

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL LABOR RELATIONS BOARD

And

NATIONAL LABOR RELATIONS BOARD UNION

Case No. 19 FSIP 055

DECISION AND ORDER

The National Labor Relations Board (Agency or NLRB) 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 (Union or NLRBU).

Following an investigation of the Agency's request for assistance, which involves the centralization of pre-election decision-writing, the Panel concluded that this impasse should be resolved through a Written Submissions procedure with the opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which could include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' final offers, written submissions, and rebuttal statements.

BACKGROUND AND PROCEDURAL HISTORY

The NLRB has two principal functions: (1) to determine, through secret ballot elections, whether employees wish to be represented by a union; and (2) to prevent and remedy unfair labor practices (ULPs). These functions are discharged by two components: (1) the General Counsel's Office; (2) and the Chairman and Members of the Board. The General Counsel investigates and prosecutes ULPs and processes representation petitions. The Board is a quasi-judicial body that decides appeals from decisions of

Administrative Law Judges in ULP cases and from representation decisions made by Regional Directors.

The National Labor Relations Board Union (Union) is a nationwide bargaining unit that represents 750 employees in two separate bargaining units. One unit includes Attorneys, Field Examiners, and Administrative Professionals in the General Counsel's Office. The second unit includes Board-side Administrative Professionals. The Attorneys and Field Examiners investigate ULP charges, hold hearings, conduct representation elections, including pre-election and post-election hearings, and determine the bargaining unit status of employees. The main difference between Attorneys and Field Examiners is that the Attorneys litigate cases before Administrative Law Judges.

The parties are governed by a national collective bargaining agreement (CBA). The effective date of the CBA is December 6, 2013. It expired on December 6, 2016, but it continues to roll over and remain in effect until a new agreement is reached. The parties are currently negotiating over ground rules for a successor CBA.

In August 2018, the Agency provided the Union notice that it would like to implement a program to streamline the pre-election decision-writing process as it pertained to representation case decisions. By way of background, a pre-election decision will be issued in a representation case typically, to determine whether a union has the support of a majority of the employees in an appropriate bargaining unit and, therefore, should be certified or decertified as the employees' bargaining representative. An NLRB agent will seek an election agreement between the parties, which among other things, identifies the appropriate unit of employees and who is eligible to vote in the upcoming election. In some instances, however, the NLRB agent is unable to secure an agreement, requiring a formal pre-election hearing, presided over by the agent acting as a Hearing Officer to develop evidence concerning the matters in dispute. After the hearing concludes, a second NLRB agent reviews the hearing transcript and drafts a pre-election decision recommending to the Regional Director that the parties may proceed to an election, or that the case should be dismissed.

The Agency indicated that pre-election decision writing has not been evenly distributed among the Regions, limiting an agent's opportunity to develop any significant decision writing expertise. The Agency also indicated that there is a wide disparity among the Regions with respect to the amount of time it takes to draft these

decisions. The proposed change would centralize the representation case writing work, using a team of NLRB agents whose primary responsibility would be to write pre-election representation case decisions. The team would not be expected to perform other significant work, such as complicated trials or lengthy investigations that would otherwise interfere with representation case writing assignments. Participation would primarily consist of volunteers who had previous decision writing experience and the ability to work quickly and independently. The Agency's hope is that by having a team of employees ready to draft decisions it will lead to a decrease in case processing time and an increase in the quality of the work product.

The parties initiated the negotiations over the pre-election decision-writing program in September 2018, exchanging proposals via email on the following dates: September 19 and 26; October 16 and 22; November 9 and 27, 2018; January 29, February 4 and 20, March 5, and May 20, 2019. The parties also held two meetings by teleconference on October 1, 2018 and January 10, 2019. The parties enlisted the services of the Federal Mediation and Conciliation Service (FMCS) to mediate their dispute. FMCS Commissioner David Thaler mediated the parties' dispute on April 1, May 22, and June 10, 2019. On July 3, 2019, Commissioner Thaler released the parties from mediation because the parties could not reach a resolution over all of the issues in dispute.

On September 17, 2019, the Panel asserted jurisdiction over the remaining three issues in dispute. The Panel directed the parties to resolve the issues through a Written Submissions procedure and provided the parties an opportunity to submit rebuttal arguments. The parties' written submissions and rebuttal statements were timely provided to the Panel. Included in the Union's submission to the Panel, it agreed to the Agency's proposed procedure to assign employees to the decision-writing program. The Union also indicated that it is in favor of a permanent program and a one-day consultation period with the Agency after the program has been in place for one year; but, the Union proposed that the Agency will bargain with the Union if employees are assigned to the program due to a lack of volunteers. The Agency, however, is opposed to reengaging in bargaining and instead would like to bring finality to the negotiation of the program. The Panel will address those proposals below.

PROPOSALS AND POSITIONS OF THE PARTIES

Union's Final Offer

Upon the Agency's first invocation of its right to assign program decision writing to qualified professionals under Paragraph 4, due to a lack of volunteers, the parties agree to reopen this agreement for the limited purposes of negotiating procedures and arrangements to accommodate those employees adversely impacted by being forced into the program and to bargain over arrangements by which the parties can encourage future volunteer program participation, including the identification and removal of existing impediments. The union agrees that it will not discourage employees from volunteering for the program in order to invoke this limited reopener provision.

The Union, in its rebuttal statement asserted that it agrees with the Agency's proposed procedure to assign employees to the program. However, the Union stated that if the Agency does need to assign employees, the parties will negotiate over the impact stemming from the Agency's decision. The Union argued that its proposal is a compromise that addresses the Agency's desire for a permanent program, their desire to have the ability to assign employees to the program when they lack qualified volunteers, and the Union's interest in ensuring that the employees assigned are appropriately accommodated.

The Union stated that if the Agency needs to assign employees to the program, then that means there is an issue with the program because there are not enough volunteers. Thus, the Union stated that it would benefit the Agency to sit down with the Union to negotiate over the problems with the program. The Union argued that its proposal, which permits the parties to reopen negotiations, is limited in scope. The reopener only comes into existence if there are an insufficient number of volunteers, then the parties will bargain procedures and arrangements for the employees that the Agency would like to assign to the program.

Agency's Final Offer

If there is an insufficient number of volunteers or if the volunteers are deemed unqualified by Management, then Management will assign such work to qualified professionals based upon their reverse order of seniority as determined by the criteria outlined in Paragraph 3, and Management may adjust such assignments after considering the following factors:

- a. Office staffing in the decision-writer's Region;

- b. Other work assignments of the qualified professionals;
- c. Qualified professional will be selected in the following order:
 - Grade 13 and 14 Field Attorneys (FA)/Grade 12 and 13 Field Examiners (FX) with an overall Outstanding rating in their prior years' appraisal;
 - Grade 13 and 14 Field Attorneys (FA)/Grade 12 and 13 Field Examiners (FX) with an overall Commendable rating in their prior years' appraisal;
 - Grade 13 and 14 Field Attorneys (FA)/Grade 12 and 13 Field Examiners (FX) with an overall Fully Successful rating in their prior years' appraisal; and
- d. Leave requests of qualified professional such that the employees are not adversely affected.

A professional assigned pursuant to this paragraph will serve in this position no longer than one (1) year consecutively, unless the professional volunteers to extend their decision-writing assignment.

If no decision-writer is available on a volunteer basis, then Management may designate a decision-writer pursuant to paragraph 4.

Under the program, the Agency will first solicit volunteers who are interested in participating in the program. However, if there is not enough interest among the employees, or if the volunteers are deemed unqualified, the Agency will then select employees by reverse seniority. The Agency also proposed additional criteria, listed above that it will consider in order to select the best qualified employees for the program.

The Agency, however, is unwilling to reengage in negotiations as proposed by the Union. The Agency argued that the parties have already negotiated over this subject and any additional bargaining will only serve to inhibit the effectiveness of the program and the Agency's ability to accomplish its mission. If the Agency were to agree to a reopener, the Agency contended that any bargaining that may ensue would impede the Agency's ability to

assign work to its employees. Therefore, the Agency is opposed to adopting the Union's proposal.

CONCLUSION

Having carefully considered the evidence and arguments presented in support of the parties' positions, the Panel finds that the Agency's proposal is the better solution to resolve the impasse. In this regard, the parties have negotiated over the implementation of the pre-election decision writing program for approximately nine months. The Union has had a sufficient opportunity to present the Agency with proposals that address any impact stemming from the Agency's decision to assign employees to the program. If there are any issues that arise during the first year, the Union may discuss those concerns with the Agency during the one-day consultation period after the program has been in place for one year.

ORDER

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

By direction of the Panel.



David R. Osborne
FSIP Member

January 10, 2020
Washington, D.C.