United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of NATIONAL LABOR RELATIONS BOARD WASHINGTON, DC and NATIONAL LABOR RELATIONS BOARD UNION	Case No. 12 FSIP 166

DECISION AND ORDER

The National Labor Relations Board, Washington, DC (NLRB or Employer) 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 National Labor Relations Board Union (NLRBU or Union).

Following investigation of the request for assistance, which arises from negotiations over 2 successor collective bargaining agreements (CBAs) involving parts or all of 17 articles and 3 appendixes, the Panel directed the parties to resume negotiations with the assistance of a private factfinder of their choice.[1/] Pursuant to the Panel's directive, the parties selected Factfinder Ira F. Jaffe, who conducted 15 days of face-to-face mediation and factfinding, and numerous telephone conferences and email exchanges. Complete agreements were

1/ Under this procedure, the private factfinder provides mediation assistance to the parties at their expense. If a complete settlement of the dispute does not occur as a result of the mediation efforts, the private factfinder issues a report, with recommendations for settlement, to the parties and the Panel. The parties then indicate which, if any, of the recommendations are unacceptable. At this stage of the procedure, if there are still issues at impasse, the Panel resolves the dispute in whatever manner it deems appropriate.

reached on 12 articles and 2 appendixes as a result of the Factfinder's mediation efforts. On May 20, 2013, the Factfinder issued a *Factfinding Report and Recommendations for Settlement* (*FR&RS*) addressing the issues that remained in dispute. In its response to the *FR&RS*, the Employer indicated that it was unwilling to accept the Factfinder's recommendations regarding: (1) Article 12, "Incentive and Performance Awards," Section 9; (2) Article 21, "Hours of Work," Sections 3, 5, 6, 7 (footnote 14), 9 and 11; (3) The entirety of Article 28, "Official Time," except for Section 15(b); and (4) Appendix - MOA on NxGen, Paragraph D. The Union objected to the Factfinder's recommendations concerning: (1) Article 11, "Washington Exchange Program," Section 1; (2) Article 12, "Incentive and Performance Awards," Section 9; (3) Article 12, "Incentive and Performance Awards," Section 10; (4) Article 12, "Incentive and Performance Awards," Section 2(b)(2); (5) Article 34, "Telework," Section 3(d); and (6) Appendix - MOA on NxGen, Paragraph D.2.

Subsequently, the Panel issued an *Order to Show Cause* (*OSC*) why it should not impose the Factfinder's recommendations to resolve the issues the parties identified as unacceptable, including why the wording or alternative approaches they proposed should be adopted instead. The Panel then would take whatever action it deemed appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*. The parties submitted responses to the *Order to Show Cause* (*OSC*) as directed. In reaching its decision, the Panel has now considered the entire record.

BACKGROUND

The Employer administers provisions of the National Labor Relations Act, which vests it with the authority to, among other things, prosecute complaints in unfair labor practice (ULP) cases and resolve questions concerning representation between private sector employers and unions. The Employer's headquarters is in Washington, D.C. and it has 32 regional offices throughout the country. The Union represents approximately 920 General Schedule employees in two separate bargaining units. One unit consists of three groups of employees: (1) Professional employees who work throughout the Employer's regional offices; (2) Support staff employees who work at the regional offices; and (3) Support staff for the Employer's Office of General Counsel (OGC) in Washington D.C. The three foregoing groups of employees were in separate bargaining units until they were consolidated into one unit. The regional office professional and support staff employees are

covered by two different CBAs that were to have expired in 2006 but remain in effect. The OGC support staff employees are covered by an agreement that was to have expired in 2001 but also remains in effect. The second bargaining unit involved in this case consists solely of the headquarters support staff in Washington, D.C.[2/] These employees are covered by an agreement that also was to have expired in 2001 but remains in effect.

Overall, the Factfinder recommended that the Panel impose successor CBAs consisting of the following: (1) The articles the parties agreed to prior to mediation; (2) The articles agreed to in mediation; and (3) The additional wording that will be ordered by the Panel in the remaining disputed areas that are referenced in his *FR&RS*. On pages 5-6 of the *FR&RS*, the Factfinder makes the following observations:

> [T]he Recommendations in this Fact-Finding Report are inter-related and integrally connected with many of the items as to which agreement was reached, both prior to and during the Mediation process. While the Recommendations stand on their own as independently appropriate, they are part of an integrated series of provisions that, in the aggregate, form what I believe to be fair and appropriate successor Agreements . . . The agreed upon provisions and many of the Recommendations are the product of the bargaining process and are inter-related. If changes are made to one part of the bargain without making concomitant changes to other parts of that bargain, the fairness of the overall Agreement may be affected.

ISSUES AT IMPASSE

The Factfinder's recommendations on the following issues are before the Panel for final resolution: (1) The number of exchange assignments for headquarters support staff (Article 11, "Washington Exchange Program," Section 1); (2) A reopener provision (Article 12, "Incentive and Performance Awards," Section 2(b)(2)); (3) Time off in lieu of performance and bilingual cash awards (Article 12, "Incentive and Performance Awards," Section 9); (4) Quality Step Increases (Article 12,

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2/ The Employer has an additional bargaining unit that is comprised of attorneys who work for the Members of the Board represented by the National Labor Relations Board Professional Association (NLRBPA), whose CBA is not at issue.

"Incentive and Performance Awards," Section 9); (5) The percentage of unit employees' pay pool (Article 12, "Incentive and Performance Awards," Section 10); (6) Maxiflex (Article 21, "Hours of Work," Sections 3, 5 and 6, 7 (footnote 14), 9 and 11); (7) Official time for Union representatives (Article 28, "Use of Official Time," entire article except for Section 15(b)); (8) Project telework (Article 34, "Telework," Section 3(d)); (9) Ground rules for mid-term bargaining (Appendix - NxGen,[3/] Paragraph D); and (10) Union-initiated mid-term bargaining (Appendix - NxGen, Paragraph D.2.).

THE POSITIONS OF THE PARTIES

1. Article 11, "Washington Exchange Program," Section 1

a. The Factfinder's Recommendation

The Factfinder recommended the following wording in Section 1 of Article 11:

> Consistent with budgetary and staffing considerations, 36 Exchange Program assignments will be offered to employees during each fiscal year of this Agreement. Of these slots, 21 will be reserved for field office professionals; 11 will be reserved for field office support staff; **2 will be reserved for GC-side headquarters support staff; and 2 will be reserved for Board-side support staff.** The program provides employees an opportunity to learn about Agency work that is performed in offices other than the employee's duty station. The goal of the program is to train employees in the overall mission of the Agency and provide career development. [The highlighted wording is in dispute.]

In support of his recommendation, the Factfinder concluded that, while the Exchange Program is popular, it also has resulted in excessive costs of $200,000 annually, justifying a reduction in the number total of assignments from 47 to 36. The Factfinder also stated that there has been a reduction in the size of the bargaining unit "and increasing difficulty at placement of those

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3/ NxGen refers to an electronic case tracking system that has been implemented in the Employer's field offices. The NxGen Appendix would replace the parties' NxGen Memorandum of Agreement, reached with the assistance of the Panel in April 2011.

selected for Exchange Program assignments in light of the decreases in size of the bargaining unit."

b. The Union's Position

In lieu of the Factfinder's recommendation, the Union proposes that the following wording be inserted as Section 1(b) in both of the successor CBAs:

(b) Applicable to Headquarters employees.

(1) A minimum of 10 employees from the Washington Headquarters Office to other Washington Headquarters offices and/or to the Washington Division of Judges, 4 employees at Headquarters to the Washington Resident Office and/or the Baltimore Regional office, and all support staff employees in the Satellite Judges offices where they are stationed, to Regional Offices within their commuting area, within the contract term. In addition, from the Satellite Judges Offices, 2 eligible employees from the Satellite Judges offices per fiscal year will be offered an exchange to the Washington Headquarters office. Such employees will not be from the same office.

(2) Opportunities for details to regional offices will be offered to two qualified employees during each year of the agreement for the purpose of giving unit employees experience in Regional Office operations and providing appropriate assistance to the designated office(s), with emphasis on computer/office automation assistance. Management shall designate the Regional Office(s) that will participate in this exchange program and will determine the skills that will be required for each detail, as appropriate. Management will advise employees, in writing, of the necessary skills concurrent with the solicitation set forth in Section 1(b)(3) below.

(3) Solicitation of qualified employees for opportunities described in Section 1(b)(2) above will be made after Management identifies a specific operating need in a Regional office. The union may provide input at any time regarding potential operational needs in regional offices. However, it is at the sole discretion of Management to determine such qualifications and operating needs.

The adoption of its proposal would benefit headquarters support staff and the Agency by providing a core of pre-trained employees with experience in operations they normally do not perform "to fill positions as vacancies and other needs arise" at little or no expense to the Agency. The Factfinder's recommendation to reduce the number of headquarters support staff eligible for the Exchange Program training details on the basis of budgetary considerations "is not correct" because "this component of the Exchange Program has no costs." In this regard, other than "nominal commuting expenses between Washington and Baltimore for up to 4 employees over 3 years," support staff would be detailed to offices within their commuting areas, and mostly within the same buildings where they currently work. Contrary to the Factfinder's rationale, while the size of the bargaining unit has been reduced, there is still approximately 70 support staff at the headquarters office who could benefit from the program.

2. Article 12, "Incentive and Performance Awards," Section 2(b)(2)

a. The Factfinder's Recommendation

The Factfinder ordered the Union to withdraw its proposal. Although he did not specifically address the matter in the *FR&RS*, his recommendation not to permit either party to reopen negotiations over award amounts if they are no longer capped at 1 percent of aggregate salaries is consistent with his recommendations in other areas to limit the parties' reopener opportunities in the new CBAs. It also comports with his general statements that, if there are to be changes in the *status quo*, they must be warranted based upon "the relevant circumstances underlying that provision" or "supported by a showing that the existing contractual provisions created problems that deserve to be remedied through new or changed contractual language."

b. The Union's Position

The Panel should reject the Factfinder's recommendation and add the following footnote in Section 2(b)(2) at the end of the second sentence:

> FN/ Either party may reopen negotiations with respect to the award amounts in the scale set forth in the appendix to this article if law, government-wide rule and regulation, or government-wide guidance, directive

> or policy does not require the Agency to limit award spending for non-SES/SL/ST performance awards and individual contribution awards to a maximum of [1] percent of their aggregate salaries.

If the Union is not permitted to reopen negotiations over award amounts they will remain fixed at the level of 1 percent of aggregate salaries for the 3-year term of the new CBAs even if financial conditions improve. Historically, however, the Employer has set its awards budget at 1.4 percent of aggregate salaries, so the inability to negotiate an amount higher than 1 percent could hurt morale and productivity.

3. Article 12, "Incentive and Performance Awards," Section 9

a. The Factfinder's Recommendation

The following wording was recommended by the Factfinder regarding Section 9 of this article:

> If the Agency curtails or limits cash awards because of budgetary considerations in accordance with Article 3, the following will apply:
>
> (a) Employees will receive time-off awards during the period when cash awards are not being paid.
>
> (1) If the Agency determines to grant time-off awards to all bargaining unit employees rated Fully Successful or above, the following time-off awards scale will be in effect:
>
> (i) Fully Successful: 11 hours.
> (ii) Commendable: 22 hours.
> (iii) Outstanding: 34 hours.
>
> (2) If the Agency determines to grant time-off awards, but only to employees who were approved for a cash award, the following time-off awards scale will be in effect:
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> (i) Fully Successful: 39 hours.
> (ii) Commendable: 43 hours.
> (iii) Outstanding: 51 hours.
>
> (b) Employees approved for Bilingual Awards will receive the following time-off awards:

Year	Level	Support Staff	Professional Staff
August 2013	Level 1	6 hours	3 hours
	Level 2	12 hours	6 hours
	Level 3	18 hours	9 hours
August 2014	Level 1	7 hours	3.5 hours
	Level 2	14 hours	7 hours
	Level 3	21 hours	11.5 hours
August 2015 (and Beyond)	Level 1	8 hours	4 hours
	Level 2	16 hours	8 hours
	Level 3	24 hours	12 hours

(c) The time-off awards in Subsections (a) and (b) shall be in addition to any time-off awards (such as on-the-spot or recognition time-off awards).

(d) If, in any fiscal year, there are insufficient funds to provide bargaining unit cash performance awards in the amounts set forth in Section 2(b)(2) of this Article because the total amount of all Agency performance awards (bargaining unit performance awards and non-bargaining unit performance awards) would exceed the total remaining Agency awards budget, the Agency will reduce the bargaining unit performance awards by the same reduction ratio used to reduce nonbargaining unit performance awards. The reduction ratio will be the actual remaining awards budget funds divided by the total amount of all agency performance awards.* If management determines that there will be no reduction to non-bargaining unit performance awards, then there will be no reduction to bargaining unit performance awards. In the event of a partial reduction in the amount of cash awards, the time off awards surrogate is reduced by a similar percentage, with the resulting time off award rounded to the nearest quarter-hour.

(e) The parties agree that management may deny requests to use time off awards issued pursuant to Section 9(b) if the time that the employee requests off would interfere with operating needs. In such

> cases, the employee may request that the time off award be used at another time.
>
> (i) If denial of an employee's request to use a time off award granted pursuant to Section 9(b) would foreseeably result in forfeiture of the award, the employee should notify management of the potential for forfeiture. Employee requests to use time off awards granted pursuant to Section 9(b) will not be denied, if denial will result in forfeiture of the award, without just cause. Further, management will make every effort to permit the employee to use the time off award to avoid forfeiture.
>
> * For example, if the total remaining performance awards budget is $100,000, and the total amount of all agency performance awards is $125,000, then the Agency will reduce all performance awards to 80% (100,000/125,000). Therefore, every performance award amount will be multiplied by 80%.

According to the Factfinder, his recommendation regarding time-off awards during periods when no cash awards are being paid attempts to rectify the fact that the Employer provided "no explanation . . . for why the time-off award amounts do not have the same relationship with one another as do the cash award amounts" in its last best offer (LBO). While the Employer explained that the cash award amounts in its proposed Appendix, which reduce the cash amounts per award from those currently in effect, would permit the more limited awards budget to be appropriately distributed to roughly the same pool of employees, the Factfinder was persuaded that "retention of that parity relationship is appropriate." This approach would not preclude the Agency from complying with the requirements of recent Office of Personnel Management and Office of Management and Budget memoranda on performance awards, but does mandate that if budgetary considerations require a reduction in the size of the awards pool for the bargaining unit, then the bargaining unit as a whole be treated fairly and in a similar fashion to the NLRBPA bargaining unit and the pools applicable to non-represented employees of the Agency. In the Factfinder's view, the recommended approach is legal, preserving "statutorily reserved discretion to the Agency in connection with budgetary matters."

b. The Employer's Position

The Factfinder's recommendation in Section 9 of this article should not be adopted because he provides no explanation of how he determined the specific time-off award amounts when cash awards are not being paid at the Fully Successful, Commendable and Outstanding performance levels, either when management determines to provide time-off awards to all employees rated Fully Successful or above, or only to employees who were approved for a cash award. Similarly, there is no explanation in the *FR&RS* as to why, when management determines to provide time-off awards to all employees rated Fully Successful or above, a GS-14 employee who is rated Outstanding would get less time off for the same level of performance simply because there are more employees receiving awards. Nor does he explain how he arrived at separate time-off award scales for support and professional staffs in lieu of monetary bilingual awards, granting support staff double the amount of time off than professional staff. In this regard, while the Factfinder posits that "translation work of the type required by the Agency is work that is paid at rates much higher than those paid to the average support staff bargaining unit employee," the same consideration should have applied when he recommended the dollar amounts for bilingual awards in Section 2(a)(6)(E) of the article, but that section does not distinguish between support and professional staff. In the Employer's view, the amounts of the recommended bilingual time-off awards are "overly generous," would result in lost productivity, and "the Agency simply can't function efficiently under those circumstances."

Instead of imposing the Factfinder's recommendation, the Employer proposes the following wording to resolve the parties' impasse:

> If the Agency determines that no funds are available for awards because of budgetary considerations, the following will apply:
>
> (a) The Agency will grant time-off awards in lieu of monetary awards to employees who were approved, in accordance with Section 2(b), for a performance award and the following time off awards scale will be in effect:
>
> (i) Fully Successful: 8 hours.
> (ii) Commendable: 16 hours.
> (iii) Outstanding: 24 hours.

(b) Employees approved for Bilingual Awards will receive the following time-off awards:

(i) Level 1: 4 hours.
(ii) Level 2: 6 hours.
(iii) Level 3: 8 hours.

(c) The time-off awards in Subsections (a) and (b) shall be in addition to any time-off awards (such as on-the-spot or recognition time-off awards).

Overall, the time-off awards scales it proposes in lieu of monetary performance and bilingual awards are sufficient to recognize the important work of employees without compromising the efficiency of the Agency.

4. Article 12, "Incentive and Performance Awards," Section 9

a. The Factfinder's Recommendation

The Factfinder included no wording in Article 12, Section 9, with respect to QSIs, in essence recommending that the Union be ordered to withdraw its proposal. Although he did not specifically address the Union's proposed wording in Section 9, with respect to Article 12 as a whole, the Factfinder was persuaded that, "in light of the present budgetary environment and other factors," neither parties' final offer on Article 12 is reasonable. In general, among other things, he stated that, if there are to be changes in the *status quo*, they must be warranted based upon "the relevant circumstances underlying that provision" or "supported by a showing that the existing contractual provisions created problems that deserve to be remedied through new or changed contractual language."

b. The Union's Position

Rather than adopting the Factfinder's recommendation on this issue, the Union proposes that the following subsections be inserted into Article 12, Section 9:

If the Agency curtails or limits cash awards because of budgetary considerations in accordance with Article 3, the following will apply:

(a) The Agency will continue to timely recommend and approve employees for all types of awards, including Quality Step Increases.

(d) Employees who would have received a Quality Step Increase absent budgetary considerations will receive the QSI. However, the QSI will be effective as of the last pay period of the fiscal year.

The imposition of its proposed wording in Section 9(a) would reduce the possibility of employee awards being delayed if the Agency curtails or limits cash awards because of budgetary considerations, ensuring that there would be "no gulf between the employee accomplishment and recognition of that accomplishment." It is also justified given the parties' agreement to a common appraisal and award date of August 15 each year, particularly where "the record shows that dozens of employee appraisals have been delayed and grievances filed over the delays." The adoption of Section 9(d) would mitigate the cost of QSIs during a year when the Agency is having financial difficulties by effectuating them only during the last pay period of the fiscal year. Thus, outstanding employees would receive long-term financial benefits in future fiscal years without imposing a substantial burden of the Agency.

5. Article 12, "Incentive and Performance Awards," Section 10

a. The Factfinder's Recommendation

The Factfinder recommended that the Union be ordered to withdraw its LBO on Section 10, concluding that "no persuasive reason was shown for the adoption of [] a provision" that "would require that the pay pool for the bargaining unit be set equal to the highest of any other awards pool at the Agency (measured as a percentage of compensation)." Unlike its LBO on Section 9(e), "it is not intended to preserve the historic relationship between the awards pool available for the bargaining unit and the awards pools maintained for other groups of Agency employees, but rather would - if adopted - mandate that a much higher percentage of the overall Agency funds used for performance awards be reserved for bargaining unit employees."

b. The Union's Position

The Union rejects the Factfinder's recommendation on Section 10 of this article and proposes that the Panel impose the following wording instead:

> The amount of money allocated by the Agency for distribution as performance awards to bargaining unit employees shall not be less than the highest percentage allocated to any other pay pool. The pool of employees eligible for performance awards under this section [is] all employees represented by the NLRBU.

The adoption of its proposal would provide unit employees "with performance award parity with other groupings of Agency staff" and, contrary to the Factfinder's conclusion, retains the framework that has existed "for many years" where the Agency has allocated an equal percentage of the awards pay pool to unit employees, attorneys represented by NLRBPA, and non-SES unrepresented staff. Rather than mandating that "a much higher percentage of the overall Agency funds used for performance awards be reserved for bargaining unit employees," its wording would ensure continuation of the current practice where "all groups of Agency staff [are] treated similarly and with equal fairness." In addition, the Factfinder's rationale is contradicted by management statements during the factfinding hearing that the Agency wanted "non-unit employees (including supervisors and managers) to have parity" with Union-represented employees.

6. **Article 21, "Hours of Work," Sections 3, 5 and 6, 7 (footnote 14), 9 and 11**

a. The Factfinder's Recommendation

On the main issues found unacceptable by the Employer in this article, the Factfinder recommended that: (1) Employees on maxiflex may work fewer than 10 days per 2-week pay period; (2) Employees on maxiflex may earn up to 2 credit hours per day; (3) Credit hours may be used within a pay period to bring daily total hours worked to 8 or bi-weekly total hours to 80; (4) There be no restriction on the ability of employees who are on a maxiflex schedule to telework; (5) No employees on a performance improvement plan (PIP) be ineligible to work maxiflex "unless determined otherwise by the Office Head"; (6) Employees disciplined for misconduct may be removed from maxiflex "only where management establishes and documents a nexus between the fact that the employee is working a maxiflex schedule and the particular misconduct underlying the discipline"; (7) Employees detailed to other offices only be eligible to work maxiflex "in accordance with the program as implemented in the office to which the employee is detailed"; (8) The Office Head may

temporarily modify maxiflex based on operating needs "provided that management gives the employee appropriate advance notice of the modification and considers the adverse impact caused by the modification before making a decision to modify the schedule"; (9) One-third of employees eligible to participate in AWS may work maxiflex 4 months after the CBAs go into effect; two-thirds of employees eligible to participate in AWS may work maxiflex 8 months after the CBAs go into effect; all eligible employees may work maxiflex 1 year after the CBAs go into effect; and, until 1 year after the CBAs go into effect, "maxiflex requests will be granted in the order of greatest seniority, as determined locally"; (10) When a particular work assignment "involving an individual not employed by the Agency requires an employee's attendance during normal office hours" which are outside the employees AWS, "the employee shall notify his or her supervisor as far in advance as practicable" and "management may modify the employee's work schedule to the extent necessary to ensure the employee's presence during that time"; and (11) There be local negotiations, to the extent required by law, regarding the designation of certain positions that require coverage during normal office hours "to permit, if possible, those employees to work any alternative work schedule."

In support of his recommendation, the Factfinder concluded that the Union's proposed version of maxiflex should be adopted because "this type of provision is found in a number of other [CBAs] in the federal sector." The proposal affords employees maximum flexibility in terms of the performance of their duties while retaining the Employer's discretion "to reject requests to work maxiflex to the extent that granting the particular request, or allowing an employee to continue to work on a maxiflex schedule, would be inconsistent with the operating needs of the Office." He also concluded that "no persuasive reason has been shown to automatically prevent an employee from working both telework and a [CWS] or a maxiflex schedule," and there "is not necessarily any loss of efficiency associated with the performance of work on telework . . . nor has there been any evidence that increasing the number of telework days . . . or allowing the same employees to both telework and perform work on a [CWS] would adversely affect employee performance or agency operations generally." In the Factfinder's view, "any showing that such adverse effects exist must be made on a situationally-specific basis, not by way of an overall ban on employees being able to work telework simply because they also work on maxiflex or a 5-4/9 [CWS]." Moreover, the parties' existing CBAs recognize the propriety of employees on a 5-4/9 CWS also working telework, and "no operational problems were identified with

allowing employees to both work a compressed work schedule and also to work telework." His recommendation also adds wording in Article 21, Section 11, recognizing "the ability of the Agency to reject, based upon operational needs, a request to take a particular day off work as part of a maxiflex or other work schedule," which provides additional safeguards to ensure operational requirements are met.

According to the Factfinder, disciplinary or adverse action for misconduct should be used to disqualify employees from participating in a Maxiflex schedule only if there is a demonstrated nexus between the particular misconduct underlying the discipline. This is consistent with his recommendation regarding the same issue in connection with the Gliding Flex portions of Article 21. The recommendation to adopt portions of the Union's LBO relating to timing and approvals/disapprovals of requests by individuals on maxiflex schedules for days off due to those individuals planning to complete the requisite 80 hours in fewer than 10 work days in the pay period are "designed to provide the Agency with adequate notice to plan who will be present on each day and to timely reject requests that will impede the Agency's operations." His recommended timeline also would permit employees who are on a maxiflex schedule an opportunity to request a different day off in the same pay period.

b. The Employer's Position

On the main issues found unacceptable by the Employer in this article, it proposes that: (1) Employees on maxiflex must be present in the office each day of the pay period during core hours; (2) Employees may not earn credit hours while working a maxiflex schedule; (3) Employees working gliding flexitime or a 5-4/9 CWS are not eligible to work maxiflex; (4) Employees on a PIP are ineligible to work maxiflex "unless determined otherwise by the Regional Director or his/her designee"; (5) Employees disciplined for misconduct may be removed from maxiflex "at management's discretion and will not be eligible for maxiflex for a 1-year period from the date of the discipline"; (6) Maxiflex will not be available to employees who are approved for "core telework"; (7) Employees detailed to other offices will only be eligible to work maxiflex while on detail; (8) The Office Head may temporarily modify an employee's work schedule in order to meet the operating needs of the office "including requiring an employee on a maxiflex schedule to begin working or end the work day at later or earlier times than previously scheduled"; (8) Upon request of an employee made to the Office

Head with reasonable notice, the Office Head may temporarily modify or adjust an employee's work schedule, "including an employee working a gliding flextime, maxiflex, or compressed hours schedule, in order to meet the requirement of work or to accommodate the family friendly needs of the employee"; and (9) Failure to record arrival and departure times each day shall be cause for removal from the AWS, "such removal shall not be subject to the grievance procedure," and once removed from the AWS an employee will not be eligible for reinstatement of an AWS for a period of 1 year.

Unlike the Factfinder's recommendation, which would be "an extreme change" in the parties' CBAs, adoption of its proposal is more reasonable because "it provides for incremental change from the *status quo*." Requiring maxiflex employees to be at work during core hours each day of the pay period, prohibiting them from also participating in "core telework," and eliminating most of the scheduling procedures in the Factfinder's recommendation would ensure that employees' work life flexibilities do not outweigh the requirement to accomplish the Agency's mission. Adopting the Factfinder's maxiflex-related recommendations, on the other hand, would be "a significant departure from Panel precedent and should be rejected in favor of the Agency's proposal" primarily because they would "create a convoluted process that intertwines 5-4/9, maxiflex, telework, schedule modifications, and seniority, thereby creating a tangled thicket that will be extremely difficult to administer." Furthermore, there is no evidence in the record to support the Factfinder's reference to other Federal sector CBAs containing "this type of provision" but, even if true, "they were agreed to voluntarily by agency representatives and were not imposed by the Panel." The cumulative effect "when maxiflex is layered on top of other workplace flexibilities" at some point impedes Agency operations, leaving Agency offices, "especially the smaller ones . . . an inadequate number of employees on duty to effectively perform case handling and other critical duties." In addition, the Factfinder's recommended provisions on scheduling are "so cumbersome that it is simply unmanageable." In this regard, "there would be no predictability as to who would be working in a given pay period, as the work schedule would be in constant flux." Finally, local management would have the "added burden" of bargaining over positions that are excluded from AWS, potentially ending up as impasses before the Panel.

7. Article 28, "Use of Official Time"

a. The Factfinder's Recommendation

On the issues the Employer finds unacceptable in this article, the Factfinder recommended that: (1) Two Executive Committee members annually would receive 75-percent official time, and four others would receive 40-percent official time, for representational purposes; (2) Consultations between the six Executive Committee members and Agency representatives would occur semi-annually for 2 days each time; Executive Committee members would receive official time for these meetings but official time for preparations and follow through would be taken from their annual bank of hours; (3) The 200 hours per year granted to the six Union representatives designated to participate in the three Labor-Management Committees pursuant to the CBA would not include additional reasonable amounts of official time for work projects agreed upon by these committees; (4) Upon request of either party, there would be at least one monthly meeting between local Union representatives and management, of equal numbers, where Union representatives would be on official time; (5) Specific official time procedures for grievances and other disputes would be implemented at the National and Local levels for Union representatives, grievants and witnesses which, in certain circumstances, would grant reasonable and necessary official time in addition to any bank of hours established elsewhere in the article; (6) Specific official time procedures would apply to arbitration and MSPB hearings for aggrieved employees, there would be equal numbers of national representatives to that of the Agency, and a local Union representative and employee witnesses, as necessary, would be granted reasonable and necessary official time in certain circumstances, in addition to any bank of hours established elsewhere in the article; (7) Reasonable amounts of official time would be granted to a national Union representative for attending congressional appropriations and/or oversight hearings involving the Agency, and for preparation, follow through and travel to and from such hearings if a national Union Officer is scheduled to testify at congressional appropriations and/or oversight hearings involving the Agency; (8) Specific annual amounts of official time not counted against any established bank of hours would be granted to National Officers, District Vice Presidents, committee members, and local officials, for training of various kinds directed toward the maintenance and improvement of a mutually beneficial labor relations environment, and implementation of the parties' CBAs; (9) The Agency would grant reasonable and necessary amounts of annual

leave, accrued compensatory time, and leave without pay to NLRBU officials in connection with their official duties; (10) Procedures concerning approval for use of official time by employees would be implemented whereby employees entitled to official time for representational activities would request approval to use such time from their immediate supervisor, supervisors would respond promptly to such requests, and approval would not be denied unless the necessity of Agency work requirements outweigh the need for the requested official time; members of the Executive Committee and their supervisors would regularly communicate regarding the employee's work and official time requirements, members of the Executive Committee would advise their immediate supervisors of anticipated absences from the office and of large projects which are expected to require the use of significant blocks of official time, and the use of official time would be approved unless the necessity of Agency work requirements outweighs the need for official time; and questions or disputes regarding requests for and use of official time would be promptly brought to the attention of the employee involved and the appropriate NLRBU official at the next highest organizational level; (11) Official time would be provided for an employee designated to act in an NLRBU officer's absence when the officer is on leave for 1 week or more; (12) Representational activities would include any activities undertaken by employees on behalf of other employees pursuant to such employee's right to representation under statute, regulation, or the CBAs; (13) Management would take into account the official time used and reported for representational activities of an employee when evaluating the employee's productivity and work performance, and consider an employee's availability or unavailability for Agency work based on the employee's need to perform union duties that qualify for approvable official time to the same extent as it considers other factors relating to availability or unavailability, such as potentially conflicting Agency work assignments, scheduled annual leave or urgent personal considerations; (14) The Agency would pay the travel and *per diem* expenses of five national officials of the NLRBU for consultation meetings and NLRBU representatives on the EEO, Health and Safety, Training, and Incentive Awards Committees who are on official time for meetings, the parties would mutually agree to attempt to coordinate all referenced meetings in order to minimize costs and attempt to schedule any negotiations arising during the term of the CBAs in conjunction with the timing of other referenced meetings, and travel and *per diem* expenses would be payable upon submission of approvable travel vouchers that comport with federal travel regulations; and (15) If the parties mutually

agree to extend the CBAs beyond the original expiration date, or if the parties allow them to expire, the amounts of official time provided for under Sections 9 (local bank for representational activities) and 11(c)(training of Union representatives) would automatically be extended on a *pro rata* basis for each upcoming year.

On the key issue of official time for Executive Committee members, the Factfinder recommended the Union's proposal because it is less draconian than the Employer's yet still implements a 22.5 percent reduction in the maximum number of bank hours. In this regard, he stated that, "while the record evidence somewhat suggests that some of the time by the Executive Committee may not have represented a reasonable use of official time, no quantitative data was presented that would support recommending any greater reduction to the banks in the existing" CBAs. Under the parties' existing CBAs, the Employer had the ability to gather more information about official time use and question its propriety through a procedure embedded in Article 28, so it is unreasonable to assume that management would have allowed twice as much official time to be used by the Executive Committee as was actually reasonable and appropriate over a period of many years. In addition, the same procedure would be continued if the Factfinder's recommendation is imposed, giving management the ability to monitor and question the particular official time use to ensure that it does not exceed what is reasonable and appropriate in light of the activities being engaged in.

Overall, a number of changes to existing official time provisions were agreed to during the mediation portion of the factfinding procedure which is incorporated into the Factfinder's recommendation. In his view, to the extent that no such changes were made, "there was no reason not to continue the existing contractual language," with the exception of the provisions concerning "Recording the Use of Official Time for Representational Activities," where the Factfinder recommended the adoption of the Employer's LBO, including use of its proposed form contained in Appendix D. With respect to the issue of whether the amounts of official time provided for local representational activities and the training of Union representatives automatically should be extended on a *pro rata* basis for each upcoming year if the parties mutually agree to extend the CBAs beyond the original expiration date, or if the parties allow them to expire, the Factfinder recommended the adoption of the Union's LBO, even though it "is new language," because it "mirrors existing practices."

b. The Employer's Position

On the issues where the Employer urges the Panel to reject the Factfinder's recommendation in this article, it proposes that: (1) With respect to the Union's National Officers, two Executive Committee members annually would receive 60-percent official time, the four other Executive Committee members would receive 40-percent official time, and up to six District Vice-Presidents would receive 100 hours of official time for representational purposes; (2) the six Union representatives on the three Labor-Management Committees established elsewhere in the CBAs would be on official time for attending and for traveling to and from headquarters for one meeting per year and receive a bank of 200 hours per year for preparation and follow through; Union representatives on other committees, non-contractual committees, or work groups would receive official time for time spent at such meetings and a maximum of 2 hours per meeting for preparation and follow through work; and any official time used by a Union representative will not count against official time granted to Executive Committee members or District Vice-Presidents; (3) Each local Union would be granted up to 220 hours for the duration of the CBAs to engage in representational activities, and if the parties mutually agree to extend the CBAs beyond the original expiration date, or if the parties allow them to expire, the amounts of official time provided for in this section would be extended on a *pro rata* basis for each extended year of the CBAs; (4) One Union representative serving as counsel in an arbitration would receive official time for attendance and travel to and from the hearing, and up to 40 hours for preparation and follow through work; grievants and Union witnesses would be granted reasonable amounts of official time for preparation and attendance at arbitration hearings; and Union representatives, grievants and Union witnesses would request official time in connection with arbitration hearings in accordance with Section 7 of its proposed article; (5) Executive Committee members and their supervisors would meet and attempt to reach agreement on the last Thursday of each pay period regarding the representative's work assignments and his/her official time needs for the next pay period and, if agreement is not reached, the matter may be submitted to the Division Head or his/her designee for expedited review; and all other Union representatives entitled to official time under the article would request approval to use such time from their immediate supervisor, providing as much advance notice as practicable, the date and time the official time would be used, and a general description of the activity to be performed; supervisors would respond promptly to such requests,

and approval could be denied if the operating needs off the office outweigh the need for official time; if the Union representative and the supervisor cannot reach an agreement on how to balance the need for official time against the need to accomplish the mission, the matter may be submitted to the Office Head or his/her designee for expedited review; (6) Management would take into account the official time used and reported when evaluating a Union representative's work performance; (7) There would be no wording in the section concerning the recording and use of official time for representational activities specifying that such activities would include any activities undertaken by employees on behalf of other employees pursuant to such employee's right to representation under statute, regulation, or the CBAs; and (8) Consultations between the six Executive Committee members and Agency representatives would occur annually for 2 consecutive days 8 hours each day; Executive Committee members would receive official time for attendance at, and travel to and from, the meeting; members would be required to travel to headquarters the day before and travel home the day after the meeting; each member would receive up to 4 hours of official time per meeting for any preparation and follow through work in addition to the amounts of official time received under Section 3 of the proposal; and the Union would be required to submit an agenda at least 2 weeks in advance of the meeting.

The Employer contends that its proposal would reduce official time use at the Agency by approximately 16 percent while still providing "appropriate amounts of official time that allow the Union to effectively represent its constituents." Its approach is reasonable given the shrinking size of the bargaining unit and the fact that past official time allocations "have been far too generous." The adoption of its proposal also would reduce the cost of official time, "direct more resources to mission work," improve oversight of official time, and lead to "fewer disagreements in the workplace," all of which are "necessary steps in these times of austerity." The imposition of the Factfinder's recommendation in Article 28, on the other hand, would "impede the Agency's ability to accomplish its mission in an efficient manner" and would "perpetuate a system that provides a disproportionate amount of official time for the Union to represent a shrinking bargaining unit of only 920 employees." Moreover, according to the Employer's estimates, it would cost approximately $700,000 per year, and "restrict management's ability to properly oversee official time use." If adopted by the Panel, official time use at NLRB also would "continue to be significantly higher than any other agency or

department in the entire Federal government" when measured as the number of hours per unit employee.[4/] In addition, the Panel "has never imposed such enormous amounts of official time on a small agency." Any savings in official time that would occur regarding Executive Committee members would, at the very least, be offset by other sections of the article, and more likely result in an increase in the amounts used in FY 2011. Overall, the recommendation would be confusing to administer and cause disputes between the parties.

8. Article 34, "Telework," Section 3(d)

The Factfinder's recommendation on this issue is the following:

> Employee Request. The employee who meets the eligibility set forth above will submit a Telework Agreement (Appendix A) to his/her supervisor in advance seeking to telework on a project. When the Telework Agreement has been approved by management, the employee will advise his/her supervisor each time the employee wishes to telework on a particular project, including the work to be performed and the timeframe in which such work will be performed.

Under the recommended wording, an employee requesting to telework on a particular project would have to submit a Telework Agreement to his/her supervisor in advance. The *FR&RS* does not address the issue of whether an employee would have to submit a new Telework Agreement each time he or she is seeking to telework on a project.

b. The Union's Position

The Panel should amend the Factfinder's recommendation by imposing the following wording to resolve this issue:

> Employee Request. The employee who meets the eligibility set forth above will submit a Telework Agreement (Appendix A) to his/her supervisor in advance seeking to telework on ~~a project~~ projects.

4/ In support of this claim, the Employer submitted OPM reports on "Official Time Usage in the Federal Government" from FY 2003 to FY 2011. The NLRB had the highest official time use per unit employee of any Federal agency for 6 of those years, was second twice and third once.

> When the Telework Agreement has been approved by management, the employee will advise his/her supervisor each time the employee wishes to telework on a particular project, including the work to be performed and the timeframe in which such work will be performed.

The adoption of its alternative wording would ensure that there is no confusion surrounding the need for an employee to submit a new Telework Agreement every time he or she is seeking to telework on a particular project, and could "avoid unnecessary and burdensome paperwork for both employees and the Agency."

9. Appendix - NxGen, Paragraph D

The following wording is recommended by the Factfinder on this paragraph of the parties' NxGen appendix:

> D. Mid-Term Bargaining Over NxGen.
>
> 1. Unless it is clear that a matter at issue was specifically addressed by the parties in this Appendix, the subject is appropriate for mid-term bargaining.
>
> 2. The Agency recognizes that, when a change is made to NxGen that has more than a *de minimis* adverse effect upon the working conditions of bargaining unit members, and to the extent that the matter is not specifically addressed in this Appendix or another provision of the Agreement, it will bargain with the NLRBU in accordance with law and the terms of this Agreement.
>
> 3. If the NLRBU seeks to negotiate, prior to implementation, regarding significant changes adversely impacting working conditions of employees, and requests that the Agency delay implementation of the changes until the completion of bargaining, then following expedited procedures shall apply:
>
> a. Each party may have up to three (3) individuals on its bargaining team.
>
> b. The NLRBU negotiators will each be granted reasonable amounts of official time for preparation, travel, attendance at any sessions, and follow through

for: (a) negotiations; (b) mediation, if necessary; and (c) impasse proceedings, if necessary.

c. The NLRBU will notify the Agency, within five (5) workdays from the time the Agency apprises the Union of the particular change (unless mutually extended by the Parties), that the Union seeks to negotiate prior to any implementation of the change. If no such notice is provided, the Agency is free to implement the change prior to negotiations. The failure to provide such notice will not waive the Union's right to negotiate, after implementation, using the non-expedited contractual mid-term bargaining procedures, regarding any changes in NxGen which have adverse effects on the working conditions of bargaining unit members that are more than *de minimis* and which are not specifically addressed in this Appendix or any subsequent agreement.

d. Initial negotiations will be conducted by teleconference or videoconference. The NLRBU negotiators will be on official time during such negotiations.

e. Written proposals will be exchanged within ten (10) workdays of the NLRBU notification, unless the parties agree to a different date. The initial bargaining session will be conducted within three (3) workdays after the exchange of proposals.

f. If there is no agreement within fifteen (15) workdays of the initial bargaining session, the parties will jointly request expedited assistance from the Federal Mediation and Conciliation Service (FMCS). The NLRBU negotiators will be on official time during any FMCS proceeding. The parties will ask the FMCS mediator to conduct mediation by teleconference or videoconference.

g. If the parties are unable to resolve the dispute with FMCS assistance, they will jointly request expedited assistance from the Federal Service Impasses Panel (FSIP). The parties will jointly request that FSIP resolve any impasse through the use of its expedited arbitration procedure, which includes the use of an FSIP in-house arbitrator and the issuance of a written decision within 48 hours of the

close of the proceeding. The NLRBU negotiators will be on official time during any FSIP proceeding.

h. In the event that either FMCS or FSIP, or both, require that the Parties appear in person at any proceeding, the Agency will pay 50 percent of the reimbursable travel expenses of no more than three NLRBU negotiators up to a maximum total reimbursement of $1,500.

In essence, the Factfinder concluded that adoption of a modified version of the Union's proposed Paragraph D would balance the Employer's interest in minimizing mid-term bargaining over future changes in NxGen and the Union's interest in ensuring that the Employer be required to negotiate mid-term over changes that are more than *de minimis*. Under the recommended wording, the Employer's bargaining obligation would not extend to Union-initiated mid-term bargaining over matters not specifically addressed elsewhere in the Appendix.

b. The Employer Position

Rather than imposing the Factfinder's recommendation the Panel should order that Paragraph D be withdrawn. According to the Employer, Paragraph D.1. would require the Agency to bargain mid-term over Union-initiated proposals that are not "specifically addressed" in the Appendix, which goes beyond the "well-established principle" that an agency is obligated to bargain only over union-initiated matters that are not "covered by" an existing agreement. Hence, it is contrary to "one of the fundamental principles of collective bargaining, *i.e.*, that the purpose of entering into an agreement is to bring stability to the parties' relationship for a fixed period of time." Paragraph D.2. is unnecessary because it "merely repeats the parties' rights and obligations under the Statute" concerning the Employer's requirement to bargain over future changes to NxGen that have more than a *de minimis* effect upon the working conditions of unit employees. Paragraph D.3. should be rejected because, among other things, the ground rules for mid-term bargaining over NxGen it sets forth would not expedite the negotiations but, rather, "could take months to complete, with the possibility that NxGen changes could be delayed for the entire period." Overall, the elimination of Paragraph D reasonably would require the parties to rely on the rights and obligations established under the Statute and FLRA case law when addressing future negotiations over NxGen.

10. Appendix - NxGen, Paragraph D.2.

As stated above, the Factfinder's recommendation would require the Employer to bargain with the Union, in accordance with law and the terms of the CBA, when a change is made to NxGen that has more than a *de minimis* adverse effect upon the working conditions of bargaining unit members to the extent that the matter is not specifically addressed in the Appendix or another provision of the CBA. The Factfinder concluded that the Union's proposed Paragraph D.2. "would allow virtually continual mid-term bargaining regarding NxGen even where there have been no changes implemented that triggered an obligation to bargain." Further, "to the extent that there are no changes that would otherwise trigger an obligation upon request to bargain, the subject of NxGen should be treated as having been dealt with in these negotiations." In this regard, the parties had the opportunity to offer substantive proposals regarding NxGen during term bargaining but failed to do so. Therefore, "for the term of the Agreement, no basis was shown to provide any special reopener provisions for NxGen." Rather, the Factfinder stated that "the obligations to bargain concerning changes that adversely affect wages, hours, and working conditions in a more than *de minimis* manner . . . provide sufficient protection to the bargaining unit and to the Union's institutional rights as the exclusive bargaining representative."

b. The Union's Position

The Panel should insert the following as Paragraph D.2.:

> The Agency recognizes that the NLRBU in accordance with law and the terms of this Agreement has the right to initiate bargaining on its own and engage in mid-term bargaining over matters not specifically addressed in this Appendix.

The adoption of the Union's proposal, which would merely incorporate into the CBA "an established principle of FLRA law - that a union has a right to make mid-term proposals concerning matters not covered by an agreement," would permit it to initiate mid-term bargaining on newly-emerging problems with NxGen that may develop "only after a period of time and only from the cumulative experience of using the system." Nor is the Factfinder's rejection of its proposal, based on his view that it would "allow virtually continual mid-term bargaining regarding NxGen even where there have been no changes implemented that triggered an obligation to bargain,"

substantiated by the record. In this connection, the fact that the Union has not initiated mid-term bargaining since the NxGen MOA went into effect in 2011 undercuts the Factfinder's rationale.

CONCLUSION

Preliminarily, as we have stated in previous cases, the Panel begins with the presumption that a party objecting to the imposition of a factfinder's recommendation on a specific issue bears a heavy burden of demonstrating why it should not be adopted. Private factfinders are selected by the parties themselves, have the benefit of working with the parties directly to explore their interests and, where voluntary settlements cannot be reached, spend considerable time assessing the evidence and arguments presented in support of their respective positions. Thus, the Panel will normally defer to a factfinder's recommendations, particularly where they are supported by clear and convincing rationale and the recommended wording otherwise appears to be legal.

Having carefully considered the parties' responses to the *OSC* and their alternative approaches to the Factfinder's recommendations, we conclude that neither side has shown cause why the Factfinder's recommendations should not be imposed to resolve the parties' impasse over their successor CBAs. In our view, the Factfinder has provided sufficient support for his recommendations and they do not otherwise appear to be illegal. In this regard, given the number of recommendations he was forced to make because of the parties' failure to reach a complete settlement during his mediation efforts, it would be unreasonable to expect him to address each of them specifically in his supporting rationale, particularly on the less significant issues. Accordingly, we shall order the adoption of his recommendations in their entirety.

ORDER

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

The parties shall adopt the Factfinder's recommendations in their entirety.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

October 21, 2013
Washington, D.C.