

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF THE AIR FORCE,
AIR EDUCATION AND TRAINING COMMAND,
JOINT BASE SAN ANTONIO

And

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, AFL-CIO, F-089

Case No. 20 FSIP 061

BACKGROUND

This case, filed by the U.S. Department of the Air Force, Air Education and Training Command, Joint Base San Antonio, (Agency or Management) on June 17, 2020, concerns proposals in the parties' ground rules for bargaining a collective bargaining agreement (CBA) that involve the use of official time and arises under Section 7119 of the Federal Service Labor-Management Relations Statute (the Statute). The Agency houses several components of the United States Department of the Air Force and came about as a result of a Base Realignment and Closure Commission recommendation to consolidate three Texas-located military bases in 2011. That same year, the Federal Labor Relations Authority (FLRA) certified a single bargaining unit comprised of the three base's existing fire departments represented by the International Association of Firefighters, AFL-CIO, F-089 (Union). Each of these three units have an existing CBA that has expired; the bargaining in this dispute concerns negotiations over a single consolidated CBA.

BARGAINING HISTORY

The Agency first attempted to bargain over a new CBA in 2018, but its attempt was outside the rollover timeframe. So, in April 2019, the Agency properly provided timely notice, and the parties turned to ground-rules negotiations in November 2019. The parties reached a tentative agreement in January 2020. That agreement included a set bank of hours devoted just to CBA renegotiations.

The tentative agreement was sent to the Agency head for review, and the Agency head rejected the agreement because it was inconsistent with Executive Order 13,387, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order). Accordingly, the parties resumed negotiations. But, for reasons discussed below, the Union insisted the Agency was inappropriately applying the Official Time Order. The parties had 3 mediation sessions with the assistance of the Federal Mediation and Conciliation Services in May 2020, but could not reach agreement. Accordingly, the Mediator released the parties on May 27, 2020, in Case No. 202012380029. On July 21, 2020, the Panel asserted jurisdiction over all issues in dispute and ordered the parties to resolve the dispute through a Written Submissions process with an opportunity for rebuttal statements.

MERIT ISSUES

The parties disagree over 5 proposals, all of which involve official time. The Agency maintains official time use is prescribed by Executive Order 13,837 Section 3(a), which limits official time to 1 hour per-bargaining unit employee per year. The Union argues that Section 4(ii)(1), which permits a representative to spend up to 25% of their yearly duty time in official-time status, controls. Additionally, the Union claims that the Agency never provided the Union with notice and an opportunity to bargain over the implementation of the Executive Orders. So, according to the Union, the Orders do not apply in these circumstances.

I. Agency Proposals and Arguments

The Agency identifies the following 4 remaining proposals as in dispute:¹

- Union representatives will be permitted time in accordance with Section 7131 of Title 5, U.S.C., and E.O. 13837 for all periods of negotiations during the time the employee would otherwise be in a duty status, provided it is approved by management and dependent on workload and mission requirement. If the requested time is unable to be granted due to workload and mission requirements, the

¹ Agency Final Offer at 2, 4.

employee will be informed and alternate times will be provided. The Employer agrees to allow union representatives a reasonable amount of time in accordance with any limitations and/or restrictions set forth in pertinent laws, rules, and regulations.

- The Union will be permitted one (1) additional individual designated as their official recorder. The Union's designated reporter will utilize time in accordance with Section 7131 of Title 5, U.S.C. and 4(b) [of the ground rules] above.
- Union representatives will utilize time in accordance with all applicable laws, rules, and regulations while in negotiations, and would otherwise be in a duty status.
- If Management cancels the negotiations for any reason, it is mutually agreed by both Parties that the union representative (s) may, if desired, request appropriate leave for the time they would have been spent in negotiations, not to exceed their regularly scheduled work hours for that day or use official time as described in E.O. 13837. If the Union or the union representative choose not to request leave, or utilize official time under E.O. 13837, the union representative shall report for duty in accordance with their regular work schedule.

The Agency's arguments devote little time to the merits of its position. Instead, they outline primarily the parties' bargaining history and allegations that the Union employed bad-faith dilatory bargaining tactics. After Agency-head review, the parties resumed negotiations in February 2020 and reached numerous tentative agreements. However, they reached loggerheads over the use of official time for bargaining the CBA. In this regard, the Union asserted that the parties had never bargained the impact and implementation of the relevant Executive Orders. As such, the Union contended that the Agency could not rely upon these Orders to support its position. However, according to the Agency, this argument was a red herring because the Agency never implemented the Orders and the parties' ground-rules negotiations constituted negotiations over their applicability.

In addition, Management takes the position that Section 3(a) of the Official Time Order controls the disposition of the main issues in dispute. This section states:

No agency shall agree to authorize any amount of taxpayer-funded union time under section 7131(d) of title 5, United States Code, unless such time is reasonable, necessary, and in the public interest. Agreements authorizing taxpayer-funded union time under section 7131(d) of title 5, United States Code, that would cause the union time rate in a bargaining unit to exceed 1 hour should, taking into account the size of the bargaining unit, and the amount of taxpayer-funded union time anticipated to be granted under sections 7131(a) and 7131(c) of title 5, United States Code, ordinarily not be considered reasonable, necessary, and in the public interest, or to satisfy the "effective and efficient" goal set forth in section 1 of this order and section 7101(b) of title 5, United States Code. Agencies shall commit the time and resources necessary to strive for a negotiated union time rate of 1 hour or less, and to fulfill their obligation to bargain in good faith.²

Management's proposed language is intended to be consistent with the above limitations. So, under Management's language, the Union may not use more official time than what is permitted under Section 3(a) of the Official Time Order. The Union's attempt to rely upon other sections of this Order is unavailing: only Section 3(a) describes the amount of official time that is available to an exclusive representative when performing their representational duties.

II. Union Proposals and Arguments

The Union provided the following final offer language in its initial Written Submission:³

- The Parties agree that initial Proposals will be exchanged in person and simultaneously within forty-five calendar days (45) of the signing of this Agreement.

. . .

² Executive Order 13,837, Section 3(a).

³ Union Position at 4-6.

Union representatives will be permitted official time to prepare the Proposals that will be submitted to the Employer, not to exceed four hundred eighty hours (480), total for contract preparation.

- The Union however, is willing to reduce the number of hours for preparation of contract proposals from four hundred eighty hours (480) to two hundred and forty hours (240).
- Each Party will be permitted one (1) additional individual designated as their official recorder. The designated recorder will be in a duty status. Jointly, the parties will select an individual to maintain constant updating of the articles being discussed.
- Official Time for Negotiations: bargaining unit employees who represent the Union will be on official time for all time they are otherwise in a duty status during negotiations, including pre, and post sessions whose purpose is to determine Proposals/Counter Proposals.
- If management cancels the negotiations for any reason, it is mutually agreed by both Parties that the union may, if desired, use the scheduled time to caucus. Otherwise the union team members will report for duty if applicable.

Despite the above language, in its rebuttal statement the Union represented the following language as its final offer:⁴

4. RULES GOVERNING NEGOTIATIONS: The negotiations will be governed by the following rules:

a. The Parties agree that initial Proposals will be exchanged in person and simultaneously within forty-five calendar days (45) of the signing of this MOA and approval by Agency Head.

(1) Union representatives will be permitted time in accordance with Section 7131 of Title 5, U.S.C., Article 8 of THE CURRENT Lackland CBA, AND E.O. 13836 for all periods of negotiations during the time the employee would otherwise be in a duty status, provided it is approved by management and dependent on workload and mission requirement. If the requested time is

⁴ See Union Rebuttal, Attachment 1.

unable to be granted due to workload and mission requirements, the employee will be informed and alternate times will be provided.

The Employer agrees to allow union representatives a reasonable amount of time in accordance with any limitations and/or restrictions set forth in pertinent laws, rules, and regulations, **AS EXPRESSED IN 5 U.S.C. 7131 (d), AND E.O. 13836.** if otherwise in a duty status, to prepare proposals for negotiations.

(b) The time used in accordance with Section 7131 of Title 5, U.S.C. will not exceed **25% (938 HOURS)** of any employee's paid time in any FY. Any official time in excess of 25% of an employee's paid time shall count toward that employee's 25% limitation in the following FY.

The Union did not explain why its rebuttal statement contains different proposal language than what is contained in its initial argument. The biggest distinction between the two is that, in the Union's initial proposal, Union bargaining team members receive a bank of hours for negotiations. But, in "(b)" in the Union's rebuttal proposal, team members may use official time so long as it does "not exceed 25%" of their yearly duty time (or 938 hours). This approach appears consistent with the Union's disagreement with the Agency over which language in the Official Time Order controls the outcome of this dispute.

In any event, the Union believes that the Agency's position is premised upon "flawed reasoning."⁵ In this regard, the Union's argument is that the Executive Orders apply to the negotiations of collective bargaining agreements *only*.⁶ So, according to the Union, the Orders cannot be used in the context of ground-rules negotiations. Moreover, the Agency never bargained over the implementation of the Executive Orders. So, notwithstanding the Union's proposed language that is reliant upon the Orders, the Union argues that the Orders do not apply to the parties. Indeed, the Union has filed an unfair labor practice (ULP) charge over the Agency's alleged bargaining failure.

Moreover, the Union notes that the Executive Orders state that they do not "abrogate" existing CBA's. Article 8, Section 2 of the relevant existing CBA language states:

⁵ Union Position at 2.

⁶ See *id.* at 7-8.

The Employer agrees to authorize Union officers and stewards to be absent from their duty stations for a reasonable amount of official duty time when ...

(e) negotiating with management officials concerning changes to personnel policies, practices and matters affecting working conditions proposed by the Employer.⁷

The Union maintains that the Agency lacks authority to deviate from this language. As such, Management cannot restrict the Union's contractual grant of official time.

III. Conclusion

The Panel imposes a modified version of the Agency's proposals to resolve this dispute. Instead of producing merits-based arguments, the parties' positions focus mostly on interpretations of the recent Executive Orders, the parties' bargaining history, and the applicability of existing CBA language. Put differently, the parties' arguments treat this dispute as an impasse in name only.

Despite the foregoing, reviewing the plain language of the parties' proposals provides a path forward. Consistent with language that was rejected on Agency-Head review, the Union continues to seek a bank of official time for negotiations. In its initial offer, the Union sought time in the range of 240 to 480 hours. Then, in its rebuttal proposal, the Union requested up to 938 hours. Both proposed banks appear to apply to each member of the bargaining team. Moreover, neither proposal specifically addresses official time devoted to actual time spent in negotiations. So, for a unit of approximately 135 bargaining-unit employees, the Union is requesting potentially several hundred - if not thousands - hours of official time to devote to CBA negotiations.⁸ The Union failed to offer any evidence or data to justify this volume of official time.

⁷ *Id.* at 4. The Union cites to only one CBA notwithstanding the existence of several others due to pre-consolidation of the bargaining unit. However, it does not appear that the contracts differ materially.

⁸ Under 5 U.S.C. §7131(a) any "employee representing an exclusive representative in the negotiation of a collective bargaining agreement under [the Statute] shall be authorized official time for such purposes . . . during the time the

Based on the foregoing, it is appropriate to reject the Union's position. The Agency's language, however, is ensconced in the parties' debate over the appropriate interpretation/application of the relevant Executive Order language. It is unnecessary to resolve this debate in order to resolve this dispute. The Agency's language can be modified to focus on generally applicable law. If the parties continue to dispute what is required under said law, they may pursue their disagreements in more appropriate forums, e.g., ULP's, grievances, etc.

Based on the foregoing, the following Agency language should be imposed with revised language in bold:

- Union representatives will be permitted time in accordance with **all applicable law** for all periods of negotiations during the time the employee would otherwise be in a duty status, provided it is approved by management and dependent on workload and mission requirement. If the requested time is unable to be granted due to workload and mission requirements, the employee will be informed and alternate times will be provided. The Employer agrees to allow union representatives a reasonable amount of time in accordance with any limitations and/or restrictions set forth in pertinent laws, rules, and regulations.
- The Union will be permitted one (1) additional individual designated as their official recorder. The Union's designated reporter will utilize time in accordance with **all applicable law**.
- Union representatives will utilize time in accordance with all applicable laws, rules, and regulations while in negotiations, and would otherwise be in a duty status.
- If Management cancels the negotiations for any reason, it is mutually agreed by both Parties that the union representative (s) may, if desired, request appropriate leave for the time they would have been spent in negotiations, not to exceed their regularly

employee otherwise would be in a duty status." Thus, a Federal agency *must* grant official time for actual negotiation periods.

scheduled work hours for that day or use official time in accordance with applicable law. If the Union or the union representative choose not to request leave, or utilize official time under applicable law, the union representative shall report for duty in accordance with their regular work schedule.

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

August 31, 2020
Washington, D.C.