In the Matter of

DEPARTMENT OF THE ARMY
U.S. ARMY AVIATION CENTER OF EXCELLENCE
FORT RUCKER, ALABAMA

and

LOCAL 1815, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 12 FSIP 29

## Arbitrator's Opinion and Decision

The Department of the Army, U.S. Army Aviation Center of Excellence, Fort Rucker, Alabama (Employer or Agency) and Local 1815, American Federation of Government Employees, AFL-CIO (Union) jointly filed a request for assistance with the Federal Service Impasses Panel to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119.

After an investigation of the request for assistance, which arose during negotiations over the successor to the parties' 2002 collective bargaining agreement, the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned Panel Member. The parties were informed that if a settlement were not reached during mediation, I would issue a binding decision to resolve the dispute. Accordingly, on April 23, 2012, I conducted a mediation-arbitration proceeding by videoconference with representatives of the parties. The parties reached a voluntary settlement on one of two unresolved issues during the mediation portion of the proceeding but could not reach agreement on the second issue. Accordingly, I am required to issue a final decision resolving the parties' dispute regarding that issue. In reaching this decision, I have considered the entire record in this matter, including the parties' post-hearing submissions.

## Background

The Employer is one of eight Army Commands located on Fort Rucker, the largest helicopter training installation in the world. The Employer's primary mission is to train military, civilian and international personnel in aviation-related and leadership skills to prepare Army Aviation for the future. The Union represents approximately 1,800 professional and non-professional employees in these Commands. Although the parties' collective bargaining agreement has expired, the parties have continued to follow its terms and conditions of employment.

## Issue at Impasse

Article 38, Section 5 of the parties' expired collective bargaining agreement provides, in pertinent part, that "the fees and expenses of the arbitrator shall be borne equally by the Employer and the Union." The issue at impasse is whether, in the successor collective bargaining agreement, that provision should be modified to permit an arbitrator to assess a greater percentage of the arbitrator's fees and expenses against one party in certain circumstances.

## Positions of the Parties

1. The Union's Position

As its last best offer, the Union proposes the following:

> If the arbitrator determines that the grievance should have been resolved at a lower level, the arbitrator will have authority to assess a higher proportion of the arbitrator's fee and costs, up to 100 percent, against the non-prevailing party.

Relying on Article 37, Section (1) (6) of the collective bargaining agreement, the Union states that the "very essence" of the parties' agreement is to resolve issues at the lowest possible level. It contends that the proposed language would provide a mutually acceptable method for the prompt and equitable settlement of grievances. According to the Union, the Employer should have to pay the Union's portion of litigation when it knowingly and willfully violates the parties' bargaining agreement but not when the Employer acts pursuant to a reasonable interpretation of a particular term of the agreement. Insofar as the Employer is concerned about dwindling resources, the provision would "ensure wise and thoughtful negotiations at the lowest level and thereby virtually eliminate – or at least drastically reduce – third party interaction."

In documents presented prior to the hearing and at the mediation, the Union supplied an arbitration award involving these parties, dated July 25, 2011, in which an arbitrator sustained a grievance in its entirety and required the Employer to pay the full amount of the arbitrator's fees. On the Employer's request for clarification, the arbitrator revised this portion of the remedy to require that the cost of arbitration be borne equally by the parties, pursuant to the parties' bargaining agreement. The Federal Labor Relations Authority upheld that award. The Union contended during the hearing in the instant case that its proposal would allow an arbitrator to assess costs against the non-prevailing party if an arbitrator were to find that party's position to be without merit. Initially, the Union's proposal would have given an arbitrator the discretion to assess those costs solely against the Employer, but during the hearing the Union changed the language to apply equally to both parties.

2. The Employer's Position

As its last best offer, the Employer proposes the following:

> Arbitrator fees/costs shall normally be borne equally by both parties; however, the arbitrator may award up to 75 percent of arbitrator fees/costs if there is a specific finding that the unresolved Agency action was wholly without merit or the Union knew or should have known that it would not prevail on the merits when it filed for arbitration.

The Employer contends that its proposal is more fair and equitable because it provides a "definitive, fair resolution of the award of arbitration fees, in contrast to the Union's "broad, vague proposal." The Employer does not see a need to change the *status quo*, which it claims has permitted two to three arbitrations a year without an allegation of hardship. A cap of 75 percent on fee shifting reflects the least deviation from the *status quo*. If there is a change in the provision, it should provide the arbitrator with an understandable standard as to when an award of fees to the Union is appropriate. The language "wholly without merit" provides such a standard. Otherwise, the arbitrator will apply a subjective analysis and there will be uncertainty surrounding the finality of the award, requiring additional time to resolve through further litigation. It is important that the language triggering fee shifting to the Union should not be the same as that applicable to the Employer. The Employer's proposed language recognizes that the Union should know whether it is filing for arbitration on a grievance that has already been resolved to the fullest extent practicable or when it is requesting impermissible relief or pursuing arbitration on issues clearly outside an arbitrator's authority.

In contrast, the Union's proposal lacks standards for an arbitrator to apply when determining whether a grievance should have been resolved at a lower level. Thus, it does not permit the parties to gauge the risk of fee shifting prior to arbitration. It is likely to lead to inconsistent results because each arbitrator may use a different standard, which creates an unpredictable outcome and encourages the parties to file exceptions. The Union's proposal also does not give an arbitrator a standard for determining which is the non-prevailing party.

## Conclusions

After a careful review of the entire record in this case, including the parties' post-hearing position statements, I have concluded that a provision that combines terms from each of the proposals provides the best resolution of the parties' impasse over payment of arbitrators' fees and costs.

1. Allocation of Fees

Initially, I conclude that the Union's proposal should be adopted insofar as it reposes discretion in an arbitrator to order the non-prevailing party to pay up to 100 percent of an arbitrator's fees and costs.

Federal sector collective bargaining agreements often grant arbitrators the discretion to allocate the percentage of fees paid by each party. See, e.g. Department of Defense, Defense Mapping Agency Aerospace Center, St., Louis, Missouri and NFFE, Local 1827, 35 FLRA 1307 (1990). Moreover, such provisions often require the losing party to pay the entire amount. See Department of the Interior, National Park Service, Pictured Rocks National Lakeshore,

Munising, Michigan and NFFE, Local 2192, 61 FLRA 404 (2005); Department of the Air Force, McGuire AFB, New Jersey and AFGE, Local 1778, 48 FLRA 740 (1993). The Union's proposal does not require such payment; it merely gives an arbitrator the authority to order payment by the non-prevailing party. Contrary to the Employer's concern, the Union's proposal does not give an arbitrator the discretion to allocate fees if the identity of the prevailing party is in doubt. It is implicit in the proposal that equal fee-splitting would remain the norm in such circumstances. Indeed, in light of the tighter standards that will be included, as set forth below, it is unlikely that arbitrators will see fit to invoke the fee-shifting language in many cases. It follows that the inclusion of this language is unlikely to lead to excessive litigation over fees, as feared by the Employer.

The risk of being ordered to pay the full costs of an arbitration procedure may lead to the resolution of more grievances at a lower level, which the Union desires and the parties' collective bargaining agreement encourages. In that regard, the pressure to settle grievances prior to arbitration in order to avoid that risk should affect the decisions of both parties when assessing whether to proceed to arbitration. The possibility of incurring additional fees of only 25 percent, as provided by the Employer's proposal, would not present the same degree of risk or the same deterrent.

The Employer claimed at the hearing that the possibility of being ordered to pay fees and costs would not deter the Union from taking specious grievances to arbitration because most arbitrators would choose not to assess such fees against a union. I know of no evidence to support that claim. Rather, it is reasonable to assume that an arbitrator would not hesitate to order the payment of fees by a union that has been shown to have taken a wholly non-meritorious grievance to arbitration.

Finally, both parties indicated during this proceeding that they expected the current practice of sharing arbitrators' fees equally to remain the norm. Accordingly, I will order the inclusion of language from the Employer's proposal establishing that as the norm.

2. Appropriate Standards

I further conclude that the standards contained in the Employer's proposal provide clearer guidance to an arbitrator in allocating fees and costs. They also comport with the Union's position that an arbitrator should have the ability to assess fees against the party that has pursued a position that is without merit.

Requiring a specific finding that the Employer's action was "wholly without merit" or that the Union "knew or should have known" that it would not prevail on the merits of a grievance does narrow the instances in which an arbitrator could shift fees and costs to the non-prevailing party. Nonetheless, there is no question that in the decision dated July 25, 2011, the arbitrator found the positions taken by the Agency to be wholly without merit. Had the Employer's proposed standards been in effect at that time, I have no doubt that the arbitrator's initial order requiring the Agency to pay the full costs in that case would have been upheld on review. Thus, insofar as the Union seeks to change the existing contract language to permit fee-shifting in such situations, the standards contained in the Employer's proposal would do so.

In contrast, the Union's proposal would require an arbitrator to determine whether the parties could have resolved a dispute at a lower level. This is a much looser standard and one that would be harder to apply. In a case where one of the parties had offered to settle the grievance prior to arbitration and the other party had refused the offer but ultimately did not prevail in any manner, the Union's proposal would allow the arbitrator to assess fees against the losing party. But other scenarios could lead to more ambiguous results. For example, if the party that refused to resolve a grievance at a lower level prevails on some, but not all, issues at arbitration, should the arbitrator assess fees against that party? Similarly, if there was no evidence that either party had offered a reasonable settlement, on what grounds would the arbitrator make the determination that resolution at a lower level was possible? Such potential issues could lead to post-hearing arguments about liability and exceptions to fee awards, thereby lengthening the arbitration process and making it more costly.

Accordingly, I shall order the adoption of the standards contained in the Employer's proposal, which are more narrowly drawn and simpler to apply.

## Decision

The parties shall adopt the following proposal to replace Article 38, Section 5 of their current collective bargaining agreement:

> Arbitrator fees and costs shall normally be borne equally by both parties. However, the arbitrator will have the authority to assess a higher proportion of the arbitrator's fees and costs, up to 100 percent, against the non-prevailing party if there is a specific finding that the unresolved Agency action was wholly without merit or the Union knew or should have known that it would not prevail on the merits when it filed for arbitration.

Barbara B. Franklin
Arbitrator

May 9, 2012
Washington, D.C.