United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of U.S. DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NATIONAL WEATHER SERVICE And NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION	Case No. 20 FSIP 021

DECISION AND ORDER

The U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service (NOAA) filed the instant request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, concerning a dispute from negotiations over a successor collective agreement (CBA). The National Weather Service (NWS or Agency) is a component of NOAA – an operating unit of the Department of Commerce. Its mission is to provide water, weather, and climate data, as well as to issue forecasts and warnings about possible storms and other weather conditions that could negatively impact life, property, and the national economy.

The National Weather Service Employees Organization (NWSEO or Union) represents a nationwide bargaining unit consisting of approximately 3,329 employees who mostly are Meteorologists, Hydrologists, Physical Scientists, and Electronic Technicians located throughout country. The parties are covered by a three-year CBA that took effect on October 25, 2001. When the CBA expired in 2004, it renewed annually and automatically every year until July 16, 2015, when the Agency notified the Union that it wanted to renegotiate the agreement.

BACKGROUND AND PROCEDURAL HISTORY

The parties engaged in ground rules negotiations from the summer of 2015 through October 2016, but were unable to reach agreement. In June 2016, the Agency filed a request for Panel assistance in Case No. 16 FSIP 092. The Panel asserted jurisdiction over the dispute and directed the parties to a Mediation-Arbitration dispute resolution procedure. During that procedure, the parties executed a memorandum of understanding (MOU) on December 7, 2016, resolving the ground rules dispute. The Agency and Union then began the negotiations over a successor CBA using the ground rules MOU.

The parties exchanged proposals over a new CBA between January and March 2017, and held their first face-to-face negotiation session on April 4, 2017. Over the course of more than two years, from April 2017 through July 2019, the parties held 146 bargaining sessions, including 55 sessions with three mediators from the Federal Mediation and Conciliation Service (FMCS). During the negotiations, the parties reached agreement on only four articles, along with some provisions contained in the remaining 42 articles that remained in dispute. On July 30, 2019, the Agency presented the Union its last best offers on the 42 articles. That same day, one of the parties' FMCS Mediators released them from mediation. On December 19, 2019, the Agency filed the instant request for Panel assistance.

On March 12, 2020, the Panel voted to assert jurisdiction over all 42 articles in dispute. The Panel ordered the parties to a Written Submissions procedure with an opportunity to submit rebuttal statements. Both parties timely provided their submissions. During the pendency of the Panel's proceedings, the parties agreed to 13 articles: Article 3 (Laws and Regulation); Article 4 (Rights of Management); Article 5 (Rights of Employees); Article 6 (Rights of the Union); Article 12 (Discipline); Article 18 (Equal Employment Opportunity); Article 23 (Travel); Article 27 (Miscellaneous); Article 33 (Position Descriptions); Article 34 (Official Records); and Article 35 (Employee Assistance and Related Programs); Article 41 (Surveys and Questionnaires); and Article 43 (Furloughs). There are now 29 articles in dispute for the Panel to resolve.

The Union argues that the Panel does not have jurisdiction over this case. Specifically, that the Panel should decline jurisdiction for five reasons: (1) the parties are not at impasse; (2) the Panel's composition violates the Appointments Clause of the United States Constitution; (3) the Agency violated the parties' ground rules agreement; (4) there are numerous Agency proposals that are either permissive matters or contrary to law; and (5) there are unresolved questions about the negotiability of many Union proposals. The Panel considered and rejected all of the Union's objections prior to asserting jurisdiction over this case. The Union's reasserted objections, with one caveat remain unpersuasive, and the Panel will once again reject those arguments. The Union presented colorable arguments with respect to some of the Agency's proposals that may be contrary to law. The Panel notes those arguments in the Decision and recommendations below.

PROPOSALS AND POSITIONS OF THE PARTIES

The Articles in dispute are as follows: Article 7 (Union Representation); Article 8 (Labor Management Relations); Agency Article 9 (Mid-Term Bargaining); Union Article 9 (Quality of Work life and Family Friendly Policies); Article 10 (Grievance Procedure); Article 11 (Arbitration); Article 13 (Performance Management); Article 14 (Merit Assignment Program); Article 16 (Details/Temporary Promotions); Article 17 (Training and Career Development); Article 19 (Leave); Article 20 (Work Schedules for Rotating Shift Workers); Article 21 (Work Schedules for Employees Non-Rotational Shift Workers); Article 22 (Facilities); Article 24 (Safety and Health); Article 25 (Union Communications); Article 26 (Telework); Article 28 (Mutual Respect); Agency Article 29/Union Article 45 (Duration and Terms of the Agreement); Union Article 29 (Retirement); Article 31 (Employee Awards); Article 32 (Contracting Out); Article 36 (Home Leave and Return Rights); Article 37 (Drug Testing Plan); Article 38 (Dues Withholding); Article 39 (Employee Relocation); Union Article 40 (Impact Based Decision

Support Services); Article 42 (Pay); and Article 44 (Changes and Amendments to the Agreement). Due to the number of issues in dispute, copies of the parties' proposals will be attached to this Decision.

1. Article 7 – Union Representation

I. Union Position

The Union states that it has three National Officers and eight Regional Chairs. The Regional Chairs correspond to the six NWS regional headquarters which are headed by NWS Regional Directors. In addition to liaising with their regional management counterparts on region-wide issues, the Union states that these more experienced and better trained Regional Chairs provide ongoing assistance to as many as 40 or more local stewards on contractual enforcement and other representational issues. Under the current Article 7, the Union President is granted 100 percent official time; the Vice President is granted 50 percent official time; and the Secretary Treasurer receives 16 hours per pay period of official time. Similarly, the Regional Chairs are entitled to 16 hours per pay period of official time. The local stewards, which the Union estimates to be around 150, are authorized by their supervisor more limited, occasional official time on an ad hoc basis.

The Union proposes to retain the language in Article 7 of the parties' current agreement, with one change to section 7(b): the amount of official time authorized by this Article and elsewhere in the agreement is subject to any quantitative limitation imposed by law or government-wide rule, or regulation. The Union states that this provision would subject the amount of official time that may be used by its representatives to the mandatory restrictions of Executive Order (EO) 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use. The Union asserts that the "mandatory" restriction it is referring to is the 25 percent cap on the amount of official time that may be performed by each employee. The Union states that the one hour per unit employee limitation is not a "mandatory" restriction under EO 13837. Therefore, the Union proposes that there should not be a bank of official time hours based on the EO's one hour per bargaining unit employee time rate. Instead, the Union asserts that the Agency should grant official time that is "reasonable, necessary, and in the public interest" in accordance with section 7131(d) of the Statute. The Union provided declarations from NWSEO officers, which the Union argues justifies its request for official time to exceed the one hour per bargaining unit employee time rate in EO 13837.

Next, the Union argued that the Agency's proposal that its officers request official time prior to each occurrence would create a disruption in their schedules and Agency operations. The Union states that the three National Officers and all but one or two of the Regional Chairs are operational shift workers (Forecasters, a Hydrologist, a Physical Scientist who issues tsunami warnings) whose shift assignments are scheduled weeks in advance on a fixed work schedule. If official time is requested and granted on an issue-by-issue basis as they arise, their operational shift would be left vacant (and the public placed at risk) or their manager will have to cover the shift or assign another employee to cover the shift on an overtime basis. Therefore, the Union asserts that the Agency has historically scheduled these officers official time shifts when planning the work location's fixed schedule.

The Union argues that another issue posed by the Agency's proposal is in section 7. The Agency seeks to impose a requirement that if official time is performed at an alternative worksite, the employee must have a telework agreement in place. The Union states that Regional Chairs and National Officers are functionally precluded from performing most of their official time activities at their NWS office. As operational forecasters, they work in a common open operations area, and do not have private offices. In almost all cases, under the current CBA, the Union argues that its officers have performed their official time shifts at home, using their own or Union resources. The Union asserts that the Agency's insistence that Union representatives must obtain a telework agreement to perform official time at home is illegal.

The Union also takes exception to several other sections in the Agency's proposal, which it states interferes with its rights under the Statute. The Union argues that the Agency is attempting to restrict the Union from having its counsel represent employees in grievance processing, Weingarten meetings, at formal discussions, and in bargaining under the agreement. Specifically, the Union states that section 1 restricts Union counsel to communications only with the Department of Commerce Office of General Counsel. Section 2 provides that the Agency is only obligated to deal with those representatives designated by the Agency, which the Union argues also interferes with its rights under the Statute.[1] The Union further states that section 3(G) of the Agency's proposal illegally restricts employees' rights to attend meetings held by the Union by requiring the employees to obtain permission prior to attending.

In section 4, the Union contends that the Agency's language, which restricts Union representatives to use official time only while engaging in representational matters, interferes with employees' rights to engage in representational matters on their own time. In this respect, the Union asserts that while its officers may not conduct internal Union business on official time, the total prohibition against engaging in Union activities within the working hours or work areas of employees constitutes an illegal restriction on employees' use of "paid free time," and would subject employees to discipline if they solicit a colleague for Union membership during breaks in their duties.[2]

II. Agency Position

The Agency notes that the Union's offer to cap official time hours at 25 percent of an employee's paid time, in accordance with EO 13837, is a notable concession that narrows the scope of the dispute over this Article, but contends the Union's proposal to retain the existing language of Article 7 fails to recognize the need for other important modifications to the Article, which the Agency states are included in its proposal. The Agency contends that the bargaining unit consists of 3,329 employees as of pay period 4 of 2020, which equates to 3,329 hours of official time under its proposal. The Agency states that this amount of official time is sufficient for the Union to perform its representational responsibilities. The Agency also states that the parameters of its proposal prevent excessive or unreasonable use of official time that would interfere with the Agency's mission and result in a waste of taxpayer dollars.

[1] *See Dep't. of Transp., Federal Aviation Admin., San Diego, Calf.*, 15 FLRA 407 (1984).
[2] *See Oklahoma City Air Logistics Ctr., Tinker Air Force Base*, 6 FLRA 159 (1981).

The Agency asserts that its proposal requires written advance requests estimating the amount of official time needed, requires the Union representatives to report official time in the Agency's timekeeping system, and provides for discipline for abusers of official time. The Agency states that contrary to the Union's contention, its proposal does not preclude the practice of pre-scheduling official time, so long as the requests are made in accordance with the procedures and requirements of the Article. The Agency does state that its proposal precludes blanket approvals of official time. The other major issue which the Union identifies in the Agency's proposal is the requirement that Union officers who perform representational duties at places other than their duty stations have a telework agreement in place. The Union claims that this proposal is illegal, but the Agency states that the Authority has held that agreements allowing union representatives to perform representational duties while teleworking is authorized by the Statute.[3]

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The parties' main disagreements surround the amount of official time that the Union's representatives will be permitted each year, the scheduling of official time, and whether there should be a telework agreement in place while performing official time at an alternate worksite. The Agency seeks to establish official time limitations consistent with EO 13837; namely that the total amount of official time shall not exceed the equivalent of one hour per bargaining unit employee each fiscal year. The Agency also seeks to limit the amount of time that an employee may spend each fiscal year on official time to 25 percent of their paid time. The Union agrees to the Agency's proposal to follow the EO's 25 percent limitation on official time as long as the EO remains in effect, but it does not agree to a bank of hours for all of its representatives.

The Union asserts that the EO does not mandate that the Union's total amount of official time be capped at one hour per bargaining unit employee. In this respect, the Union is correct. The EO, specifically section 3(a). states that "[a]gencies shall strive for a negotiation union time rate of 1 hour or less…" Notwithstanding, the Panel has now consistently described President's May 2018 EO's on labor-relations matters as an "important source of public policy that the Panel will choose to implement,"[4] where appropriate. The Panel has also stated that official time agreements that do not exceed the one hour per bargaining unit employee recommendation in EO 13837 would ordinarily be considered reasonable, necessary and in the public interest.[5] The Panel has required the party moving for such time in excess of that amount to demonstrate that the requested time is reasonable, necessary, and in the public interest.[6] The Union has not met that burden here.

The Union provided affidavits from several of its National Officers. Through those statements, the Union demonstrated that there are many bargaining unit employees that the Officers represent and, as a result, many issues that they must address on a daily basis. While this information certainly is helpful in understanding the responsibilities of the National Officers,

3 *See GSA*, 63 FLRA 213 (2009).
4 *HHS and AFGE, Local 3601*, 2019 FSIP 031 (2019).
5 *Id.*
6 *Id.*

it does not demonstrate the need for the Union to exceed the one hour per bargaining unit employee limitation proposed by the Agency.

The Union did not provide any data indicating the time spent and activities performed representing the bargaining unit using official time during each year under the parties' contract. The Panel has repeatedly advised parties to an official time dispute that they each have an obligation to justify their offers on official time under section 7131(d) of the Statute.[7] When a party has been unable to provide evidence establishing that their offer is consistent with the Statute, the Panel has regularly turned to the guidance and policy set forth in section 3(a) of EO 13837. The result here should be no different for the official time permitted to the Union.

The Panel will adopt the Agency's proposed procedure in section 3 that the Union's officers must follow when requesting official time, and notes that it is consistent with section 5(b) of EO 13837. The Panel will modify the Agency's section 4 proposal and strike the language that prohibits the Union from performing activities related to internal Union affairs during all times of work. The Union demonstrated that this language may violate its rights to engage in solicitation of membership during paid free time, such as during breaks or lunch.[8] The Panel will also modify section 4(C)(3) of the Agency's proposal because it does not permit the Union president to engage in the same representational activities that the Vice President and Secretary are permitted to engage in under that section. Therefore, inserting the President into this section will alleviate the probable oversight.

For the remainder of the Article, the Panel adopts the Agency's proposal, which permits the Union to use official time for training in section 5, commits management to not interfere with the Union's right to represent employees in section 6, and does not prohibit the Union's official time for statutorily required official time under 7131(a) and (c) of the Statute in section 8. The Union's argument that the Agency's requirement in section 7 that all representatives obtain a telework agreement is illegal is without merit. In *U.S. Dep't of Agriculture Good Safety and Inspection Service,* the Authority held that the location at which official time is to be exercised is a mandatory subject of bargaining.[9] Consistent with this precedent, an agreement allowing union representatives to perform representational duties on official time while working from remote locations is authorized by the Statute and enforceable unless another law prohibits the agreement.[10] The Union has not identified another law that prohibits the Agency from requiring Union officials to have a telework agreement in place. Thus, the Union has not provided a colorable argument.

2. Article 8 – Labor-Management Rights

I. Agency Position

The Agency states that this Article defines the criteria for the utilization of pre-decisional input (PDI) and establishes the structure and terms for Local Office Teams (LOTs), Regional

7 Section 7131(d) provides that official time authorized under it may only be granted where it is "reasonable, necessary, and in the public interest."
8 *Oklahoma City Air Logistics Ctr., Tinker Air Force Base, Oklahoma*, 6 FLRA 159 (1981).
9 62 FLRA 364 (2008).
10 *Id.* at 367.

Labor Council (RLC), and National Labor Council (NLC) meetings and bargaining. Section 1 of the Agency's proposal provides that management will use PDI only. The Agency contends that its proposal is consistent with EO 13812, Revocation of Executive Order Creating Labor-Management Forums, and ensures that PDI will be used to the extent that it determines the cost of doing so brings tangible benefits to the Agency.

The Agency states that sections 3, 4, 5, 6, 7, and 8 establish procedures for LOTs, RLCs, and NLCs. The Agency's proposal indicates that the purpose of LOTs is to provide labor and management an opportunity for consultation and discussion of matters of local interest, and where required, to fulfill statutory obligations. Like the proposals for LOTs, the Agency states that its proposals for the RLC and NLC meetings provide a reasonable process for consultation and bargaining, and enables the Union to perform its representational responsibilities that impact regional and national matters. On the whole, the Agency asserts that its proposals provide a reasonable process for consultation and bargaining over local, regional, and national issues and affords the Union with reasonable opportunities to perform its representational responsibilities.

II. Union Position

The Union states that its representatives and local and regional managers are well acquainted with the language of and procedures contained in the current version of Article 8, and have been employing them successfully on an ongoing basis at over 150 NWS offices nationwide for two decades. Absent compelling reasons, which the Union asserts that the Agency has not proffered, they should be retained. Therefore, the Union proposes to retain the language of Article 8 in the parties' current CBA, but with a few changes.

In this respect, the Union states that subsections 2(b)(1) and 3(a),(b), and (c) of the current contract require the Agency to notify the Union of and bargain over the impact in changes in conditions of employment that "materially affect" bargaining unit employees. The Union asserts that this is a higher threshold than what the law requires. Therefore, the Union proposes to change the language from "materially affect" to "more than *de minimis*" to comply with the Statute.

Lastly, the Union argues that the Agency's proposal restricts the Union's right to designate representatives for bargaining and bypasses the Union by designating employees as subject matter experts for the purpose of negotiations.[11] The Union further argues that the Statute requires face-to-face bargaining, but the Agency's proposal only requires such bargaining if the parties mutually agree.[12]

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. Addressing the Union's legal argument over an alleged bypass by the Agency designating bargaining unit employees as subject matter experts, the Union cites to an ALJ decision in the *National Oceanic*

[11] *See National Oceanic and Atmospheric Admin., Aircraft Operations Center*, AT-CA-05-0402, OALJ 06-19 (2006).
[12] *Dep't of the Air Force, Griffiss Air Force Base, Rome NY*, 25 FLRA 579, 596 (1987).

and Atmospheric Admin., Aircraft Operations Center, which is not precedential. Whether the Agency designating a bargaining unit employee to be a subject matter expert is considered direct dealing for which the Agency has an obligation to deal with the Union as the exclusive representative is not clear from the case presented by the Union. Therefore, because the Union has not presented a colorable argument, the Panel rejects this claim.

The Union also argues that bargaining must occur face-to-face under the Statute. The Union cites to the *Dep't of the Air Force, Griffiss Air Force Base, Rome, New York* to support its position.[13] However, in that case, the Authority reaffirmed an ALJ's findings who stated that there is no statutory restriction on the scope of bargaining; the parties themselves may restrict the scope of bargaining through ground rules. The Agency, here, is proposing to precisely do that – restrict bargaining to telephonic or by videoconference. Therefore, the Union has not presented a colorable argument.

On the merits, the Agency provided a more detailed explanation of its proposal, explaining its intent and meaning, while the Union simply asserted that it wished to carry over the current language in Article 8 to the parties' new contract, with some modifications. The Agency's proposal encourages PDI when it will provide tangible benefits to the parties, which is consistent with the Office of Personnel Management (OPM) guidance for implementation of EO 13812.[14] The Agency's proposal establishes the procedures the parties will follow for LOT, RLC, and NLC meetings, such as the number of representatives on each bargaining team, the location of the meetings, the meeting schedules, who may participate in the meetings, and the costs associated with these meetings. To the latter issue, the Agency's proposal requires the parties to share the expenses associated with such meetings, which will incentivize each party to aim at keeping costs at a minimum. The Panel will, however, modify the Agency's section 3(C) proposal to remove the word "materially" and replace it with "more than *de minimis"* to correspond with the Statute's bargaining obligation requirement as pointed out by the Union.[15]

3. Agency Article 9 – Mid-Term Bargaining

I. Agency Position

The Agency states its proposal will provide the Union with adequate notice and an opportunity to bargain over changes which materially affect conditions of employment; when proposed changes effect more than one region, the issues will be addressed first at the national level with the understanding that there will be subsequent bargaining at local or regional levels as appropriate; notice concerning changes will be in writing and provided as far in advance as practicable before implementation; and notices will contain a description of, and need for, the change, as well as the implementation date. The Agency's proposal also establishes ground rules for midterm bargaining; time limits for the Union to request clarification or bargaining over the proposed changes; allows management to implement the changes if the Union does not timely

[13] *Id.* The Union also cites to NLRB case law, but that is not controlling.
[14] *See OPM Guidance for Implementation of Executive Order 13812,* https://www.chcoc.gov/content/guidance-implementation-executive-order-13812 (2017).
[15] *See, e.g., U.S. Dep't of the Treasury, IRS,* 56 FLRA 906, 910 (2000).

respond; and establishes time limits for the commencement of bargaining over any midterm changes.

The Agency contends that section 6 of the its proposal sets forth a process for the parties to try to avoid disagreements over whether past policies, practices, agreements, arbitration awards, and Memoranda of Understanding (MOUs), which predate the CBA remain in effect. In the event of such disagreements, the Agency states that the position of management will prevail pending resolution of the dispute by means of the negotiated grievance procedure or other appropriate means. The Agency argues that disagreements of this nature have frequently arisen between the parties. The Agency states that its proposal enables the Agency to maintain its position while allowing an opportunity for the parties to bargain and reach agreement on the resolution of such disagreements and disputes.

II. Union Position

The Union asserts that the Agency has proposed a new Article 9 containing entirely different procedures by which the parties are to bargain over changes in conditions of employment, including different deadlines and requirements to bargaining. The Union argues that the Agency's proposal, which conditions bargaining on the submission of written proposals in advance is a waiver of its bargaining rights. The Union also states that the procedures contained in Article 9 are limited to bargaining over only the impact and implementation of management-initiated changes in conditions of employment. In this respect, the Union asserts that it omits any process by which the Union can submit midterm bargaining proposals over a matter that is not covered by the CBA. The Union argues that it has a statutory right to bargain over such proposals.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The Agency's Article 9 details the procedures that the parties will follow for midterm negotiations, such as when and how the Agency will provide the Union notice to bargain, the timeframes to initiate negotiations, and ground rules that the parties will follow when bargaining. The Agency proposes to provide notice and an opportunity to bargain over changes that "materially affect conditions of employment." As previously stated, this language is not consistent with the Statute, which requires the change to be more than *de minimis* to trigger bargaining obligations. As such, the Panel will modify the Agency's proposal to require notice when a change is more than *de minimis.*

The Union argues that parties should abide by the current contract language, which keeps midterm bargaining matters within Article 8. The Union contends that the Agency's Article 9 proposal is more formal than the parties' current midterm bargaining language; however, based on the parties long and drawn out bargaining history over this contract, it is clear that they will both benefit from a new approach to bargaining. A more structured approach will better serve the parties in their future bargaining efforts. In this respect, the Agency's proposal ensures that the parties follow specified timeframes, which will ensure that bargaining transpires in an effective and efficient manner.

The Union also argues that conditioning bargaining on the submission of written proposals is a waiver of the Union's rights; however, the Union's argument does not have merit. One of the cases cited by the Union, *Environmental Protection Agency* actually stands for the opposite proposition that the Union argues.[16] Parties may advance proposals over the procedures for bargaining, which can include written proposals. The Union does point out that the Agency's proposal does not provide for procedures and arrangements if the Union wishes to submit a midterm bargaining request over a matter not covered by the CBA. The Panel will modify the Agency's proposal, section 2, to include language that permits the Union to make midterm bargaining requests, such as the following: "Similarly, when the Union initiates a midterm bargaining request over a matter that requires bargaining under the Statute, the Agency will negotiate with the Union to the extent required by law."

The Agency also proposes that it may implement the proposed change if neither party requests the services of the Panel within seven days from the negotiation process. The Agency is free to implement the proposed change if it allows the Union a reasonable period of time to invoke the Panel's assistance.[17] To satisfy this obligation, the Agency must notify the Union that it considers the parties to be at an impasse and inform the Union when it intends to implement the proposed change.[18] When the Agency gives the Union notice and if the Union fails to timely invoke the services of the Panel, the Agency may lawfully implement its last best offer.[19]

The Agency's proposed language corresponds to its statutory obligations, but it seeks to set a specified timeframe when the Agency may implement its last best offer. This period of time may vary from one circumstance to the next. Rather than tie the Agency's hands to a specified period of time that may or may not be lawful under the circumstances, the Panel will impose the following language in section 4: "If during the negotiation process the parties reach an impasse, either party may request the assistance of third-party mediation. If voluntary arrangements fail to resolve the negotiation impasse, either party may request the services of the Federal Service Impasses Panel (FSIP). If the Agency provides the Union notice and the Union fails to invoke the services of the FSIP within a reasonable period of time, the Agency may lawfully implement its last best offer."

Finally, the Agency proposes that if there is a disagreement over whether or not a past practice, policy, or agreement remains in effect, the Agency's position will prevail pending the resolution of the dispute. The Statute requires the parties to maintain the status quo unless the change proposed is necessary for the functioning of the Agency.[20] The Agency provided no rationale for requiring the parties to adhere to the Agency's position. As such, the Panel will modify the Agency's section 6 proposal to indicate that the parties will adhere to the statutory requirements during the pendency of a dispute, such as the following: "[T]he parties will adhere to the statutory requirements pending the resolution of the dispute."

---

[16] *See, EPA* 16 FLRA 602, 613 (1984).
[17] *See Dep't of Labor, Wash., D.C.*, 60 FLRA 68, 70-71 (2004).
[18] *See U.S. INS, Wash., D.C.*, 55 FLRA 69, 73 (1999).
[19] *See Dep't of Labor, Wash., D.C.*, 60 FLRA 68, 71 (2004).
20 *HUD*, 23 FLRA 435, 436 (1986).

4. Union Article 9 – Quality of Life and Family Friendly Policies

I. Union Position

The Union proposes a new addition to the CBA to cover work life balance and family friendly provisions in the contract. The Union contends that this Article will optimize organizational performance, retention, and improve employee job satisfaction. The Union states that this Article will also enable the parties to work together to maintain safe, healthy, and an environmentally friendly workplace to create a positive atmosphere where employees can work.

II. Agency Position

The Agency does not have a proposal for this Article. The Agency states that the Union's proposal covers several topics that are addressed in other parts of the CBA (e.g., leave) or in regulations (e.g., emergency evacuation); expands LOT/RLC/NLC involvement into areas that are within management's discretion; imposes substantial costs on the Agency (e.g., restoration of annual leave, emergency evacuation payments and administrative leave, child care subsidy, and environmental improvements), and would limit management's ability to fill vacancies.

III. Conclusion

The Panel will require the Union to withdraw its proposal. The Union proposes a new Article in the parties' CBA to address employee morale and quality of work life. While the Union's proposal addresses important aspects of an employee's career, it does not establish the need for a standalone article. The Agency is well advised to address and respond to such matters. The topics that the Union addresses in this Article are addressed in other articles, federal regulations, and by the Statute. Based on this order, it's unnecessary to address the Agency's legal arguments.

5. Article 10 – Grievance Procedure

I. Agency Position

The Agency asserts that its proposal establishes procedures for prompt and equitable resolution of grievances consistent with the requirements of section 7121 of the Statute. In this regard, the Agency asserts that its proposal establishes reasonable time limits and allows for extensions of time limits by mutual agreement up to 15 days, and it provides that if the Agency fails to observe a grievance processing time limit, the grievance will be elevated to the next step. The Agency also states that its section 3 incorporates exclusions from the grievance procedure set forth in section 7121 of the Statute, but also excludes grievances for removals of misconduct and performance consistent with section 3 of EO 13839, Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Systems Principles. The Agency argues that the Union's proposal includes a list of matters to exclude from the grievance procedure, but stops short of excluding grievances over removals. The Agency contends that the Union's proposal is not consistent with the EO's mandate that the Agency shall endeavor to exclude removals from the grievance procedure.

II. Union Position

The Union proposes to retain the language in the current Article 10 of the CBA with one change to the list of exclusions contained in section 1. The Union proposes to exclude "any other matter excluded by law or government-wide rule or regulation." The Union contends that this language would exclude those matters contained in section 4(a) of EO 13839 (assignment of ratings of record; and the award of any form of incentive pay; including cash awards; quality step increases; or recruitment; retention; or relocation payments) so long as the EO remains in effect. The Union states that the language is not intended to exclude grievances over removals discussed in section 3 of the EO because that is not a mandatory exclusion and only directs agencies to seek such an exclusion. The Union further states that the ability to grieve a removal is not burdensome on the Agency, as there have only been two such arbitration cases since the parties' first nationwide agreement in the 1980s.

The Union argues that section 9 of the Agency's proposal contains a prohibition against releasing personal information to the Union needed for grievance processing or arbitration, without the employee's consent. The Union argues that this would be a waiver of the Union's right to information under § 7114(b)(4) of the Statute. The Union also argues that section 13(B) of the Agency's proposal makes a distinction between grievances affecting "the Union's institutional rights" and those which it has filed on behalf of unit employees. The Union states that it has an institutional right to represent employees in the grievance procedure, as well as an institutional right to enforce the CBA it has negotiated. Although management has proposed a procedure in section 14 for the Union to file grievances on behalf of employees' interests, the Union states that it is limited to only "matters affecting employees from more than one Region." The only other grievance procedure proposed by management is found in section 11, but the Union states that it is limited to grievances filed by individual employees, and not the Union. Thus, the Union states that the Agency's Article 10 would preclude the Union from exercising its statutory right to file grievances on behalf of employees unless it concerns a matter that affects employees in more than one region.

III. Conclusion

The Panel will impose compromise language. The parties' main disagreement is over the matters that will be excluded from the grievance procedure. The parties agree to exclude several matters from the grievance procedure, including matters articulated under section 4 of EO 13839, which include ratings of records and the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments. The Agency, however, also proposes to exclude removals for misconduct or performance; disapproval of an honorary or discretionary award; the substance of performance standards and elements/measures and/or the determination as to whether an element/measure is critical or non-critical; progress reviews; issuance of a performance improvement plan; non-selection from a group of properly ranked and certified candidates; and matters which can be raised as an EEO complaint.

For matters pertaining to removals, the Panel has held that it will not automatically exclude these topics from the grievance procedure. This holding is consistent with section 3 of EO 13839. In this respect, the EO states, "[w]henever reasonable in view of the particular

circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated . . . any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance." Thus, the exclusion over removals is not automatic. Instead, the Panel has required the party to demonstrate "convincingly" in the "particular setting" of the dispute whether the grievance exclusion is warranted, consistent with *AFGE*.[21]

The Panel has adopted proposals to exclude grievances involving "the award of any form of incentive pay, including cash awards; quality steps increases; or recruitment, retention, or relocation payments" from the negotiated grievance procedure where the opposing party does not rebut the exclusion. Excluding those matters is consistent with section 4(a)(ii) of EO 13839. This directive comes without qualification, which states that the federal agencies "shall" refrain from taking several types of personnel actions, including agreeing to language that would permit challenges to employee awards. However, the Panel is not an "agency" within the meaning of the EO and is not obligated to enforce its terms.

The Agency has not demonstrated "convincingly" that the Panel should exclude removals from the parties' grievance procedure. It has not provided any evidence or support for this exclusion. Further, the Union has demonstrated that including these matters in the grievance procedure will not be onerous on the Agency, since the parties have only litigated two matters involving removals since the 1980s.

Similarly, the Agency has not provided rationale or support for the following exclusions under section 3 of its proposal: progress reviews; the issuance of a performance improvement plan; and matters which can be raised as an EEO complaint. The Panel, however will impose the grievance exclusion over disapproval of an honorary or discretionary award, since the Union has not offered persuasive rationale to not exclude those matters. The Panel will exclude non-selections from a list of properly ranked and certified candidates, as a non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance under 5 C.F.R. § 335.103(d). Finally, the Panel will exclude the substance of performance standards and elements/measures and/or the determination as to whether an element/measure is critical or non-critical from the grievance procedure, as a proposal challenging those matters may interfere with management rights under the Statute.

For the remainder of the Article, the Panel will impose the Agency's Article, with the following modifications. Under section 6 of the Agency's proposal, the Union argues that if an employee who has filed a grievance departs from the bargaining unit then the Union should be able to continue with the grievance. The Agency, however, limits the ability of the Union to pursue the grievance to arbitration. The Panel will strike this language from the Agency's proposal.

The Panel will strike the Agency's section 7(B) proposal, which indicates that employees may not choose a representative other than the Union to represent them in the processing of a grievance, as that may violate the employee's rights under section 7102 of the Statute. Similarly, section 7(A) of the Agency's Article may violate an employee's choice to designate a

[21] 712 F.2d 640,649 (D.C. Cir. 1983).

representative of its choosing by stating that employees will normally be represented by the local steward. The Panel will strike this language and all other language that designates the specific representative for the Union.

Finally, the Union argues that the Agency's proposals in sections 13 and 14 do not provide the Union a right to file grievances on behalf of an employee, which limits the Union's statutory right. However, under section 3(A) of the Agency's proposal, it indicates that the Union may present and process a grievance on behalf of any employee in the bargaining unit. Therefore, sections 13 and 14 should be read in conjunction with section 3(A), to permit the Union to file a grievance on behalf of employee and not as a waiver of that right. Similarly, the Union's argument that the Agency's section 9 proposal, which requires the employee to consent to release of information violates the Statute, is not colorable.[22]

6. Article 11 – Arbitration[23]

I. Agency Position

The Agency asserts that the parties' proposals are similar in many respects, but the principal differences have to do with allocation of costs. The Agency states that its proposal provides that no overtime or premium pay will be allowed for time spent on arbitration hearings and that transcript costs will be shared by the parties. Conversely, the Agency contends that the Union's proposal allows for the possibility of overtime and premium pay and requires the Agency to pay for the full cost of transcripts. The Agency states that its final proposal also includes language regarding identifying and resolving arbitrability issues in section 1, and requires the parties to exchange witness lists in section 4. Finally, the Agency states that it is not opposed to the Union's proposal to consider arbitrators from the National Academy of Arbitrators (NAA).

II. Union Position

The Union proposes to retain the language of Article 11 of the current CBA with one change to the wording of the second sentence of section 1. The Union proposes to include the requirement that Arbitrators must be members of the NAA. The Union states that the parties have agreed to limit FMCS requests to NAA members in each case arbitrated under the current agreement and last year the parties' counsel made an explicit agreement to do so in all future cases.

The Union argues that the Agency's proposal to bifurcate the arbitrability and merits hearings in all cases should be rejected because it will foster delay and increase costs. The Union states that section 3(A) of the Agency's proposal would allow it to unilaterally insist that arbitration hearings on Union or management grievances be held at NWS headquarters. Presently, if the parties cannot decide, the Arbitrator selects the location. The Union asserts that

---

[22] *See Dep't of the Air Force, 56th Support Group, MacDill AFB, Fla.*, 51 FLRA 1144, 1150 (1996). It is not enough that an employee has asked for union representation in a particular matter; the employee must specifically consent to the release of information.

[23] The parties reached tentative agreements on sections 7 and 10 of this Article.

this allows the Arbitrator to weigh whether the hearing should be held elsewhere, such as where the dispute arose and where the witnesses are located.

Finally, the Union contends that the last sentence of section 4(A) of the Agency's proposal asks the Union to "recognize that Arbitrators in federal sector arbitrations do not have subpoena power." The Union asserts that federal sector arbitrators do, in fact, have subpoena power. The Union contends that Arbitrators have routinely granted subpoenas in arbitration cases between the parties, and they are particularly important for reluctant witnesses, including managers as well as bargaining unit employees, who fear retaliation from either management or their co-workers for voluntarily testifying.

III. Conclusion

The Panel will adopt the Agency's Article, with modification. The parties disagree over the arbitration procedures that will be contained in the successor CBA. The Agency's proposal requires the parties to share the fees and expenses associated with an arbitration, which will keep both parties motivated to avoid unnecessary costs. The Agency's section 4(F) proposal to not afford overtime pay to employees participating in arbitration is an attempt by the Agency to save more expenses associated with the arbitration, but this proposal may actually have the opposite effect. If there is a provision in the contract that does not permit the Agency to pay for overtime pay in connection with a grievance, the Arbitrator may need to schedule an entire day for that arbitration when he or she may have been able to conclude the matter by continuing the arbitration for a few hours after the employee's duty day. This may actually increase costs and not minimize them. The Panel will strike this language.

The Panel will modify the Agency's section 3 proposal to permit the Arbitrator to determine the location of the hearing when the parties cannot agree, which will promote fairness and neutrality. The Panel will strike the language in the Agency's section 4 proposal because, as demonstrated by the Union, Arbitrators do have subpoena power.[24] The Panel will also modify the Agency's section 1 proposal to include language that the Arbitrators who the parties request from FMCS will be members of the NAA, since both parties have agreed to that modification.

Lastly, the Union argues that the Agency's proposal to bifurcate the arbitration process will foster delay and increase costs; however, a bifurcated hearing may actually accomplish the opposite. The goal of bifurcation is actually to prevent unnecessary costs expended at a hearing by uncovering the weaknesses of the case, e.g., whether there are any defenses that may prevent the matter from moving forward to a hearing on the merits, which ultimately, may encourage settlement. As such, the Panel will adopt the Agency's proposal with the above-referenced modifications.

7. Article 13 – Performance Management

I. Agency Position

[24] *See AFGE, Local 922*, 354 F. Supp. 2d 909, 915 (E.D. Ark. 2003).

The Agency's proposal replaces the current pass/fail performance evaluation system with a 5-tier rating system. The Agency argues that it provides management with the flexibility to distinguish employee performance; identify and reward superior performers; better address problem performers, incentivize high performers; increase accountability for lower performers; and increase communication between management and employees on performance goals and objectives. The Agency's proposal also provides that for performance improvement plans (PIPs), 30 days will generally be considered to be a reasonable time to improve, to align the proposal with restrictions on use of PIPs contained in Executive Order 13839. Finally, the Agency contends that the Union's proposal is non-negotiable because it does not permit the Agency to replace the current pass/fail system with the new 5-tier rating system.

II. Union Position

The Union proposes to retain the existing language of Article 13 in the current agreement, which will keep employees on the pass/fail performance system. The Union contends that the Agency's proposal is contrary to law because they commit management to a 5-tier performance rating system.

III. Conclusion

The Panel will adopt the Agency's proposal. The parties' disagreement is over their performance management system. The Union argues that the Agency's proposals to modify the parties' performance management system from pass/fail to a 5-tier rating system is contrary to law, is without merit. It is well settled that the Agency has the right to establish the particulars of its performance rating system, including the elements under which the employees will be rated, pursuant to its statutory right to assign work.[25] As such, the Union's argument is not colorable.

On the merits, the Agency's proposal acts like a handbook for employees and managers alike, which will ensure that the parties are on the same page, creating an effective and efficient system for the parties to follow. The Agency's proposal establishes a comprehensive performance management system that defines employee expectations and objectives. In this respect, it defines the summary rating that employees must obtain in order to meet an acceptable level of performance (Level 3) and explains and differentiates between the levels of performance in section 5(k). It not inconsistent with EO 13389 by allowing an employee 30 days to demonstrate improvement should an employee's performance fall to a Level 1.[26] It provides employees and managers with guidance regarding their responsibilities during the performance cycle in section 6. It encourages managers to provide employees training opportunities that will permit their careers to develop in section 10. It provides employees information about obtaining performance award increases, such as within-grade increases in section 16. Finally, the Agency's proposal excludes the contents of an employee's performance plans from the grievance procedure. This exclusion is consistent with Panel's order under Article 10. As such, the Panel will impose the Agency's Article on Performance Management.

[25] *See NTEU*, 13 FLRA 325 (1983).
[26] Section 4(c) of EO 13839.

8. Article 14 – Merit Assignment Program[27]

I. Agency Position

The Agency asserts that its proposal incorporates the June 2019-NOAA Merit Assignment Plan (NOAA MAP). By doing this, the Agency contends that its proposal avoids uncertainty, ambiguity, or inconsistency concerning the Merit Assignment Program. The Agency states that the Union received notification of the new NOAA MAP on July 17, 2019, and made recommendations to it during its exercise of its national consultation rights. The Agency, however, contends that the Union's proposal deviates in significant respect from the NOAA MAP and interferes with management rights over hiring, staffing, and budget. Specifically, in section 5, it requires the Agency to staff specific positions and limits the Agency's discretion over hiring selections.

Regarding the Union's proposal to retain the current Article 14, the Agency states that language is outdated and obsolete. In this respect, the Agency contends that the CBA language refers to hiring practices that have not been used for 20 years (e.g., rating boards, limiting the number of names for hiring and promotion actions) and have been modified or rendered obsolete by OPM rules or procedures for hiring. Finally, the Agency states that the Union's claim that the proposal to incorporate the MAP would allow the Agency to change its terms at will is not accurate, as the Agency's proposal does not include that right.

II. Union Position

The Union states that the Agency's proposal to allow it to change the terms of the MAP at will, rather than negotiating is illegal. The Union states that the Agency issued a new MAP via NOAA Administrative Order 202-1109 on December 1, 2019. However, the Union contends that the order specifically states in section 2.02 that it does not apply to competitive service actions for bargaining unit employees. Thus, the Union states by this order, it cannot be made applicable to bargaining unit employees.

The Union also argues that it never had an opportunity to negotiate over NOAA MAP. The Union states that the Agency did send a letter offering the Union the opportunity to exercise its consultation rights on a new draft MAP. The Union offered its consultation rights comments on July 29, 2019, and the Agency responded to those comments on August 2, 2019. The Union wrote back asking for clarification of what suggestions had been incorporated into the final version. On August 5, 2019, the Agency responded that "none of NWSEO's recommendations were adopted, but section 14 will be rewritten to incorporate the spirit of NWSEO's recommendations." Thus, the Union asserts that the provisions of the NOAA MAP were not yet finalized by the time the parties last bargained on July 30, 2019.

III. Conclusion

The Panel will adopt the Union's proposal, with modification. The parties disagree over whether the NOAA MAP will be incorporated into the CBA pursuant to the Agency's

[27] The parties reached tentative agreements on section 1 of this Article.

proposal, or whether the parties will carry over the language from their current CBA on the MAP. The Union contends that the MAP does not apply to bargaining unit employees. The Union's argument appears to be correct. When the Agency issued NOAA Administrative Order 202-1109 in December 2019, the purpose of which was to implement the MAP policy, section 2.20 of the Order specifically stated that MAP procedures do not apply to bargaining unit employees covered by negotiated agreements. Further, even if the Agency did amend that language to include bargaining unit employees, which the Agency did not reveal to the Panel, the Union has provided a colorable argument that it was not provided an opportunity to negotiate over the MAP.

In this respect, as demonstrated by the evidence submitted by the Union, the parties were in the "national consultation"[28] phase of negotiations in July 2019, at the same time that the parties concluded negotiations over this successor CBA. Thus, the Agency was obligated to provide the Union an opportunity to negotiate once the policy was finalized. As a result, the Panel will impose the Union's Article, but modify the Article by requiring the parties to implement the following language:

> "Applicable personnel placement actions will be taken consistent with the NOAA Merit Assignment Plan (NOAA MAP). The Agency will notify the Union of changes to the policy and the Union may request bargaining as appropriate."

9. Article 16 – Details and Temporary Promotions

I. Agency Position

The Agency asserts that its proposal defines and outlines the procedures to process details and temporary promotions, and provides management full discretion to make selections among eligible and qualified employees for non-competitive temporary promotions. The Agency states its proposal is intended to eliminate a past practice of processing temporary promotions that was established by an Arbitrator, [29] which required a temporary promotion of any bargaining unit employee assigned the duties of a higher-graded position, even for one day. The Agency states that this arbitration award has resulted in administratively burdensome and costly requirements to process temporary promotions when employees are detailed to higher grade assignments for short periods of time. Therefore, the Agency asserts that its proposal enables an employee to be detailed to a higher-graded position for a short period of time without a pay adjustment or temporary promotion.

II. Union Position

The Union proposes to retain the existing Article 16 and related May 2001 side agreement concerning temporary promotions enforced by an Arbitrator.[30] The Union argues that

---

[28] Under section 7113 of the Statute and section 2426.1(b) of the Authority's Regulations, an agency must consult with a union on agency-wide regulations it plans to promulgate if a union meets certain criteria establishing its entitlement to national consultation. After an agency implements the regulation, it still has a duty to fulfill its bargaining obligations with the union. *See Veterans Administration Central Office*, 9 FLRA 323 (1982).
[29] *See Dep't of Commerce, NOAA*, 58 FLRA 490 (2003).
[30] *Id.*

the Agency should have to abide by a 2001-side agreement, which requires the Agency to temporarily promote employees if they have filled a vacant position for 20 consecutive days. In this respect, the Union states that employees are temporarily promoted without regard to the consecutive number of shifts they are assigned to work the higher graded position, so long as the position remains vacant for 20 days. The Union asserts that this usually has occurred when a General Forecaster has been assigned to cover a Lead Forecaster shift that is vacant because the position has not been filled. When the General Forecaster is assigned to the Lead Forecaster shift, he or she will assume the final responsibility as to whether to issue severe warnings for their forecast office area, which is populated on average, by 3 million people.

The Union contends that last year, the NWS Director testified before the House Science Committee that there were, at times, 434 unfilled vacancies in NWS. Consequently, the Union states that it is essential to retain the side agreement in order to ensure that employees who are routinely assigned to perform higher graded duties as a result of an unfilled vacancy. Without such agreement, the Union asserts that the Agency would have no incentive to permanently fill these positions.

The Union further states that the Agency's proposal would also make it harder for employees who are assigned higher graded duties in other circumstances to qualify for a temporary promotion. As previously stated by the Union, such employees are entitled to a temporary promotion under Article 16 when they are assigned to higher graded duties for 20 days or more, but management has proposed to change that to two pay periods. The Union argues that although there are 20 work days in two pay periods, the 20-day assignment would have to coincide precisely with two pay periods to entitle the employee to a temporary promotion. If the employee is assigned the higher graded duties at the beginning of the second week of a particular pay period, for example, he or she would have to work more than two pay periods to receive a temporary promotion.

III. Conclusion

The Panel orders the parties to withdraw their proposals. The parties' disagreement is over the procedures and arrangements surrounding details and temporary promotions. The Agency has proposed new language to be included in the CBA to cover these matters, while the Union has proposed to carry over the current language in the parties' contract. Neither party provided sufficient support for its proposal, so the Panel will order the following language on the parties:

"Temporary promotions and details shall be addressed pursuant to OPM guidelines."

10. Article 17 – Training and Career Development

I. Agency Position

The Agency states that its proposal recognizes that it is within management's discretion to identify and assign training and determine content, methods, and frequency of training, but also provides that training will be offered "as equitably as practicable." The Agency states that its proposal allows the Union to offer proposals for training, and commits the Agency to give due

consideration to Union recommendations. Conversely, the Agency contends that the Union's proposal allows for impact and implementation bargaining, which would delay the provision of training; requires the Agency to maintain a Learning Management System (which is duplicative of the Department of Commerce Learning Center); establishes a Training Review and Career Development Board; requires management to approve applicants for the University Assignment Program; allows appeals and grievances to challenge non-selection decisions, which would interfere with management rights; provides time off for preparation of applications to the program; and requires the Agency to justify decisions to deny participation in the mentoring program.

II. Union Position

The Union contends that this Article warrants updating because the current agreement is outdated due to changes in the NWS training programs. The Union believes that Union input to training are essential to a well-trained workforce. The Union argues that it has a right under the Statute to bargain the impact and implementation bargaining over management's exercise of its right to assign training.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The parties disagree over how the Agency will provide and deliver training to its employees. The Union argues that the Agency's proposal does not permit it to negotiate over training. However, the Agency's section 1 proposal permits the Union to advance proposals over training. Nonetheless, the Panel will modify the Agency's proposal to include the following language in section 1:

> "The Agency will notify the Union when making substantial or more than *de minimis* changes to its training program."

Lastly, although not contained in the Agency's proposal, the Agency argues that the Union should not be permitted to grieve a management decision not to select an employee for training because it would interfere with managements rights; however, the Agency has not provided any case law to support its position. The Agency has not demonstrated "convincingly" in this setting that the Panel should preclude grievances of this matter. As such, the Panel will not exclude this matter from the parties' negotiated grievance procedure.

11. Article 19 – Leave

I. Union Position

The Union accepts the Agency's proposal for this Article, with the exception of five sections. The Union proposes to retain the corresponding language of the current agreement in lieu of the Agency's proposal for the following five sections. In the Agency's proposal section 2, paragraph 3, the Union proposes to retain the language that appears in section 1(a), paragraph 2 of the current agreement because it will continue to require the Agency to notify each employee in October of their need to schedule "use or lose" leave before the end of the year. In the Agency's proposal section 3(c), the Union proposes to retain the language that appears in

section 2(c) of the current agreement, which allows the Union's steward to designate the peak leave period for the year, for which employees must submit advance leave requests for simultaneous consideration by management. The Union contends that the Agency's proposal would allow the local manager to designate those peak periods instead.

In the Agency's section 6(f), (g), and (h), the Union proposes to retain the language that appears in section 3 of the current agreement. The Union states that the Agency's proposal increases the burden on employees to provide medical documentation to justify sick leave. Presently, the Union states that employees can self-certify the need for sick leave in excess of three days, so long as it provides, in the supervisor's judgement, adequate information justifying the use of sick leave. The Union argues that the Agency's proposal would require documentation in all cases of sick leave and would require a medical certificate for any leave in excess of three days, which the Union states may result in an unnecessary medical visit and attendant costs. Under the Union's proposal, it states that a supervisor may always require additional documentation when there is a reasonable doubt as to the validity of the employee's claim.

Finally, the Union takes exception with the Agency's section 10 and section 19 proposals. The Union contends that the Agency is attempting to roll back an arbitration award affirmed by the Authority in section 10, which permits employees to leave during the period when he or she is on jury duty.[31] The Union argues that the existing agreement not only protects employees, but benefits the Agency by ensuring employees are not exhausted when reporting for work or jury duty. The Union also states that it does not agree to the Agency's section 19 proposal, which proposes that the parties abide by the new Article 9 for midterm bargaining (the Union proposes to abide by Article 8 for such matters).

II. Agency Position

The Agency contends that the Union's final offer to accept the Agency's proposal with modifications narrows the scope of the dispute, but is still unacceptable to the Agency. The Agency states that the Union misconstrues the Agency's proposal concerning documentation for sick leave. The Agency asserts that its proposal generally allows employees to self-certify for absences of three days or less, but for absences longer than three days, acceptable evidence is required.

The Agency states that its proposal also clarifies the treatment of court leave in section 10. The Agency states that the Union has taken the position that an employee is entitled to court leave for the entire duration of court service, regardless of whether the employee is actually required to report for court service each day. The Agency asserts that its proposal tracks the law and regulations, and eliminates ambiguity concerning entitlement to court leave. In this respect, it indicates that employees are not entitled to court leave on days that they are not required to be physically present in court, such as on days the employee is required to call-in, a court holiday, or temporary excusal/dismissal.

[31] *See Dep't of Commerce, NOAA*, 67 FLRA 356 (2014).

III. Conclusion

The Panel adopts the Agency's proposal, with modification. The Union accepts the Agency's proposal on the use of leave with the exception of five sections. The Union takes exception with section 2, paragraph 3 of the Agency's proposal, which advises managers to make reasonable efforts to allow employees to take two or even three weeks of consecutive leave. The Union only contends that it prefers to continue the existing language in the current contract. This argument is not compelling.

The Union takes exception with the Agency's section 3(c) proposal, which requires employees to submit leave requests during "peak periods" at least 60 days in advance. The Union argues that employees should be permitted to designate the peak periods. The Panel disagrees. Management should have the discretion to determine when peak periods occur based on the manpower needed and workload of the division.

The Union also takes exception with sections 6(f), (g), and (h) of the Agency's proposal. Section 6(f) indicates that management may grant sick leave when the need for sick leave is supported by administratively acceptable evidence as to the reason for the absence; section 6(g) articulates the types of evidence that management will accept; section 6(h) provides that employees may self-certify the use of sick leave for periods of three days or less absent suspected leave abuse. The Union argues that the Agency's proposal puts a burden on employees to provide medical documentation, but the Agency's proposal, as it explains, does not require employees to provide such documentation in every instance. Instead, it requires medical documentation only when sick leave is for more than three days.

Finally, the Union argues that the Agency's section 10, which details the requirements for employees to be entitled to court leave is contrary to an arbitration award affirmed by the FLRA.[32] In that case, the Authority stated that an Arbitrator's enforcement of section 11 of the parties' agreement was not contrary to 5 U.S.C. § 6322, when the Arbitrator found that the Agency improperly denied an employee court leave for weekend days, which he was scheduled to work. Section 11 of the current agreement states that [a]n employee eligible for court leave shall be granted court leave to serve on a jury for the entire period of service, extending from the date on which he/she is required to report to the time of discharge by the court."

The statutory provision authorizing court leave - 5 U.S.C. § 6322 – provides in pertinent part that an employee is entitled to leave, without loss of, or reduction in pay, leave to which he otherwise is entitled, credit for time of service, or performance of efficiency rating, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding by a court or authority responsible for the conduct of that proceeding to serve as a juror. The Comptroller General held that an employee is entitled to compensation for regularly scheduled working hours although he is not scheduled for actual jury service when it would impose a hardship upon him to return to his regular work.[33] It has also been held by the Comptroller General that employees may be excused from their regularly scheduled night duties

[32] *Dep't of Commerce, NOAA*, 67 FLRA 356 (2014).
33 *Comptroller Gen. Warren to the Pub. Printer*, 26 Comp. Gen. 413, 413 (1946).

when the employee serves on a jury during the day without charge to annual leave and with compensation at the night differential rate.[34]

The Agency's proposal does not entitle employees to court leave on days when they are not physically present in the court. The Agency argues that its proposal is consistent with law and regulation, but does not provide any authoritative sources which support its argument. The above-cited decisions by the Comptroller General present a colorable argument that the Agency's proposal may not be permissible. Further, the arbitration award, which was enforced by the Authority, makes it clear that court leave is granted for the whole period that an employee is on jury duty.[35] Because the Agency has not provided support for its proposal, the Panel will adopt the Agency's proposal, but strike the Agency's section 10 language and instead require the parties to adhere to the current contract language in section 10 of the Union's proposal, which will permit employees leave to serve on a jury for their entire period of service.

12. Article 20 – Work Schedules for Rotating Shift Workers and Article 21 – Work Schedules for Employees Who Do Not Work on a Rotational Shift Basis[36]

I. Agency Position

The Agency contends that Articles 20 and 21 establish principles governing the scheduling of rotating and non-rotating shifts that are essential to the Agency's ability to accomplish its mission. The Agency argues that its proposal defines management's rights and provides it with the flexibility needed over staffing requirements, start times, the number of employees to be assigned to shifts, leave planning, and to establish and temporarily suspend alternative work schedules (AWS). The Agency states that the recognition of management's authority to determine staffing requirements is essential to override a 2007 arbitration decision involving staffing at the Missoula, Montana Forecasting Office, which requires the Agency to maintain two-employee shifts.[37] The Agency contends that technological advances have allowed it to operate with fewer than two people per shift. The Agency further states that The Weather Research and Forecasting Innovation Act requires flexibility for management to align staffing with evolving operational needs.

II. Union Position

The Union argues that Article 20 is the most important article in the CBA for most bargaining unit employees. With the exception of section 13, the Union asserts that the scheduling procedures of this article have been in place since the 1980s. The Union states that they have served as the "ground rules" by which the NWS operational workforce have consistently provided its valuable services to the public. The parties have developed work schedules and rotations and long-term planning schedules under the provisions of this Article, which the Union argues should not be disrupted by implementation of a new system.

---

34 *Comptroller Gen. Warren to the Adm'r, Gen. Servs. Admin.*, 29 Comp. Gen. 427, 427 (1950).
35 *Id.*
36 The parties reached tentative agreements on Article 20, section 3 and Article 21, sections 1, 3, 4, 5, and 6.
37 *See National Weather Service and National Weather Service Employees Organization*, FMCS 06-04457-7 (2007).

The Union proposes to retain the existing language of Article 20, with one clarification to the end of section 12(e): "including the right, in appropriate circumstances, to negotiate flexible schedules." The Union contends that this phrase will make clear that in addition to the agreement to negotiate and implement compressed work schedules discussed in subsection (a) through (d) of this section, the Union has the right to also negotiate flexible work schedules, and that the Union is not waiving its right to negotiate other forms of alternative work schedules within the Flexible Work Schedules Act.

The Union states that each Weather Forecast Office serves on average 3 million people, and the Washington, DC Forecast Office (located in Sterling, VA) provides forecasts and warnings of severe weather to over 9 million people. The Union asserts that it is a large responsibility to place on one person, working alone overnight, in a stand-alone facility, full of computer and other electronic equipment. In its FY 2020 budget request, the Agency sought permission from Congress to reduce its forecaster workforce in anticipation of reduced shift staffing. "[A]n office would have only one person on duty" the Agency told Congress (while acknowledging that "the safety and security of NWS employees" was a concern).[38] However, the Union argues that both Houses of Congress rejected this request. The NWS's request "would only serve to exacerbate the staffing problems" the House Appropriations Committee wrote.[39] The Union states that the Agency offers no proof of its claim that technological advances have enabled the Agency to operate with fewer than two forecasters on a shift. Finally, the Union argues that several of the Agency's proposals in Article 20 and 21 violate the law.

III. Conclusion

The Panel will adopt the Union's proposal. The parties disagree over the employees' schedules in Article 20 and 21 of the successor CBA. The Agency seeks to modify the parties' language in these two articles, which has existed for approximately 40 years, but offers little support for doing so. The Agency states that its proposals provide it flexibility over staffing requirements, start times, the number of employees assigned to shifts, and the ability to establish and temporarily suspend AWS; however, it does not explain how the current contract language memorialized in the Union's proposal does not accomplish these objectives.

The Agency states that it would like to supersede a 2007 arbitration that required the Agency to maintain two-employee shifts because advances in technology have allowed the Agency to operate with fewer than two employees per shift. As the Union notes, the Agency has not presented evidence, nor explained the technological advances that have permitted the Agency to make this adjustment. The Agency only points to The Weather Research and Forecasting Innovation Act, but does not offer an explanation of how it has implemented technological advances in compliance with that Act. Further, as noted by the Union, the Committee on Appropriations report commented in 2019, that it was concerned about staffing levels within the Agency.[40] The committee did not adopt the Agency's proposal to reduce

---

[38] NOAA Budget Justification at NWS-54, https://www.noaa.gov/sites/default/files/atoms/files/NOAA-FY20-Congressional-Justification.pdf (2020).
[39] H. Rept. No. 116-101, at 34 (2019). *See also,* S. Rept. No. 116-127 at 51 (2019).
[40] Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2020 at p. 34, https://www.govinfo.gov/content/pkg/CRPT-116hrpt101/pdf/CRPT-116hrpt101.pdf, (2019).

staffing, which it stated would only serve to exacerbate the staffing problems experienced at the Agency.[41]

The Union's proposals clearly lay out the scheduling arrangements for employees, establishes management's authority to set employee schedules, requires the Agency to afford overtime payment to employees in accordance with law and regulation, and permits the establishment of AWS, but leaves it up to management's discretion to approve such schedules. Thus, because the Agency has not offered sufficient support for its proposals, and the Union has demonstrated that its proposals further the mission of the Agency, the Panel will impose the Union's Article 20 and 21. Based on this recommendation, it's unnecessary to address the Union's legal arguments.

13. Article 22 – Facilities[42]

I. Agency Position

The Agency asserts that its proposal allows management to appropriately manage its facilities, while affording and preserving reasonable access to Agency facilities for Union representatives and mandating negotiations over safety procedures. The Agency contends that its proposal allows the Union to request space to conduct Union meetings, while also ensuring that costs for use of Agency space will be appropriately charged to the Union and that the use of the space and arrangements for official time for attendance at such meetings will be subject to appropriate approvals and procedures.

The Agency's proposal also provides that the Agency may, in its discretion, determine the feasibility of establishing child/elder/family care facilities, which the Agency states balances it rights to manage its facilities with the concern for improving employee work-life balance. The Agency's proposal provides for PDI with the Union regarding facility funding or plans for building, remodeling, or consolidating facilities when the Agency determines that PDI will have a "tangible benefit"; and provides that the parties will negotiate over facility security and safety issues, allowing opportunities for consultation and collaboration with the Union in appropriate circumstances.

In contrast, the Agency asserts that the Union's proposal imposes significant costs and burdens the Agency in the form of parking costs; subsidies for a bike to work program and free shuttle services; private office space for Union representatives; adjustable tables; full kitchen facilities; radon and water quality testing; five gallons of bottled water per employee per day; family care center, and mandating PDI for all facility projects. In addition to the costs raised by the Union's proposals, the Agency asserts that the Union's offers also raise numerous building code, leasing, and other legal issues.

---

[41] *Id.*

[42] The parties reached tentative agreements on section 19 of the Agency's proposal (section 18 of the Union's proposal) regarding shelf-space in non-work areas for the storage of Union materials.

II. Union Position

The Union argues that the parties should abide by the current contract language for this Article. The Union states that the Agency's proposal, which requires the Union to obtain prior approval before being able to access Agency facilities will create confusion, additional work, and will stifle communication between the parties. The Union instead proposes that representatives will be permitted to enter Agency facilities, subject to the security requirements of the facility that are visited. The Union also proposes that the Agency provide, upon request, an office space to perform representational activities and to hold meetings.

The Union argues that as the employees' exclusive representative, it must have secure office space at each local, regional, and national office to address representational matters with its bargaining unit. The Union states that the Agency's proposal discriminates against the Union. The Union also proposes that the Agency provide at least two parking spaces in every Agency-owned or leased facility where there is parking for Union officers when engaged in labor-management relations and to provide free parking to all bargaining unit employees to the maximum extent practicable.

Next, the Union states that the parties disagree over whether personal items will be permitted in the workplace, such as radios, television sets, magazines, tables, laptops, cell phones, heaters, fans, compact refrigerators, coffee makers, small appliances, and adjustable desks. The Union contends that the Agency has always permitted employees to have these items in the office; therefore, the Agency should continue to allow for this practice. The Union also requests that the Agency continue to provide full kitchen facilities to employees, which include a dishwasher, stove, microwave, and additional refrigerators. The Union argues that these types of amenities will accommodate employees who remain at work for long hours each day.

The Union proposes that when a facility is constructed or acquired by the Agency, the Agency must conduct a "needs assessment survey" to determine the feasibility of establishing on-site child/elder/family care. Similarly, the Union proposes that the parties shall meet to determine the need to establish a day care center. The Union contends that its proposals will address the needs of the bargaining unit, many of whom work rotating shifts that make family care very difficult.

When employees must work during times of an emergency, the Union proposes that the Agency provide food and lodging for these employees. The Union states that some of these events could last for several days, requiring employees to remain at or nearby their duty location since roads could be closed, homes might be damaged, or there may be a need to maintain minimum staffing levels due to the emergency. The Union contends that the Agency in the past has provided these accommodations to employees; therefore, this practice should continue. The Union also proposes that the Agency provide on-site safe rooms or shelters capable of withstanding a Category 5 typical cyclone or tornado at locations that experience these types of weather events. The Union argues that the bargaining unit employees are deemed emergency essential employees, required to report to duty during events that pose danger to human life. When employees are at work issuing life-saving forecasts, the Union states that the Agency should ensure that the employees are safe.

Finally, the Union requests that the Agency contact the Union prior to building, expanding, or remodeling a facility for PDI based on the long-standing practice that the parties have utilized to work together and resolve issues. Similarly, the Union requests that the Agency negotiate over any changes in workstations, whereas, the Agency's proposal does not include such language. The Union argues that the work assigned to bargaining unit employees continues to increase and the Agency is continuously determining whether there is need to implement new workstations, the number of workstations it will implement, and where to locate those workstations.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The parties disagree over several matters contained in the Facilities Article, but one of the main disagreements surrounds the Union's access to the Agency. The Agency's proposal is heavily influenced by EO 13837. Section 4(a)(iii) states, that "[n]o employee, when acting on behalf of a union, is permitted the free or discounted use of government property or agency resources if such free/discounted use isn't generally available for non-agency business by employees…including office or meeting space, reserved parking, phones, computers, and computer systems." The Union argues that it needs an office space to conduct its representational responsibilities and without such space, it interferes with the Union's rights under the Statute.

As previously noted, the Panel has recognized the President's EOs on labor-relations, including section 4(a) of EO 13837, as public policy in prior decisions. Here, the Union has not demonstrated its need for free office space, and it is not an efficient use of government resources to grant the Union's request to free use of the space. The Union pointed to no case law to state that it has a right to free government space and that an agency discriminates against a union by not offering such space. What's more, under the Agency's section 1 proposal, the Union may not even be charged for the use of government space, since the Union may request space for local meetings at no cost to the Union, unless the Agency would incur costs by doing so. The Union also argues that the Agency must provide Union officers at least two parking spaces when engaged in representational activities, as well as free parking at any Agency facility. The Union has not demonstrated a need for such an accommodation.

The Agency proposes in section 3 that its representatives must obtain prior approval before being granted permission to visit facilities. The parties have traditionally permitted the Union to access a facility by obtaining a security clearance prior to visiting a facility, but did not require the Union to obtain prior permission from management before entering a facility. The Agency has not explained why it needs this added layer of protection when the Union has agreed to continue to obtain a security clearance before entering the premises. The Panel will impose the Union's section 1 and strike the Agency's section 3 proposal.

The parties disagree over the employee's use of personal items in the workplace in section 4, such as cell phones, tablets, and laptops. The Agency's proposal permits the use of such items, but appropriately leaves it within management's discretion to ultimately approve or deny such use. Similarly, the Agency should also maintain the discretion to determine whether a full kitchen is warranted at each location and there should not be a blanket requirement imposed on the Agency especially where the Agency leases the building.

The Union also seeks to require the Agency to conduct a study in section 7 to determine whether on-site child and family care is necessary for its employees. The Agency has agreed to conduct a study if it determines that there is a need for establishing these services. The Agency's proposal should sufficiently satisfy the Union.

The Union argues that the Agency must provide food and lodging expenses to employees working during emergencies. The Union expressed understandable concern over situations when employees must work during an emergency and has advanced several proposals aimed at addressing some of those issues. The Agency, however, should be permitted the discretion to determine, based on the circumstances of the event, whether it will grant those accommodations, rather than be contractually required to automatically provide those expenditures to employees. For example, if the situation requires the employees to work for several hours, but then they are able to return home, under the Union's proposal, the Agency could be required to provide food and lodging. Conversely, the Agency's proposal permits it the ability to make an assessment to authorize these expenditures at the time of the event.

Finally, the Union proposes that the Agency bargain with the Union over any changes to employee workstations and requires the Agency to engage in PDI when deciding whether to build, expand, or remodel a facility. The Agency has proposed that it will negotiate changes in working conditions of the bargaining unit, which could include workstations and building or remodeling. Further, the Agency has committed itself to engaging in PDI with the Union when it will result in "tangible benefits". Thus, for the reasons mentioned, the Panel will adopt the Agency's Facilities Article, but with the modification mentioned above: imposing the Union's section 1 and striking the Agency's section 3 proposal.

14. Article 24 – Safety and Health

I. Union Position

The Union states that it accepts the Agency's proposal for this Article with the exception of the addition of the Union's proposal for section 18, regarding the Health Club and Wellness Services Reimbursement Program. The Union also takes exception to the Agency's final section, which proposes to incorporate its new midterm bargaining article, Article 9, into the contract. The Union contends at the 2008 National Labor Council meeting, the parties agreed to a program that would reimburse employees up to $300 annually for membership in a health club or other wellness program such as a weight loss or smoking cessation program. The Union states that according to a 2016 response to an information request, nearly 1,100 employees participated in this program annually in FY 2014 and 2015.

II. Agency Position

The Agency states that the Union's final offer to accept the Agency's proposal for Article 24, with the addition of a new section 18 concerning "Health Club Reimbursement" narrows the scope of the disagreement, but would require the Agency to continue offering a $300 reimbursement for health club fees. The Agency asserts that it remains committed to employee health and welfare, but this program impacts the Agency's budget and its need to retain flexibility over the administration of such discretionary expenditures.

III. Conclusion

The Panel will adopt the Agency's proposal. The Union agreed to all of the Agency's proposals within Article 24, except for a health club and wellness program subsidy and the Agency's proposal to follow the new midterm bargaining procedures in Article 9 over matters not covered by this Article. The main disagreement is over the subsidy.

The Union proposes that the Agency will reimburse all employees up to $300 per year for health club and wellness service fees. While the health and wellness of employees is certainly important and beneficial to the Agency's mission, the Union has not demonstrated the need to maintain the program. The Union asserts that nearly 1,100 employees participated in the program in FY 2014 and 2015; however, that was five years ago. The Union did not provide any recent data indicating the employees' support for the program. Therefore, the Panel will adopt the Agency's proposal, which commits itself to sustaining and maximizing employee health, and may include a health club subsidy if the Agency determines it has the necessary funding and means for it.

15. Article 25 – Union Communications

I. Agency Position

The Agency asserts that its proposal establishes a reasonable means for the Union to communicate with bargaining unit employees. Section 1 of the Agency's proposal provides that space will be provided, where available, for a Union bulletin board and that management will consult with the Union concerning objections to posted material, and the Union can grieve any decisions by management to remove objectionable material. Section 3 provides that Union representatives may use Agency equipment and supplies for representational purposes in accordance with limitations in Article 5, Section 10 (which the parties tentatively agreed to) when the use does not interfere with Agency operations, does not involve prohibited uses, and results in minimal cost to the Agency. The Agency also asserts that its proposal makes clear that Agency equipment cannot be used for internal Union business.

The Agency contends that the Union's proposal for section 1 of this Article would not allow management to remove material from Union bulletin boards that it determines to be libelous, malicious, or scandalous. The Agency argues that its proposal is consistent with controlling authority and principles involving the balancing of Agency property rights and Union rights to communicate with its bargaining unit.

II. Union Position

The Union proposes to carry over four sections of the current CBA - sections 1, 2, 3, and 8 to the successor agreement. The Union argues that the Agency has not proffered a compelling reason for changing the terms of the existing agreement. The Union contends that the change which the Agency proposes in section 1 would entitle it to unilaterally remove postings on the Union's bulletin board if it deems them to be libelous, malicious, or scandalous. The Union asserts that the current contract requires the Agency to first contact the Union before removing any material.

III. Conclusion

The Panel will adopt the Agency's proposal. The parties disagree over the Union's communications to its bargaining unit. The Panel has consistently endorsed a Union's right to free speech and has denied several proposals that curtail that right. However, the Union's right to free speech as part of its representational rights is not absolute; it is limited by other parts of the Statute, including the Agency's right to maintain an orderly workplace and ensure that Union representatives do not engage in flagrant misconduct.[43] Consistent with that notion, the Agency has a right to insist that its publication standards be met when the Union seeks to post information on Agency bulletin boards.[44] The Agency's proposal, which permits it to remove material that does not conform with Agency standards from Agency bulletin boards, is consistent with the Statute. Further, the Agency's proposal, contrary to the Union's argument, does actually require it to first discuss its objections to the material posted with the Union, and permits the Union to grieve an Agency decision to remove a posting if the Union believes that the Agency's conduct is impermissible.

The parties' other main disagreement is over the Union's use of Agency equipment and resources in section 10. Section 4(a)(iv) of EO 13837 states, "[n]o employee, when acting on behalf of a union, is permitted the free or discounted use of government property or agency resources if such free/discounted use isn't generally available for non-agency business by employees when acting on behalf of non-federal organizations, including…phones, computers, and computer systems." The Agency attempts to comply with the EO by limiting the Union's use of Agency resources, but even permits the Union to use some Agency resources such as copying and facsimile machines, telephones, and internet access. The Union did not provide support for its proposal to convince the Panel to deviate from the public policy established by the EO. As such, the Panel will impose the Agency's Article.

16. Article 26 – Telework[45]

I. Agency Position

The Agency states that its proposal recognizes the value and importance of allowing employees to pursue telework opportunities and arrangements to improve work-life balance, while ensuring that teleworking arrangements will not compromise the Agency's operational needs and mission. The Agency argues that its telework proposal tracks the 2018 NOAA Telework Implementation Plan, which covers all NOAA line offices including NWS. The Agency states that the Union's final proposal significantly deviates from the NOAA Telework Implementation Plan. Specifically, the Agency asserts that the Union's proposal allows employees to choose alternate work locations without management approval unless the choice of the location has a negative impact on Agency mission; removes levels of oversight required by the NOAA Telework Plan for employees moving to full-time telework; requires management to grant administrative leave when an employee's personal issues at home preclude telework; requires the Agency to provide hardware and software to enable teleworking employees to

[43] *See, e.g., Dep't of the Air Force, 315th Airlift Wing*, 294 F.3d 192 (D.C. Cir. 2002).
[44] *See Army Reserve Personnel Command*, 55 FLRA 1309 (2000).
[45] The parties reached a tentative agreement on section 1 of this Article.

access sensitive and classified information; requires the Agency to pay for internet connects at the employee's telework site; requires the Agency to provide equipment and office supplies for home use; requires four weeks' advance notice prior to terminating a telework arrangement, irrespective of the need to expedite the decision; requires the Agency to pay travel costs when an employee's chosen telework site is more than 50 miles from their duty station; and allows employees to telework while simultaneously caring for children or other dependents.

In contrast, the Agency asserts that its proposal embraces various forms of teleworking, including "Regular Telework" (section 2H), "Ad Hoc Telework" (section 2A), "Unscheduled Telework" (Section 2M) and "Emergency/Coop Telework" (section 4D), and defines various Telework Plan Options (section 5). The Agency states that employees may identify alternate worksites for teleworking, subject to management approval based on both the needs of the employee and the organization (section 2B). The proposal ensures that employees are responsible for ensuring that they have sufficient work (Section 5A4 and 5B4); provides management with the ability to terminate an approved telework arrangement if an employee fails to adhere to a telework agreement or fails to truthfully report time, meet deadlines, maintain acceptable performance, or when changes in organizational needs require the employee's physical presence (section 6C). In the event management decides to terminate a telework arrangement, the Agency contends that the proposal indicates that the reasons for the termination will be provided to the employee in writing and the employee has the right to discuss the decision and reapply for telework consideration (section 6C). Finally, the Agency asserts that its proposal sets out rules and understandings for telework arrangements, reporting obligations, and treatment of leave during emergencies or inclement weather in a wide range of situations (office closures, early dismissals/late arrivals, emergencies at alternative work sites) (section 7).

II. Union Position

The Union did not provide its position on telework and instead referenced a submission it provided the Panel during the investigation of this case in January. The Union addresses several matters within the January submission where it asserts that the parties' proposals differ. However, based on the Agency's proposal, those differences either do not exist or are much narrower than they were in January. For example, the Union asserts that the parties' proposals on employee eligibility to telework differ; but, a review of the Agency's proposal reveals that the parties' proposals are actually the same. In other areas, the parties do actually differ on their respective proposals.

The Union's proposal provides for mobile telework, which is not present in the Agency's proposal. This covers situations where an employee is not always working from the same alternative worksite that is provided for in the employee's telework agreement. The Union argues that there have been situations where managers have asked employees to report to their offices because the employee would need to perform work at an alternative worksite than what is in the employee's agreement. The Union contends that the Agency's proposal for 100 percent telework will not be approved because it requires Deputy Assistant approval. Conversely, the Union's proposal only requires the manager of the employee to approve the agreement. Finally, the Union argues that the Agency's proposal is contrary to law because it requires the parties to adhere to 5-tier performance rating instead of the pass/fail system.

III. Conclusion

The Panel will adopt Agency's proposal. Currently, the parties do not have an article on telework. Instead, the current telework practices are based on the NOAA Telework Policy, which covers all NOAA offices, including NWS. Pursuant to that policy, managers determine if an employee is eligible to telework and the number of days employees are permitted to telework, which may include 100 percent telework.

The Agency's proposal closely resembles the NOAA Telework Policy. It recognizes the importance of providing employees telework by creating a robust policy that is employee-friendly, but balances this benefit with the Agency's goal of ensuring that its mission is met. In this respect, the Agency offers employees a variety of options to create a comfortable work-life balance, such as teleworking when an employee transitions back to work after the birth of a child, the ability to telework on an ad hoc, regular basis, during emergency situations, and even permits employees the option of full-time telework. For the latter types of telework, the Union argues that this telework will never be granted because the discretion to approve such requests rests with the Deputy Assistant. The Union provided no basis to support that conclusion. The Union also argues that the Agency's proposal, which conditions an employee's telework eligibility on obtaining at least a Level 3 performance rating is illegal. However, as previously stated under the parties' Article 13, Performance Management, that argument is not colorable. The Telework Enhancement Act[46] encourages agencies to allow employee participation in telework programs to the maximum extent possible. The Agency's proposal fulfills that objective. Therefore, the Panel will adopt the Agency's Article on Telework.

17. Article 28 – Mutual Respect

I. Union Position

The Union proposes a new Article over mutual respect that it says will provide both bargaining unit employees and management information on how to handle bullying in the workplace in a safe and proper manner. The Union argues that by including this new Article in the CBA, the parties will have a better and more "cutting-edge" CBA. Therefore, the Union proposes procedures to institute to ensure that this type of behavior is not exhibited in the workplace.

II. Agency Position

The Agency has no proposal for Article 28. The Agency asserts that the Union's proposal would create an unnecessary process (three-person panel and web-based reporting system) and training involving bullying claims, which is duplicative of existing systems for investigation and training concerning inappropriate workplace behavior. The Agency contends that the Union's proposal also creates unreasonable deadlines for investigations of bullying claims and creates a committee consisting of both management and Union representatives, which raises potential questions of objectivity, impartiality, and conflicts of interest in connection with

[46] 5 U.S.C. §§ 6501, et. seq.

investigations. Finally, the Agency states that the Union's proposal would create additional processes on top of, and potentially in conflict with, existing EEO and grievance procedures.

III. Conclusion

The Panel will order the Union to withdraw its proposal. The parties disagree over whether the successor CBA should contain an article regarding "mutual respect". While bullying is not condoned by the Panel, the Union has not demonstrated the need to include a stand-alone article dedicated to this subject. In this respect, the Union has not provided evidence that there is a pervasive existence of this type of behavior in the workplace. Therefore, the Panel will require the Union to withdraw its proposal, but it will also encourage the Agency to inform its employees, at least annually, of the Agency's. anti-harassment policy, as well as how to report this type of behavior.

18. Agency Article 29/Union Article 45 – Duration and Terms of Agreement

I. Union Position

The Union accepts the Agency's proposal for this Article, with the exception that the Union proposes to add a second subsection to section 1 incorporating into the CBA a provision that has been in the first CBA and every successive CBA. The Union also does not wish to include language that the parties may negotiate matters not covered in this Article in accordance with the Agency's new midterm bargaining article, Article 9.

The Union contends that language which it proposes to include was originally proposed by the Agency for the first CBA, and was the subject of the Panel's order in *Department of Commerce, National Weather Service, Washington, D.C. and National Weather Service Employees Organization.*[47] In its decision, the Union states that the Panel explained that, "[A] specific time limitation for the negotiation of a successor agreement should serve as an incentive for both parties to complete negotiations in an expeditious manner, thereby avoiding the excessive costs and delays which the parties experienced during negotiations over their first collective-bargaining agreement. If negotiations are nevertheless not completed within the 90-day period, either party may prevent the terms of the contract from expiring by requesting the services of the Panel by the end of the 90th day. Thus, the contract would remain in full force and effect until a successor agreement has been finalized, thereby eliminating the potential for unrest in the workplace should it have been allowed to lapse before a new agreement were reached."

II. Agency Position

The Agency contends that its proposal is intended to streamline and simplify the contract amendment and termination process. In this respect, the Agency argues that its proposal specifies clear processes and procedures for the parties to seek amendments to the CBA, using ground rules as set forth in Article 9, and provides a one-time opportunity to reopen two articles at the midterm of the Agreement. Regarding the Union's proposal to include language that the

[47] 80 FSIP 30 (1986).

agreement will remain in effect for 90 days from the start of CBA negotiations, but may be terminated if an agreement is not reached, the Agency asserts that this language has resulted in years of protracted litigation, which is currently ongoing, over the Agency's decision in 2015 to terminate the CBA.[48]

III. Conclusion

The Panel will adopt the Agency's proposal. The parties agree over the duration and most terms of this Article, with one main disagreement. The Union seeks to include a provision in the parties' CBA that indicates the agreement will remain in effect for 90 days from the start of negotiations over a new agreement. At the end of the 90 days, if the parties have not reached an agreement and neither FMCS nor the Panel has been invoked, either party may terminate any or all sections of the CBA. The Union argues that this language was ordered by the Panel in 1986 and, therefore, should be included in the parties' successor CBA. The Agency is opposed to such inclusion because it contends that the language has created unnecessary litigation.

Based upon that language, during the parties' successor CBA negotiations, the Agency terminated the current CBA after the parties were unable to reach to a new agreement within 90 days.[49] The Union filed a grievance alleging that the Agency's actions violated the CBA and the constituted an unlawful repudiation. The Arbitrator determined that the Agency violated the agreement, but its actions did not amount to a repudiation. On appeal, the Authority concluded that the Agency's termination was consistent with the parties' CBA, and it vacated the Arbitrator's award. The Union has appealed the Authority's decision, which is pending in the D.C. Circuit Court of Appeals.

The Panel does think including such language in the parties' successor CBA would be beneficial to the parties. The parties have not had much, if any success negotiating a new CBA. The parties have bargained over a new CBA, including their ground rules since 2015. During the negotiations that lasted over two years, the parties were only able to reach agreement on four articles. Including a provision in the new CBA that has been the subject of conflicting interpretations and now litigation is not beneficial to any future bargaining efforts that the parties may undertake given their inefficient and ineffective negotiations over their successor contract. As such, the Panel will impose the Agency's Article 29, which will require the parties to adhere to a 3-year contract, providing the parties much needed stability for that period.

19. Union Article 29 – Retirement

I. Union Position

The Union contends that its proposal was inspired by requests from employees. The Union argues that the Agency provides very little training or guidance on retirement and employees are often left on their own to read through OPM guidance to make their retirement decisions. The Union contends that those decisions are frequently made when the employees are nearing retirement eligibility only to realize then that had they received retirement planning

[48] *See NWSEO*, 71 FLRA 380 (2019).
[49] *Id.*

earlier, they would be in a better financial position. Consistent with OPM requirements, the Union seeks to provide the employees retirement training guidelines.

II. Agency Position

The Agency does not have a proposal on retirement. The Agency contends that the Union's proposal would impose requirements on the Agency which are vague, confusing, and duplicate or conflict with long established OPM, DOC, or NOAA regulations, rules or guidance concerning retirement process or procedures. The Agency states that the Union's proposal would require the Agency to provide an annual retirement training program and to permit bargaining unit employees to attend "at least five (5) training sessions" on paid time. The Agency argues that this training would be duplicative of numerous existing training opportunities that are readily available to employees at Agency cost.[50] The Agency states that the Union's proposal imposes additional obligations on the Agency (e.g., briefings, assistance with filing claims, retirement estimates) which are duplicative of shared services overseen by NOAA. The Agency also states that the Union's proposal would require the Agency to maintain a phased retirement, which is subject to Agency discretion.

III. Conclusion

The Panel will require the Union to withdraw its proposal. The Agency has agreed to provide employees nearing retirement education and training to plan for retirement in Article 17. The Union has not provided any evidence to suggest that the Agency's current practices with respect to retirement training is not adequate for the employees. Should the Union feel that the employees need additional retirement education and training, the Union may direct employees to the Agency's benefit officers or OPM.

20. Union Article 31 – Employee Awards

I. Agency Position

The Agency states that its proposal retains and establishes NWS-wide criteria and processes for current awards; provides that the NWS administrator has sole discretion to establish award pools and funding levels based on budget considerations and OPM Guidance; provides the Agency with the discretion to reserve up to 15 percent of the award pool to distribute to the highest performers; retains and establishes NWS-wide criteria and processes for Quality Step Increases (for employees who receive Level 5 ratings); reaffirms management's right to allocate the percentage of awards for specific awards programs; and eliminates differing procedures for determining awards between regions and offices.

The Agency contends that the Union's proposal seeks to memorialize a past practice for allocating 1.5 percent of the Agency's salary budget for employee awards. Contrary to the Union's contentions, the Agency asserts that allocations for employee awards have varied over the years. The Agency states that the Union's proposal would interfere with the Agency's

[50] The Agency's proposal for Article 17, section 7 provides for retirement planning seminars for employees who are within five years of retirement eligibility.

discretion to manage its budget and to determine the amount of money to allocate for employee awards, which could be above or below 1.5 percent. The Agency also contends that the Union's proposal interferes with the Agency's discretion to distribute the award pool.

The Agency argues that section 3 of the Union's proposal significantly increases the size of the "Cline Awards"51 (from $5,000 to $7,500 for National level) and includes five-day time-off awards on top of the cash awards, which equates to an additional $7,000 - $10,000 based on government valuations of time. The Agency further contends that section 5 of the Union's proposal calls for the establishment of a LOT Peer Recognition Committee which would be given at least 50% of the Office Award Pool (and Time Off Awards) to award in its discretion. The Agency asserts that the current awards process already allows for peer recognition and reserves to management the discretion to decide how much to award. The Agency argues that the Union's final proposal would preempt management's ability to decide who will receive such awards and how much to award deserving employees.

II. Union Position

The Union states that the most important dispute in this Article is in section 1. For the past decade or more, the Union contends that the Agency has had a past practice of allocating 1.5 percent of its salary budget for employee awards, which have been distributed by local supervisors from their proportionate share of this allocation, based on their individual judgment of an employee's performance. The Union argues that this has resulted in awards totaling approximately $4 million annually to bargaining unit employees. The Union seeks no change to that practice, but asks that in the event that management determines to reduce the amount that it allocates for employee awards, that it notifies the Union and bargain over the impact of that reduction. The Union argues that the Agency's proposal, that it retain sole and exclusive discretion to determine the amount allocated for award funding levels, precludes bargaining over the impact of any reduction in the amount of award funding, or percentage for allocation. The Union asserts that the Agency's proposal would require the Union to waive its statutory bargaining rights. Finally, the Union once again argues that the Agency's proposal to replace the 2-tier appraisal system with a five-tier system is contrary to law.

III. Conclusion

The Panel will adopt the Agency's proposal. The parties are in dispute over employee performance awards. The Union argues that the Agency has allocated 1.5 percent of its salary budget for employee awards and the Union would like to continue that practice. The Agency disagrees that it has allocated that amount every year, and instead states that the awards budget has varied throughout the years. Neither party produced evidence demonstrating the amount of money dedicated to employee awards during the past several years. Nonetheless, the Agency should maintain flexibility in determining when and if to issue employee awards to balance its awards budget with mission-critical opportunities.

[51] Cline Awards are awards presented annually that recognize substantial accomplishments that contribute to the Agency's mission.

The Agency's proposal recognizes high performing employees by not only making them eligible for a performance award, but also rewarding employees for superior accomplishments with a "Cline Award," a one-time lump sum cash award for a specific achievement, and peer awards that spotlight the accomplishments of coworkers who exceed expectations. The Agency's proposal is also fiscally responsible and prudent, providing the Agency the discretion to determine employee award distributions based on budget and other economic factors, while permitting the Agency flexibility to determine award amounts. The Union argues that the Agency's proposal requires it to waive its statutory right to negotiate over the impact and implementation of employee performance awards. The Union is correct that it has a right under the Statute to negotiate over employee awards; however, the Agency is not refusing to negotiate over the program. Instead, the Agency is negotiating over how it will exercise its discretion for distributing employee awards during the term of the parties' CBA.

The Union's proposal would create an ongoing, perpetual bargaining right every time the Agency exercised its discretion to implement a determined amount for employee awards. As discussed earlier, the parties have demonstrated that they have not been able to negotiate in an effective and efficient manner. The Panel does not have any confidence that this would change with employee awards negotiations.

The Union again argues that the Agency's proposal is contrary to law, which replaces the current 2-tier performance rating system with a 5-tier system to determine employee awards. That argument is without merit for reasons previously discussed. Finally, the Agency's proposal limits the Union's right to grieve management's determination not to grant non-mandatory performance awards. Consistent with EO 13839, section 4(a)(ii)'s requirement that agencies shall not subject awards of incentive pay, including cash awards to grievance procedures, the Panel will grant the Agency's limitation here, since the Union has not persuasively argued to include those matters in the parties' grievance procedure. As a result of the Panel's decision to adopt the Agency's Article, it is unnecessary to address their legal claims.

21. Article 32 – Contracting Out

I. Agency Position

The Agency states that its proposal provides for an opportunity to bargain over an Agency decision to contract out work using the Office of Management and Budget's (OMB) A-76 bidding procedure. The Agency asserts that the A-76 process is a process for determining whether commercial activities should be performed by using in-house using government facilities and personnel or outsourced to contractors. The Agency's proposal also carries over language from the current CBA providing that "final decisions on A-76 reviews are not grievable" which would prevent undue delays in the Agency's desire to contract out work.

The Union contends that the Agency's proposal to allow the Agency to contract out bargaining unit work using the A-76 procedure is illegal because of a Congressionally imposed moratorium on A-76 activities. Contrary to the Union's assertion, the Agency states that its proposal only allows for the possibility of contracting out using A-76 procedures if the moratorium is lifted. The Union's proposal also requires management to annually provide the Union with a copy of the report on it use of contractors, the identity and date for each contract,

location of each contractor working under the contract, and identity of individuals directing the work. The Agency asserts that it uses hundreds of contractors every year and the Union has not demonstrated the need for imposing this significant reporting burden on the Agency.

II. Union Position

The Union asserts that the purpose of its proposal is to permit the Union the right to conduct impact and implementation bargaining should the A-76 moratorium be lifted. The Union argues that the Agency's proposed section 1 is illegal, as it would allow the Agency to determine to contract out despite the Congressionally imposed moratorium on A-76 activities. The Union states that Federal Acquisition Regulations, (FAR) 37.104, prohibits personal service contracting, which is being used by the Agency and which is displacing bargaining unit employees.[52]

The Union points to section 410 of the Weather Research and Forecasting Innovation Act of 2017, 15 U.S.C § 8547, to state that the Agency is required to publish on the internet an annual report on contract positions at the NWS. The Union argues that the Agency has failed to comply with this statutory requirement by not publishing a single report. Section 4 of the Union's proposal would require the Agency to do so, and provide a contractual remedy for its failure to provide this information.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. OMB Circular A-76 is a federal policy for managing public-private competitions to perform functions of the federal government.[53] A-76 states that, whenever possible, and to achieve greater efficiency and productivity, the Federal government should conduct competitions between public agencies and the private sector to determine who should perform the work.[54] There is a current Congressional moratorium on the A-76 Circular based on a debate over what functions the Federal government should perform compared to what functions the private sector should perform.[55]

The Agency clarified in its position statement that its proposal is only intended to apply once the moratorium is lifted. The Agency's proposal permits the Union an opportunity to negotiate once the Agency determines that it will contract out bargaining unit employee work. Thus, the Agency's proposal achieves the Union's stated interest of bargaining over the impact and implementation of management's decision to implement the A-76 Circular once the moratorium is lifted.

---

[52] Under FAR 37.104(a), a personal service contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract. Under FAR 37.104(b), it states that "[a]gencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so.
[53] Consolidated Appropriations Act 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2494 (2019).
[54] *Id.*
[55] *Id.*

The Union asserts that the Agency is using personal service contracting to displace bargaining unit employees; however, the Union does not provide any evidence to substantiate these claims. The Union, however, does correctly note that under 15 U.S.C § 8547, the Under Secretary of Commerce is required, each fiscal year, to publish on a publicly accessible Internet website an annual report on the use of contractors at the Agency. The Panel will adopt the Agency's proposal, but modify it by including the following language in section 1: "The Agency shall post on the Internet an annual report of the use of contractors at the Agency in accordance with 15 U.S.C § 8547." As to the remaining information that the Union requests in its proposal (the identity and date of each and every contract, along with the title and location of each contractor working under that contract), the Union has not established that it is entitled to this information. Should the Union feel that this information is necessary to represent its bargaining unit, it is free to make a request for that information under the Statute.

Finally, the Agency states that it proposes to exclude from the grievance procedure final decisions on A-76 reviews. That language does not appear in the Agency's last best offer. Notwithstanding, the Agency has not demonstrated "convincingly" that this exclusion is warranted in this particular setting.

22. Article 36 – Home Leave and Return Rights

I. Agency Position

This Article concerns travel and transportation benefits for employees stationed on tours Outside the Continental United States (OCONUS). The Agency states that its proposal would ensure that any current or future tours OCONUS expenses required by law, rule, or regulation will be paid. It also provides the Agency with the discretion to review and determine whether or not employees currently stationed OCONUS will receive home leave.[56]

The Union contends that the Agency's proposal makes the travel and transportation benefits for employees stationed on tours OCONUS discretionary and would allow the Agency to arbitrarily revoke entitlements to home leave from employees. The Agency, however, asserts that its proposal provides for a review and determination in accordance with the law as to whether employees receiving such benefits will continue to receive the benefits.

II. Union Position

The Union asserts that the Agency has offered renewal agreement travel and home leave to all employees recruited from the United States and assigned to NWS offices in Puerto Rico, Guam, and American Samoa since 1993. The Union proposes to continue that practice, and its proposal for the first paragraph of section 1 would entitle all employees who are eligible to receive these benefits under the federal travel regulations, continue to receive them. Conversely, the Union contends that the Agency's proposal makes these benefits discretionary.

[56] Home leave means leave authorized and earned by service abroad for use in the United States, Commonwealth of Puerto Rico, or in the territories or possessions of the United States. 5 C.F.R. § 630.601.

The Union states that these employees were recruited for and assigned to an overseas post based on the promise of home leave, and it would be unfair to break that promise. The Union contends that the Agency has proposed no criteria under which it would review current employees' entitlement to home leave. Instead, the Agency seeks to revoke employees' entitlement to home leave on a "case-by-case" basis, which the Union argues allows it to discriminate among similarly situated employees.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The parties are in disagreement over the Agency's overseas tour renewal agreement travel or, "OCONUS". This term, "OCONUS" stands for Outside the Continental United States. An employee's entitlement to overseas tour renewal agreement travel is based on statute, not on the parties' CBA.[57] An employee is entitled to overseas tour renewal agreement travel if he or she meets the requirements set forth in 5 U.S.C. § 5728, i.e., after the employee has satisfactorily completed two years of service outside the continental United States, Alaska, and Hawaii and is returning to his actual place of residence to take leave before serving at least two more years of duty.

For section 1 of the Agency's proposal, the Panel will impose its own language since neither party appropriately captured an employee's entitlement to overseas tour renewal agreement travel or home leave in their proposals. The Panel will impose the following language for section 1: "The parties will follow applicable law, rule, and regulation for overseas tour renewal agreement travel and home leave." The Panel will impose the Agency's proposal for section 2, since it is virtually the same as the Union's and impose the Agency's section 3 proposal, which requires the parties to abide by Article 9 for bargaining over matters not covered in this Article.

23. Article 37 – Drug Testing Plan[58]

I. Agency Position

The Agency asserts that its proposal provides guidance concerning the policies and procedures governing drug testing, while taking into consideration employee and Union interests, and maintaining Agency discretion to discipline employees in appropriate circumstances. The Agency states that its proposal ensures that drug testing will be administered in accordance with the Department of Commerce's Drug-Free Workplace Plan (section 1A). It sets forth procedures for drug and alcohol testing (section 1C); includes provisions to mitigate potential costs for employees (section 1G); enables the Union to receive relevant information and assist employees with testing issues, where appropriate (section 4); and includes reasonable requirements for the imposition of discipline (section 1P).

Conversely, the Agency states that the Union's proposal would impose unreasonable, burdensome, and costly requirements in the administration of testing. It would require the Union to be notified prior to an employee being notified of a drug test (section 1E) and would allow a

[57] *In the Matter of Vicky Hawkinson*, 08-1 B.C.A. (CCH) ¶ 33848 (Apr. 18, 2008).
[58] The parties reached tentative agreements on sections 2, 3, and 5 of this Article.

representative to use official time to be present to monitor the drug testing of any employee (sections 1F and 1G), which could compromise the integrity of the testing and may not be permitted by testing facilities. The Agency argues that the Union's proposal would also require the Agency to pay travel expenses for the Union representative for drug testing outside the employee's normal commuting area (section 1N); would require retesting in certain circumstances (section 1L); and grant employees paid leave to participate in counselling for rehabilitation (section 1X).

II. Union Position

The Union also asserts that its proposal is consistent with the Department's Drug-Free Workplace Plan. The Union proposes that management negotiate any changes to its drug testing program with the Union (section 1A); that the Union will be notified prior to notifying the employee that he or she will be tested so that proper planning can occur if the representative must accompany the employee to the collection site (section 1E); that the Union will be permitted to be present at the testing site, if the employee requests (section 1F); and that the Union will be permitted to observe the actions of the collector (Section 1G).

The Union also proposes that the collector must be trained/certified to test for alcohol (section 1H); that the Agency will abide by Department of Health and Human Services (HHS) guidelines regarding the proper storage, handling, and refrigerating of urine samples (section 1I); and that when the employee receives a positive test result, the Agency will perform a second test to ensure the positive result is valid and that the employee will be allowed to show any proof of medical prescriptions (section 1L). The Union requests that any test results will not become part of the employee's Official Personnel Folder (section 1O). The Union also requests that employees shall be granted absences without loss of pay or charge to leave to participate in counseling (section 1X). Finally, the Union states that employees will be given adequate time after rehabilitation to reintegrate into the workplace (section 1Z).

III. Conclusion

The Panel requires the parties to withdraw their proposals. The parties disagree over the procedures that they will follow for employee drug testing. Neither party, however, provided the Panel any authoritative guidance or policy by which they relied upon to formulate their proposals. In this respect, the parties assert that their proposals are consistent with the Department's Drug-Free Workplace plan, yet neither party indicates what that plan is or provides a copy of it for the Panel's review. In the parties' statements, they merely restate their proposals without providing much, if any rationale or explanation of them. Neither party has demonstrated with any specificity the merits of their respective proposals. As such, the Panel will order the following language on the parties: "The Agency shall comply with the requirements of the Department of Commerce's Drug Free Workplace Program. The Agency will notify the Union when making changes in the Drug Free Workplace Program. If those changes are more than *de minimis*, the Union may negotiate in accordance with applicable law."

24. Article 38 – Dues Withholding[59]

I. Agency Position

This Article sets forth the procedures for the collection of Union dues for bargaining unit employees. The Agency asserts that its proposal is consistent with the way in which the Agency currently administers dues withholding and with recent case law concerning the rights of employees to withdraw dues withholding authorizations.[60] Specifically, the Agency asserts that its proposal provides that bargaining unit employees may authorize dues withholdings from their compensation (section 1) and details the respective obligations of the parties (sections 2 and 3). The Agency states that the Union's proposal (section 6) conflicts with current law by only allowing employees to revoke dues once a year. The Agency also argues that the Union's proposal (sections 3 and 5) seeks to hold the Agency responsible for dues processing errors that are outside the Agency's control and are handled by a NOAA shared service contractor. The Agency states that the Union's proposal would impose timeframes for the Agency to resolve administrative errors and penalties on the Agency for improper withholdings that are outside of its control (section 7).

II. Union Position

The Union argues that the core dispute in this Article is the Agency's refusal to accept ultimate responsibility for dues withholding. The Union states that NOAA uses an outside vendor to administer its payroll and process dues allotments and other personnel functions. The Union argues that this vendor regularly mishandles dues allotments by failing to timely withhold dues and by dropping employees from dues withholding in error. The Agency has argued at the table that the mistakes of this vendor are outside of its control and, therefore, it has no responsibility for them. In section 7, the Agency proposes that the Union can grieve only those violations of this Article for which the Agency is responsible, which the Union states will leave it without a remedy for violations of the Article committed by the Agency's contractor.

III. Conclusion

The Panel will adopt Agency's proposal, with modification. The parties disagree over two matters in this Article: The Agency's liability for errors attributed to a third-party vendor that processes employee dues withholdings; and the time period when employees may revoke their Union dues. With respect to the first issue, it appears that the parties are asking the Panel to determine the Agency's legal liability for errors made when processing employees' dues withholding. The Panel will not issue a legal determination, especially where the parties have failed to provide any authoritative guidance on point. Instead, the Panel will modify the Agency's section 7 language to the following: "Any violations of this Article will be resolved utilizing the procedures outlined in the Grievance (Article 10) and Arbitration (Article 11) Articles of this CBA." That language will permit the parties to argue to an Arbitrator whether the Agency is liable for third-party dues withholding errors.

[59] The parties reached tentative agreement on section 1 of this Article.
[60] *OPM*, 71 FLRA 571 (2020).

For the second issue in dispute, the Union proposes that employees may revoke their dues once a year, while the Agency proposes that employees may revoke their dues any time after the employee's one-year membership anniversary. Recently, the Authority issued a policy statement interpreting section 7115(a) of the Statute.[61] The Authority further stated that it will soon issue a regulation that will be consistent with its policy statement on dues allotments. The Authority has not yet issued this regulation. Therefore, the Panel will strike the Agency's section 6 language and require the parties to implement the following language: "The Agency will abide by applicable law, U.S. Supreme Court precedent, rule, and regulation when processing employee dues withholdings." The Panel will also strike the Agency's section 5(c) language that requires the Union President to countersign a dues revocation by an employee.

25. Article 39 – Employee Relocation

I. Agency Position

This Article addresses Permanent Change in Duty Station (PCS)[62] benefits. The Agency contends that the Federal Travel Regulations (FTR) provides agencies the ability to pay PCS relocation costs for employees under certain conditions, i.e., only when they are authorized in a job opportunity and in compliance with law. In recent years, the Agency states that PCS costs have had a significant adverse impact on Agency staffing objectives. The Agency states that its proposal ensures that employees will have a clear understanding when they will receive PCS benefits, consistent with legal requirements, as well as avoid significant PCS costs that have inhibited its ability to fill vacancies. Finally, in section 1, the Agency asserts that its proposal provides that employees who accept PCS reimbursement will be required to sign a 12-month service agreement. The purpose of this is to help ensure that when the Agency "invests" in an employee's relocation, the employee will be required to remain in government service or reimburse the Agency.

The Agency contends that section 2 of its proposal deals specifically with reimbursement of costs related to sale and/or purchases of home residences in connection with a permanent move. It provides that such costs may be reimbursed "to the extent … permissible" under the FTR and law, and does not allow the use of third-party housing relocation companies. The Agency asserts that it has incurred significant PCS costs in recent years, which has hampered staffing plans. In the last three fiscal years (FY 2017 – 2019), the Agency states that it spent $26.3 million on PCS costs. When the Agency has to plan for PCS costs for filling a position, the Agency contends that it must budget, on average, an additional $60,000 on top of the labor costs for the position. The Agency argues that if it did not have to incur PCS costs, it could use the savings to significantly reduce vacancies.

Turning to the Union's arguments, the Agency states that the Union mischaracterizes the Agency's proposal. In this respect, the Union claims that the Agency's proposal would end a past practice of paying PCS benefits; however, the Agency asserts that its proposal makes clear that PCS benefits will continue to be offered and paid when authorized in job announcements.

---

[61] *OPM*, 71 FLRA 571 (2020).

[62] A permanent change of station (PCS) is an assignment of a new appointee to an official station or the transfer of an employee from one official station to another on a permanent basis. 41 C.F.R. § 302-4.1.

The Union claims that this restriction is unlawful, but the Agency asserts that PCS benefits may be mandatory or discretionary, depending upon the circumstances of the move and the type of benefit.

II. Union Position

The Union asserts that the mobility of employees has been a hallmark of employment with NWS. The Union states that traditionally, graduates of the nation's leading meteorology programs apply for trainee positions at less desirable office locations, and accept an offer of employment knowing that as they progress through their career they will have the opportunity to bid on a vacancy in a more desirable location as well as to grow their career by developing expertise in forecasting for entirely different weather systems in different parts of the country. The Union contends that the Agency has benefited by this because it has been able to fill entry level positions in undesirable locations based on the applicant knowing that he or she will eventually be able to relocate to another office. Historically, near universally, the Union asserts that the Agency has paid the relocation costs of any employee who has been selected for another position through the Merit Assignment Program; however, the Agency now is seeking contractual language in section 2 that would terminate this past practice of offering to pay relocation costs for those selected through the Merit Assignment Program.

The Union argues that under the Agency's proposal, employees will have to be able and willing to pay for their own moves in order to obtain a promotion when a higher graded position opens in another location. The Union contends that the Agency's proposal, which prohibits the payment of relocation expenses in merit assignment actions unless an offer of such expenses is indicated on the vacancy announcement is illegal. The Union points to 5 U.S.C. 5724, which provides for reimbursement of relocation expenses when an employee is transferred "in the interest of the Government" but precludes such reimbursement when a transfer is "primarily for the convenience or benefit of an employee, ... or at [the employee's] request." The Union also points to a Comptroller General decision, which states "[w]hen an agency issues a vacancy announcement under its merit promotion program such action is a recruitment action and when an employee transfers pursuant to such action the transfer is normally regarded as being in the interest of the Government in the absence of agency regulations to the contrary."[63] The Union states that agencies may not escape their obligation to pay relocation expenses through the mere expedient of omitting them from the vacancy announcement, as the NWS proposes to do. The Union asserts that neither the NOAA Travel Regulations, nor the Department of Commerce Travel Handbook provide otherwise.

On the merits, the Union states that its proposal would entitle employees to continue to receive payment of any relocation expenses authorized by NOAA's policy guidance. The Union's proposal includes a third-party relocation program, which the Union states will assist employees with costs associated from the sale of their old residence and purchase of a new residence, as well as facilitating real estate transactions, through a third-party contractor. The Union argues that the Agency will be harmed by its proposal because its workforce will stagnate, as employees will be unable to gain experience in a variety of weather situations occurring in diverse geographic regions.

---

[63] *Bernard J. Philipps, Request for Reconsideration of Relocation Expense Claim,* B-206624 (1982).

III. Conclusion

The Panel will adopt the Agency's proposal. The parties disagree over whether an employee is entitled to reimbursement for relocation expenses. Under 5 U.S.C. 5724, it states that "when the head of the agency concerned or his designee authorizes or approves, the agency shall pay from Government funds the travel expenses of an employee transferred in the interest of the Government from one official station or agency to another for permanent duty, and the transportation expenses of his immediate family…" In one of the cases that the Union cited, the Comptroller General held that when an agency issues a vacancy announcement under its merit promotion program, such action is a recruitment action and when an employee transfers pursuant to such action, the transfer should *normally* be regarded as being in the interest of the government, *in the absence of agency regulations to the contrary.*[64] Thus, while a vacancy announcement using merit promotion procedures may be "in the interest of the Government" and may require the Agency to pay relocation expenses, based on the Comptroller General decision, it appears that the Agency is not required to reimburse travel expenses in every instance. Instead, if there are agency regulations to the contrary, the Agency may be permitted to not pay those expenses.

As the Union points out, the DOC's Travel Policy Handbook indicates that employees are eligible to receive transportation expenses if the employee is "transferring in the interest of the Government from one agency or duty station to another for permanent duty, and [the employee's] new duty station is at least 50 miles distant from [the employee's] old duty station."[65] However, the Agency is not disputing that the employees may be entitled to such expenses, only that the Agency has the discretion to make that determination.

The Panel found the Deputy Regional Director's statement very compelling. The Agency has incurred a significant amount of expenses due to PCS costs totaling $26.3 million over the last three fiscal years, $5 million of which were from third-party housing relocation reimbursements. Therefore, the Panel will adopt the Agency's Article, which will require it to pay employee relocation expenses to the extent required by Federal Travel Regulations and law.

26. Article 40 – Impact Based Decision Support Services

I. Union Position

The Union asserts that in section 1 of its proposal, it would like to clarify portions of the "NWS Evolve Initiative," which directs some of the key duties the bargaining unit employees are expected to embark on in the future. In section 2 the Union states that it would like to ensure that sufficient and effective training is provided to all of the bargaining unit before starting Impact Based Decision Support Services (IDSS). The Union requests state-of-the-art communication tools in section 3. Finally, the Union proposes in section 5 that participation in the program is voluntary and that employees are provided proper rest after extended assignments in section 6.

---

[64] *Eugene R. Platt - Reconsideration - Relocation Expenses - Merit Promotion Transfer*, B-198761 (1981).
[65] Department of Commerce, Travel Policy Handbook, 4.4(b), Eligibility (2016).

II. Agency Position

The Agency does not have a proposal for the IDSS.

III. Conclusion

The Panel will require the Union to withdraw its proposal. The Union proposes to include an article in the CBA on Impact-Based Decision Support Services or "IDSS". The Union, however, does not provide any explanation about the IDSS, its purpose, intent, meaning, etc. The Union only references each section within its proposal with very basic and general explanations. The Union should not assume that the Panel understands the conditions of employment that are particular to the Agency and the bargaining unit. As such, the Panel will require the Union to withdraw its proposal.

27. Article 42 – Pay

I. Agency Position

The Agency asserts that its proposal provides that pay administration will be performed in accordance with legal requirements and that training will be provided to employees if the Agency determines it is necessary (sections 1 and 2). Conversely, the Agency asserts that the Union's proposal is duplicative of existing regulations and legal requirements concerning differential, overtime, comp time, standby pay, and pay caps (section 2); requires unnecessary training for the entire workforce on pay administration (section 1) and monthly audits (section 6); requires changes to the government-wide time and attendance software (section 4); and imposes unrealistic timeframes for the resolution of pay administration issues (section 5) and for curing underpayment errors (section 6).

II. Union Position

The Union asserts that it seeks to ensure that the administration of pay for employees complies with OPM policies and guidance (section 1). The Union states that the reason its section 2 proposal includes the different types of premium pay that can be earned by employees is because employees have not been trained on the intricacies of the laws and regulations concerning pay, which has led to errors in timekeeping and resulted in the Agency paying back pay to an employee, as well as an employee having to pay back money for inputting the incorrect pay code. The Union asserts that the time and attendance system should include a gross biweekly and annual salary estimator based on the employee's grade, step, and hours worked so that the employees can use it to compare to their earning and leave statements to ensure that employees are properly paid (section 4).

The Union also asserts that it would like language in the CBA that requires the Agency to abide by certain timeframes to correct administrative errors related to an employee's earning and leave statement (section 5). Similarly, the Union requests that the Agency perform monthly audits of its pay system to ensure that employees are properly paid (Section 6). The Union proposes that the Agency make employees whole and provide them back pay if an administrative error is uncovered during an audit (section 7). Finally, the Union proposes that the Agency

notify employees annually of the process it uses to investigate payment issues, so that employees can know who to contact if they have a problem (section 8).

III. Conclusion

The Panel will adopt the Agency's proposal. The parties' main disagreement is over the procedures that the Agency will follow to ensure the proper payment of employees' salaries. The Agency's proposal commits itself to ensuring that it will follow all Federal laws, rules, and regulations with respect to the administration of pay for its employees. The Agency is also committed to providing employees training, to the extent needed, on pay administration. The Union, on the other hand, seeks to define the possible types of pay that an employee may be entitled to earn for overtime. The Union asserts that not having references to the different types of premium pay afforded to employees in the current CBA has led to errors in employee's improperly reporting their time and attendance codes. Two administrative errors are not sufficient evidence to demonstrate a pervasive practice in need of change. Similarly, the Union proposes several measures that the Agency must comply with, such as monthly audits and notifications to employees, but the Union does not provide any corresponding data to support the need for these burdensome requirements that take the Agency's attention away from more pressing matters. The Agency's proposal offers the parties a clear and simplistic Article for the parties and employees to follow in the administration of pay for employees. Thus, the Panel will impose the Agency's Article.

28. Article 44 – Changes and Amendments to the Agreement

I. Agency Proposal

The Agency states that the purpose of this Article is to streamline and simplify the contract amendment process. The Agency asserts that the Union's final proposal is consistent with the Agency's proposal in that it allows for reopening and amendment of the CBA by written requests and mutual consent. However, unlike the Agency's proposal which provides that negotiations over amendments will be conducted using the ground rules in Article 9, the Union's proposal does not include or reference any ground rules for negotiations over amendments to the CBA, and could subject the parties to disagreement over ground rules in the event they desire to amend the contract. The Agency also states that the Union's proposal does not allow for a limited midterm reopener as permitted by the Agency's proposal. The Agency believes that including an opportunity for the parties to reopen bargaining over two Articles provides both sides with desired flexibility to address unanticipated issues which may arise during the administration of the CBA.

II. Union Proposal

The Union proposes that either party may request to open any article at any time for the purpose of amendment, provided that the parties mutually agree to the reopening.

III. Conclusion

The Panel will adopt the Agency's proposal. In this Article, the Agency seeks to include the same language it proposed under Article 29, section 3. That language indicates that the parties may amend the CBA at any time by mutual consent using the parameters laid out in Article 9 for midterm bargaining. Those ground rules detail the timeframes and procedures that the parties will follow when conducting midterm bargaining, such as when the parties will initiate bargaining and the manner in which the parties will exchange bargaining proposals. The Union proposes that the parties should continue to use Article 8 for midterm negotiations. If the parties' successor CBA negotiations is any indication of how they conduct their midterm bargaining, a change in the negotiations procedures is warranted. The Agency's proposal effectuates that change and ensures that the parties will remain focused on negotiations in an effective and efficient manner. As such, the Panel will adopt the Agency's proposal.

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 25, 2020
Washington, D.C.

ATTACHMENTS

- Parties' Proposals