030 and U.S. Department of the Interior, Bureau of Land Management, Idaho Falls District Office, Idaho Falls, Idaho*, 56 FLRA 667 (2000).

met all requirements of law." Without such a provision in the contract, management could pass over the promotion procedure by simply deciding to fill the job solely by selecting a supervisor to fill a very desirable unit position, and there would be a "high risk of successful litigation if it clandestinely fills jobs without a documented rationale as to why the decision was made."

The concern behind the Union's proposals in Sections 3.B.2. and 3.B.5. is that management will have the ability to reach into a group of similarly-situated employees, assign one of them a new duty, and then announce that because the employee it chose to give the new duty is working at a higher grade level, he or she will be non-competitively promoted above the others. Its proposals "would merely provide advance notice to the Union as to when management plans to select one of several similarly-situated employees for duties that are higher graded and require a salary upgrade." This mirrors management's collective bargaining obligation to notify the Union in advance of changing working conditions.[51/] With respect to Section 4.B., the Union proposes that employees be permitted to apply for a promotion vacancy "if they work OR LIVE in the commuting area of the vacancy." Management's current definition of commuting areas, on the other hand, "is nonsensical." It would, for example, exclude anyone living in New Jersey from applying for a vacancy in the Philadelphia commuting area, "even though for some employees in New Jersey, a Philadelphia work location is just one bridge away." In contrast, someone living in New Castle, Delaware, which is about 30 miles from Philadelphia, can apply for vacancies in Philadelphia. Moreover, when management solicits applicants via USAJOBS.COM, anyone living anywhere in the world can apply so long as he or she is a citizen of the U.S.

In Section 5.E., the Union proposes that vacancy announcements be open for a minimum of 14 calendar days. This is consistent with the NTEU-IRS contract, which requires vacancy announcements to be open for at least 10 work days, and the former NTEU-Customs contract, which required a 15-day announcement period. The Employer has never explained to the Union why its own employees should be limited to a 7-day window when prospective candidates responding to vacancy announcements

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51/ The Union cites Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, OH and AFGE, Council 214, 25 FLRA 541 (1987) in defense of its claim.

advertised via USAJOBS.COM are given months to apply. The parties' proposals in Section 5.F. concern the payment of moving and related expenses for employees who transfer from one location to another. Because applicants in the first round of consideration can only apply within the commuting area, the payment of such expenses is likely to be rare. Nevertheless, the Union's proposal should be adopted because it would impose the "mechanical" criterion that moving expenses be provided if there are fewer than four candidates, while the Employer's proposal uses wording which is "subjective" and "unenforceable," such as, "as a general rule" and the decision "may be made."

By moving to an automated system, management will know within seconds whether an applicant meets the minimum qualifications of the vacant position. There are a variety of reasons why an employee may be held not to be qualified. The Union's proposal in Section 6.F. would require management to use the computer to promptly inform employees whether they are qualified or not. Employees "should not be denied the opportunity to compete for a promotion because they unintentionally failed to click the box asking whether they had a college degree, entered a date in the wrong format, or reversed two numbers." The Union has even modified its prior proposal on this issue to give management 1 year to comply with the requirement. In Section 7.B.2., the Employer has never explained why it opposes defining the four rating levels it wants to use when ranking promotion candidates. By leaving the rating levels undefined, it "risks losing the right to use its merit system as a defense" against a discrimination allegation. Failure to define rating levels also is "likely [] in violation of federal promotion regulations," specifically, 5 C.F.R. 335.103(a), 335.103(b)(5), and the Uniform Guidelines on Employee Selection Procedures (UGOESP). Moreover, the adoption of the Union's proposal is supported by the fact that the NTEU-IRS agreement "contains definitions of similar terms that drive its promotion ranking process."

The parties propose different wording in Section 8.B. concerning the requirement to interview candidates on the BQ list. Management wants to be able "to pick and choose from the best qualified candidates regarding who actually gets to meet with the selecting official." This is inconsistent with its claim that the Union's proposal that employees be given a chance to correct errors on their digitized promotion applications is non-negotiable because that would not be "fair and equitable" and would grant an advantage "not authorized by law." Although it might have been a burden on management to interview all BQ

candidates under its own proposed BQ list, which called for more than a dozen applicants on each list, under the Union's proposal the BQ list is limited to only four candidates. In Section 8.C., there is no reason why management should not give NTEU notice whenever it changes the content of a vacancy announcement. In all likelihood, such changes would affect working conditions over which the Union is legally entitled to receive notice, and management benefits because "it then places a burden on the Union to either timely request bargaining or lose the right to object." The Union's proposal in Section 8.D. would require its local chapter president to agree before a selecting official could delay selection from a promotion certificate beyond 120 days of its issuance. In this regard, employees "must be eligible for a promotion by the time the announcement closes." Each day after that date, other employees become eligible to apply for the promotion, and it is unfair "to unnecessarily delay a promotion action because if management re-announced the vacancy they would then be able to apply." Furthermore, "a quarter of a year is enough time to sit with a promotion certificate without making a selection."

In Section 8.F., the Union proposes that, where management determines to fill multiple positions in the same commuting area using a single promotion certificate, the highest ranked applicants would have their first choice of placement into the vacant positions. This provides the "clarity, consistency and transparency" management has repeatedly claimed it needs throughout the bargaining process. By not proposing any rules to deal with this situation, "management actually creates precisely the kind of employee confusion and suspicion that is so destructive to morale." If the Employer wants to have the opportunity to choose who it places at each location within a commuting area, all it needs to do is run separate promotion actions. The Union's Section 9.F. proposal "merely makes clear that if it requests information in connection with a promotion grievance, any dispute over access to the requested information will be joined to the promotion grievance." There is no need to generate two separate cases from a dispute over a single promotion action, nor has management explained why it opposes this proposal. Management's approach could lead to an "absurd" result where one arbitrator denies the Union the requested information while another arbitrator draws an adverse inference against management for withholding it.

Under its proposal in Section 13, the Employer would have to provide the Union with the EEO statistics it already is required to collect regarding its hiring and selection processes

under government-wide UGOESP regulations found at 5 C.F.R. § 300.1103(c). Management has never told the Union why it is opposed to supplying data that is important "to drive future refinements of the promotion process." In addition, the proposal "places no burden on management that is not already there, although there is no evidence in the record that [it is] complying with that obligation today." The issue addressed by the Union's proposal in Section 14 concerns management's ability to use any of several financial incentives to attract outside candidates to compete against current unit employees for vacant positions. While it acknowledges that CBP has the discretion to use these incentives, its proposed wording merely requires the Employer to notify and bargain with the Union before it does so. By giving advance notice, "management avoids the risk of being accused of unilaterally implementing a discretion it has and shouldering what could be substantial remedies."

b. The Employer's Position

The Union's proposals in Sections 3.A.(4), 3.B.(2), 3.B.(3), 3.B., 6.F., and 8.A. of this article are outside the Employer's obligation to bargain. In response to the Union's non-negotiability claims, the Employer has modified its proposal in Section 3.B.(10); the Union's legal arguments with regard to the Employer's proposals in Sections 7.H. and 8.D. are without merit. The Union's proposal in Section 3.A.(4) would require management to use merit promotion procedures when it reassigns or demotes a non-unit employee to a unit position "absent the agreement of the chapter president." As such, it "does not address conditions of employment of bargaining unit employees as defined by 5 U.S.C. § 7113 (a)(14)" and, therefore, is outside the mandatory duty to bargain.[52/] Its proposal in Section 3.B.(2) would exclude promotions from actions covered by merit promotion procedures resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard, or the correction of an initial classification error so long as everyone similarly situated in that position is simultaneously upgraded. 5 C.F.R. § 335.103(c)(2)(i), however, specifically

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52/ The Employer cites *Antilles Consolidated Education Association and Antilles Consolidated School System, Fort Buchanan, Puerto Rico*, 46 FLRA 625 (1992) and *United States Department of the Navy, Naval Aviation Depot, Cherry Point, North Carolina v. FLRA*, 952 F.2d 1434 (1992) to support its claim.

provides that such procedures do not apply to "a promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error." Unlike other actions identified subsequently in the regulation, "this section does not provide any agency discretion, and therefore cannot be modified through collective bargaining." Thus, the proposal conflicts with a government-wide regulation and is nonnegotiable.

Similarly, the Union's proposal in Section 3.B.(3), which would exclude position changes required by reduction in force procedures from actions covered by merit promotion procedures, conflicts with 5 C.F.R. § 335.103(c)(2)(ii), which specifically provides that such procedures do not apply to "a position change permitted by reduction-in-force procedures in part 351 of this chapter." Since this section does not provide any agency discretion it cannot be modified through collective bargaining and, therefore, the proposal is nonnegotiable. In Section 3.B., the Union's proposed wording states that the items listed below the section, describing actions not covered by merit promotion procedures, "are the only placement actions that may be done without complying with this article." By requiring management to use these procedures, notwithstanding the existence of any authority provided for by government-wide law, rule or regulations that authorize appointment or placement without competition, the proposal excessively interferes with management's right to make selections for appointments from among properly ranked and certified candidates from promotion or any other appropriate source, under 5 U.S.C. § 7106 (a)(2)(C).[53/]

Among other things, the Union's proposed wording in Section 6.F. would require management to notify all non-qualified candidates why they were not qualified, and give them 48 hours to correct any entry error that was made before any of the candidates are ranked. 5 U.S.C. § 2301 (b)(1), however, requires recruitment to "be from qualified individuals . . . and selections should be determined solely on the basis of relative ability, knowledge, and skills, after ***fair and open competition which assures that all receive equal opportunity.***" [emphasis added]. Subsection (b)(2) further states that "[a]ll employees and applicants for employment should receive fair and equitable

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53/ The Employer also contends that in *ACT, Treasure State Chapter #57 and Montana National Guard, Helena Montana*, 56 FLRA 1046 (2001), the FLRA found "a practically identical proposal" is not an appropriate procedure.

treatment." Under the Union's proposal, "a subset of applicants (those who were found not to qualify for the position) would be provided additional time to change, amend, or adjust their application packages, while those who did qualify would not be afforded same." Based on the above, consistent with 5 U.S.C. § 7117(a), the Union's proposal is nonnegotiable "as it conflicts with government wide-rule and regulation."[54/] In addition, the proposal would require the Employer to "grant a preference or advantage not authorized by law, rule or regulation to an employee or applicant . . . for the purpose of improving or injuring the prospects of any particular person for employment," which constitutes a prohibited personnel practice under 5 U.S.C. § 2302 (b)(6) and Section 2.F. of Article 7 of the parties' CBA.

Finally, the Union's proposal in Section 8.A. would prohibit selecting officials from considering non-unit applicants until they have made "final decisions" on whether to select internal BQ candidates. This "goes far beyond a procedural first-consideration requirement found negotiable under long-established FLRA precedent.[55/] In addition, the proposal requires that a determination be made on whether to select a lower ranking unit applicant prior to the evaluation of a higher ranking non-unit candidate. This excessively interferes with management's right to select among properly ranked and certified candidates for promotion or any other appropriate source, under 5 U.S.C. § 7106(a)(2)(C). The proposal is also contrary to 5 C.F.R. § 335.103a(5), which requires selection procedures to:

> [P]rovide for management's right to select or not select from among a group of best qualified candidates [and to] select from other appropriate sources, such as reemployment priority lists, reinstatement, transfer, handicapped, or Veteran Recruitment Act eligibles or those on [] an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals.

54/ In support of its assertion, the Employer cites *Local 556, SEIU and Department of the Navy, Navy Exchange, Pearl Harbor, Hawaii*, 25 FLRA 796 (1987).

55/ The Employer cites *AFGE, Local 12 and U.S. Department of Labor*, 61 FLRA 209 (2005) in this connection.

The proposal would clearly prohibit management from exercising such rights.

Turning to the Union's non-negotiability contentions concerning the Employer's proposal in Section 3.B.(10) that would exclude "any other action permitted by law or government-wide regulation without competition" from merit promotion procedures, it "is intended to capture the parties' agreement codified in its implemented Effect of Law & Regulation contract article" for dealing with government-wide laws and regulations at the time this agreement is executed, or after the agreement is executed. To alleviate the Union's concern, the Employer has modified the wording "to avoid a negotiability dispute," and is now proposing to exclude: "Any other action permitted by law or government-wide regulation (in effect on the date of this agreement) without competition" from merit promotion procedures as its new Section 3.B.(10) proposal. This adjusted wording is within the duty to bargain "as it mirrors the parties' current contractual obligations," and meets the standard cited by the Union in FLRA precedent.

The Union's contention that it is not obligated to bargain over the Employer's proposals in Section 7.H. and 8.D., which would provide management with flexibility in the selection of candidates to promote diversity goals and affirmative action, should be rejected. It characterizes the proposals as "a protective layer of *dicta* legitimacy" and further asserts that the Agency is prohibited from establishing work rules in order to promote diversity. To the contrary, the Agency's proposals "are significantly linked to the requirements of government-wide rules and regulations" and, rather than conflicting with them, "are within the mandatory duty to bargain." In this regard, 5 C.F.R. § 335.103(b)(4) includes wording obligating agencies "to determine which selection source is the most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals." 5 C.F.R. § 335.103 (b)(1) requires that actions under an agency's merit promotion plan "must be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying physical handicap, or age, and shall be based solely on job-related criteria." 5 U.S.C. § 2301(b)(1) requires recruitment to "be from qualified individuals . . . and selections should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." Consistent with the requirements of 5 U.S.C. § 7117(a), the FLRA has long

held that proposals are only negotiable to the extent they are not inconsistent with law, government-wide regulation, or agency regulation for which a compelling need exists.[56/] Accordingly, the Arbitrator should find the Agency's proposals consistent with government-wide law, rule, and regulation, and within the mandatory duty to bargain.

Moving to the merits of the parties' disagreement in this article, CBP's merit promotion plan has been in place for the entire Agency, including the Office of Border Patrol whose bargaining unit will soon be larger than the one represented by NTEU, since shortly after its establishment in 2003. While it may be possible to manage the program with slight differences, depending on which bargaining unit the position being filled belongs, "it is in the interest of all employees to maintain a certain level of consistency in application and evaluation procedures so that all employees across the Agency understand the process and are treated fairly for all positions to which they may apply." Consequently, the Arbitrator should be mindful of how changes in the merit promotion plan will impact the administrative process and employees who are not covered by this CBA. Throughout negotiations, the Employer "made adjustments and offered compromises whenever the Union has sufficiently demonstrated the existence of a legitimate problem or opportunity for improvement to the process." At this point, the Employer's last best offer provides the more reasonable basis for settlement given the lack of evidence offered by the Union that there are significant problems with the current merit promotion plan. Despite "the many thousands of actions the Agency has processed through its merit promotion process, it has only received a handful of challenges." During the hearing, instead of demonstrating any problems with the Agency's processes, the Union attempted to justify its proposed changes based on problems at other Agencies. Thus, "the Union's proposals are aimed at fixing problems that do not exist at this Agency, or at best, address issues that are speculative." Because the Union has had more than 7 years of experience with the Agency's processes and has not met its burden of demonstrating a need for any of the changes it proposes its proposed article "should be summarily rejected, and the Agency's adopted in its entirety."

56/ To support its allegation, the Employer cites *Local 556, SEIU and Department of the Navy, Navy Exchange, Pearl Harbor, Hawaii,* 25 FLRA No. 65 (1987).

CONCLUSION

After reviewing the arguments and evidence presented by the parties regarding the numerous issues at impasse in this article, on balance, I am persuaded that the Employer's final offer provides the better basis for resolving the dispute. While many of the issues appear to be minor, the most significant in my view involve: (1) the number of best qualified applicants that should be forwarded to the selecting official; (2) whether unit employee applicants who are deemed unqualified should be given 48 hours to supplement their applications; (3) first consideration of unit employee applicants; and (4) whether the top ranked applicant should get first choice of placement where multiple positions are filled. On the first issue, the Union proposes that the top four candidates be referred to the selecting official, whereas the Employer would refer candidates who are within 12 points of the top candidate as long as there are at least 5 and no more than 15. In my judgment, the Employer's proposal would allow too many candidates to be referred and, therefore, too much discretion for the selecting official. On the other three issues, however, the Employer's position is superior. In this regard, the Union has not given a compelling rejoinder to the Employer's contention that providing unit employees 48 hours to correct their applications is a violation of merit principles. Its response that violations of merit principles may only be addressed through prohibited personnel practice complaints processed by the Office of Special Counsel is unimpressive, and the implication that potential violations of merit principles should be ignored because they probably will not be addressed must be rejected. With respect to the issue of first consideration, while the parties present conflicting arguments on the negotiability of the Union's proposal, that underlying threshold question need not be addressed because, on its merits, the Union has failed to justify its requirement that a definitive determination be made on whether to select a lower ranking unit applicant prior to the evaluation of a higher ranking non-unit candidate. If the goal is to select the best candidate for the position, there is no reason why the selecting official should not be permitted to reconsider unit applicants after reviewing the applications of non-unit candidates. To prohibit a selecting official from doing so, as the Union's proposal clearly requires, also appears to be detrimental to the interests of the employees the Union represents. Finally, permitting top ranked applicants to choose where they are placed when multiple positions are filled would essentially allow employees to select their supervisors. Such a

constraint on the Agency's placement of employees appears to be unwarranted.

Thus, in evaluating the parties' positions on the merits of the issues before me, overall I favor the Employer's approach, particularly in light of the Union's admonition that "evidence should anchor each party's presentation, no matter what the argument." In this regard, there is little, if any, evidence in the record indicating problems with the way the Employer has conducted the thousands of merit promotion actions it has taken since 2003 that would support the imposition of the Union's safeguard-laden final offer. Moreover, the Employer has modified its proposal in Section 3.B.(10) to address the Union's negotiability concern and, contrary to the Union's contention, the Employer's proposed wording in Sections 7.H. and 8.D., which are intended to promote diversity goals and affirmative action, appear to be consistent with Government-wide rules and regulations. In any event, if the provisions are disapproved on agency head review, as the Union predicts, the parties will have another opportunity to address the matter. Accordingly, the parties shall be ordered to adopt the Employer's final offer on the Merit Promotion article.

13. Permanent Reassignments to Other Duty Stations (Union)/Reassignments (Employer)

a. The Union's Position

In Section 4., among other things, the Employer proposes that it have the unilateral right to reassign an employee to a position within his/her duty station or commuting area for the purpose of correcting or minimizing deficiencies in the employee's performance or conduct. As management's application of this unilateral right would be standardless, enabling it to take "two similarly-situated employees with whatever management considers to be a performance problem and reassign one but not the other," it violates the *McClatchy* rationale the Union has urged the Arbitrator to adopt in evaluating the parties' final offers in this impasse. It is nonnegotiable because the "Union is entitled to more specificity in the face of a proposal which grants management the right to unilaterally make what would otherwise be negotiable mid-term changes."

The Employer's contentions that the Union's proposals in Sections 2.A. and B., 2.L., 6 and 7 are outside its duty to bargain are without merit and should be rejected by the Arbitrator. Contrary to its claim that the Union's proposal

in Section 2.A. and B. is non-negotiable because it denies management the right to fill the position from any appropriate source, this proposal merely provides that once management has decided to fill a position "it will first look to see if any employees currently occupying the same position (series, schedule/grade, title) want to relocate to that location from their current location. Assuming they meet the qualifications, they would be relocated by seniority." A position in the port from which they came would then be vacant, at which point, if there are no other employees interested in relocation, management could decide to fill that position from whatever source it chooses. In addition, when faced with the same argument that a relocation/reassignment proposal conflicted with management's appropriate source right, the FLRA found that it did not involve that right in "any way."[57/] This is consistent with a long line of FLRA decisions holding that, where the employee performs the work he or she is currently assigned does not involve a management right, but merely the location of where the employee performs his work.[58/]

The Employer contends that the Union's proposed Section 2.L., which states that employees in the same occupation as defined by series and position title are qualified for the same position at another duty station, interferes with management's right to determine qualifications. To the contrary, if management wants to deviate from what the proposal defines as the current practice, it merely needs to serve notice and the Union will negotiate over the matter. The Employer also suggests that, even though employees occupy the same position, "one may not be qualified to replace the other." While the FLRA recognizes management's right to set qualifications for a position, the only qualifications the Union has been made aware of for any CBP position "are those approved by OPM and printed on every vacancy announcement." Management, nevertheless, "has a habit of suddenly finding new qualifications that must be met

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57/ The Union cites *NAGE, Locals R4-45 and R14-23 and U.S. Department of Defense, Defense Commissary Agency, Central Region, Virginia Beach, VA and Midwest Region, Kelly Air Force Base, Texas*, 54 FLRA 218 (1998)(*Defense Commissary Agency*).

58/ In connection with this claim, the Union cites FLRA decisions in *NTEU and Internal Revenue Service*, 28 FLRA 40 (1987) and *American Federation of Government Employees, Local 987 and Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 5 FLRA 83 (1981).

when an employee wishes to reassign, but they do not want him or her," or when it wants a specific person and then tailors the additional qualifications to fit only that person. The Union accepts management's right to set qualifications, subject to the limits of law and regulation, but objects "to wording which suggests that they are more than being in the same position (series, title, grade)."

While the Employer alleges that the Union's proposal in Section 6 is non-negotiable, "if anything is non-negotiable, it is the Employer's proposal," which ignores the requirements of 5 U.S.C. 4302(b)(6) that, when an employee is performing at an "unacceptable" level he may be terminated, demoted, or reassigned, but "only after an opportunity to demonstrate acceptable performance." Unlike the Employer's proposal, the Union's is consistent with statutory requirements because it only permits management to make the reassignment permanent where the employee has been issued a Performance Improvement Plan," or PIP, and the employee has failed to demonstrate acceptable performance. In addition, "the content of a PIP is of critical importance and has been addressed often by the MSPB."[59/] Thus, if the Employer wants to make the reassignment permanent as permitted by law, it should "comply with proper procedures." With respect to the Union's proposal in Section 7, which would require the Employer to provide it with notice and an opportunity to bargain if it intends to involuntarily reassign an employee to a non-bargaining unit position, the FLRA has ruled that "such a reassignment carries an obligation to negotiate" with the Union.[60/] Consequently, "management's position borders on being a waiver demand — not to mention another reckless, disingenuous assertion designed to mislead the Panel and further delay proceedings."

59/ According to the Union, the case it cites, *Peter Macijauskas v. Department of the Army*, 34 MSPR 564 (1987), also identified other relevant factors in determining whether an agency has afforded an employee a reasonable opportunity to demonstrate acceptable performance, including: the nature of the duties and responsibilities of the employee's position, the performance deficiencies involved, and the amount of time necessary to provide the employee with an opportunity to demonstrate acceptable performance.

60/ In this regard, the Union cites *Customs and Border Protection, Washington, D.C. and NTEU*, 63 FLRA 434 (2009).

On the merits of the 13 issues in dispute in this article, those addressed by the Union in its proposals in Sections 2.B., 2.E.(c) and 3.D. are the most significant and should determine which party's offer is selected. In Section 2.B., the Union seeks to establish "an objective selection process for those employees who wish to move to another location to do the same job they are assigned to do today." It proposes that, once all of the other appropriate sources of internal candidates for an existing vacancy are examined/selected, management agree to let existing unit employees move into one of every two vacancies in a location "via this objective method." This would not bar management from filling as many vacancies as it wants but "would merely impact where those new employees could be placed." It should be adopted because a current employee "should have the right to move to another location before management hires a total stranger to fill the vacancy," perhaps to move to an area closer to extended family, with better health care or educational facilities, or even just to "get away." Refusing employees the ability to be objectively selected for relocation would impact morale and increase attrition, as the employee denied any opportunity to move within the Agency inevitably would look outside CBP for a position in the desired location. A similar provision is contained in the NTEU-IRS contract, and the former NTEU-Customs contract already entitles employees to bid where they will perform their assigned duties within a port. Consequently, the Union "fails to see any additional harm" from providing the more expanded relocation opportunities its proposal would provide.

NTEU has offered to make the proposal easier to operate by giving management the flexibility to make the relocation decision as vacancies arise or at the beginning of a hiring cycle. All of this could be done in 5 to 10 workdays, "at which point management would be free to start making offers to the college graduates." There is no basis for the Employer's claim that this would be difficult to operate and its approach "would be far easier than management's current approach of posting reassignment opportunity announcements, vacancy-by-vacancy, when it does want to hire experienced CBP employees." Nor did the Employer present evidence that if it is forced to place a new, untrained, probationary employee in one location rather than another CBP would be harmed. Furthermore, under management's proposal, it merely would fill one out of every two vacancies through relocation "if it has decided not to fill it with a new hire." That would effectively reduce CBP's relocation program to being totally within management's discretion or "a total fiction." Moreover, management also proposes that even where it

decides to use the relocation program it can pass over someone with the "just cause" exception, which is why the Union "has raised a *McClatchy* objection to adoption of this provision." Finally, the Employer's exhibit purporting to show that it reassigned over 2,000 employees in one recent year should not "be taken as evidence that there is a thriving system of voluntary reassignments to preferred locations." While the exhibit indicates that there is substantial interest among employees in relocating, it does not demonstrate that there is an objective selection system, *i.e.*, "anything objective about when managers decided to relocate rather than hire anew," or that the reassignments all involved voluntary relocations or were unconnected to other benefits, such as increased promotion potential.

Its Section 2.B. proposal includes wording that would require the Employer to use the relocation reassignment procedure to fill two out of every three vacancies for those locations in the commuting areas of San Diego-San Ysidero and Miami, and to move those employees volunteering for reassignment who already work within the commuting area to the top of the seniority list before all other candidates. Miami and San Diego are "probably the most desirable areas in which to live and will generate a lot of employee voluntary relocation interest." Its proposal supports that, but would also give local employees an opportunity to move around to different locations in those areas before others relocate there. In addition, San Diego is unique because "management has broken what not long ago was one port into many smaller ports and in the process made it much harder to move between locations" and, in particular, to transfer from the undesirable port at San Ysidero. Without the exception proposed by the Union, employees may be relocated from other parts of the country to the very desirable downtown San Diego sea and air ports before the employees at San Ysidero, and "the relocation program will only generate local morale problems."

Under its proposal in Section 2.E.(c), a reassignment preference would be given "to those employees whose spouses must move in order to retain a job or take a promotion opportunity." When so many families have two working spouses, "it seems calloused not to try to do something for CBP employees in these situations." Given that NTEU is only establishing a preference, "not an immediately enforceable right," the proposal strikes "the right balance." In contrast, management has offered an extremely limited preference which would not include employees whose spouses are in the military or in the federal government, and apply only in situations where spouses were "involuntarily

reassigned." It is unclear why CBP would deny a reassignment preference to the spouse of an employee it just promoted which would amount "to identifying the best person for promotion and then cutting the chances of the employee accepting the promotion because of the hardship of maintaining two households and spousal separation."

The Union's proposals in Section 3.D., dealing with hardship relocation reassignment, and Section 2.L., concerning the voluntary exchange of duty stations, both start with a presumption that employees in the same position are interchangeable, but recognize that if management wishes to "create" additional qualifications for moving within a position, it will notify the Union and bargain first. Its approach is more reasonable than the Employer's because it would "minimize the chance of error and remedial costs." The Employer's proposal should be rejected for a number of reasons. It is a "litigation starter" because its opening sentence would permit a position exchange "absent just cause" but its last sentence creates "an exception" without explaining whether the exception is an example of "just cause" or in addition to it. Second, the proposal suggests that "even though employees occupy the same position (title, series and grade), one may not be qualified to replace the other." While the FLRA recognizes management's right to set qualifications for a position, the only qualifications the Union has been made aware of for any CBP positions are those approved by OPM and printed on every vacancy announcement. Thus, the Employer's proposal goes beyond the requirements of law and regulation by suggesting that there are qualifications other than being in the same position and that the Union already is "aware of these qualifications requirements for moving within a position and therefore has no right to negotiate when they are used."

Among the other remaining issues in the article, its proposal in Section 2.A. includes the placement of returning pre-clearance employees in the "order of consideration" list for employees requesting reassignments. The Employer's proposal does not, and "creates the question of where in the order of consideration management may turn to the preclearance returnee." In Section 3.A., the Union's proposal would create "only a minor impact on management" requiring it to "consider" swaps between employees at different grades, e.g., a CBPO GS-9 for a CBP GS-11, but "no enforceable obligation." The Union's proposed wording in Section 5.A., which acknowledges management's right to direct reassignments outside the duty station, includes an extra subsection "in recognition of the reality that there may

be cause why management does not or cannot reassign the most senior volunteer." In that event, the Union "wants a clear record as to why." Its proposal in Section 6 would ensure that employees receive the protections they are entitled to under 5 U.S.C. 4302(b)(6) before the Employer can exercise its right to reassign them to a position within their duty station, commuting area, or home for the purpose of correcting or minimizing deficiencies in performance or conduct. Management's proposal, on the other hand, would permit it to reassign an employee without ever providing a PIP. The Union "refuses to abandon those employee protections for a permanent reassignment," and its offer of a 120-day reassignment "is a reasonable balance between the two parties on this issue."

As the Union stated previously when it addressed the Employer's claim that its proposal in Section 7 is nonnegotiable, "management's position borders on being a waiver demand." Even if it is not, "not placing this now clarified rule among all the other bargaining rules makes no sense." Finally, its proposal in Section 8 would provide CBP Canine Officers whose canines have died, retired, become unneeded, or otherwise become unavailable, a one-time right to reassign into a Canine Officer vacancy that becomes available anywhere during the 12-month period after losing the canine and management does not have another dog available at the duty location to assign. Currently, management "simply removes the 'canine' designation from his or her position title and they return to being a CBP[O] at that location, unless assigned a new dog." The Employer's approach could result in "absurd" situations where management would have to select and train another CBPO in the canine specialty even though a canine officer already is available in the same commuting area. Moreover, there is no reason why "there should be any geographic limit on where the canine officer relocates." Canine officers can only go where management has a vacancy it wishes to fill, and the reassignment results in management getting a trained and experienced canine officer "instantly" with moving expenses paid by the canine officer.

b. The Employer's Position

The Union's proposals in Sections 2.A., 2.B, 2.L., 6 and 7 are outside the Employer's duty to bargain, and the Union's claim that the Employer's proposal in Section 4. is outside its duty to bargain because it enables the reassignment of one employee, but possibly not another, is without merit. In Section 2.A., the Union would require the Employer to reassign

an employee upon making a determination to fill a position. By prohibiting management from filling positions through any other method than reassignment, the proposal excessively interferes with management's right to make selections for appointments from among properly ranked and certified candidates from promotion or any other appropriate source, under 5 U.S.C. § 7106(a)(2)(C).[61/] Similarly, because the Union's Section 2.B. proposal would require the Employer to fill at least one out of every two positions through the granting of employee reassignment requests, it also excessively interferes with management's right to make selections for appointments from among properly ranked and certified candidates from promotion or any other appropriate source, under 5 U.S.C. § 7106(a)(2)(C). In addition, as the Union explained, the proposal "is designed to ensure senior employees (GS-11 level) are placed into positions rather than new hires at the entry level (GS-5 and GS-7 levels)." Its effect, therefore, is "to dictate to the Employer the grades of employees and positions assigned to an organizational subdivision," a matter that is negotiable only at the election of the Agency, under 5 U.S.C. § 7106 (b)(1).

In Section 2.L., the Union proposes that employees in the same occupation, as defined by series and position title, be considered qualified for the same position at another duty station and, if management wants to deviate from that practice, the Union be notified in advance, given a copy of any documentation related to the validity of the qualification requirement, and the opportunity to negotiate. The Agency, however, "has not asserted, nor has it established a practice at any time" that occupancy of a position with a certain occupational title and series represents or demonstrates that an employee is qualified for every other position of the same occupational title and series. In fact, the establishment of such a practice would run contrary to the purpose and function of the government-wide classification and qualification evaluation systems established by OPM, which were "never intended to imply that employees occupying a position within a class are assumed to possess the qualifications required for every other position within that class." In its Introduction to Classification Standards, OPM explains that:

> Jobs within an occupation frequently vary so extensively throughout the government that it is not

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61/ The Employer cites *ACT, Treasure State Chapter #57 and Montana National Guard, Helena, Montana*, 56 FLRA 1046 (2001).

> possible to reflect in a standard all the possible combinations and permutations of duties and responsibilities. Proper application of standards, therefore, requires the use of judgment rather than just a mechanical matching of specific words or phrases in standards. Regardless of the format of the standard being used, it should be viewed in terms of its overall intent, and considerable judgment is needed in determining where work being classified fits into the continuum of duties and responsibilities described by the standard.

Further, "the categorization of a position into a class does not in any way dictate what qualifications are required to perform the duties of a specific position." Under the OPM Qualifications Standards Operating Manual, qualifications determinations are be made on an individual basis, *i.e.*, "the evaluation of an individual's experience as it relates to the specific duties of the position being filled, not on the general class of the position or that the employee has previously occupied." Just as it would be inappropriate to presume that all employees occupying a System Accountant position are qualified to perform all System Accountant positions, even within the same agency, without the evaluation of the specific duties and responsibilities of the position being filled compared to the qualifications of the individual being considered for the position, similarly, "the Union's proposal forces the Agency to presume that all CBP[O]s are interchangeable, which is not the case." In this regard, the CBPO occupation covers a wide spectrum of inspection and interdiction work that is also easily distinguishable based upon the environments in which an employee operates. The presumption that employees who work in these environments are interchangeable, therefore, "is contrary to law, rule or government-wide regulations," specifically, OPM's classification and qualification standards.

The Union's proposal also interferes with the Agency's ability to make qualification determinations and, therefore, excessively interferes with management's right to assign employees, under 5 U.S.C. § 7106 (a)(2)(a), and to assign work and determine the personnel by which agency operations shall be conducted, under 5 U.S.C. § 7106 (a)(2)(B). In this regard, the FLRA has found that proposals prohibiting management from making qualifications determinations "cannot be construed as a

procedure or appropriate arrangement."[62] The proposal also addresses the types of employees assigned to an organizational subdivision, which is negotiable only at the election of the Agency, under 5 U.S.C. § 7106(b)(1). Furthermore, to the extent the proposal requires management to notify and bargain every time it makes "routine decisions" regarding the qualifications required to perform work, it prevents the Agency from negotiating a single CBA addressing the conditions of employment for employees within the unit. Although it "may elect to bargain over such matters," it is outside CBP's duty to do so.

The Union's proposed Section 6 would prohibit the Employer from reassigning an employee for a period of more than 120 days in order to correct or minimize deficiencies in the employee's performance or conduct. It is well established, however, that proposals limiting the duration of assignments in this manner interfere with management's right to assign and direct employees, under 5 U.S.C. § 7106(a)(2)(A), and to assign work and to determine the personnel by which agency operations will be conducted, under 5 U.S.C. § 7106(a)(2)(b).[63] In Section 7, by requiring management to provide the Union with notice and an opportunity to bargain if it intends to involuntarily reassign employees to a non-bargaining unit position, the proposal would force the Employer "to waive its unilateral right to have one contract with the exclusive representative of the bargaining unit by insisting to impasse on piecemeal bargaining." While a party is free to propose such a concept, neither party is obligated to negotiate over it through impasse.[64] Moreover, the FLRA has found a party engaged in bad faith bargaining when it insisted on negotiating separate agreements for different segments of one bargaining unit.[65] Here, the Union's response to

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62/ In this connection, *AFGE and HHS, Sacramento, California*, 49 FLRA 845 (1994)(*Sacramento*) is cited by the Employer to support its contention.

63/ In addition to *Sacramento*, the Employer cites *AFGE and DOL, Philadelphia, Pennsylvania*, 37 FLRA 828 (1990) to support its position.

64/ The Employer cites *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions and AFGE, Council No. 242*, 53 FLRA 1269 (1998).

65/ *Department of Defense, Department of the Army and the Air Force , Headquarters, Army and Air Force Exchange Service,*

CBP's article that includes a standardized set of procedures and arrangements for involuntary reassignments is to negotiate a different agreement every time an employee is involuntarily reassigned. Not only has the FLRA ruled that such a tactic violates the obligation to bargain in good faith, but the NLRB has found this approach to be "a cancer on the collective bargaining process."[66/]

The Arbitrator should reject the Union's position that the Employer's proposal in Section 4., which involves the reassignment of employees to positions within their duty stations or commuting areas for the purpose of correcting or minimizing deficiencies in the employee's performance or conduct, is outside its duty to bargain. It provides only bare assertions "with no mention of an authority or other legal precedent supporting its claims." The proposal is a set of procedural steps that management will follow when effecting its right to assign employees, under 5 U.S.C. § 7106(a)(2)(A). The FLRA recently confirmed long-standing precedent that management's right to assign employees includes the right to reassign employees to different positions and to make temporary assignments or details.[67/] From what it "can decipher," the Union appears to be contending that the proposal is outside the duty to bargain because it enables the reassignment of one employee, but possibly not another. This assertion "is without legal merit inasmuch as the right to assign employees includes the right to refrain from assigning employees."[68/] Accordingly, the Arbitrator should find that the proposal is a procedure

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Dallas, Texas, 19 FLRA 652 (1985) is cited by the Employer in this regard.

66/ To support its claim, the Employer cites *E.I. Dupont de Nemors and Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007), where it alleges the court references NLRB precedent that a party has a right to insist on negotiating an entire contract rather than engaging in piecemeal bargaining over a particular subject.

67/ The Employer cites *United States Dep't of the Navy, Naval Undersea Warfare Ctr., Div. Newport, Newport, Rhode Island*, 63 FLRA 222 (2009) in support.

68/ The Employer supports its position by citing *United States DOJ, Fed. Bureau of Prisons, Metropolitan Detention Ctr., Guaynabo, Puerto Rico*, 57 FLRA 331 (2001).

"flowing from its statutory rights and within the mandatory obligation to bargain."

On the merits of the issues in this article, the most important areas of disagreement are: (1) the employees covered under the annual solicitation procedure for voluntary reassignments; (2) when the Agency will use the employee requested reassignment rosters; and (3) how qualifications determinations are made for position exchanges. With respect to annual solicitation procedures, the Union abandoned its initial agreement with the Employer that such procedures, and the establishment of rosters, was only warranted for positions in the unit's primary occupations, CBPO and CBP Agriculture Specialist. Instead, it is now proposing that the Agency solicit employee interest to be reassigned on an annual basis and maintain rosters for employees at every position and grade level. Employees in other occupations do not currently have any negotiated procedures under which they may express or submit an interest in relocating to another location, other than through vacancy announcements or their own personal efforts. The Employer's proposal provides "a clear procedure by which such requests will be submitted, considered and maintained." While the Union's proposal also meets these goals, it does so at the "very high cost" of requiring the Agency to conduct an annual solicitation and maintain rosters for each of its hundreds of job occupations, and at each grade level. The numbers of employees occupying these non-majority occupations "do not create the economies of scale necessary to warrant the establishment of a national roster system for these types of positions." The more direct application procedure proposed by the Agency is more practical, workable and appropriate for these circumstances.

Regarding the issue of when the Agency should use the employee requested reassignment rosters, under the Union's proposed wording, when filling a position at a location, the Agency "***will reassign*** (emphasis added) the most senior qualified employee" from the sources listed. The section continues to require that where there are qualified employees on the voluntary reassignment lists, "the Agency "***will fill***" (emphasis added) at least one out of every two vacancies through voluntary reassignment." The Employer's proposal, in contrast, establishes procedures for reassigning employees once it has made some key determinations as to the general source it wishes to pull from. The Employer addressed the Union's "unsubstantiated fear" that it would not use these procedures by offering to document its election to fill not less than one out of every two positions

not filled with probationary or trial period employees through these methods. Its proposal also is more workable and appropriate than the Union's approach to filling positions, which "would result in a never-ending string of job offers and placements throughout the Agency that would be practically impossible to track." In addition, such an approach would interfere with the Agency's ability "to fulfill its succession planning obligations by making it practically impossible to anticipate the locations at which it needed to recruit new employees," given that such decisions are made more than 2 years in advance of the employee's reporting date. The Union's assertion that "management abuses" justify its approach "is completely and wholly unfounded and has no merit." As the record demonstrates, management regularly uses voluntary reassignments as a method for filling positions, with more than 2,000 reassignments in FY 2008 alone, even without formal contract procedures and under a more complex announcement and application procedure. The increased availability of a roster of employees ready to voluntarily relocate will likely result in the increased use of this method over other methods that take much longer to effect. As a result, "the Union's proposed mandated use is unnecessary." Based on the above, the Employer's proposal "best meets the needs of the parties."

Concerning the final significant issue of qualifications determinations, the Union's proposal "is based on a presumption that all employees in a given occupation are qualified to perform all work associated with that occupation." This presumption is "untrue" and "nonsensical" given that positions within the same occupation have differing titles and perform highly specialized work in certain environments. Such determinations must be made on a case-by-case basis and in relation to the position(s) being filled. While the Employer has never adopted a practice of making presumptive qualifications determinations, its proposal nevertheless attempts to meet the Union's interest in reducing potential qualifications roadblocks to placing employees through this procedure. In Section 2.C.(1)(f), except when an employee lacks skills and/or training that would hinder port operations if the employee were placed, management has elected "to provide the necessary training when the employee arrives at the location." This approach is essentially identical to that adopted elsewhere in the agreement, and establishes the "perfect balance" between the Union's interest in increasing the number of employees considered qualified and management's need to ensure that operations are not unnecessarily disrupted.

CONCLUSION

Having thoroughly considered the evidence and arguments presented by the parties with respect to the Reassignments article, I shall order the adoption of the Employer's final offer. Preliminarily, as set forth at the beginning of this *Opinion and Decision*, the Union urges the Panel to be guided by the private sector principles enunciated in *McClatchy* in breaking federal sector impasses. According to the Union, this means, essentially, that any Employer proposal giving management unilateral discretion over a matter constitutes bad faith bargaining, and should be rejected. It is appropriate to address this so-called *McClatchy* standard here because the Union specifically states that I should reject the Employer's final offer on this article on that basis. In my view, the Union has seriously misread the *McClatchy* decision, where the Court of Appeals for the District of Columbia Circuit approved the NLRB's *Colorado Ute* doctrine. *See Colorado-Ute Elec. Ass'n,* 295 NLRB 607 (1989), *enf. denied,* 939 F.2d 1392 (10th Cir. 1991). In this regard, in *NLRB v.* Katz, 369 U.S. 736 (1962), the Supreme Court held that an employer violates § 8(a)(5) of the NLRA when it makes a unilateral change in a mandatory subject of bargaining without negotiating to impasse. Under *Colorado Ute* and *McClatchy*, an employer violates § 8(a)(5) when it unilaterally implements after impasse its proposal that it may grant merit raises completely at its discretion, without any specific standards to guide the decision, and not subject to review through the grievance and arbitration procedure. The NLRB regards that as tantamount to a refusal to bargain at all. Those cases do not hold, however, that it is a ULP for an employer to propose a provision that grants it unreviewable discretion over a mandatory subject of bargaining. On the contrary, the Supreme Court has held that such a proposal, and insistence to impasse on such a proposal, is not a ULP. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). Thus, *McClatchy* does not provide support for applying the standard of review regarding the merits of proposals that the Union urges, and it shall not be used as guidance for rendering merits decisions in this case.

With respect to the merits of the parties' proposals in this article, the key issue involves their different versions of a reassignment selection procedure. Under the Union's approach, after all of the other appropriate sources of internal candidates for an existing vacancy are exhausted, management would be required to permit current unit employees to move into one out of every two vacancies at a location on the basis of

seniority, except in San Diego and Miami, where two out of every three vacancies would be filled by current employees interested in being reassigned to those locations. Under the Employer's approach, current employees seeking reassignments would be selected for one out of every two vacancies, but only if management decides not to fill vacancies with probationary employees. As stated elsewhere in this *Opinion and Decision*, the practices established in the expired Customs-NTEU contract provide the best benchmark for determining whether a proposal will work rather than disrupt operations. Compared to the reassignment provisions established in Article 20, Part III of that contract, the Employer's final offer clearly is more consistent with what was agreed upon in 1996 and can be viewed as an incremental improvement over those practices. The Union's final offer, on the other hand, goes well beyond anything the Customs Service or CBP have ever attempted with respect to employee requested reassignments. As the party proposing the more substantive change to the *status quo*, NTEU has the initial burden of demonstrating why such a change is necessary. The record evidence, including the Employer's FY 2008 reassignment data, does not support the conclusion that management has abused its reassignment authority over the past 7 years or otherwise deviated from the parties' practices under the Customs-NTEU contract. Although the Union argues that its final offer is needed to address major problems with employee morale, there is no evidence in the record supporting the Union's claim that the Employer's approach will render the employee requested reassignment program "a total fiction." Thus, the Union has not demonstrated a need for such a substantial change to the status quo.

14. Preclearance

a. The Union's Position

Preclearance sites are duty stations located outside the U.S. where travelers are cleared for entry into the country before they leave foreign soil. There has been a special process for staffing these locations for many years. The prior NTEU-Customs contract contained provisions governing preclearance duties but both parties' proposals differ from what was previously in that agreement. There are two disputed sections that "stand above the others in terms of their impact," the first of which deals with the issue of what compensation should be provided to an employee if he or she is not provided adequate advance notice of a move. In this regard, employees need to terminate any housing leases or rent any home owned,

lease living quarters in the new location, arrange for household goods to be moved at a certain time, release and then obtain utilities, and arrange any school transfers. In Section 4.B., the Union proposes that if employees are provided less than 60-days notice, the minimum needed for an employee moving to a pre-clearance location for what is most likely to be a 5-year period, they will be reimbursed for any legal expenses reasonably incurred as a result of their departure for the preclearance port.

While the parties agree that employees will ideally receive 120-days notice, "management will not offer an ironclad guarantee," which makes the proposal "so vital." Such expenses could be the cost of a late lease termination, a furniture storage fee, or a lost school tuition payment. The employee would also be considered to be on a temporary duty (TDY) assignment for the number of days needed to reach 60. This would help the employee bear the burden of having to rent in one location while still paying rent in another, pay utilities in two locations, move himself and his family at two different times, buy food for two locations, or other related expenses. Without such a clause, management could give very short notice and the employee would have to bear the entire financial burden of a quick move "even though it is always totally within management's control as to when the employee moves." Employees should not be victimized because management did not plan correctly or prefers not to use other options that are clearly available.

The issue in Section 6.C. concerns where employees will be located once their preclearance assignment is over. Management proposes to return them to their original or home port, alleging that it no longer needs to offer the prospect of an eventual move away from one's home port in order to attract preclearance volunteers. No evidence was provided to support this allegation, which "is clearly based on a mere management hunch or assertion, rather than data." Furthermore, because management's proposal is not limited to those employees newly assigned to a preclearance location after the contract is implemented, "it would change the rules for those employees already in the midst of a preclearance assignment." This would penalize those who have already spent several years at a preclearance location in the hopes that they will not have to return to their prior port.

In contrast, the Union's proposal permits the employee to return to his home port if he wishes, but also allows the

employee to use the voluntary relocation system, contained within the Reassignment article, to seek placement elsewhere. The size and attractiveness of the preferred locations "will greatly impact the odds of going somewhere other than the home port, and that should moderate employee choices." Under its Reassignment article, if a vacancy in a location is not filled through certain sources, the Agency then goes to the national voluntary relocation list and selects the most senior preclearance applicant for that vacancy. In Section 6.C., the Union also proposes that the selection not count as one of the voluntary reassignment selections that must be made out of every two selections, ensuring that returning preclearance applicants are able to effectively compete against very senior applicants, even though it is the preclearance applicant who must be given a new assignment. If there are simultaneous vacancies in all three of the preclearance employee's preferred placements, management would decide which of the three the employee would be offered. Its proposal would continue "the NTEU-Customs contract tradition of incentivizing CBP employees to apply for Preclearance assignments with the lure of eventual placement in a preferred location," and is similar to the reassignment system contained in the NTEU-IRS contract.

Of the remaining issues in the article, while both of the parties' Sections 3.A. proposals provide employees the right to request extensions of a preclearance assignment, only the Union's obligates the Employer to respond within a reasonable period of time. Rather than proposing more time to respond, under management's approach there would be no requirement to respond within any time frame. Thus, an extension could be requested 6 months in advance but the employee might not receive a response until the day before the employee is due to move. It is "complicated and costly for the average employee to move out of or back into the U.S. with a family." The sooner the employee can make the necessary arrangements, the better. Management's proposal "shows no concern" for the employees' needs and, along with "its refusal to compensate employees for unusual expenses when they are moved on short notice," its system "amounts to a calloused way to manage employees who are undertaking an unusual assignment for the good of the Agency."

The Union's proposal in Section 4.C. would require that the employee be granted administrative leave or an excused absence to make relocation arrangements, while management's proposal merely states that the time "may" be granted. Management's proposal also contains no measure of how much time to grant to an employee, while the Union's contains a reasonableness

standard and gives management "immunity from a grievance should the employee want more than 40 hours." The Union's proposal should be adopted because it is "the more balanced of the two." In Section 6.E., the Union's proposal mirrors an already agreed understanding found elsewhere in the contract "that the Employer will provide necessary refresher training to the preclearance employee," and it does not know "why management chose to ignore the issue here."

b. The Employer's Position

In this article, both parties have an interest in unifying CBPOs under the best procedures that will provide preclearance employees a much needed transparent process. A review of the significant areas of disagreement within the proposals makes it clear that their mutual interests "are best obtained by the adoption of the Agency's article." The first area of concern with the Union's last best offer is two "add-ons" to the agreed upon sections addressing assignment duration (Section 3.A.) and establishing reporting dates for returning to the U.S. (Section 6.D.). Including these add-ons "will make it difficult to administer the Agreement as a whole and inevitably increase the likelihood for disputes." The wording would require management to place an employee who has volunteered for a reassignment to a preclearance location on TDY status, and to reimburse expenses when traveling from the preclearance location to their permanent duty location. Given that procedures and appropriate arrangements for temporary assignments and travel are included in contract articles that already have been agreed to by the parties, and that home leave is an area encompassed in the parties' dispute over the Leave article, the Union "has not demonstrated any need to further complicate the impasse of other contract articles within this article," or articulated any rationale for interfering with agreed upon contract articles by placing these additional proposals in the Preclearance article. Moreover, the Union has asserted that "employees use preclearance assignments to change their permanent duty location." Both sides spent a great deal of effort addressing voluntary reassignments in the Reassignment article, which ultimately will provide a "comprehensive set of procedures for employees to voluntarily move from one port to another." There is no reason to "complicate this impasse by forcing the other impasse articles into it."

Another significant difference with regard to the Preclearance article is the Agency's belief that its proposal for a guaranteed reassignment back to the originating duty

station "is far more efficient than the ambiguities of the *status quo*" and cures the problems the Union identified in the previous Customs-NTEU contract. The Employer's proposal provides employees who opt for a preclearance assignment with the exact duty location upon their return and does not place an employee "in the dark" as to where they may end up upon returning to the U.S. Employees who have a desire to change their permanent duty location "should use the robust procedures provided in the Reassignment article." In addition, the Union's proposed Preclearance article defeats its own expressed interests by combining different administrative processes and creating unresolved questions in the contract that will undoubtedly lead to arbitration. The Arbitrator "should adopt the Agency's proposal as it gives employees clear expectations of the policy and procedures when volunteering for a preclearance assignment."

CONCLUSION

After fully examining the parties' positions on this article, I conclude that the Union's final offer provides the more reasonable basis for resolving the impasse. The most significant difference between the parties' proposals concerns what happens to an employee returning from a preclearance assignment. Under the Union's approach, if the employee does not want to return to his home port, the employee receives priority over others in the reassignment pool. It argues that CBP needs to offer the prospect of an eventual move away from the employee's home port in order to attract preclearance volunteers. The Union's position is at least consistent with the terms of the Customs-NTEU contract, which permits the employee to submit a prioritized list of up to five locations to which he or she prefers to be reassigned, and requires management to reassign the employee to one of those locations if a vacancy exists "absent just cause." Under the Employer's approach, an employee returning from a preclearance assignment would be guaranteed reassignment back to the originating duty station, and should use the procedures provided under the Reassignment article to move to a different location. The key difference is the Union's proposal gives employees returning from pre-clearance priority in the reassignment process. While the parties' disagree over whether CBP needs to incentivize employees by offering the prospect of reassignment to a different location than the originating duty station to ensure that there are enough preclearance volunteers, as in other articles, the record does not support either side's contention in this regard. A significant defect in the Employer's approach

is that employees currently in the middle of a preclearance assignment, who volunteered expecting to be relocated upon their return in accordance with the conditions outlined in the expired Customs-NTEU contract, would no longer have that option. Nor is there any inconsistency in adopting the Employer's final offer in the Reassignment article and the Union's final offer in the Preclearance article. In this regard, Section 6.C. of the Union's final offer in the Preclearance article requires preclearance employees who do not wish to return to their home port at the end of their current tour to apply for relocation using the voluntary relocation reassignment procedures in the Reassignments article. Section 2.B.(2) of the Employer's final offer in the Reassignments article commits CBP, absent just cause, to fill at least one out of every two positions through the voluntary reassignment of current employees when it decides to fill positions with other than probationary or trial period employees. Accordingly, I shall order the adoption of the Union's final offer on this article.

15. Safety and Health

a. The Union's Position

The Employer's contention regarding the Union's Section 18.B. proposal involving beards and other facial hair "centers on a new theory that it believes renders the proposal to be non-negotiable." In response, the Union incorporates by reference its discussion above concerning the negotiability of Section 2 in the Attire and Appearance article. As previously stated, its proposal has been found to be negotiable by the FLRA and, in accordance with the guidance provided to the Panel and interest arbitrators in its *Carswell* and *Yuma* decisions, "a new legal theory is insufficient to render a substantially identical proposal non-negotiable where the [FLRA] has already found the proposal to be negotiable." Accordingly, the Union requests that the Arbitrator decide on the merits the appropriateness of whether its proposal should be included in the contract.

The issue in dispute in this article is related to the grooming standards dispute in the Attire and Appearance article. The Union's Section 18 proposal "is designed to ensure that those uniformed employees who are subject to the CBP grooming standards are permitted to grow facial hair but still be able to comply with the CBP respirator program." It reflects the fact that, "while the overwhelming majority of employees that are subject to the CBP grooming standards do not need to use a respirator in the performance of their job duties," they

nevertheless must be able to wear a respirator in the event of an emergency. The proposal requires employees to shave to the extent necessary in order to pass the respirator fit test after which they are permitted to grow facial hair as long as they have shaving equipment available at their worksite so they can shave in the event they need to wear a respirator.

CBP has chosen to use the N-95 respirator "as its respirator of choice." The N-95 respirator requires that employees have a cleanly or mostly cleanly-shaven face in order to be fit-tested for respirator use. The Union's proposal in Section 18.C.1 and 2. tracks the materials provided to one of NTEU's negotiators who attended training by DHS and the Occupational Safety and Health Administration (OSHA) concerning the N-95 Respiratory Protection Program and its implementation at CBP. In this regard, employees who may need to use an N-95 respirator must "ensure that facial hair (beards, stubble growth, mustache or sideburns) do[es] not cross the respirator sealing surface or ha[ve] immediate access to shaving supplies when needed." Its proposal is also consistent with the practice at the Center for Disease Control (CDC). The wording the Union proposes in Section 18.B. recognizes that the overwhelming majority of CBPOs and Agriculture Specialists do not use a respirator in the performance of their job duties, a fact established by the Union through testimony from witnesses and written evidence. Even CBP's expert witness on respirators, a Safety Manager, testified that he did not know of one instance when a port ordered its employees to don their respirators, and CBP's own survey showed that the use of respirators was "sporadic to non-existent" at all of its field offices, with most ports unable to identify even one employee who during the entire period covered by the management survey wore a respirator. The Union also presented emails from a number of ports "that established that CBP did not even have respirators available for use as late as 2005," and testimony from NTEU negotiators that respirators currently "are not co-located where employees work," are often kept under lock and key, that employees do not know where to go to get access to them, and would have to get permission from management to wear a respirator "although no procedures are in place to secure such approval." Nevertheless, the Union's proposal acknowledges that CBP has required that all employees subject to the Agency's grooming policy be fit tested in respirator use, and nothing in the proposal conflicts with this policy. Because the proposal balances the employees' interest in determining their own facial appearance without sacrificing the safety protections offered by

the CBP respirator policy, it should be adopted to resolve the parties' remaining dispute in this article.

b. The Employer's Position

The Union's proposal in Section 18.B. "mandates that the Agency modify" its Personal Appearance Standards for uniformed personnel "to permit employees to grow facial hair." During the arbitration hearing, the Employer offered evidence that its Personal Appearance Standards are intrinsically linked to its Use of Force Continuum, "which is the primary enforcement tool used by its uniformed workforce." Further, the Employer provided evidence that the adoption of less stringent standards would likely result in the erosion of public trust in the unformed workforce and the Agency, as well as increase risks to officer safety and mission accomplishment. Consequently, the proposal "constitutes a method of performing work under 5 U.S.C. § 7106 (b)(1)," [69/] and is negotiable only at the election of the Agency.

On the merits of this issue, the Union has made it clear that the parties' CBA should educate the bargaining unit and managers regarding CBP's respirator program. To meet this interest, CBP's proposal includes a comprehensive set of procedures and appropriate arrangements concerning the program. As written and articulated during the interest arbitration hearing, the Union's proposed Safety & Health article "serves as another attempt to address [its] disdain for CBP's personal appearance standard," *i.e.*, the prohibition of facial hair. Rather than include "a robust educational section that includes safeguards for employees," its proposal "exploits the use of respirators as a means to provide employees the right to have beards." While the use of this bargaining tactic is itself questionable, the best reason for rejecting the Union's proposal is that it includes wording requiring the parties to recognize there is "not a reasonable likelihood" that CBPOs and Agriculture Specialists will need to use a respirator, wording that "is simply not true."

In today's environment, the likelihood of the CBP front-line workforce needing to don a respirator "is more than just

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69/ In this regard, the Employer acknowledges that in *NTEU and CBP*, 64 FLRA 395 (2010), the FLRA addressed a previous Agency assertion that the standards constituted a means of performing work, but "declined to answer whether it constituted a method."

reasonable." CBP employees encounter thousands of travelers and products from diverse origins that enter the U.S. every day, and among those thousands of daily inspections "situations occur that require the use of a respirator." In this regard, CBP Occupational Safety and Health managers and port management officials testified that "the need and use of respirators are common, and ports are capable of meeting this demand." The need can arise when a passenger exhibits signs of tuberculosis, a box in a container leaks unfamiliar fluids, or in a crisis like the H1N1 virus. Additionally, where CBP's mission requires the timely processing of travelers and goods into the country, the Union's "on-the-spot shaving procedure" would create an "operational nightmare." Moreover, at the same time that the Union is proposing joint recognition that there is "not a reasonable likelihood" that respirators are needed, institutionally it is diligently "fighting for employees to have access to this tool." In conclusion, the Arbitrator "should adopt the Agency's proposal as it provides the desired effect of the parties during bargaining."

CONCLUSION

Having carefully considered the evidence and arguments presented by the parties on this article, I shall order the adoption of the Employer's final offer to resolve the matter. This dispute concerns the parties' conflicting proposals under Section 18, which the Employer titles "Respirators," and the Union titles "Facial Hair and Respirators." The Employer proposes a fairly comprehensive set of provisions regarding the use and maintenance of respirators at the workplace, while the Union's proposal is concerned primarily with permitting employees to wear beards and other facial hair, except where there is a reasonable likelihood that they will have to use a respirator in the performance of their duties which requires a cleanly shaven face, and on the mechanics of how such employees would comply with the requirements of a "fit test." In my view, the Employer's final offer is consistent with the other topics in the Safety and Health article, whereas the Union's is more appropriately addressed in the Attire and Appearance article.

16. Scheduling

a. The Union's Position

The Employer's proposals in Section 14.A. and 15.A. of this article, which deal with changes in existing shifts and the establishment of new shifts, respectively, are nonnegotiable

because "they authorize management to implement proposed (and obviously substantial) changes in working conditions irrespective of the Union's right to negotiate over the proposed changes through impasse." Consequently, consistent with FLRA precedent, they involve a permissive subject of bargaining, *i.e*, a demand that the Union waive its statutory rights, and insisting to impasse on them constitutes an ULP.[70/] In addition, by restricting the Union's right to notice and bargain to 7 days, the wording in Section 14.A. "flies in the face of the statutory obligation to negotiate over ANY change in conditions of employment."[71/]

On the other hand, contrary to the Employer's position, the Union's proposals in Sections 16 and 17 are negotiable. In this regard, the Union has opted to modify its last proposal in Section 16.[72/] Given the Employer's new interpretation that 5 U.S.C. § 6101 bars voluntary employee changes of tours/schedules, the modification isolates "the situations where 6101 MAY be a problem given management's previously unheard of reading of this statutory provision."[73/] This approach enables

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70/ The Union cites *Federal Deposit Insurance Corporation, Headquarters and NTEU*, 18 FLRA 768 (1985) to support its allegation.

71/ In this connection, among other FLRA decisions, the Union cites *Department of the Air Force, Scott AFB, Illinois and NAGE, Local R7-23*, 35 FLRA 844 (1990) and *Department of Transportation, Federal Aviation Administration, Los Angeles, California*, 15 FLRA 100 (1984).

72/ The Union's modified Section 16 proposal can be found in Appendix A.

73/ Also contrary to the Employer's position, the Union contends that 5 U.S.C. § 6101:

> [I]s an obligation on management to meet certain standards, not employees. If employees, once properly assigned under the 6101 criteria, decide to swap assignments for a day, e.g., the 8 a.m. shift [for] the 11 a.m. shift, nothing in 6101 bars them.

The Union also concedes that "there is no case saying that – probably because no one has ever argued the law means that."

the parties to include a temporary swapping or position exchange proposal in the article, thereby continuing a decades-old tradition within the Customs Service and now CBP, "while preserving management's right to say 'No' in those situations where none of the exceptions apply." With respect to the FLRA decisions the Employer cites to support its underlying threshold assertion, they are "inapplicable." In the case involving the Department of Veterans Affairs, 5 U.S.C. § 6101 is not even mentioned because it operates under different scheduling authorities. Moreover, the proposal at issue in that case has "little or nothing to do with the proposal now before the Panel." Unlike the proposal in that decision, under the Union's Section 16 proposal, management will set the schedules, hours, staffing, etc. All the employees could do is say that "I will work his assigned hours and he will work mine." Its proposed wording also is nothing like the defective proposal in the case the Employer cites involving pilots in the Panama Canal. That proposal concerned "the assignment or division of duties," while the Union's Section 16 "merely provides that once management assigns duties to specific tours, qualified employees can agree to swap their duty hours." Hence, in making its non-negotiability assertion, management falls "far short of meeting its initial burden." Finally, there is no merit in the Employer's non-negotiability allegations concerning the Union's proposal in Section 17 for the same reasons.

Of the six issues at impasse in this article, those addressed by the Union's proposals in Sections 6, 14, and 17 are the most significant. Management's Section 6 proposal constitutes a waiver of the Union's right to negotiate impact and implementation "in the face of the agency head exercising the 5 U.S.C. § 6101 exception." Consequently, the Arbitrator should "turn away from the mischief inherent in management's proposal and toward the clearer statement of how the Union may deal with a change in working conditions." Further, exercising the statutory exception is a very significant matter because it permits the elimination of an employee's right to 2 consecutive days off every week and the same starting and quitting times throughout each individual week. Management is living "in a fantasy world if it believes it can do that without giving employees any way to soften the impact or to procedurally transition to that system." Thus, the Employer's proposal should be rejected because it "would bar NTEU from representing those employees." Moreover, even if not considered a waiver, the Union would object to its adoption "on the basis of the *McClatchy* precedent."

As discussed previously, the Employer's proposals in Sections 14.A. and 15.A. constitute waivers of the Union's statutory right to negotiate over modified or newly-created shifts, and also should be rejected on the basis of the *McClatchy* precedent because they lack "any enforceable procedures or efforts to moderate impact." Even if they are properly before the Panel, the Union's approach in Section 14 is "wiser" and "more balanced" because it has limited its right to bargain by excluding some classes of shift changes, "such as a change in an 8 a.m. to 4 p.m. shift to a 6 a.m. to 2 p.m. shift during the week of Thanksgiving to accommodate the increased flights and travelers." Other provisions of that same subsection serve to limit negotiations to those changes that will have considerable impact on employees, including where management intends to modify a 6101 exception shift to another 6101 exception, or move employees from a fixed to rotating shift. In addition to these "concessions," the Union has offered to expedite any bargaining over these negotiations through the use of a third-party neutral quickly entering the bargaining dispute to issue recommendations. The Employer, however, has refused to allow any bargaining over these "most troublesome forms of shift changes," and "shown no concern for employees' needs or balance."

In Section 16.A.(1), the Employer appears to address the right to swap shifts that do not conform to the standard requirements of 5 U.S.C. § 6101, and in Section 16.A.(2) it appears to address the swapping of shifts that do conform to those requirements. Given its latest allegation that the law bars the swapping of Section 6101 exception shifts, it is "disingenuous, if not outright bad faith bargaining" for management to now propose to permit swaps of those shifts "infrequently" if done with 5 days notice, rather than the 7 days mentioned in the statute. Aside from the legality of management's proposal and strategy, it has never explained "why the right to swap shifts should be handled any differently under a Section 6101 shift versus a non-conforming Section 6101 shift." Therefore, the Arbitrator should adopt the wording already agreed to in the Union's Section 16 and management's Section 16.B. "as the rule for a swap of either kind of shift." Finally, management's proposal is "reckless" in that it uses wording such as "infrequent," "do not result in negative impact on operations," "may be approved," "undermine the intent." Once again, while repeatedly asking the Arbitrator to impose contract language that would provide "clarity, consistency and transparency," it has put words on the table that are "classic litigation breeders."

On the article's remaining issues, the Union's Section 14.C. proposal would require the Employer to solicit volunteers and select employees on the basis of seniority when implementing any of the shift changes set forth in subsection 14.A. Given the Union's recognition that the employee must be qualified, using seniority enables the Employer to avoid disputes over less objective methods of assignment provides management "shelter against civil rights and other statutory claims." The Employer's Section 15.B. proposal "comes close to accepting this concept" but ties it to an "absent just cause" exception, which is undefined by contract or existing arbitration precedent between the parties. The Arbitrator also should reject the "drive-by" reference in management's proposal limiting volunteers to just those from "appropriate work groups (as defined by the employer)." It is unclear what this means, the proposal has "no enforceable content," and "it is a litigation breeder." The last sentence of the Union's Section 16 "appears to mirror the thought expressed in management's Section 16.B.," but management also proposes to exclude swap issues from the grievance procedure. Because a party seeking an exclusion from, or the narrowing of, the grievance procedure carries a heavy burden before the Panel, the Employer's proposal should be rejected. Finally, the Union has "no idea why management" is proposing its Section 18 wording, which requires employees to be scheduled, excused, and compensated for holidays in accordance with the policies and procedures contained in the Holidays and Religious Observances article. Scheduling, excusals, and compensation must be done consistent with a number of articles, several regulations, and federal statute. The lack of any explanation of what this proposal would mean is another reason it should be rejected.

b. The Employer's Position

The Union's proposals in Sections 16 and 17 of this article are outside management's obligation to bargain because they are contrary to 5 U.S.C. § 6101(a)(3).[74/] In addition to the exception

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74/ 5 U.S.C. § 6101(a)(3) states that:

> Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with

provided in this section of the law, 5 U.S.C. § 6101 (a)(4) provides the Employer the flexibility to authorize a special tour of duty for employees so that they may take one or more courses in a college university under certain circumstances, and 5 U.S.C. § 6122 specifically exempts flexible and compressed work schedules (which are worked only at the election of the employee) notwithstanding the requirements of 5 U.S.C. § 6101. Other than these three exceptions, "the law clearly places the responsibility on the Employer to schedule work, and to do so in accordance with these requirements." Nothing else in this or any other applicable law, rule or regulation permits employees to schedule work, or an employer to reschedule an employee for work at an employee's request, in a manner inconsistent with law, rule or regulation. The Union's proposals, however, presume that once the Employer schedules employees it has met its statutory obligations, and then require it "to permit employees to independently adopt schedules that do not conform to these requirements." Absent express statutory language that permits an employer to schedule work in this manner, the Union's proposals "runs afoul of and [are] contrary to 5 U.S.C. § 6101." As they are contrary to law, they cannot constitute procedures or appropriate arrangements. In addition, the FLRA has also found that proposals attempting to shift the responsibility of scheduling decisions from management to employees are nonnegotiable because they interfere with management's right to assign work, under 5 U.S.C. § 7106 (a)(2)(B).[75/]

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respect to each employee in his organization, that--

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;
(C) the working hours in each day in the basic workweek are the same;
(D) the basic nonovertime workday may not exceed 8 hours;
(E) the occurrence of holidays may not affect the designation of the basic workweek; and
(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.
(G)

75/ The Employer cites *National Union of Hospital and Health Care Employees, District 1199 and Veterans Administration*

In response to the Union's allegation that it has no obligation to bargain over the Employer's Section 14.A. and 15.A. proposals because they deprive it of the statutory requirement for "specific notice," CBP provided the Union with specific notice of the procedures and appropriate arrangements that will be observed when exercising its management right to establish or modify employee work schedules through its contract proposals. In this regard, the Union "is well aware of the scope and nature of changing work schedules and that those changes are imminent," and both parties realize that CBP's operations necessitate work schedules being modified or new schedules being created on a greater than infrequent basis. Under FLRA precedent, whether or not an agency's notice is reasonable and adequate depends upon the facts of each case.[76/] In this case, after receiving CBP's contract proposals concerning work schedules, the Union had the ability to request information and it submitted bargaining proposals. Thus, CBP's proposal meets the standard of sufficient notice because the Union "clearly had CBP's desired procedures for employee work schedules and NTEU had more than the required *'meaningful opportunity to bargain about the decisions'*."[77/]

Medical Center, Dayton, Ohio, 28 FLRA 435 (1987) and *International Organization of Masters, Mates, and Pilots and Panama Canal Commission*, 11 FLRA 115 (1983) to support its position. In addition, the Employer points out that its Section 16 proposal contains wording similar to the Union's that also would permit employees the opportunity to voluntarily change their work schedules. In its view, once employees have been exempted from those requirements, "the granting of employee requests to make schedule changes would no longer be in violation of statutory scheduling requirements, provided the procedures did not violate other laws or inherent management rights."

76/ *Department of the Treasury, U.S. Customs Service, Region I, Boston, MA and NTEU*, 16 FLRA 654 (1984) is cited by the Employer to support this proposition.

77/ In further support of the claim that its proposal is within the duty to bargain, the Employer cites *Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532 (1996), noting that "the FLRA routinely holds that adequate notice of a proposed change in conditions of employment is a notice that triggers the exclusive representative's responsibility to seek bargaining" and that "NTEU has definitely sought

The Union's explanation of its assertion includes an argument that it is not obligated to bargain over CBP's proposals because "no one knows the exact timing of schedule changes via a specific notice." This assertion "is without legal merit because the FLRA has found that an agency's change notice was [a] sufficient, specific, and definitive, event without including an implementation date."[78/] Its proposal provides the Union definitive notice that work schedules will be changed in certain circumstances and that new work schedules will need to be established in certain circumstances. In addition, the Union alleges that the Agency's proposal would restrict the right to notice and bargaining to 7 days. This allegation "is severely misplaced because under the Agency's proposal, there is no more bargaining that will take place over the impact and implementation of work schedule changes." In this regard, "all negotiation over the impact and implementation of management's right to establish or modify a work schedule is specifically addressed in the Agency's contract article."

Adopting the Union's negotiability theory "would make vulnerable the integrity of collective bargaining in the federal sector" by virtually eliminating "the need for term contracts to guide the parties." Management would have to provide a specific change notice before taking any action pursuant to the terms of a CBA, whether it involves proposing a discipline letter, announcing a promotion opportunity, granting a request for a voluntary reassignment, or creating a new work schedule to accommodate a change in operations, and it would be unlawful for an agency to make contract proposals to address procedures for such matters. A party could unilaterally avoid term contract bargaining on any issue "until the very instance management seeks to change a condition of employment." Adopting the Union's arguments in the instant matter essentially would "reverse the legislative goals of collective bargaining in the federal sector, cause harm to the public interest, eliminate the ability to negotiate term contracts, and ultimately result in government operations to operate less efficiently," in direct conflict with the findings and purpose of the Statute.

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bargaining in response to the Agency's proposed Scheduling article."

78/ The Employer cites *U.S. Department of Defense, Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colorado and American Federation of Government Employees, Local 1867*, 61 FLRA 688 (2006) (*Colorado Springs*).

As to the merits of the issues in dispute, the most important areas of disagreement in the Scheduling article are: (1) the procedures to be followed by the Agency when work requirements necessitate the modification or alteration of an existing shift or tour of duty, and the appropriate arrangements for employees adversely affected by such changes; (2) the procedures to be followed by the Agency when work requirements necessitate the establishment of a new shift or tour of duty (and the appropriate arrangements for employees adversely affected by such changes); and (3) the conditions under which voluntary weekly or daily tour of duty changes are permitted. On the first two issues, for the majority of the bargaining unit, the parties agree that mission and work requirements necessitate frequent changes to employee work schedules and the establishment of new shifts or tours of duty. When addressing the scheduling of work for employees, "the parties have adopted the goal of establishing a minimum level of predictability through the advanced scheduling of anticipated work, while at the same time providing the flexibility to make the necessary adjustments for changes that were not anticipated." This is reflected in certain agreements that were previously reached in the Scheduling and Overtime articles, which constitute "significant deviation from the current practice in most of the Agency's ports of entry, where schedules and assignments are frequently made and posted much closer to the time the work is performed."

Consistent with this approach, in the sections of this article that remain at impasse, the Employer proposes "a set of unambiguous procedures and appropriate arrangements for it to apply when work requirements dictate the inevitable changes to posted schedules" and the establishment of new work schedules or tours of duty. These procedures were created in response to the "issues, concerns and interests" presented by the Union during negotiations. In addition, even though the Union was "unable to articulate any specific local circumstances that were not addressed by the Agency's proposed procedure and appropriate arrangements," the Employer offered an additional period in which local Union representatives would be notified and provided the opportunity to discuss unique concerns they believe would be more appropriate. In contrast, the Union's "proposed solution is notification and bargaining each and every time a schedule or tour of duty change [] does not meet a very narrowly crafted set of criteria." Its last best offer also "is less than clear as to whether 'changes' include the movement of employees to a new shift or tour of duty" and, if so, "it fails to provide any

procedures by which those shifts would be staffed." Unlike the Union's approach, the Employer's contributes to the effective and efficient accomplishment of the Agency's mission by providing standardized rules for assigning and scheduling work across the bargaining unit and "is likely to improve employee working conditions." It also eliminates "the waste of time and resources" necessary to negotiate over procedures and arrangements each time management exercises its right to adjust or create new work schedules in response to the constantly fluctuating operational requirements at CBP's more than 340 ports of entry. In this regard, the Union has failed to explain why it needs to negotiate each occasion separately. The Employer's proposal also "fosters effective labor-management relations by ensuring local notification and engagement prior to the implementation of a change," while the Union's "is clearly designed to frustrate and delay changes resulting from operational requirements." In summary, the Employer's proposal for a set of standardized procedures "is consistent with the intent of the framers of the Statute, as interpreted by the FLRA - and is therefore superior to the Union's proposed approach of piecemeal bargaining."[79/]

Concerning the issue of voluntary weekly or daily tour of duty changes, the primary difference in the parties' proposals is their "context and applicability to certain employees." The Employer's proposal is "specifically tailored" to address the adverse impact on employees who unexpectedly are affected by an Agency decision excepting them from the scheduling requirements of 5 U.S.C. § 6101 by providing them the opportunity to voluntarily request and be approved weekly or daily tour of duty swaps with other qualified employees. On the other hand, the Union's proposal "would apply to all employees in all occupations, and in all circumstances regardless of whether they are subject to variable work schedules and unanticipated changes." Such an arrangement cannot be deemed appropriate because it is overly broad, not tailored, and "provides a general benefit rather than alleviating the impact on employees from the exercise of a management right." The Employer's proposal is also more consistent with existing practice whereby, on a case-by-case basis depending upon the specific work expected to be performed that day, employees are permitted to swap provided they are qualified to perform each other's work.

79/ To support its position, the Employer cites *DOD and Air Force Exchange Service, Dallas, Texas,* 19 FLRA 652 (1985).

CONCLUSION

Upon thorough examination of the remaining issues in this article, it appears that the most significant ones involve the parties' conflicting allegations concerning their duty to bargain over the other side's proposals. Neither party, however, has cited FLRA decisions where substantively identical proposals previously have been found negotiable. Therefore, regardless of which final offer is imposed, under the guidance provided in *Carswell AFB*, I am without authority to resolve these duty-to-bargain questions. Remarkably, the parties' jurisdictional arguments appear to be completely removed from the realities that exist at CBP's more than 340 ports of entry. In this regard, it is clear from the testimony of the Buffalo, New York, Port Director that it is unworkable to require bargaining over every scheduling change because of the frequent need to change shifts on a daily basis with little or no notice. Moreover, there is no evidence in the record that the Union locally has actually requested to bargain over such scheduling changes even though it may be statutorily entitled to do so. Thus, no matter how the legal arguments eventually are decided, it is unlikely to have much impact on the practices the local parties have established to handle these constantly fluctuating operational requirements. Nevertheless, consistent with the Panel's procedural determination in this case, I am required to select one of the parties' final offers on this article. Under the circumstances presented, based primarily on the testimony of the Buffalo Port Director, I am persuaded that, on the merits of the issues in dispute, the Employer's final offer is better than the Union's because it is more consistent with current practices and offers greater flexibility in meeting CBP's operational needs at the various ports of entry. As the Union has raised arguable claims that Sections 6, 14.A. and 15.A. of the Employer's final offer constitute waivers of its statutory right to negotiate future scheduling changes, however, I shall order that they be withdrawn from the article. Until these jurisdictional questions are resolved in an appropriate forum, the parties will have to rely on the applicable sections of the Statute with respect to their rights and obligations.

17. Training and Employee Development (Union)/Employee Development (Employer)

a. The Union's Position

Neither of the Employer's proposals in Sections 5.C. and 6.B. is within the Union's obligation to bargain. In Section

5.C., management only proposes to "advise" the Union of funding changes to the Tuition Assistance Program (TAP), which is an attempt "to have the Union waive a right to fully bargain before tuition reimbursement is suspended or even restarted."[80/] It also raises a *McClatchy* objection to its adoption. The Employer's proposal in Section 6.B. would require the Union to "assert the lack of adequate training as a defense to any action adverse to the employee." By obligating the Union "to do something when representing unit employees," the proposal does not address a mandatory subject of bargaining. In this regard, the Union has a right to present its own views while representing an employee and cannot be "forced to bargain over what those views might be."[81/]

With respect to the merits of the Union's proposals in this article, the first sentence of both parties' proposals in Section 3.A.3. requires that the Employer use a "fair and equitable" method to make selections regarding in-service training. The Employer could use a variety of methods as long as each is fair and equitable, so the Union wants notice of the details whenever the Employer chooses to implement or change its procedure. This would enable it "to enforce any bargaining rights it may have over a change as well as other protections, e.g., a civil rights claim." While management seemingly offers a seniority system, its proposal contains an undefined "just cause" right to deviate from seniority, and the creation of a "targeted work unit." The Employer's proposal should be rejected because it "offers little in terms of predictability or reliability." As stated above, because the Employer's Section 5.C. proposal would waive the Union's right to negotiate over decisions to limit or eliminate a tuition assistance financial benefit that is worth up to $2,500 a year per employee, the Arbitrator cannot impose it. Even if it is not considered a waiver, "it fails to meet the *McClatchy* standards because it is a grant of standardless or unfettered discretion to the Employer in the matter of a major employment condition." In contrast, the Union's Section 5.C. proposal is "more reasonable" as it

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80/ The Union cites *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916*, 3 FLRA 512 (1980) to illustrate the position in which the Employer is "trying to place the Union."

81/ In support of its position, the Union cites *Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office and NTEU*, 41 FLRA 402 (1991).

merely reiterates the burden the Statute already places on management to notify and bargain before making any changes in working conditions.

b. The Employer's Position

In response to the Union's jurisdictional arguments, the Employer's Section 5.C. proposal contains procedural steps that would take place in the event there is a need to modify or temporarily suspend the TAP program, but does not address procedures to apply if the TAP is to be permanently canceled. The Agency exercises its discretion to utilize the TAP as a long-term recruitment and retention tool and a means to improve employee and organizational performance in accordance with 5 U.S.C. § 4109. Inasmuch as the existence of a TAP is at an agency's discretion, "the topic is negotiable in substance." Its proposal gives the Union specific notice that there may be a need to modify the funding available or even temporarily suspend the program, nor can it "avoid the negotiation of related proposals that do not conflict with law, rule, or regulation." Since the procedures to be followed when modifying the TAP is not inconsistent with the structure of 5 U.S.C. § 4109, the "Union cannot skirt its obligation to negotiate by relying on an *ad hoc* or piecemeal bargaining scheme." Therefore, the Arbitrator should find that the Employer's proposed procedures are within the mandatory duty to bargain.

In Section 6.B., the Union bases its negotiability argument on the assertion that there is no duty to bargain over a proposal that obligates a party "to do something." The FLRA, however, has consistently found that agencies have violated the Statute by attempting "similar lazy attempts to avoid negotiation,"[82/] and there should be a "corollary proposition" applying the same standard "for the other party in the

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82/ The Employer cites *National Federation of Federal Employees, Local 2099 and Department of the Navy, Naval Plant Representative Office, St. Louis, Missouri,* 35 FLRA 362 (1990) to support this allegation, where the FLRA stated:

> To conclude that a proposal or provision interferes with management's right to assign work simply because it requires an agency to take some action would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations.

bargaining relationship." The Employer's proposal, which is similar to the Union's proposal in this section, was modified after receiving clarification from the Union that it will be the responsible party administering this article provision. If the Union only wanted to assert the lack of adequate training as a defense to any action adverse to the employee "some of the time" or "maybe" assert this defense, this should have been articulated in its proposal. Based on the above, the Union's assertion that the Employer's proposal is outside the mandatory obligation to bargain should be rejected.

On the merits of the issues in the article, the parties' proposals significantly differ in three areas. The first concerns the selection procedure that should be used where the Employer offers in-service training to enhance job proficiency, excluding required and remedial training. In Section 3, the parties have agreed that the Employer will advertise these training programs through an electronic web-posting, the information that will be included in the advertisement, on what happens when failure to advertise impacts a group of employees, and that CBP will provide the Union data concerning in-service training. While the Employer proposes a selection procedure in the section, the Union wants separate notification and a bargaining opportunity to address the procedures. CBP's proposal advises selecting officials to apply the fairness and equitability standard codified elsewhere in the CBA, and provides a selection procedure that reiterates the existing practice throughout the Agency whereby, essentially, "absent a special circumstance," qualified employees would be selected for in-service training in seniority order. The Union, however, would "ignore the carry-over of an existing past practice and place all solicitations and selections for in-service training on hold prior to a separate notice and bargaining situation that will occur after the [CBA] is implemented," and "has never justified its resistance to management's proposal."

The parties' second area of disagreement concerns the procedure that should be used if TAP is temporarily suspended. The current TAP was created by CBP in 2008 as another means to invest in the continued education of employees who are committed to improving their contributions to mission accomplishment. It "has been operating successfully since 2008 and CBP has no intentions of canceling the program." The Employer's article provides for specific procedures to be used in the unlikely event funding changes are necessary or the program needs to be temporarily put on hold. It would place potential TAP participants on the earliest advance notice possible to make any

personal adjustments, as well as the expected timeframe for restarting the program. The Union's article, on the other hand, would provide "an ineffective solution to a potential circumstance," *i.e.*, *ad hoc* notice and bargaining prior to a temporary halt of the program, and would effectively mandate that CBP "ignore any fiscal concerns" and "continue the program unless all phases of notice and bargaining are completed." The Arbitrator "should not reward NTEU's lack of responsive proposals by imposing a 'layaway' bargaining scheme." If the Union was really concerned with the procedures that would apply if the temporary cancellation of TAP is necessary, it has "had over 3 years to propose some." The Employer's proposal asks for a "reasonable trade-off" whereby CBP would continue to fund its implemented program in exchange for flexibility in making potential temporary adjustments.

The last issue in dispute is whether the Union should "be bound by the contract demand [it has] asked of CBP," *i.e.*, to let everyone know that the Union will assert the lack of adequate training as a defense to any action adverse to the employee. The Union's corresponding proposal reads as follows: "The lack of adequate training will be a defense to any action adverse to the employee". Given that management is not likely to represent a bargaining unit employee during a defense to any action that is adverse, it is obvious that the Union will be the responsible party administering this article provision. After receiving clarification from NTEU, the Agency modified the provision in its last best offer to accurately demonstrate this intention. Avoiding wording that places the emphasis on the Union as the responsible party "would promote confusion in its application." The Employer's proposal also meets the Union's desired outcomes that "everyone is on notice that lack of adequate training will be a defense," and that the Union is the party defending the employee under this contract. Thus, its proposed article should be imposed on the parties because it "more clearly reflects the intentions voiced during collective bargaining."

CONCLUSION

Upon careful review of the parties' positions on the remaining issues in this article, they will be ordered to adopt the Employer's final offer to resolve their impasse with the following two exceptions: (1) the Employer's proposal in Section 5.C., concerning the TAP, shall be withdrawn; and (2) the Union's proposed Section 6.B. shall be substituted for the Employer's proposal in that subsection. The two significant

issues is dispute concern in-service training and the TAP. On the first, while the parties agree that employees will be selected for such training in a fair and equitable manner, the Employer's proposal specifies that selections would be made by seniority, "absent just cause." The Union's final offer would not include a specific selection procedure, but would require management to notify the Union of the details of the procedure it intends to use before it is implemented so the Union can "enforce any bargaining rights it may have over a change as well as other protections." As the Employer has already indicated that it intends to use seniority, and the Union has not cited any substantive objection to a seniority-based selection procedure, I am persuaded that the Employer has presented the superior approach. Concerning the TAP, the Union alleges that the Employer's proposal constitutes a waiver of its statutory right to negotiate if future reductions in funding require changes to the program. While the Employer's desire to avoid negotiations in such circumstances is understandable, the Union's duty-to-bargain allegation is arguable. By eliminating Section 5.C. of the Employer's final offer from the article, the parties will have to rely on the requirements of the Statute should future changes to TAP funding occur. In my view, the Union also raises an arguable claim that the Employer's proposal in Section 6.B. involves a permissive subject of bargaining. Although the parties appear to be quibbling over an extremely minor matter, consistent with the authority granted the Arbitrator by the Panel in its procedural determination letter, substituting the Union's proposed Section 6.B. is warranted in the interest ensuring that the parties' CBA does not contain any potentially illegal provisions.

18. Union Representatives and Official Time (Union)/Official Time (Employer)

a. The Union's Position

The central issue in this article involves how many full or half time Union representatives will be allowed in each chapter. While official time for Union representatives is typically perceived as "only providing benefits to the employees and Union, there are many advantages to management of having regularly available Union representatives." Because the contract already gives Union representatives reasonable time for their activities, the Union expects that "if full-time Union

representatives are present and available, there will be less need or justification for a part-time representative to be taken off his job." In addition, if management has only one representative regularly available in a 24/7 operation, it will experience problems reaching that representative when it needs to arrange representation at a pending investigatory interview, "it will have to shoulder the time and cost of replacing the less-than-full time Union representative who needs to leave his or her CBP post to tend to Union business," and it will have a more difficult time scheduling meetings with the primary Union representative.

In Section 4.E., the parties have proposed formulas to calculate the number of full and half time representatives that differ in number of unit employees required to get a full or half time representative, and in whether the geographic structure of the ports and chapters should also be a variable in the formula. Management's failure to consider geographic structure in calculating the number "is a fatal flaw" in its approach. For example, if its formula were adopted, the chapters in the ports of Dulles Airport (294 employees) and Maine (354 employees) would each be entitled to only one half-time representative. While the Dulles chapter's employees are concentrated in and around Dulles Airport, the Maine chapter's jurisdiction takes in the entire state. By CBP's own public count, that includes 18 border crossings spread over 611 land miles, in addition to the air and seaports. Those two locations are not comparable when assessing how much time the Union would need to represent the employees. Attendance at formal meetings, Weingarten interviews, or negotiations "is a major undertaking in Maine, often taking a day or more just to travel to the meetings." At Dulles Airport, travel would take about an hour from one end of the airport to another and to satellite locations around the airport, such as bonded warehouses, importers, etc. When ports/chapters with pre-clearances sites are factored in, such as Miami, which includes employees in Aruba, Bermuda, and the Bahamas, "there can be no doubt that the official time formula must take into account the number of duty locations a chapter must cover." The Union's Section 4.E.(6) proposal entitles a chapter to an additional full-time person if it must cover 10 or more duty locations, with a total of approximately 13 chapters gaining another full-time person using the geographic variable. Its approach is consistent with Panel decisions that have "repeatedly taken the geographic dispersion of unit employees into account when deciding official time

disputes."[83/] The Employer's article, on the other hand, should be dismissed not only based on its failure to consider the geographic structure, but also because management offered no evidence or argument in rebuttal to the Union's proposal.

Turning to the second element of the dispute over official time, management's proposal results in a ratio of between 2.0 hours per unit employee and 5 hours for those chapters entitled to a full-time representative, while the Union's ratio is between 3.1 and 7.5 hours. Using OPM data from FY 2003, "the last year Customs was in Treasury," the ratio was almost 8 hours per unit employee among the more active units, *i.e.*, the Department of Labor (7.63), the Department of the Treasury (7.58), the Social Security Administration (8.17), and EEOC (8.58). Given the frequent litigation in the CBP unit to date, as measured by comparing the number of FLRA/Panel decisions issued involving CBP and those other agencies between May 27, 2007, when NTEU was certified at CBP, and August 25, 2010, "it should be considered to be comparable to these more active units." While this may not be conclusive, it is more objective evidence than management presented in support of its case or even in rebuttal to the Union's. Another "objective benchmark" is the official time data from IRS which show that the 85,060 member bargaining unit had 220 full-time representatives in 2010. If the CBP unit were under the IRS formula it would be entitled to about 62 full-time representatives, which is more than twice what management is offering and slightly more than the Union's proposal for full and half time slots. IRS documents also show that each of the 17 chapters between 275 and 550 employees, which is the Union-proposed CBP range for one full-time representative, had one or more full-time representatives, and that even below the 275-employee mark "there was a substantial acceptance for full-time representatives." This supports the Union's claim that those CBP chapters between 75 and 275 employees should be entitled to a half-time representative.

The last factor in the analysis of the correct number of full or half time employees "is the state of this unit in

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83/ The Union cites the Panel's decisions in *Department of the Army, Army Corps of Engineers, Northwest Division, Portland, Oregon and United Power Trades Organization*, 01 FSIP 48 (May 24, 2001) and *Department of the Army, Army Corps of Engineers, Pittsburgh Engineer District, Pittsburgh, Pennsylvania and AFGE, Local 2187*, 01 FSIP 1 (February 21, 2001) to support its position.

comparison to the present." In this regard, "the level of activity in the CBP unit is about to skyrocket" because: (1) the Customs-NTEU bargaining unit was about 60 percent the size of the unit that the Union must represent under the new CBA; (2) around 8,000 CBP employees have not had grievance rights because they were not covered by one of the three pre-existing agreements, and the additional "grievance activity they bring will require official time from Union representatives"; and (3) as the result of management's insistence on severing "all ties to the prior contract's wording and rules, this entire unit must now learn how to operate [under] a totally new contract" which "will play out in an inevitably long trail of trial and error moments that need to be remedied." In response to the Union's evidence in support of its last best offer, the Employer "presented no objective evidence in support of its position or to rebut the Union's," either on the actual number of full or half time representatives today or the relationship of that number to unit size, or costing data that would indicate a financial burden from the Union's proposal. Finally, the Employer showed no interest in the Union's offer to include a clause similar to that in the NTEU-IRS contract that would create an incentive for the Union to reduce the amount of official it uses from year to year. Nonetheless, "that offer will continue if at any time during the next contract the Agency wishes to adopt the idea."

Concerning Section 4.K., the Arbitrator should reject management's proposal because it establishes a contract standard for when full-time Union representatives can be ordered to return to Agency work. This "should not be a matter of contract interpretation, but rather statutory interpretation," as the Union proposes, particularly in light of the fact that the issue "is still an unsettled area of case law."[84/] Since those cases were issued, "the parties throughout the federal sector have pretty much avoided trying to figure out what the right is." Even a contract standard would have to conform to statutory law,

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84/ In support of its claim that the issue of when full-time Union representatives can be ordered to return to Agency work is still an unsettled area of case law, the Union cites *Council of Locals No. 214, AFGE and Federal Labor Relations Authority*, 798 F.2d 1525 (D.C. Cir. 1986); *162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona and AFGE, Local 2924*, 21 FLRA 715 (1986); and *Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region, APO New York*, 21 FLRA 640 (1986).

so the Union's proposal "to remove the middle step is the wiser way to go."

b. The Employer's Position

The only matter in dispute in this article concerns the allocation of official time in blocks to NTEU chapters. Contrary to the Union's presentation during the arbitration hearing, the parties have "conceptual" agreement that: (1) their existing practices utilize full-time Union representatives; (2) full-time representatives provide several advantages for management; and (3) there is a need to increase block time to implement and administer the new contract. The significant difference between the two proposals is that "CBP provides a base distribution of block time that can be increased upon an appropriate request," while the Union's proposal would "muddy the water" by requiring supervisors and employees to calculate a "multi-faceted and confusing equation to determine who is eligible for block time." For example, the Union's proposal mandates additional full-time representatives for chapters that have jurisdiction across a particular number of ports yet it has never provided the Employer with the geographic jurisdictions of its chapters. The Employer nonetheless has proposed "a dramatic increase in block time Union representation" even though the Union failed to demonstrate the rationale for its proposed distribution of block time. Under management's offer, 18 chapters will receive at least 1 representative on 50-percent block time, 17 Chapters will receive at least 1 representative on 100-percent block time, and 4 Chapters will receive at least 2 representatives on 100-percent block time.

The Union has been in "aggressive pursuit of additional full-time representatives," but has never articulated how many representatives will receive block time in accordance with its proposal. Rather than create a scale for block time distribution "based on unknowns," the Employer's proposal uses a model similar to what the parties agreed to for determining the number of stewards for a post of duty, *i.e.*, that "the total number of bargaining unit employees justifies a minimum number of representatives. Given the Union's assertion that the unique characteristics of a chapter make it impossible to quantify the work done by a chapter representative to determine a definitive formula for block time distribution, "CBP's proposed solution provides the more transparent procedure to allocate block time." It would provide the parties "a floor" for the exact number of representatives entitled to perform representation functions on

block time on the first day the CBA goes into effect. The adoption of the Union's proposed article "would leave approximately 40,000 bargaining unit employees and management officials scratching their heads, wondering who is now getting block time and where."

The Employer's proposal also "sufficiently addresses" the Union's inability to justify additional block time for those locations not identified in CBP's proposal by establishing "an expeditious block time request process where disagreements are referred to the expedited arbitration process." Its contract proposals also provide other institutional benefits, including: (1) reasonable time granted to stewards, chief stewards, Chapter Presidents, and affected employees to prepare for meetings; (2) the Union's ability to designate at least one official steward at each post of duty; (3) its ability to appoint increasing numbers of stewards depending upon the number of employees stationed at a post of duty, starting at 2 stewards where there are between 26 - 50 unit employees, up to 18 stewards where there are more than 1,076 unit employees; (4) its ability to designate 1 chief steward for each CBP Port, Area or Headquarters Office; (5) an entitlement for Union representatives other than full-time representatives to use official time through *ad hoc* requests; (6) explanations from supervisors to the representative and/or employee when requests for official time are denied due to work requirements indicating when it will be possible to grant the request.

In addition, "the desired end effect of official time" of appropriately supporting the Union in its representational role is complimented by these other Agency contract articles: (1) management will provide meeting space in areas occupied by the Employer for meetings during non-duty hours; (2) an NTEU National Representative, upon an approved request received by the Employer, normally no later than 24 hours in advance, may visit non-work areas located on the Employer's premises to discuss appropriate Union business with bargaining unit employees during non-duty hours; (3) the Employer will provide confidential meeting space during official hours of business, in areas occupied by the Employer; (4) in the event meeting space is not available, the Employer will make necessary arrangements to reserve meeting space as soon as it becomes available; (5) management will provide two four-drawer file cabinets to each NTEU chapter which has not previously been provided with file cabinets by the Employer; (6) at a minimum, the Employer will provide the Union with adequate office space and equipment at a CBP worksite or other approved facility, in accordance with

government-wide regulations on space management; (7) upon the effective date of the CBA local chapters may request to negotiate over office space in accordance with the Bargaining article; (8) at a minimum, any office provided will be equipped with a desk, four chairs, and a telephone; and (9) upon the request of the Chapter President, the Employer will provide one "Blackberry" per NTEU chapter, including any necessary government access codes, enabling it to communicate with managers and employees on employee conditions of employment. In comparing the parties' last best offers on this article, therefore, "it is clear that CBP's provides a more effective method of allocating block time." Furthermore, in view of the immediate increase of block time contained in the Agency's proposal, the additional protections built into the Agency's articles that provide official time, and the other enhancements to the Union's representational capabilities, the Employer's article should be adopted as the better option.

CONCLUSION

Having carefully considered the evidence and arguments presented by the parties on the remaining issues in this article, I conclude that, on balance, the Union's final offer provides the more reasonable basis for resolving their impasse. Unlike a number of the other articles in this case, the parties agree that past practices under the legacy Customs-NTEU contract are not relevant to their official time dispute, with the Employer acknowledging that "CBP and NTEU have conceptual agreements on the use of block time for official time purposes." The parties also agree that the Union's need for official time will be substantially greater than previously and that having full time union representatives provides substantial benefits to management as well as to the Union.

Turning to the specific elements of each side's proposals, the Employer's final offer creates a substantial likelihood of continuing conflict over official time whose additional costs must be considered in determining whether it should be adopted on its merits. While setting a "floor" of block time entitlements, it also permits the Union to request that additional representatives receive official time on a full-time or other percentage basis, with any disagreements being resolved through expedited arbitration. The floor the Employer proposes, however, is below the amount of official time already provided at some ports, such as Miami. Although under the Employer's proposal no port suffers a reduction in official time from what it currently has, the growth in the number of unit employees

virtually guarantees that requests for additional official time will be generated and that expedited arbitration will be invoked. Management's proposal in this regard also appears to be inconsistent with the standards of finality and avoidance of piecemeal bargaining it has urged the Arbitrator to apply when evaluating the Union's final offers in other articles.[85/]

In addition, the Employer's final offer does not address the geographical diversity of the Union's chapters and the resulting variations in service its representatives will be required to provide. Although this was a major point raised by the Union during the arbitration hearing, the Employer refused to acknowledge its validity by modifying its final offer. Instead, the Employer maintains that geographically spread out ports can be covered using stewards. This flies in the face of the parties' conceptual agreement that the use of full-time representatives is a better approach than relying on stewards and, once again, increases the likelihood that *ad hoc* disputes over official time will ultimately result in the need for expedited arbitration at a number of CBP's over 340 ports of entry.

Moreover, the Employer has offered no rationale to support its floor-setting formula. Despite inquiries at the arbitration hearing, the Employer's post-hearing brief does not explain the methodological basis for its formula, such as comparability with what other similarly-situated agencies provide their exclusive representatives. Without a rational explanation for why, for example, chapters representing fewer than 200 bargaining unit employees should have no representatives on block time, its formula appears to be arbitrary.

Nor does the Employer argue that adoption of the Union's official time formula would be cost prohibitive or raise national security or other concerns. To be fair, according to one of the Union's own exhibits, its formula would provide one representative on 50-percent official time for Chapters with as few as 75 unit employees. This would amount to 13.8 hours of official time per unit employee in a 75-employee unit, which is clearly excessive. As the number of unit employees per chapter increases, however, the Union's formula appears to be similar to

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85/ Although the Union's proposal does not appear to preclude the Union from requesting additional official time, it is my expectation that such requests will be rare and that the Union will bear a heavy burden of justifying such requests if they are denied and arbitrated.

what other comparable agencies provide to their exclusive representatives, at least according to the OPM data from FY 2003, which is the latest data OPM has published concerning official time use throughout the federal government. While the number of hours of official time per unit employee ranges from 1.02 (Department of State) to 16.94 (Department of Transportation), with an overall government-wide average of 4.58, the Union's formula would result in a range of between 3.1 and 7.5 hours of official time per unit employee. This is somewhat less than the average of 8 hours per unit employee provided by agencies in the "more active units" the Union urged the Arbitrator to consider as the entities most comparable to CBP, *i.e.*, the Department of Labor (7.63), the Department of the Treasury (7.58), the Social Security Administration (8.17), and EEOC (8.58). It is notable that the Employer did not dispute the Union's contention that those are the agencies that should be used for purposes of comparison, nor did it offer any response to the Union's additional claim that its formula also is reasonable when compared with the formula used at IRS, which would result in approximately 62 full-time representatives if applied to CBP, or more than what the Union's proposal would provide in 100-percent and 50-percent slots combined. Finally, the Union's argument that geographic diversity must be considered in evaluating the need for official time is persuasive.

In conclusion, while the Union's final offer on this article is less than ideal, the final-offer selection procedure does not permit the Arbitrator to improve it. The Employer, on the other hand, did not respond to a number of the Union's arguments, and its final offer appears to be arbitrary, would result in additional litigation and associated costs, and is contrary to the Employer's stated goal of achieving finality in matters addressed by the parties' CBA. Accordingly, I shall order the adoption of the Union's final offer on the Official Time article.

DECISION

1. Access to Facilities and Services

The parties shall adopt the Employer's final offer.

2. Adverse Actions and Disciplinary Actions

The parties shall adopt the Employer's final offers.

3. **Attire and Appearance**

The parties shall adopt the Union's final offer with the exception of Section 2.C., which shall be withdrawn.

4. **Awards and Recognition**

The parties shall adopt the Employer's final offer.

5. **Part B: Bid & Rotation and Work Preferences for Positions Other Than CBP Officers and CBP Agriculture Specialists**

The parties shall adopt the Employer's final offer.

6. **Duration**

The parties shall adopt the Employer's final offer.

7. **Employee Rights**

The parties shall adopt the Employer's final offer.

8. **Equal Employment Opportunity**

The parties shall adopt the Union's final offer.

9. **Use of Force & Firearms**

The parties shall adopt the Employer's final offer.

10. **Holidays**

The parties shall adopt the Union's final offer.

11. **Leave and Excusal**

The parties shall adopt the Employer's final offer.

12. **Merit Promotion**

The parties shall adopt the Employer's final offer.

13. **Reassignments**

The parties shall adopt the Employer's final offer.

14. **Preclearance**

The parties shall adopt the Union's final offer.

15. **Safety and Health**

The parties shall adopt the Employer's final offer.

16. **Scheduling**

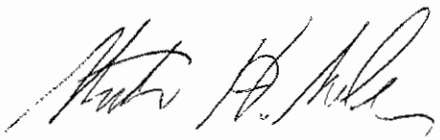
The parties shall adopt the Employer's final offer, with the exception of Sections 6, 14.A. and 15.A., which shall be withdrawn.

17. **Employee Development**

The parties shall adopt the Employer's final offer, with the exception of Section 5.C., which shall be withdrawn, and Section 6.B., where the Union's final offer in that subsection shall be substituted for the Employer's proposal.

18. **Union Representatives and Official Time**

The parties shall adopt the Union's final offer.



Martin H. Malin
Arbitrator

January 10, 2011
Chicago, Illinois