

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE NAVY,
NAVAL UNDERSEA WARFARE CENTER DIVISION,
NEWPORT, RHODE ISLAND

And

FEDERAL UNION OF SCIENTISTS AND ENGINEERS
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, R1-144

Case No. 20 FSIP 043

DECISION AND ORDER

BACKGROUND

This case, filed on April 15, 2020, and arising under 5 U.S.C. §7119 of the Federal Service Labor-Management Relations Statute (the Statute), concerns Department of Defense (DoD) employees who are on a "Demonstration project" (Demo project) pay system, which is an alternative to a General Schedule pay system. The U.S. Department of Defense, Department of the Navy, Naval Undersea Warfare Center Division, Newport, R.I.'s (Agency or Employer) mission is to conduct research and development on underwater weapons systems. The Federal Union of Scientists and Engineers, National Association of Government Employees, R1-144 (Union) represents approximately 2,100 non-professional technicians, administrative officers, and contracting officers who, per the Demo project are on a pay-band system. The Federal Labor Relations Authority (FLRA) certified the Union as the bargaining unit's exclusive representative in 1976. The parties do not have a collective bargaining agreement. Instead, they have numerous individual memoranda of understanding that govern various conditions of employment.

In 1994, Congress passed P.L. 103-337, an authorization for certain Federal agencies to participate in Demo Projects. Demo projects are alternative pay-for-

performance and personnel systems which replace the General Schedule pay structure with pay bands for determining salaries. In 1997, acting pursuant to authorization under this law, the Office of Personnel Management (OPM) published in the Federal Register provisions for implementing personnel demo projects. Labor organizations which represent employees in agencies eligible to participate in demo projects were given the right to voluntarily consent to employee participation. As relevant here, the parties were given the authority to enter into a demo project agreement pursuant to an OPM published notice in the Federal Register, *Science and Technology Reinvention Laboratory Personnel Demonstration Project at the Naval Sea Systems Command Warfare Center*, 62 Fed. Reg. 64,050 (Dec. 1997) ("Demo Notice" or "Notice").

Under the above framework, the parties entered into a Demo project agreement in 1999 that renews on an annual basis. The agreement implemented a performance system that establishes different pay bands for employees. The Notice also grants the Union the ability to negotiate with Management over aspects of incentive pay awards. Incentive pay under the Notice can take the form of a one-time bonus, an increase in salary, or some combination thereof. A salary adjustment, which involves transferring an employee to a different pay band, is a separate action altogether.

The Demo Notice provides a mechanism to resolve incentive-pay disputes. Employees have permission to request reconsideration from their supervisors, but the specifics of how that process will occur are left to a facility and its union (if any) to address in negotiations. Whatever process is selected must adhere to the following:

[It must be] administratively streamlined; provide expedited resolution; maintain appropriate confidentiality; be fair and impartial; address assertions of harmful error involving issues of process and procedure; and ensure that management payout decisions reflect reasonableness in judgment in evaluating applicable criteria.¹

With the above criteria in mind, the parties created a three-step process that could allow an employee to seek internal review if dissatisfied with decisions involving incentive pay. At the third step, the Union may invoke arbitration if an employee is dissatisfied with the results of reconsideration in prior steps. Arbitration has been a part of the parties' Demo agreements since 1999. However, out of 10 facilities covered by the Demo Notice, these parties are the only ones that continue to have an arbitration process in their agreement.

BARGAINING HISTORY

The parties' most recent Demo project agreement ended September 30, 2019, so they entered into negotiations in November 2019 over a new annual agreement. The

¹ Demo Notice, 62 Fed. Reg. at 64,063.

parties resolved most of their disputes, but ran into disagreement on how to address incentive-pay arbitration. They requested assistance from the Federal Mediation and Conciliation Services (FMCS) in Case No. 202010020024, and had multiple mediation sessions in March and April 2020. The FMCS mediator released the parties on April 1st. On April 2nd, the Agency informed the Union that it intended to implement its final offer on April 15th. To prevent implementation, the Union filed this request for assistance. On May 21, 2020, the Panel asserted jurisdiction over this dispute and ordered it to be resolved through a Written Submissions process with an opportunity for rebuttal statements.

ISSUE

The parties disagree over one item: whether the Demo project agreement should continue to permit arbitration for disputes over incentive pay. The Agency wishes to end this practice, and the Union seeks to retain it.

I. Agency Position

The **Agency** proposes removing language within the Demo agreement that permits arbitration over incentive-pay disputes. The existing informal process that grants employees the ability to ask their supervisor for reconsideration would remain mostly in place. However, the third step would be modified so that all challenged decisions would go through a three-person panel that has supervisory figures who are not in the aggrieved employee's chain of command. Arbitration would not be an option.

The existing arbitration system burdens Management's operations, both in terms of costs and timing. As to costs, under the Demo agreement, the Agency has an obligation to fully pay for 5 arbitrations *per year*.² In order to contract an arbitrator's services via the Agency's acquisition process, the Agency must pay \$13,105.³ And, over the course of 3 years, the Agency paid \$22,400 for six different arbitrator's costs alone.⁴ If the Agency's internal panel idea were adopted, all the foregoing costs would vanish. Additionally, arbitration awards are non-binding precedent and are not otherwise published. So, the costs that arise due to arbitration do not provide benefits to other interested parties in the Agency's facilities.

Arbitration also significantly hampers the timing of incentive pay decisions. Management's internal reconsideration process takes 30 calendar days from start to end. By contrast, an arbitration for one employee can take up to 6 months on average.⁵ For example, at the conclusion of Fiscal Year 2019 that ended September 30,

² Agency Position at 1.

³ *Id.* at 7.

⁴ *Id.*

⁵ *Id.*

2019, all employees save for one received their incentive pay increases by mid-December 2019.⁶ The one exception was an employee who elected to undergo arbitration; his arbitration will not occur until June 2020. Should he prevail, his award will not be provided until July 2020.⁷ Management also notes that, as part of its Panel submission, the Union cited to an arbitration award issued in July 2019 for a performance period that *ended in July 2017*.⁸

Management also argues that its proposed approach more closely aligns with the principles of the Demo Notice. The Notice emphasizes the “goals of creating a government that works better and costs less, and a flexible system that can reduce, restructure or renew to meet diverse mission needs, expand or contract a workforce quickly, respond to workload exigencies, and contribute to quality products, people and workplaces.”⁹ It also states that internal reconsideration is “intended to facilitate communication and understanding between employees and supervisors/managers concerning performance contributions and their impact on pay decisions.”¹⁰ And, nothing within the Demo Project calls for arbitration as a requirement.

Management’s proposal is consistent with all of the foregoing because it creates a fair and efficient process that brings matters to a satisfactory conclusion with haste. As noted, cases proceed quicker under the reconsideration process. It also allows for robust discussion between supervisors and employees, which is important to Management because it wants to incentivize employees to work for the Agency. Indeed, the Agency conducts nearly 5,000 incentive-pay analyses per year, and the end result is roughly 4-5 arbitrations in the same timeframe.¹¹ The paucity of arbitrations suggests that the need for arbitration is not as dire as the Union portrays it to be and that the majority of employees are satisfied with the process. The Agency also has a stake in ensuring that its reconsideration decisions are fair and impartial because the Agency wants to do everything within its power to retain high-quality personnel.

Finally, Management maintains that the existing arbitration procedure under the Demo agreement is *not* a negotiated grievance procedure. To the contrary, the parties have a separate negotiated grievance procedure MOU.¹² Despite this, however, the Agency believes that permitting arbitration to continue under the Demo project would “be contrary” to Executive Order 13,839, “Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles” (May 25, 2018) (Removal

⁶ See *id.* at 6.

⁷ See *id.*

⁸ Agency Rebuttal at 1 (citing Union Position, Ex. 5(d)).

⁹ Agency Position at 3-4 (quoting 62 Fed. Reg. at 64,052-53).

¹⁰ *Id.* at 5 (quoting 62 Fed. Reg. at 64,063).

¹¹ See Agency Rebuttal at 2.

¹² See Agency Position at 11.

Order).¹³ Section 4(a)(ii) calls for agencies to exclude matters involving “incentive pay” from a negotiated grievance procedure or an arbitration process. The unique pay structure of the Demo Project system involves combining incentive pay with base salary, so the language of the Order applies.

II. Union Position

The Union proposes retaining the status quo, i.e., permitting arbitration for incentive pay disputes. The Union notes that, for negotiated grievance procedures, the Panel has adopted the standard of Federal courts that a proponent of a proposed grievance exclusion must “establish convincingly, that in the particular setting, its position is the more reasonable one.”¹⁴ The Union argues that the Agency has not met this burden. Indeed, the Union argues that, throughout negotiations, the only rationale and evidence the Agency offered was consistency with the Removal Order.

For Fiscal Year 2018, the Agency had an operation budget of \$1.2 billion alone.¹⁵ Even accepting the Agency’s cited financial figures, incentive-pay arbitration represents but a small drop in the Agency’s overall financial bucket. Employees, by contrast, have received a much greater benefit as a result of arbitration. In Fiscal Year 2018, for example, employees “received positive outcomes from the arbitration process in three (3) out of four (4) matters filed including pay increases from \$1,582 to \$3,164, continuing or bonus point increases, and increased performance ratings.”¹⁶ The parties also minimize arbitration costs by presenting several claims per day. Management’s reliance upon its internal procurement system is an entirely internal decision; Management could reduce this cost by granting an arbitrator a multi-year contract. Instead, Management chooses to select a new arbitrator each year.¹⁷ This contracting process is also what contributes to delays in the issuance of arbitration awards. And, even the internal reconsideration process has its own costs. In this regard, the Union estimates that a three-person Management panel amounts to approximately \$1,971 per day. This figure is greater than the approximately \$1,800 arbitrators receive per day.¹⁸

The Union’s proposal is also consistent with the principles of the Demo Notice. Under Management’s proposed approach, all decisions concerning incentive pay would be left entirely to the Agency’s discretion. This approach does not “meet the requirements to be fair and impartial; address assertions of harmful error involving issues of process and procedure; and ensure that management payout decisions reflect

¹³ *Id.* at 4.

¹⁴ Union Position at 5 (citing *AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983)(*AFGE*)).

¹⁵ *Id.* at 1, 7.

¹⁶ *Id.* at 3.

¹⁷ *See* Union Rebuttal at 3.

¹⁸ *See id.* at 4.

reasonableness in judgment in evaluating applicable criteria.”¹⁹ Arbitrators have provided insightful commentary by pointing out, among other things, that certain supervisors provide inconsistent evaluations.²⁰ Additionally, Management has not explained how a panel consisting of Management officials would be neutral. Although the Agency utilizes other internal panels, several of them have Union representation.²¹

Finally, the Union disputes the applicability of the Removal Order. For various reasons, the Union argues that the Order, and its application, is illegal.²²

III. Conclusion

The Panel will impose Management’s proposal. To begin with, there is some dispute over the standard of review that should control the resolution of this matter. Management maintains that this dispute does *not* involve a negotiated grievance procedure. But, to the extent that it could be viewed as involving such a procedure, the Removal Order is applicable. The Union relies upon precedent involving negotiated grievance procedures and disputes the very notion that this Order is applicable.

The Panel has recognized the significance of Federal court precedent concerning grievance exclusions. The Panel has acknowledged the United States Court of Appeals for the District of Columbia’s conclusion that a proponent of grievance exclusion must “establish convincingly” in a “particular setting” that this position is the “more reasonable one.”²³ The Panel has further clarified that the Removal Order – and related Executive Orders – demonstrates important public policy that must be taken into consideration when resolving these disputes. In particular, Section 4(a)(ii) of the Order call upon agencies to exclude challenges to “any form of incentive pay” from a negotiated grievance procedure in order to “promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service.”²⁴

Assuming the Federal court standard announced in *AFGE* applies, the evidence – for the reasons discussed below – demonstrates that the Agency’s arguments satisfy it. This is true without considering the policy implications of the Removal Order, so it is unnecessary to address the Union’s challenges to it. Moreover, given that the Agency’s arguments satisfy the “heightened” burden of *AFGE*, it logically follows that they are

¹⁹ Union Position at 5, 7 (citing 62 Fed. Reg. at 64,054, 64,063).

²⁰ See Union Rebuttal at 4-5.

²¹ See *id.* at 6.

²² See Union Position at 9-12.

²³ See, e.g., *SSA and AFGE*, 19 FSIP 019 at 9-10 (2019)(quoting *AFGE*, 712 F.2nd at 649).

²⁴ Executive Order 13,839, Section 4(a)(i).

persuasive in a non-*AFGE* context. So, even if the arbitration provision in the Demo project is not a negotiated grievance procedure, the Agency would still prevail.

Turning to the parties' arguments, the Agency has presented compelling information that incentive-pay arbitration produces a strain on the Agency's resources that outweighs the potential benefits to employees. To be sure, the Agency does have a budget of over 1 billion dollars, and the arbitration figures provided by Management appear to be only a fraction of those costs. But, as the Agency's data demonstrates, even a single arbitration can delay the results of an award of incentive pay by over 6 months. And, in at least one instance, a Union-initiated arbitration resulted in a 2-year delay of an award. This approach seems inconsistent with the ideals established by the Demo Notice. In this regard, the Demo Notice instructs parties to adhere to a reconsideration process that is:

administratively streamlined; provide[s] expedited resolution; maintain[s] appropriate confidentiality; [is] fair and impartial; address[es] assertions of harmful error involving issues of process and procedure; and ensure[s] that management payout decisions reflect reasonableness in judgment in evaluating applicable criteria.²⁵

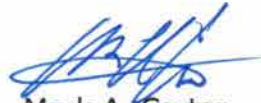
A process that takes months, and potentially years, to complete in comparison to the alternative cannot be said to be consistent with the foregoing. Indeed, as the parties do not dispute, none of the other facilities that fall under the aegis of the Demo Notice utilize arbitration. This fact is unsurprising given that the Demo Notice has no requirement for arbitration.

The Union is, understandably, concerned about the impartiality of Management's proposed panel system. However, the third step constitutes a review by managers who are not within an employee's chain-of-command. So, the Union's desire of independent review is satisfied. And, to the extent that the Union finds itself confronting various challenges under this new arrangement, it always has the ability to produce evidence and data demonstrating why this practice should be altered during the parties' next round of negotiations over the Demo Project.

²⁵ 62 Fed. Reg. 64,063.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.



Mark A. Carter
FSIP Chairman

June 29, 2020
Washington, D.C.