United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of US DEPARTMENT OF DEFENSE EDUCATION ACTIVITY And FEDERAL EDUCATION ASSOCIATION	Case No. 20 FSIP 042

DECISION AND ORDER

This case, filed by the U.S. Department of Defense Education Activity (DODEA or Agency), concerns a dispute over the parties' successor collective-bargaining agreement (CBA) between it and the Federal Education Association (FEA or Union). This dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). The Federal Service Impasses Panel (Panel or FSIP) asserted jurisdiction over this dispute and directed the matter to be resolved in the manner discussed below.

DODEA is the umbrella organization under the Department of Defense (DOD) that unites efforts to provide quality educational opportunities and services to military dependents around the globe. DODEA operates 163 schools within 3 regions in 8 districts located in 11 foreign countries, 7 states and 2 territories. All schools within DODEA are fully accredited by U.S. accreditation agencies. DODEA, as one of only 2 Federally-operated school systems, is responsible for planning, directing, coordinating, and managing pre-kindergarten through 12th grade educational programs on behalf of the Department of Defense. DODEA employs approximately 14,000 employees who serve more than 71,000 children of active duty military and DOD civilian families.

FEA is the labor organization who is the exclusive representative for a bargaining unit composed of all non-supervisory professional school level personnel, including Not-to-Exceed (NTE) employees, employed by the Department of Defense Dependents Schools but excluding DODEA's Europe South (Bahrain, Italy, Spain and Turkey), all nonprofessional employees, educational aides, substitute teachers, management

officials, supervisors and other employees otherwise excluded by the Statute. FEA is an affiliate of the National Education Association (NEA).

BARGAINING AND PROCEDURAL HISTORY

The parties are covered by a 1989 CBA that continues to roll over until the parties enter into a new agreement. On July 15, 2013, the Agency notified the Union that it would be opening up the 1989-CBA for modification. On February 19, 2019, after 5 and a half years of ground rules negotiations, the Panel issued a decision imposing ground rules (Case No.19 FSIP 001). The ground rules imposed by the Panel established a process and timeframe for negotiations to proceed: an initial 6-week face-to-face bargaining session; followed by a potential 12 additional weeks of bargaining based upon the number of articles opened. At the conclusion of the 18 weeks, either Party had the option of extending negotiations by up to one week. The Panel also imposed a 30-day period for mediation, unless otherwise directed by FMCS.

Face-to-face negotiations began on June 17, 2019. The 19 weeks of bargaining concluded on December 20, 2019. At the request of the Parties, the FMCS mediator attended bargaining on September 26, 2019, September 30, 2019 and October 2, 2019. Further, in accordance with the ground rules, the Parties participated in mediation for 30 calendar days, plus an additional 2 weeks. That mediation began on January 6, 2020 and concluded January 17, 2020. Two more weeks of mediation occurred from January 27, 2020 through February 5, 2020, completing the 30-day requirement. Two additional weeks of mediation took place from February 18, 2020 through February 28, 2020, after which the mediator released the Parties to the Panel. During the 25 weeks of negotiations, the Parties tentatively agreed to 30 articles, combined 9 articles into other articles and 2 articles were withdrawn.

In April 2020, the Agency filed a request for Panel assistance in resolving the bargaining over 19 articles (99 separate provisions) in the parties' successor CBA. The Panel determined that the parties had extensive negotiation and mediation, and the parties had reached the point in negotiations where voluntary settlement efforts had concluded. The Panel determined, under 5 C.F.R. Section 2471.6 (a) (1) and (2) of its regulations, to decline jurisdiction over 16 provisions and part of 1 provision, and to assert jurisdiction over the remaining 82 provisions and part of 1 provision (within 18 articles[1]). The Panel ordered the parties to resolve the impasse through a Written Submissions procedure.

PARTIES ARGUMENTS AND PANEL DECISIONS

At impasse are provisions within 18 articles; 83 separate provisions. See the attached Side-by-Side for the proposals at impasse and the Panel's Ordered Language.

[1] Remaining 18 Articles – 2; 5; 11; 12; 13; 14; 16; 21; 25; 27; 35; 44; 45; 46; 47; 48; 59 (U)/53 (A); and 58.

- Article 1, Section 1 (A) – Relationship to Laws and Government-Wide Regulations

Section 1 addresses the impact of government-wide laws, rules and regulations on the terms of the CBA. In accordance with 5 USC 7114, the CBA is "subject to the provisions of this chapter and any other applicable law, rule, or regulation." In other words, the terms of the CBA must be executed consistent with the Statute or applicable law, government-wide rule, or regulation. The Agency's proposal in the first paragraph adds "existing or future" laws. The parties agree that the proposed language is a distinction without a difference; it changes nothing in terms of the parties' understanding of the application of laws on the CBA. As the additional language changes nothing from the former CBA, the Panel declines to order the additional language proposed by the Agency.

The next paragraph addresses the impact of current regulations and directives that are NOT government-wide. Those non-government-wide regulations and directives (i.e., agency-developed and issued regulations and agency-developed and issued directives) would not have automatically trumped the terms of the prior CBA, but may have been subject to negotiations before they were implemented under the prior CBA. The Agency's proposed language to the second paragraph would provide that where there is no conflict with the new CBA, then the current regulations or directives would continue to be in effect. The Union has not agreed to this proposal, arguing that such proposal would force the Union to waive its right to bargaining over negotiable changes under Section 7117. The Agency did not provide a listing of current regulations and directives they intend to apply to the new CBA; nor did the Agency provide any bargaining history around those regulations and directives. The Panel agrees that it is efficient to have terms that are unimpacted by the terms of the new CBA to continue. However, without specific reporting on the regulations and directives and their bargaining history, the Panel will not impose terms where the parties had not reached agreement or a meeting of the minds. The Panel orders the parties to adopt a modified version of the Agency's language: Where there is no conflict with the new CBA and the parties had reached agreement in the prior CBA, such non-government wide regulations and directives pertaining to personnel policies or practices or other general conditions of employment will apply.

- Article 1, Section 1 (E) – Relationship to Laws and Government-Wide Regulations

This section addresses the Union's entitlement to information. 5 USC 7114 (b)(4) requires agencies to provide information to a union upon request when the requested information is "necessary for full and proper discussion, understanding, and negotiation" of collective bargaining issues. When requesting information from an agency, unions must show a "particularized need" for that information; the union must articulate why the information is needed, how the information will be used, and how the requested information connects to the union's representational duties. *Internal Revenue*

Service, Kansas City, Mo., 50 FLRA 661 (FLRA 1995). Once the union establishes "particularized need," the agency commits an unfair labor practice if it denies the request, unless the agency can adequately justify not disclosing the information or prove the disclosure is prohibited by law.

The Agency has proposed adding language to the CBA that reflects that the request for the information must include support for the particularized need. As the "particularized need" standard comes from FLRA case law interpreting 5 USC 7114 (b)(4), and has remained in place since 1995, the Panel orders the parties to adopt the reference to the standard; the parties will adopt the Agency's proposal.

- Article 1, Section 2 - Association

DOD employees serving as labor organization representatives are authorized under the DOD regulations normal TDY travel and transportation allowances when traveling to attend labor-management meetings that are certified to be in the Government's interest. A labor organization representative is a DOD employee specifically designated by a labor organization to represent the organization in dealing with management. In accordance with the DOD travel regulations, DOD travelers must use the DOD Travel System (DTS) to process travel authorizations and vouchers for TDY travel and local travel. In accordance with the DOD instruction, a traveler must use the DTS to the maximum extent possible to arrange all in route transportation, rental cars, commercial lodging, and Government quarters when the DTS's functionality is available.

The parties are in dispute over the Union's use of permissive travel orders to obtain reduced travel rates when conducting representational responsibilities. Permissive TDY is TDY at no cost to the Government. For that reason, authorizations and vouchers in DTS for permissive travel allow no payments to the traveler. While both parties provide that the Agency may provide permissive orders to Union representatives travel to conduct representation functions, the Agency proposes that the permissive orders shall not be used to obtain reduced rates, thereby reducing the Union's expenses. The Union representatives are also DOD employees that are required to use the DTS to book travel. The use of the system provides access for DOD employees to discounted travel, in this case, at no cost to the government, but travel that is deemed to be in the government's interest. If eligible for discounted travel, the traveler should not be prohibited from benefitting from that eligibility. The Panel orders the parties to adopt the Union's proposal.

- Article 2, Section 3 (B) – Employee Rights

Section 3 addresses a bargaining unit employee's right to see their Union representative during the work day. Under the Union's proposal, the employee would be permitted to seek union assistance any time they are not otherwise involved in instructional duties. The Agency did not agree with the language because there are any number of other duties, besides instructional duties, that may take precedence over

approved time to meet with a Union representative. The Agency's language simply states that the employee can meet, on official time, with the Union representative when approved in advance. The Union argues that the Agency's language limits the employee's right to meet with the Union representative during non-duty time. The Agency makes it clear in their rebuttal that their language does not apply to or restrict non-duty time. The Panel orders the parties to adopt the Agency's proposal.

- Article 2, Section 3 (C) – Personnel Files

With regard to subsection 3 (C)(1), the parties are in dispute over the notification to the employee of the files that are being retained regarding the employee. The Union has proposed that subject to the Privacy Act restrictions, employees are to be informed of all files retained on them. The Agency has essentially proposed the same language that is in the prior CBA. The Agency argues that this additional notification requirement is burdensome and unnecessary. The Union provided no justification or explanation for their proposal. The Panel orders the parties to adopt the Agency's proposal.

With regard to subsection 3 (C) (2), the parties disagree over the language that requires that any adverse material on an employee in a "supervisory file" must be acknowledged by the employee. While the parties agree that the material will be shown to the employee and the employee will have an opportunity to attach a response to the material, the Agency seeks to remove language that is in the prior contract, creating the additional step of the employee acknowledging the material. The Agency presented no evidence to support its argument that the long-standing requirement is burdensome. The Panel orders the parties to maintain the prior CBA language without modification.

With regard to subsection 3 (C) (3), the parties disagree over the use of prior admonishments, letters of caution, warnings, reprimand, and similar disciplinary actions. The Union proposes a 1-year time frame before that prior discipline can no longer be relied upon. The Agency proposes a 2-year time frame. The Agency seeks the longer period because these employees generally work 9 months out of the year, creating an even shorter period that the Agency would be able to rely on the prior actions. Also, the Agency seeks consistency with other bargaining units across the Agency. The Panel orders the parties to adopt the Agency's proposal.

- Article 2, Section 3(D) – Employee Rights

Section 3(D), addresses Leave and Earning Statements (LES). The LES provides specific information to an employee regarding their pay and deductions. The Agency lost an arbitration case in 2003. In that case, the Union alleged that the agency failed to pay employees correctly and failed to provide documentation showing that correct payments had been made for back pay, interest on back pay, Thrift Savings Plan matching funds, and lost earnings. Arbitrator Daniel F. Brent sustained the grievance. The Arbitrator acknowledged that the multiplicity of deductions and computations routinely necessary to pay a bargaining unit teacher in an overseas situation is complex. Nevertheless, the Arbitrator found that there was an unacceptable

pattern of persistent and systemic failure to provide employees timely and accurate payment and explanation of payment. The Arbitrator ordered the Agency to modify its computer programs and other procedures so that bargaining unit employees would receive with every payment a clear, fully understandable explanation of what was included in the payment[2]. The Agency filed an exception to the Arbitration decision with the FLRA (Case No. 60 FLRA No. 8), challenging the ordered remedy. The Agency requested that the Authority set aside the portion of the Arbitrator's remedy that requires the Agency to "create or modify its computer programs or other procedures by which bargaining unit employees are paid so that all bargaining unit employees receive with every payment a clear, fully understandable explanation of what is included'. The FLRA denied the Agency's request to set the order aside.

The Agency has now proposed additional language to the CBA to address the 2003 arbitration order of Arbitrator Brent. The Agency has proposed that the LES, which employees receive bi-weekly, will be sufficient to provide employees the information necessary to monitor their pay; will meet the obligation to provide employees with a clear, fully understandable explanation of how each pay check was calculated. The Union argues that the Panel should not adopt this language because it would overturn the legal requirement for clarity, as interpreted by Arbitrator Brent and upheld by the FLRA.

The Arbitrator could have ruled in the 2003 case that the LES was sufficient to meet the information requirement for employees, but he did not. Instead, the Arbitrator ordered the Agency to create or modify its computer programs so that all bargaining unit employees receive with every payment a clear, fully understandable explanation of what is included. The Agency provided no explanation on how the LES, which was in place in 2003 when the arbitration decision was decided, now meets the need. The Agency was given tremendous latitude in 2003 to determine how they would meet the Arbitrator's notification requirement. Since 2003, the Agency could have built its case of sufficiency for the LES serving as the notice. The Agency has failed to make that demonstration before this Panel. The Panel orders the Union's language for Section 3(D).

[2] DODDS or DFAS or some other entity of the Department of Defense shall create or modify its computer programs or other procedures by which bargaining unit employees are paid so that all bargaining unit employees receive with every payment a clear, fully understandable explanation of what is included. For example, the nature of the payment, the period represented by the payment, the date of the document submitted for payment, the actual exchange rate of foreign currency upon which the payment was predicated, and the number of units (for example, days or hours) times the applicable rate, whether interest is included, the period covered by the interest, the rate of interest, and the arithmetic computing the interest must be shown for each item. Regardless of the mode of compliance selected by DODDS, such compliance shall be achieved and documented for all bargaining unit employees Agency-wide within a reasonable interval. Arbitrator Award at p. 5-6.

- Article 2, Section 3 (H) – Employee Rights

The parties disagree over whether employees should be paid over the course of 21(+)[3] pay periods (from the first duty day of school to the last duty day of school) or over 26 pay periods (the full calendar year). According to the DOD Teachers Pay Policy, DOD 7000.14-R (2011), an educator's school-year consists of 190 duty days[4]. In most overseas locations, these duty days fall on days during the normal workweek (i.e., Monday through Friday). An educator, however, does not work every Monday through Friday during the school year because of nonduty days during recess periods (i.e., Thanksgiving, winter and spring recess; federal holidays; and certain host-nation holidays). As a result, the school-year normally runs 213 days, Monday through Friday, between the educator's first and last duty day of the school-year. As the 190 duty days are spread throughout the 213 days, if the employee was simply paid for the duty days worked in any given 2-week pay period, their pay check would fluctuate from week to week. To eliminate that fluctuation, the DOD policy offers the following compensation schemes: 190-Rate[5], 213-Rate[6], or the 260-Rate[7].

The Agency has proposed the employees be paid during the 21 pay periods that the employees are in duty status. The Agency offers this proposal consistent with the DOD Regulations 7000.14-R and DoDEA Regulation 1400.13, which provides for employees who work 190 days to be paid normally over 21 pay periods. The Agency also proposes that an employee who has a non-pay status day during that 21-pay period would be deducted at a daily rate of 1/190th of the school year salary.

The Union proposes that the employees would have the option of receiving compensation over 21 pay periods or over 26 pay periods. The Union also relies on the DOD Regulation 7000.14-R, which provides that educators may have the option to elect between the number of bi-weekly pay periods. The Union also argues that employees that receive compensation over 21 pay periods do not receive a salary over the summer when they are not working, creating a financial hardship for some. The 26-pay period option allows the employee, at their choosing, to spread their earned salary over the

[3] 213 days is 21 full pay periods plus 3 additional days, Monday – Friday, between the first and last duty day of the school year; 190 duty days.

[4] The bargaining unit consists of non-supervisory professional school level personnel. The salary schedules for most, if not all of those positions in the bargaining unit, are based upon 190 duty days. Some positions (e.g., Instructional Systems Specialists) is based upon 222 duty days.

[5] "190-Rate" – The number of duty days in the school-year is 190. The rate is the school-year salary divided by 190.

[6] "213-Rate" - For most school years, the school-year days will total 213 or 214 days, depending on the calendar year. School-year days equal the total number of days (Monday through Friday) falling within an educator's first through last duty day during the school-year. School-year days include 190 duty days, as well as all other nonwork recess days that occur on Monday through Friday during the regular school-year. Nonwork recess days include federal holidays (e.g., Labor Day) and school recess days (e.g., spring recess) when educators are not normally scheduled to work. The number of school-year days is used to determine an educator's school-year rate, or "213-Rate." The school-year rate is the daily rate used to provide a uniform payment for each biweekly pay period. The school-year rate is multiplied by 10 days in order to determine the educator's biweekly basic pay amount.

[7] "260-Rate" - Biweekly payments over 260 or 261 days will have the school-year rate determined by dividing the school-year salary by 260 or 261 days.

whole year, to avoid financial hardship over not receiving a salary over the summer. This option has been available in this unit for years due to an MOU between the parties. Despite having these options in place for many years, the Agency argues that the 26-pay period option creates an administrative burden on the Agency, causing over payments and debts.

The DODEA regulations provide for calculations based upon the 21-pay period option. For clarity and consistency across DODEA's bargaining units, the Panel orders the Agency's language, providing for a 21-pay period schedule.

- Article 2, Section 4 (B) – Management Rights

Section 7106 (b) (1) of the Statute gives discretion for management, at its election, to exercise certain rights in several important areas: the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work. Section (b)(2) and (b)(3) addresses other authorities that are subject to negotiations.

Both proposals mention the topics under Sections (b)(2) and (b)(3). However, the Union's proposal includes the matter under Section (b)(1). The Agency's proposal does not commit in the CBA to bargaining over those matters. The Panel orders the parties to cite the full section of 7106 (b)(1), (b)(2), and (b)(3). However, the section will be modified to allow the Agency to choose if they want to bargain over the permissive subjects. The Panel has repeatedly determined that it will not force parties to waive their statutory rights.

- Article 2, Section 4 (C) – Management Rights

The Agency offers language that states the term "days" in the contract is meant to mean "calendar days" unless otherwise stated. This is a catch-all in case the parties failed to define the term throughout the CBA. The Agency provided no examples and specific referenced where this "catch-all" definition would apply. Without any specific reference, the Panel in unable to assess the impact of the proposal throughout the CBA. The Panel declines to order the inclusion of that proposal by the Agency.

- Article 5, Section 1 – Official Time Article Coverage

The Union advised the Panel that the Union's proposals are generally the prior CBA language, with a few modifications based on 5 U.S.C. 7131(d). The Agency's proposals were derived almost exclusively from Executive Order 13837 – "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use." This bargaining unit is unique from most in the federal government because of the geographic locations of the employees. There are no schools within the Continental United States covered by this CBA. The overseas schools are spread over 6 different countries in Asia and Europe. In addition to providing representation at the school-level, the Union also engages with Agency representatives at the District level, the Area Level

(one in the Pacific and one in Europe), and at the Headquarters level in Alexandria, VA. With all of these representational activities through the world, the Union argues that many of the Agency's proposals based upon the E.O. 13837, are not appropriate in this bargaining unit. The parties disagree on the opening coverage language in Section 1. The Panel orders the parties to adopt modified, more generic language that simply states that the article applies to the amount and procedures for granting official time for Union representatives and for employees.

- Article 5, Section 2 – Official Time Bank

The Union's proposal envisions "business as usual" in terms of how and where the representatives engage with the Agency representatives. For example, the Union proposes that the Agency grant official time to the elected school Faculty Representative Spokesperson (FRS) in almost every school (i.e., 92 educators), which will cost approximately $859,375 per school year. Additionally, the Union proposes that 9 representatives serve at 50% or 100% of their time performing representational activity; at the cost of almost $1.3M per year. The Union proposes that the Agency pay to relocate the elected Union President to Washington, DC to serve as a full time Union representative.

The Agency proposes a bank of official time, that would be readjusted each year. To start, that bank would be calculated at 1-hour per bargaining unit employee. The bank would include official time for the Union representatives, as well as official time for front line employees to use official time (which would be out of the control of the Union). The Agency also proposes an individual cap of 25% for each representative using official time. All of these proposals are offered in the spirit of Executive Order 13837. The Panel orders the parties to adopt the Agency's language, as the most responsible solution.

- Article 5, Section 3 – Official Time Representative

The Union proposes the prior CBA, with modifications for official time granted for above-school level representation. Under this section, the Union designates representatives at various levels (e.g., district, area, national) to perform representational activities and to engage with management. The Agency has no counter because under their proposal in Section 2, the Union would be free to designate their representatives as they see fit, within the limits of the official time bank and the 25% individual cap. As the Panel has ordered the Agency's Section 2, the Panel does not order the parties to adopt the Union's Section 3, as it would be unnecessary.

- Article 5, Section 3 – Official Time Procedures

The Agency proposes a procedure for requesting and approving official time in advance. The Union does not offer a procedure, other than to indicate a willingness to use a form in the CBA for reporting time used. The Panel has determined in other

cases that it is reasonable to expect the official time to be approved in advance, in order for management to have accountability for the employees. The Panel orders the parties to adopt the Agency's proposed procedures.

- Article 5, Section 4 – Official time Accounting

As background, on June 17, 2002, the Director of the Office of Personnel Management (OPM) issued a memorandum to agency and department heads describing her expectations when it comes to granting and using official time. She emphasized that labor and management are equally accountable to the taxpayer and have a shared responsibility to ensure that official time is authorized and used appropriately. The Director also instructed each agency and department to report to OPM by the end of each fiscal year on the number of hours of official time used by employees to perform representational activities. The first such report was due by October 31, 2002, covering FY 2002. In turn, OPM consolidates the official time reports from departments and agencies and posts the report on its website for the public.

OPM determined that agencies would report their official time in 4 categories:

- Term Negotiations—time used by union representatives to prepare for and negotiate a basic collective bargaining agreement or its successor.

- Mid-Term Negotiations—time used to bargain over issues raised during the life of a term agreement.

- Dispute Resolution—time used to file and process grievances up to and including arbitrations and to process appeals of bargaining unit employees to the various administrative agencies such as the Merit Systems Protection Board (MSPB), the FLRA and the Equal Employment Opportunity Commission (EEOC) and, as necessary, to the courts.

- General Labor-Management Relations—time used for activities not included in the above three categories. Examples of such activities include: meetings between labor and management officials to discuss general conditions of employment, labor-management committee meetings, labor relations training for union representatives, lobbying Congress concerning pending or desired legislation (unless it is otherwise prohibited under law), and union participation in formal meetings and investigative interviews.

The Agency's proposal is an attempt to capture the OPM reporting categories by requiring employees and Union representatives using official time to report their use of official time on their time sheet using 4 designated codes:

* BA- Term negotiations
* BB- Mid-term negotiations

* BD- General labor management relations
* BK- Dispute Resolution proceedings before the FLRA

The Union argues that because the time is requested and approved in advance by management, the Agency should be responsible for accounting for the official time reported to OPM. Additionally, while there are only 4 codes to consider, with generic descriptions, the Union believes the user may not understand which code to use and there may be errors. The Panel orders the parties to adopt the Agency's proposal.

- Article 5, Section 6 – Union President in Pay Status During Summer

The Union proposed that the Union President may request to be placed on official time in a pay status for up to twenty (20) days during the summer break to perform representational duties for the Union. The Agency has no corresponding proposal in part because the Union President is not in duty status over the summer break and would not otherwise be entitled to use official time while in a non-pay status. Adopting the Union's proposal would require the Agency to agree to put the Union President in duty status for up to 20 additional paid days beyond the 190 days used to calculate their annual salary; resulting in additional pay.

Under 7131 (a), Official Time is time granted to an employee by the agency to perform representational functions under 5 U.S.C. Chapter 71 when the employee would otherwise be in a duty status. The Statute does not grant official time for the performance of representational functions when not otherwise in duty status. The Union's proposal would require the Agency to place the employee in a duty status, so that they can then be paid additional pay for the representational work performed. There have been a number of cases[8] throughout the government, challenging the entitlement to overtime pay for representational activity. The Panel will not order the parties to adopt the Union's Section 6, as it would result in the Union President being granted additional pay over their salary, it would lead to litigation over the decision to grant the request, and it would lead to litigation over the entitlement to pay under the Fair Labor Standards Act.

- Article 5, Section 7 – Official Time for Travel of Representatives

The Union has proposed that when travel is required to meet with an Agency official, the Union representative on official time will receive government travel orders and the Union's representative's travel expenses will be paid in accordance with the government travel regulations (Joint Travel regulations – JTR). Section 031701 of the JTR provides the Agency authority to pay for the travel of a civilian employee who serves as a labor organization representative and travels to attend labor-management meetings that are certified to be in the Government's primary interest. Under the JTR, a labor organization representative is authorized the standard travel and transportation

[8] See, NTEU v. Gregg, No. 83-546 (D.D.C. Sept. 28, 1983), and other cases applying the courts analysis.

allowances that are found in the JTR, as long as they can attest that the labor-management meetings are in the Government's best interest.

The Agency does not argue that the expense is not appropriate under the JTR, or that the meetings are not in the Agency's best interest; both requirements to qualify for the funding. The Agency argues that the Union should be required to pay for its own travel expenses because they are flush with money; they have an exceptional amount of money in the Union's financial accounts (per the 2019 DOL, LM-2 form filing). The Union responded that the assets referenced in the LM-2 form belong to the Union's parent organization, not the local Union. The Panel will not order the parties to adopt the Union's proposal.

- Article 5, Section 8 - Union Training

The Union's proposal is the prior CBA language, which provides for Union training on the new CBA. Under the proposal, during the first year after this CBA goes into effect, each member of the Union's negotiation team would be authorized thirty (30) days of official time to conduct training for every bargaining unit employee. The proposal would allow for 170 Union representatives to have 2 days of training (including travel to the location of the Union's choosing) under the new CBA, each year. The Agency estimates that the cost would equate to $223K annually for each year the CBA is in effect. The Agency disagrees that the Agency should have to provide for that paid time and travel. The Agency argues that the Union is flush with money and should pay their representatives to participate in this Union-training. The Union provided no justification or response to the Agency's argument regarding the Union-training. The Panel will not order the parties to adopt the Union's proposal.

- Article 5 - Official Time Request Form

Both parties offer a request form to be included in the CBA. The Union proposes to use the form that is in the prior CBA. The Union's form does not address the new time and attendance codes that will be required; does not provide a supervisor with the necessary information to make an informed determination regarding the request in advance; and the form does not ensure the supervisor's consideration of the availability of time in the official time bank and the Union representative's individual cap.

The Agency's PDF is more appropriate. It flows from the procedures ordered in the Article and supports the information the supervisor will need to make an informed determination on the request. The Panel orders the parties to adopt the Agency's PDF form.

- Article 11, Section 5 Reduction in Force (RIF), Competitive Area

RIF, an acronym for reduction in force, refers to the process of eliminating one or more positions in an effort to terminate or reduce the size of an organizational component. Although management retains the right to determine whether to conduct a

RIF, a host of issues related to the procedures and arrangements connected with implementation of its decision to conduct a RIF are negotiable. A "competitive area" is a grouping of employees within an agency, according to their geographical or organizational location, who compete for job retention when a particular position is abolished or some other adverse action constituting a RIF is imposed. The broader the competitive area in a RIF, the broader the scope of competition within a competitive level and the better the potential for assignment rights to other positions. Generally, unions seek a broader competitive area, maximizing the opportunities for a more senior impacted employee to find placement out of harm's way. Generally, agencies seek a narrower competitive area, to minimize the cost of relocating employees to other positions and to minimize the number of employees impacted by the movement of employees in positions being eliminated.

As background, in 1992, the parties came before the Panel regarding the definition of the competitive area. 92 FSIP 247 (4/8/93). The Panel rejected both parties' proposals. In that case, the Union proposed that the competitive area would be the entire Agency. The Panel determined that the adoption of a single competitive area would have a negative impact on educational programs, as many communities and schools throughout the entire competitive area would be affected by the downsizing or closure of any DOD school. Moreover, a single competitive area would be extremely difficult to administer since military drawdowns or base closures involving different branches of the armed services in different areas of the world could lead to overlapping school closures or RIFs.

The Agency proposed that the competitive areas would be separated by each school, district office, and regional Office. The Agency argued in 92 FSIP 247 that establishing each school, district office, and regional office as a separate competitive area is the most efficient way for DOD to respond to continuing worldwide military draw downs. That Panel determined that that Agency's proposal was inconsistent with Department of Defense (DOD) Directive 1400.13, which requires that competitive areas be established to permit "adequate competition" among educators. The Panel determined that senior employees, especially those in "unique" positions such as guidance counselor and media specialist, could be separated, with junior employees in the same occupation being retained elsewhere. Given that many of the DOD schools have less than 50 faculty members, adoption of the Agency's plan could result in employees with many years of service being separated without an opportunity to compete for job retention. The Panel determined that result was contrary to the DOD directive and afforded inadequate deference to the widely accepted principle of labor-management relations which favors the retention of senior employees during periods of reduced operations. The Panel ordered that the competitive areas be established on a district-wide basis; allowing for adequate competition among teachers while keeping manageable the overall cost to the Employer for their relocation.

In 1992, DODEA operated approximately 224 schools in 19 countries. Today, DODEA operates 163 schools, in 3 regions, in 8 districts located in 11 foreign countries, 7 states and 2 territories. In this case, the Union has proposed that the competitive

area essentially be defined by region: Pacific portion (which covers approximately 40 schools) or the Europe portion (which covers about 50 schools); two competitive areas within the Agency; slightly broader than their offering in 92 FSIP 247. The Union argues that their proposal allows for fairness. However, the Union fails to demonstrate how their broad proposal addresses or mitigates the concerns raised by the Panel in 92 FSIP 247 - many communities and schools throughout the entire competitive area would be affected by any RIF action throughout the area.

In this case, the Agency has proposed the competitive area to be defined as a local school system located on a military installation; either a single installation or complex within the same commuting area (up to 163 separate competitive areas); similar to the Agency's proposal in 92 FSIP 247[9]. The Agency argues that this more limited competitive area is consistent with other agreements with other similar bargaining units across DODEA. The Agency also argues that the proposed area is administratively manageable. However, the Agency fails to address or mitigate the concerns raised by the Panel in 92 FSIP 247 – the competitive areas established must permit "adequate competition" among educators.

Neither party demonstrated that their proposal addresses the concerns raised by the prior Panel. Additionally, neither party addressed why the prior CBA language, ordered by a prior Panel, needs to be changed. The Panel orders the Parties to maintain the competitive area as defined in the prior CBA language – all employees in the district.

- Article 11, Section 7 – RIF, Retentions Register

Within each competitive area, the Agency groups interchangeable positions into "Competitive Levels." Each competitive level includes positions with the same grade, classification series, and official tour of duty (e.g., full-time, part-time, seasonal, or intermittent). All positions in a competitive level have interchangeable qualifications, duties, and responsibilities. After grouping interchangeable positions into competitive levels, the Agency applies retention factors in establishing separate "Retention Registers" for each competitive level that may be involved in the RIF. The factors are: rating of record; tenure group; average score; veterans' preference; and length of DoD service (SCD).

Both parties recognize that the RIF procedures should be effectuated consistent with the requirements of 10 U.S.C. 1597, which establishes guidelines for the reduction of civilian positions. Included in that guideline is a determination under Section (e) that reductions shall be primarily on the basis of performance as determined under the performance management system. However, each parties' proposal addresses performance differently.

[9] Agency's proposed in 97 FSIP 247 – Each school, District Superintendent Office [DSO], Regional Office, the Office of Dependents Schools shall be in a separate competitive area, except when more than one school is tenant on a military installation or sub-installation.

Under the Union's proposal, the parties would only consider the latest performance appraisal rating of record. The Union proposes that no performance appraisal rating of record issued prior to the effective date of this CBA would be used in determining the retention registry standing. The Union is concerned that as the parties have set up a new performance appraisal system under this CBA, that performance ratings will likely be different under the new system and only performance under this new system should be considered. However, the Agency notes that the appraisal system has been effective since May 2018. The employees have been under the "new" system for 2 years.

The Agency's proposal is the current practice and is consistent with the DOD procedures established in January 2017. The Agency proposes that ranking will be determined by periods of assessed performance as a primary factor: 1) Employees with a period of assessed performance of less than twelve (12) months and, 2) Employees with a period of assessed performance of twelve (12) months or more. Separating the senior employees from employees who have had less than 12 months of service to even receive a full year assessment.

The Union's proposal is based upon concerns over the performance appraisal system that has been in place since 2018. However, the Union failed to demonstrate how the performance appraisal system has created an adverse impact on appraisals. Additionally, the Union failed to demonstrate how the current retention practice has failed since implementation in 2017. The Panel orders the parties to adopt the Agency's proposal.

- Article 12, Section 2 (C) - Negotiated Grievance Procedure, Exceptions

The parties disagree over the matters that will be excluded from the negotiated grievance procedure. The scope of the grievance procedure, meaning the types of matters considered, is fully negotiable. The party moving to exclude matters from the negotiated grievance procedure should be prepared to establish persuasively the reasonableness of the exclusion narrowing the scope because Congress has expressed a preference for "broad scope" grievance procedures. (*AFGE Local 225 v. FLRA*, 712 F. 2d 640 (D.C. Cir 1983)). See also, (*Pension Benefit Guarantee Corporation*, 59 FLRA 937 (FLRA 2004)).

The Agency proposes to exclude: (1) Section 2 (C)(6) - final decisions regarding adverse actions; (2) Section 2 (C)(9) - non-selection for promotion or transfer from lists of properly ranked eligible termination of a temporary appointment; (3) Section 2 (C)(11) - granting or failing to grant incentive pay or the amount of the incentive pay (including cash awards, and recruitment, retention or relocation payments); (4) Section 2 (C)(12) - alleged violations of law, rule, or regulation for which options for redress are otherwise provided in statute or Government- wide regulations (e.g., EEO, adverse actions, debt collections, etc.); (5) Section 2 (C)(13) - anticipatory grievances (e.g., "Goodbye" grievances); and (6) Section 2 (C)(14) - performance ratings.

The Agency argues that it is better to exclude matters (i.e., (6) and (12)) from the negotiated grievance procedure when the employees have alternative avenues of redress to expert adjudicators. The Agency argues that some of the matters (e.g., adverse actions) are otherwise appealable to the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), and the Office of Special Counsel (OSC). The Agency argues that appeals to those administrative law judges with the proper foundational knowledge to adjudicate those actions would allow for a timely resolution and lead to more even results than to arbitrators. The Agency provided no support to their concerns regarding timely resolution. The Agency offered discussion regarding a recent arbitration decision were the arbitrator determined that the Agency committed an error when removing a teacher, therefore, ordering reinstatement. However, the Arbitrator also determined that the teacher had some level of culpability in the removal, therefore, the arbitrator ordered no back pay. The Agency offered various arbitrator decisions to demonstrate that arbitrators can produce: uneven results; poorly reasoned decisions; and confusion over precedent that should be followed. The Union notes that if the Agency disagrees with an arbitrator's decision, the recourse for some cases is to file exceptions to the decision with the FLRA. The Agency did not identify any decision of concern where they filed exception with the FLRA. Additionally, the decisions of Administrative Law Judges can also be varied and delayed due to backlogs in outside agencies.

Regarding the exclusion of the decision to grant incentive pay (i.e., (11), the Agency offered that exclusion in light of E.O. 13839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Systems Principles", which provides in Section 4(a)(ii) that Agencies shall exclude from the negotiated grievance procedure: incentive pay; cash awards; quality step increases; and recruitment, retention and relocation payments. Besides referencing the E.O. 13839, the Agency offered no argument to support its proposed exclusion. The Union notes that in the Agency's submission to the Panel, the Agency acknowledged, that while incentive pay has been grievable under the CBA, "there have been no known grievances on this topic over the past several years".

Regarding "Goodbye" grievances (i.e., 13), the Agency proposed exclusion because at the end of the school year, the Union sends out a reminder, encouraging departing members to file a Goodbye Grievance, furnishing templates for doing so. The purpose of these grievances is to preserve the Union's right to represent the employee after their separation (when errors and violations are discovered). Over 100 "Goodbye" grievances are filed each year, burdening Agency resources. The parties litigated the appropriateness of a "Goodbye" grievances, in an arbitration before Arbitrator Sands in 2009. The Union instituted the practice of securing the grievance documentation at the end of the school year for employees who were retiring or for individuals who would be leaving the bargaining unit and, therefore, would no longer have access to the grievance procedure. To protect their rights to relief on continuing pay violations, grievances on their way out the door was their only alternative. Arbitrator Sands wrote, "based on the record, as well as my long involvement with these parties, I find that FEA's Goodbye Grievance strategy is both necessary and consistent with the parties'

contract and relevant authority to preserve the rights of employees before they leave service. … Without this option, which preserves departing bargaining unit employees' claims and rights to relief, these grievants will be left with either no remedy or difficulty securing counsel to bring claims in federal court for de minimis amounts, which is tantamount to no remedy. I therefore sustain the appropriateness and timeliness of the Goodbye Grievances before me".

Under the Statute (5 U.S.C 7103)[10] and as incorporated into the CBA, a "grievance" means any complaint concerning any matter relating to the employment of the employee. While the matters in the "Goodbye" grievances may involve concerns of departing bargaining unit members, those matters are still by definition grievable, unless the Agency can demonstrate that in this setting they should be excluded. While the Agency stated over 100 "Goodbye" grievance are filed by the Union each year, as Arbitrator Sands discusses, these grievance filings are necessary and appropriate to address the continuing pay problems in this unit.

The Agency has proposed excluding performance ratings, arguing that an arbitrator should not be allowed to substitute their opinion in lieu of the supervisor's judgment. Additionally, the Agency argues that the exclusion is consistent with E.O. 13839, which instructs agencies to exclude actions involving performance ratings. The Agency offered no examples or demonstration on how the inclusion of performance ratings in the grievance procedure has impacted the Agency and the delivery of its mission.

The Agency has failed to demonstrate persuasively the reasonableness of the proposed exclusions. Absent that demonstration, the Panel orders the parties to maintain the following matters as grievable in the current CBA:

- Section 2 (C)(6) - final decisions regarding adverse actions;
- Section 2 (C)(11) - granting or failing to grant incentive pay or the amount of the incentive pay (including cash awards, and recruitment, retention or relocation payments)
- Section 2 (C)(12) - alleged violations of law, rule, or regulation for which options for redress are otherwise provided in statute or Government- wide regulations (e.g., EEO, adverse actions, debt collections, etc.)
- Section 2 (C)(13) - anticipatory grievances (e.g., "Goodbye" grievances); and, Section 2 (C)(14) - performance ratings

[10] "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

Regarding non-selection for promotion (i.e., (9)), the Agency argues that those matters have been excluded from the grievance procedure for over 30 years. The Union only offered a statement that they do not believe that issue affects employees in their bargaining unit, with no argument offered regarding the exclusion of the matter. The Panel orders the parties to maintain status quo and continue to exclude that matter from the negotiated grievance procedure.

- Article 12, Section 3 – Types of Grievances

The first issue in disagreement is individual grievances filed by an employee, without the Union's assistance. The parties agree on most of the provision, however, the Union has proposed that the Agency provide notice to the Union when such a grievance has been filed. That information will allow the Union to monitor the commitment in the CBA that any resolution of that grievance will be consistent with the CBA. The Panel orders the parties to adopt the Union's proposal.

Next, the Agency's proposal defines the four types of grievances that may be filed under the CBA: Individual grievance, Group grievance, Union grievance, and Agency grievance. The Union has not agreed to include any grievance-type definitions in the CBA, but provided no rational for their position. The Panel orders the parties to include clear, simple definitions of grievance-types in the CBA. The Panel orders the parties to adopt the Agency's proposal, with modification for clarity. Additionally, the parties disagree over the inclusion of one grievance-type with another. Under the prior CBA, the Agency argues that the Union has re-filed Individual grievances as part of a later-filed Group or Institutional grievance. The Union believes arbitrators have supported their right to co-mingle the different types of grievances. A grievant is not entitled to receive multiple remedies to resolve the same complaint. Once the concern is resolved, it is reasonable for the Agency to expect that the matter is moot; not continuously subject of re-litigation. The Panel orders the parties to adopt language that makes it clear that once a matter is resolved (e.g., remedy granted, matter dismissed by an arbitrator, matter no longer timely or grievable), it cannot be refiled (even under a different category of grievance).

- Article 12, Section 4 – Grievance Process

The Agency offered language that they believe makes reading the procedures simpler, however, the Agency provided no explanation or discussion regarding any problems that were caused by the language in the prior CBA. The Union offered status quo language, with a few amendments arguing that changes offered by the Agency are unnecessary and repetitive. The Agency did offer a substantive change that should be adopted. The Agency added the term supervisor/"or designee". The Panel orders the parties to maintain status quo procedures, with the modification of the term supervisor/"or designee."

- Article 12, Section 5 – Grievance Process

The Agency offered language that they believe makes reading the procedures for institutional and employer grievances simpler, however, the Agency provided no explanation or discussion regarding any problems that were caused by the language in the prior CBA. The Union offered status quo language, with a few modifications. The Agency did offer a substantive change that should be adopted. The Agency amended the delivery of the answer ("furnished" instead of "electronically send"), which appears to have been agreeable to the Union. The Panel orders the parties to adopt the Union's proposal, with the modification of the term "furnished."

- Article 12, Section 6 – Arbitration

Section A. triggers the arbitration process. The Union proposes the language from the prior CBA. The Agency adds additional language that prohibits the grievant from raising new arguments for the first time that were not first raised and fully detailed in earlier steps of the grievance procedure. Under the Agency's proposal, the grievant would also not be allowed to submit documents or evidence at the hearing that had not already been submitted throughout the grievance process. The Agency is seeking to avoid being ambushed in the arbitration with new arguments or new evidence. The Agency argues that if all of the arguments and documents are submitted in the earlier stages, issues may be resolved short of needing to pay for arbitration. The Union rejects this provision for several reasons, including arguing that such limitations to a hearing would be unfair under the Statute, and that the proposal will encourage the Agency to withhold adverse evidence and information in order to ensure that evidence cannot be presented for the arbitrator's consideration.

5 U.S.C 7121 (b)(1) requires a fair and simple grievance process (which includes the final step of the grievance process, the arbitration step). Arbitrators are required to grant parties a fundamentally fair hearing: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. (*Department of Commerce, Patent and Trademark Office, and Patent Office Professional Association*, 60 FLRA 869 (2005). The FLRA will find an arbitrator's award deficient on the grounds that the arbitrator failed to conduct a fair hearing where the arbitrator refuses to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *DHHS, National Institute of Environmental Health Sciences, National Institutes of Health, Research Triangle Park, N.C.*, 69 FLRA 286 (2016). The FLRA has determined that it is properly the function of an arbitrator to determine the relevance and materiality of documents and other evidence. *Social Security Administration*, 27 FLRA 706 (987). With this responsibility of ensuring fairness under the Statute, the appropriateness of introducing arguments and evidence should be a matter decided by the Arbitrator. The Panel will not order the parties to adopt the Agency's additional language.

Section B and C address the time frame for filing an invocation to arbitration. The Agency's proposal provides for a more-timely process, allowing for the filing party

to submit its request to arbitrate either 30 days after the grievance decision was due or 30 days after receipt of the final decision, whichever is sooner. The Union's proposal would provide a 60-day timeframe to invoke arbitration. The Panel orders the parties to adopt the Agency's proposal, as modified, for Section B and C.

Sections D and P address withdrawal of the grievance if an arbitration date is not scheduled before the arbitrator within 6 months. The Agency argued that the Union will invoke arbitration and let the grievance sit dormant for 6-7 years. These delays result in challenges such as loss of witnesses and additional back pay. The Union did not address the delay in completing the grievance process or their lack of diligence in scheduling the cases. The Union did argue that cases invoked under the prior CBA should not be subject to these new scheduling rules under this CBA. The parties are free to modify the scheduling terms of those cases invoked under the prior CBA.

The scheduling of a hearing is a shared responsibility that requires cooperation of all involved: Union (in coordination with the grievant), opposing party, and arbitrator. The moving party has no control over the willingness and availability of the others. The Panel orders the parties to adopt the Agency's proposal, with modification, for Section D: allowing an exception to the scheduling deadline[11] where the moving party can demonstrate they exercised due diligence in attempting to schedule within the deadline. The modification to Section D also provides an opportunity for the parties to clean up outstanding cases that are pending upon the effective date of this new CBA. The scheduling deadline will apply to those cases beginning on the effective date of this CBA.

Section E and F addresses the definition of the issue for the arbitrator to resolve. The Agency proposes that where the parties cannot reach agreement on the statement of the issue, the arbitrator will decide. The Agency goes on to propose that the arbitrator would not be empowered to define the issue beyond the original grievance. Consistent with the orders above, with the responsibility of ensuring fairness under the Statute, the defining of the issue should be a matter decided by the arbitrator. Once it is determined that the parties are unable to reach agreement on the issue, the arbitrator should be free to define the issue (as well as the appropriate remedy), without artificial limits. The Panel orders the parties to adopt the Agency's proposal for Sections E and F, as modified.

Section G addresses witnesses in the hearing. As ordered above, the witness will either appear in-person for Individual or Group grievance, or they will appear via video or telephone for Institution or Agency grievances (which would be held in Washington, DC.) Because the witnesses could be many time zones away, and participating after hours or through the night, the Union's proposal would ensure that they are on duty time when asked to testify. The Agency has not agreed to put them in duty status. Asking employees to participate in a hearing after hours and through the night, without the benefit of compensation, will certainly have a chilling effect on their

[11] The employees of this bargaining unit work in a school setting and are generally not in duty status for several months out of the year; presenting unique challenges to availability of a grievant and witnesses.

willingness to participate. In order to ensure the availability of witnesses in the hearing, the Agency's proposal will not be adopted. The Panel orders the parties to adopt the Agency's proposal, with modification, for Section G.

In Section J, the Agency adds language in an attempt to interpret or clarify the case law regarding the effectuation of an arbitrator's decision, when that decision becomes final, and when the arbitrator becomes *functus officio*. The Agency offered no explanation on how this has been an issue for the parties. The Panel orders the parties to adopt the Union's proposal.

In Section M, the parties disagree over which of the arbitration fees will be listed. The Agency's proposal is clearer. The Panel orders the parties to adopt the Agency's proposal. Section O addresses ex parte communications with the arbitrator, and appears to reflect the current practice. The Panel orders the parties to adopt the Agency's proposal. Section Q addresses the submission of pre-hearing briefs. The Agency proposes that they not be allowed unless specific request of the arbitrator or by mutual consent of the Parties. This appears to be the current practice of the parties. The Panel orders the parties to adopt the Agency's proposal.

- Article 12, Section 7 – General Provisions

Section A. addresses the time period for the grievant to file the complaint. The Union proposes new language indicating that the time frames will be tolled when the there is a school recess of more than 4 days (e.g., summer break) or when there is a government shutdown. This is the time that employees would not be in duty status or would be generally unavailable. While the parties had specific language[12] in the prior contract indicating that the time frames would not be tolled due to these same circumstances, the Union provided no demonstration where the time frames have inhibited an employee or the Union from pursuing justice. The Panel will not order the parties to adopt the Union language.

In Section 1 of the Time Period provision, as with the terms of the prior CBA, the Agency offers an extended time period (i.e., 45 days) for the filing of Institutional or Agency grievances. The Panel orders the parties to adopt that part of the Agency's Section 1.

In Section 1, the Agency also offers language that limits back pay to no earlier than the date the grievance was filed in order to limit liability for the Agency. The Back Pay Act, 5 U.S.C. 5596 and 5 CFR part 550, subpart H, authorizes the payment of back pay, interest, and reasonable attorney fees for the purpose of making an employee financially whole, when the employee is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the

[12] 4. Both parties agree to make a maximum effort to comply with the time limits established in the grievance procedure. Failure to comply with established time limits because of unavoidable delays such as postal problems, school recesses, vacation schedules, etc., will not serve as a basis for either party to file a grievance under this grievance procedure, to advance the grievance to the next step, or to reject a grievance as untimely filed.

withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due to the employee. Generally, a two-year statute of limitations applies to the recovery of back pay. In the case of willful violations, a three-year statute of limitations applies. However, under the Agency's proposal, if a grievant discovers, for example, that the Agency has committed a pay error, but the employee doesn't learn of the error for weeks, due to the pay check cycle, and the employee files a timely grievance a few weeks later, the employees back pay remedy would be limited to the grievance filing date, limiting their full recovery. As discussed above, an arbitrator should determine the appropriate "make whole" remedy for the employee. The Panel will not order the Agency's remedy-limiting language.

Section 3 addresses the failure to move the grievance in accordance with the timeframes for the CBA. If the grievance fails to move the grievance times, the grievance would be closed. If the Agency fails to respond to the grievance in a timely manner, the grievant is free to move the grievance to the next step of the grievance process, but is not required. The grievant should have the choice of waiting for the Agency's response, if they choose. The Panel orders the parties to adopt the Agency's proposal, with modification to clarify that the grievant can wait for the response before moving the matter on to the next step.

Section F for the Union addresses language from the prior CBA, challenges to ratings of records. While the Panel ordered above that ratings of records not be excluded from the grievance procedures, the parties had agreed in the past that certain challenges over ratings of record would not be subject to arbitrations. That language should continue under the new CBA. The Panel orders the parties to adopt the Union's Section F.

- <u>Article 12, Section 8 – Attorney Fees</u>

Section 8 addresses attorney's fees. The Panel declined jurisdiction over Section 8A, where the Union challenged the Agency's language before the FLRA. The Union proposes a process for requesting and receiving notification of the status of an attorney fee awarded by the arbitrator. The Agency proposes a method for determining attorney fees. Attorney's fees may be recovered in connection with grievance arbitration, but only as authorized by Statute. The Back Pay Act (BPA) grants jurisdiction on an arbitrator to consider a request for attorney fees. Once the BPA's threshold requirements are met, fees may be awarded by the arbitrator consistent with the provisions of 5 USC 7701 (g). The requirements for an award of attorney's fees are: 1) the employee (or union) must be the prevailing party; 2) the award of fees must be warranted in the interest of justice; 3) the amount must be reasonable; and 4) the fees must have been incurred by the employee (or union). Fees may also be awarded under other fee-shifting statutes, such as the Fair Labor Standards Act. There must be a specific statutory authorization for an award of attorney's fees. *Naval Surface Warfare Center*, 60 FLRA 530 (FLRA 2004). When an arbitrator fails to sufficiently explain the basis for a fee award, necessary to ensure the statutory requirements have been met, that is subject to review by the FLRA. The arbitrator will determine the entitlement to

attorney fees and the FLRA will assess whether the legal sufficiency has been met by the arbitrator in making the award.

The Back Pay Act and other statutes grant jurisdiction to the arbitrator to determine the entitlement to attorney fees, subject to the review of the Authority. The Panel orders the parties to adopt language that acknowledges that authority of the arbitrator to address attorney fee entitlement.

- Article 13, Section 1 – Discipline and Adverse Action

In the federal government, a disciplinary action includes suspensions of 14 days or less and reprimands, while an adverse action includes the more severe forms of discipline such as, removals, suspensions of more than 14 days, and a reduction in grade (demotion) or pay. As for the standard for taking disciplinary actions, under the prior CBA, Article 13, discipline could only be taken for "just cause". The Agency proposes to change to standard to the "efficiency of the service" standard, as reflected in the MSPB regulations for Adverse Actions. The "just cause" standard is a common disciplinary standard adopted in contracts (and by arbitrators[13] enforcing contracts) to ensure disciplinary actions taken by an employer against an employee are just and appropriate. Adopting that standard means that discipline of employees will only occur if the Agency establishes "just cause" for doing so.

The "efficiency of the service" standard for imposing discipline comes from the Civil Service Reform Act; from Congress. Agencies are authorized to subject employees to adverse actions "only for such cause as will promote the efficiency of the service," according to 5 U.S.C. § 7513(a).

The Agency argues that having two different standards (one under the CBA and another in an MSPB litigation) would be inefficient and leads to confusion later depending upon the appeal route that is chosen. The Agency provided no evidence that having a different standard in the current CBA has caused confusion or lead to challenges.

The Panel addressed a similar issue in a recent FSIP case. In that case, the parties had adopted a "just and sufficient cause" standard in their CBA since at least 2001. The Parties presented no evidence or argument regarding the use of the standard. With no evidence to support concerns offered, the Panel ordered the parties to maintain the current contract standard. Similarly, in this case, the Panel orders the parties to maintain the prior contract standard – "just cause". The parties are ordered to add to the prior CBA language – disciplinary actions will be based on just cause.

In Section 1, the Agency also offers language that addresses performance-based issues. While there are two formal procedures a supervisor may use in resolving unacceptable performance: Chapter 43 and Chapter 75 of Title 5 of the U.S. Code,

[13] A Supreme Court decision in 1985 (Cornelius v. Nutt) held that for adverse actions, arbitrators must apply the same standards as those used by the Merit System Protection Board (MSPB).

performance and performance-based issues will be addressed in Article 14 – Performance System.

The disagreement in Section 4 (A) is over the notice and reply period for a notice of disciplinary action under consideration. The Agency proposes a 15-day period. The Union proposes a 15-duty day period, taking into account that there are gaps of time when members of this bargaining unit are not in duty status (i.e., summer break). As discussed above regarding the tolling of grievance timeframes, the Union provided no demonstration where the time frames have inhibited an employee or the Union from responding to these proposed actions. The Panel orders the parties to adopt the Agency's Section 4 (A) language.

In the Agency's Section 4 (C), the Agency is attempting to exempt from the right to respond to a disciplinary action, employees that are in the bargaining unit, but are probationary. The Agency's stated reason for excluding those bargaining unit employees from these notices and respond opportunities is because those same employees are also unable to challenge an adverse action before the MSPB or under the Negotiated Grievance Procedures. The Panel orders the parties to adopt the Agency's proposal excluding the probationary employees from challenging disciplinary actions that do not amount to termination under the grievance procedure. The Panel is concerned about incentivizing the Agency to terminate a probationary employee rather than taking a lower level discipline, in order for the Agency to avoid being challenged before an arbitrator.

- Article 14, Section 2 – Performance System

The parties disagree over the implementation of the department-wide performance management system (i.e., DPMAPS) in this unit. The DPMAPS system was implemented in this unit in May 2018. These parties began negotiating over this successor CBA in June 2019. The language ordered in Article 2 states that where there is no conflict with the new CBA, the non-government wide regulations and directives pertaining to personnel policies or practices or other general conditions of employment will apply. Consistent with that language, the Panel orders the parties to adopt the Agency's Section 2, with modification to cite the actual policy.

- Article 14, Section 7 – Performance

The Agency removed language from this section that would commit that the notice of proposed action based upon unacceptable performance shall not rely upon any instances of unacceptable performance occurring more than one year before the date of such notice. Under Article 2, Section 3 (C)(3), the parties addressed reliance on prior disciplinary actions. This section should address reliance of prior performance-based actions. The Agency failed to demonstrate how this language has caused concern or restricted the Agency. The Panel orders the parties to adopt the Agency's proposal, with modification to reinsert the prior CBA language.

- Section 9 – Tolling of Timeframes to Respond

The Union proposes tolling of timeframes to response to notice of performance actions based upon recesses. Tolling has already been addressed above regarding grievance timeframes and timeframes to respond to disciplinary actions. The Union provided no demonstration where the timeframes have inhibited an employee or the Union from responding to these proposed actions. The Panel will not adopt the Union's proposed language.

- Article 16, Section 1 – Access to Facilities

The Agency proposes to amend the prior CBA language to make it clear that the provision must be read consistent with management rights (i.e., to make determinations regarding internal security). The Panel orders the parties to adopt the Agency's Section 1.

- Article 16, Section 2 – Access to Facilities

The Agency claims that they have made substantial changes to the prior CBA commitments because they want to create equity between the Union and any other "non-agency business" such as the boy scouts, religious groups, after school activity groups. The Union believes that the changes proposed are simply an effort to comply with the Executive Order 13837. The Panel orders the parties to adopt the Agency's proposal.

Under the Union's Section 7, Union representatives would be authorized to utilize the Employer's official email system in order for the Union to provide representation to bargaining unit educators. While the Agency acknowledges that there are numerous places where the parties have proposed or agreed to email notification and acknowledgment, the Agency believes the Union representatives can use their personal emails to accomplish those notifications. To the extent that the Union representatives are also Agency employees, they will already have access to the Agency email system and can use that system consistent with the Agency policies. To the extent that the Union representatives are not also Agency employees, the Panel will not force the Agency to grant them access to their internal email system. The Panel will not order the parties not adopt the Union's proposal.

- Article 21, Section 1 – Leave

Section 1 (C) addresses paternity leave. 20 U.S. Code § 904 addresses leave for overseas teachers – Education Leave. The authorized purposes for taking leave under this section of the Statute includes:

(1) for maternity purposes,
(2) in the event of the illness of such teacher,

(3) in the event of illness, contagious disease, or death in the immediate family of such teacher, and
(4) in the event of any personal emergency.

The prior CBA also provided for paternity leave. It provided that when the wife of a unit employee was physically incapacitated by reason of pregnancy or complications resulting therefrom, the unit employee would be granted Educator Leave. The Agency proposes to change the title of the section from "Paternity Leave" to "Leave for the Purpose of Paternity", "so that it is clear that employees do not get paid paternity leave, but instead get educator leave"; leave to support the maternity. The Union seems to be expanding the leave for other purposes beyond to support maternity, without authority to rely upon. The Agency doesn't seem to be changing the entitlement to take paid leave to support maternity as the employees did under the prior CBA. The Agency suggests changing "wife" to "spouse". That will be adopted. As the change in title offered by the Agency doesn't seem to change any entitlements, the Panel orders the parties to adopt the Agency's proposal.

Section 1 (J) addresses entitlements under the Family Medical Leave Act. The Agency's proposal would entitle eligible employees to take unpaid leave. The Union argues that the employees are eligible to request and be granted any leave permitted (including paid leave) under FMLA. The parties seem to disagree over the application of 29 CFR 825.100 (a), which provides the employee can take unpaid leave or can substitute appropriate paid leave and the application of 5 CFR 630.1201, which allows the Secretary to determine the terms and entitles employees to take unpaid leave. As it is not clear which regulation applies to this unit, the Panel will not order the adoption of either parties' language under Section 1 (J).

- Article 21, Section 3 – School Closures

The parties disagree over making up days due to school closures. The Panel addressed the same language offered in the Agency's proposal in FSIP Case No. 18 FSIP 073. The Agency's proposal takes into consideration their offer to adhere to a pay schedule in Article 2, Section 3 that requires employees to work 190 duty days per year in order to earn their salary. This school closure proposal would allow the Agency the flexibility to schedule teachers to work additional days without extra compensation. The Agency relied upon this scenario to address school closures in Puerto Rico as a result of Hurricanes Irma and Maria in 2017.

The Union argues that the Agency regulations requires that if the school year is extended, the educator will be compensated. But the Union only provided a partial quote of the regulation. The regulation provides that compensation is required if the school year is extended beyond the 190-duty days. The Agency intends their proposal to be read consistent with the regulations. As closed days are not considered duty days, adding them to the end of the year would not add to the duty days. In Case No.18 FSIP 073, the Panel ordered adoption of the Agency's proposal. The Panel orders the parties to adopt the same language (Agency's proposal for Section 3) here.

The Union's proposal for Section 3 is a carryover from the prior contract. The provision addresses weather or emergency related closures where the educator is ordered to report to the facility. The Union is seeking consideration when the educator is delayed due to the emergency that resulted in school closure (e.g., weather). The Agency disagrees with the provision arguing that it takes the "option" out of management's hands. However, the language says "may grant up to ½ a day administrative leave". That is not a requirement and how much to grant is discretionary. The Panel orders the parties to adopt the Union's proposal for Section 3.

- Article 21, Section 9 - FMLA

The parties disagree over the inclusion of the terms leave to "bond with a new child." The Agency's proposal only includes "care for" the new child. The Union provided no argument but simply asserted that the "bonding" term needs to be stated. The Agency recognizes that FMLA provides for bonding, the Agency expressed concerns about its inclusion in this section because the Agency believes they are entitled to put limits on the bonding if both parents are employees.

The Family and Medical Leave Act allows an eligible employee to use 12 weeks of FMLA leave for the care of and bonding with a newborn, adopted or foster child for up to one year after birth or placement. Mothers and fathers have the same right to take FMLA leave to bond with a newborn child. Concerns about the placement of the language will be addressed with a qualifier – "consistent with the FMLA."

- Article 25 – Salary Setting Practices

The parties disagree over how salary will be set upon the completion of higher education by the educator. 20 USC 903 provides that the Secretary of Defense will establish regulations that address the pay setting practices. Those regulations were established and can be found at DODEA Regulations 1400.13 (most current March 2006). Sub-section 4.3.2.4. addresses the Completion of Higher Level of Education. While the parties have been effectively operating under the guidance of 1400.13, the parties litigated the application of the pay setting concerning credit for higher education achieved by the educator. Citing DODEA Regulation 1400.13, dated March 1, 2006, the Agency had been granting pay credit for completion of higher education only for graduate credits earned after educators' first master's degree was granted. Arbitrator Sands determined that the Agency had mis-applied the regulations - graduate credits are graduate credits, regardless of when they are earned.

The Agency proposes that salary for teachers will be in accordance with the Department of Defense Education Activity Regulation 1400.13 or its successor, when not provided for in law or government-wide regulation. The Agency goes on to define when graduate credits will be acknowledged – "degree plus hours" means graduate semester hours completed after the award of the most recent academic degree. The Agency is now attempting to undo Arbitrator Sands' finding by proposing contract

language that limits when higher education will be acknowledged. The Agency argues that the graduate credits that will result in additional pay should be recent and relevant to the current class room environment. The Union proposes a modified version of the prior contract language, which essentially follows the provisions of 1400.13, without clarity or modification to when the credits will be acknowledged. The Union seeks to continue relying on Arbitrator Sands determination - graduate credits are graduate credits, allowing for the credit of any hours earned regardless of how recent or relevancy.

The Panel addressed this same issue in December 2018, Case No. 18 FSIP 073. In that case, the Panel agreed with the Agency's argument that the advanced degree should be recent and should be relevant. The Panel orders the Agency's language for Article 25, with modification. The Agency would need to follow the Statute regarding bargaining obligations over any modifications to Regulations 1400.13.

- Article 27 – Extracurricular Duty Assignments (EDA)

First, the parties could not agree on the title of the article. This article was also in the prior contract, titled "EXTRA CURRICULAR ACTIVITIES". The Agency proposes to change the title "Activities" to "Assignments" to align with the title of the corresponding, revised Instruction – Agency Administrative Instruction 1417.01, drafted in January 2020 (not yet agreed to by these parties), and to bring this CBA in line with 6 other contracts that reference the term "assignments". The Union withdrew its proposed language concerning the title and agrees to adopt the Agency's title.

- Article 27 Section 2 – EDA, Selection

In Section 2 (C), the parties disagree over the assignment of Extra-curricular activities (EDAs). These duties are extra-curricular activities such as coaching or after school clubs. The Union proposes that the Agency will first try to assign the additional duties to volunteers from within the bargaining unit, based upon seniority. The Agency objects to the Union's language because it would not allow the Agency to select a more qualified applicant (e.g., another school on the same installation, or a non-bargaining unit applicant); the selection process may not meet the needs of the students the activity it is intended to serve. The Panel orders the parties to adopt the Agency's proposal, which provides for the selection of the "most qualified" applicant.

- Article 27, Section 4 – EDA, Duties

In Section 4, the Union is attempting to proscribe every duty that will be included in the compensable time for the assignment. The Agency disagrees with the proposal. While the Agency has the right to determine the hours for the assignment, the compensation entitlement will be determined by statute and regulations.

The Union also proposes language that addresses the ability of the parents of the students to use raised funds to join the children for overnight stays. Use of non-

appropriated funds will be determined by the rules of the funds and legal requirements. The Panel will not order the parties to adopt the Union's proposals in Section 4.

- Article 27 – EDA Contract Form

The EDA Instruction 1417.01 will include a form, where the employee will need to certify their understanding of the program requirements (e.g., completing an After Action Report (AAR) within 5 days of the EDA ending). As noted above, the parties have not yet bargained over the Instruction 1417.01. The Union objects to the Agency's version of the form for a number of reasons, including the fact that the actual Instruction, and the requirements that will be a part of the Instruction, are not yet negotiated and agreed to by the parties. The Panel will not impose the form in the CBA. The form and its content will be addressed through the Instruction 1417.01.

- Article 35 - Tours of Duty

This article addresses tours of duty. The prior contract provides that tours of duty will remain unchanged from the implementation of that CBA, unless mutually agreed otherwise. That means that tours of duty have remained unchanged since 1985. The Agency proposes a number of changes, most significantly, the length of the tour of duty. The Union proposes that the tours will remain unchanged under this new CBA.

The Agency references the DOD regulations for tours of duty, asserting that the Agency has the ability to adjust the tours of duty and they would prefer the tour of duty to align with those of other civilian employees in the DOD on overseas tours. The standard tour for DOD civilians overseas is 36 months for initial agreements and 24 months for renewal agreements. The tours include a roundtrip transportation agreement for the employee to return home to the continental US. However, Appendix Q, Part 4, is the section that applies to Civilian Employees with Special Circumstances Tours of Duty; applies to educators. Under Part 4, DOD Education Activity Personnel are specifically references. Pursuant to 20 USC 901-907, the tours of duty for teaching positions is 1 year and 2 years (including a roundtrip transportation agreement); not the standard 36 months and 24 months. Those same tours are codified in the DODEA Instruction 1400.13, Section 4.7.

The Agency seeks longer tours (i.e., 36 months of the initial tour and 24 months for the renewal tour) because the cost of paying for the 1-year tour employee's return transportation to the continental US is approximately $4M a year. By stretching the initial tour period to 36 months, the Agency can save approximately $2.2 million dollars. The Union proposes that the Agency continue to be bound by its own regulations, which provides for the 1-year and 2-year tours. The Panel orders the parties to follow the current DODEA instruction regarding tours of duty.

- Article 44, Section 2 and 3 – Dues Withholding

The parties disagree over when the allotments will begin to be withheld and how much. The prior contract provides that the allotments shall be effective on the second complete bi-weekly pay period in October of each school year. The Union proposes to maintain that language. In the prior CBA, the amount of the allotments would be the designated dues divided by 12 full pay periods. It appears that over time, the parties have agreed that the dues allotment would be divided by 10 pay periods, instead of 12 pay periods. The Union's proposal reflects that agreement with that allotment period. The parties disagree over when the withdrawal will begin. Under the Union's proposal, the withdrawal begins in October; same as the prior contract. Under the Agency's proposal, the withdrawal begins 2 pay periods after the Agency receives the form. The Union also rejects the Agency's additional language that requires the Union to certify the amount of the dues prior to the submission of the form. The Union argues that there is no place on the standard form (SF-1187) for such a certification. The majority of the Panel has determined that it will order the parties to adopt the Agency's proposal for Sections 2 and 3.

- Article 44, Sections 5/6 – Remittance of Union Dues to the Union

Union's Section 6 and the Agency's Section 5 addresses the remittance of the dues collected to the Union. The Union proposes the prior contract language. The Agency raised no concerns with the operation of that language, but added language that asserts that the Union is responsible for further dispersing those funds to their locals. The majority of the Panel has determined that it will order the parties to adopt the Agency's proposal.

- Article 44 – Termination of Union Dues

A federal employee is free to terminate their union dues using form SF-1188. There has been extensive and evolving FLRA litigation over the timing of processing dues termination. Under section 7115(a) of the Statute, an authorization for dues withholding "may not be revoked for a period of 1 year." In *U.S. Army, U.S. Army Material Development and Readiness Command, Warren, Michigan*, 7 FLRA 194 (1981), the Authority held that "the language in section 7115(a) that 'any such assignment may not be revoked for a period of 1 year' must be interpreted to mean that authorized dues allotments may be revoked only at intervals of 1 year." Id. at 199. Additionally, the Authority held that parties may implement section 7115(a) by defining the yearly intervals required by that section through negotiations. See, for example, *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 19 FLRA 586(1985).

The Union would prefer no language in the CBA reflecting the right of an employee to withdraw their membership in the Union. As such, the Union offered no procedures on termination of dues withholding. The Agency proposes language that attempts to capture the current state of FLRA policy regarding dues withholding. In

February 2020, the FLRA announced it would be moving to allow federal employees who are paying dues to stop those payments at any time after a year has passed, rather than being restricted to only one point during a year. The FLRA policy statement followed a request from OPM in mid-2019 to make that change in light of a U.S. Supreme Court decision involving dues withholding for state and local government employees. The FLRA for decades had interpreted the Statute to mean that dues withholding may be revoked only at intervals of one year. However, the new policy statement, which was effective August 10, 2020, says that while the law clearly requires an initial wait of one year, it imposes no limits afterward; allowing an election to stop at any time afterward. The majority of the Panel has determined that it will order the parties to adopt the Agency's proposal, putting employees on notice that they can cancel dues withholding and allowing for the current interpretation of Section 7115 of the Statute to apply.

- Article 44, Section 8 – Dues Withholding Errors

Under 7115 of the Statute, when an employee authorizes payroll deduction for dues, the agency must honor the assignment and make an appropriate allotment pursuant to the assignment. The language in this section addresses reimbursing the Union for any lost dues as a result of a government error. The parties agree over language that would essentially be carry over language from the prior CBA. The Agency adds new language that makes it clear the Agency would then turn and collect that money from the employee; the Agency would recoup that money as an "overpayment" from the employee. The Union added language that provides for exceptions to be negotiated below the national level. The Agency rejects this language, arguing that dues are collected and dispersed at the national level (see Article 44, Section 6 above). The majority of the Panel has determined that it will order the parties to adopt the Agency's language regarding reimbursements, with slight modification –" as provided by law."

- Article 45 – Debt Collection

This article addresses the procedures for the Agency to collect financial debts owed to the Agency. The Union submitted a number of arbitration decisions where the Agency failed to collect debt in accordance with laws. The Agency's proposals commit the Agency to following the appropriate procedures when conducting debt collection or in allowing an employee to appeal a debt (e.g., by asking for collection waiver). The Panel orders the parties to adopt the Agency's proposal, with modification to simply commit to following the laws regard to debt to the Agency.

- Article 46 – Unit Employee Workday

This article addresses the length of the workday. In the prior contract, the work day was built around the instructional day. That contract provided for the school workday to commence not more than twenty (20) minutes before and terminate not

more than thirty (30) minutes after the instructional day. The contract provided for 7-periods (50 minutes) a day, subject to the approval of the Regional Director.

The Agency has proposed that the work day be 8 hours, plus a 30-minute uncompensated lunch period. The Agency argues that the 8-hour work day will be consistent across all sites, allows for increased instructional time for the students, allows for collaboration time and professional development, and allows for more time for staff meetings.

The Union has proposed that the work day be as it was under the prior contract. The Union argues that the Agency's proposal is in violation of 20 USC 902. Section 902 (a)(2) provides that the Secretary will set the basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population.

During the negotiations, the Agency asserted that a number of provisions were permissive subjects of bargaining and, therefore, were outside of the duty to bargain and the Agency had chosen not to bargain over those matters. One of those issues involved the definition of the workday. Initially, the Agency argued that the Union's proposal should not be considered by the Panel as it was permissive and only negotiable at the election of the Agency, and the Agency was not in agreement to bargain over the tour of duty. The Agency then changed its position. It then asserted that the Union's proposal was not permissive and the Agency was willing to negotiate over it. The Union submitted an opposing statement regarding the Agency's change of position. The Panel determined that while the Agency had changed their position on the permissive nature of the proposal, by asserting negotiability concerns from the beginning of bargaining, the Agency created a POPA[14] concern when they arrived at impasse having not negotiated and mediated over the matter. The Panel declined jurisdiction over that provision because the parties were not yet at impasse over that matter.

The Agency also proposes that the part time (PT) tour will be 4 hours; consistent with the charge of leave for the educators (i.e., 1/2 day and full day increments). The Panel orders the parties to adopt the Agency' proposal regarding part time tour of duty.

The Agency also proposes in Section 1 (C) that employees will be required to be on-site outside of duty hours when directed by the Agency to participate in, for example, Open House, parent-teacher conferences, public performances by students of plays, concerts, athletic events, other extra- curricular activities, etc. without additional compensation. Entitlement to compensation for this additional time should be determined by pay statutes. The Union offers a counter proposal in Article 58, Section 1. The Panel orders the parties to adopt the Agency's proposal regarding outside duties, modified without the language regarding compensation.

[14] Patent Office Professional Association v. FLRA, 26 F.3d 1148 (D.C. Cir 1994) (POPA)

- Article 47, Section 1 - Housing and Overseas Allowances

The parties disagree over citing that the benefits must be consistent with the law or government-wide regulation. In Article 2, Section 1 (A), the Panel ordered language that provides that the parties will be governed by existing law or government-wide regulations. This language should be consistent with that order above. The Panel orders the parties to adopt the Union's language, with modification.

- Article 47, Section 2 – Housing Office

The parties disagree over a number of grammatical issues in this Section, but more substantively, the main disagreement is over providing new employees information regarding the housing office at the new duty station. The Agency proposes that the information regarding the location of the housing office will be provided if the employee asks for the information. The Agency argues that information is readily available with a search of the internet. The Union proposes that the information should be provide automatically. The Union argues that the new employee may not even know that there is a housing office. The Panel orders the parties to adopt the Union's proposals for Section 2, with modification to correct typos.

- Article 47, Section 3 – Living Quarters Allowance (LQA)

Both parties reference entitlement to living quarters allowance, consistent with regulations. However, the Union references the State department regulations, without explanation. The Agency references DOD regulations. As these employees are affiliated with the Department of Defense, it would be more appropriate to reference DOD regulations. The Panel orders the parties to adopt the Agency's proposals for Section 3.

- Article 47, Section 4 – Personally-Owned Quarters (POQs)

The Agency admits that the regulations governing POQs are complex. Both parties seem to have attempted to clarify the regulations, by citing sections of interest to the bargaining unit. While their intent seems to be the same, their wording is slightly different. The Panel orders the parties to adopt the Agency's language for Section 4, except the last section: 4 (E). Under Section E, the Agency is attempting to bring all housing agreements in compliance with the current DOD regulations within 30 days of the execution of the new CBA. The Union argues such an action could have a tremendous adverse impact on the workforce. The employees entered housing agreements and made rental commitments based upon their understanding of the rules over the last decades. Bringing the workforce in compliance with the updated rules could adversely have financial impact on overseas families, causing them to resign, retire, or take another job in the continental US. The Union argues that the current workforce should be grandfathered. Neither party submitted data demonstrating the impact of change. The Panel orders the parties to adopt the Agency's language with modification to allow for a 2-year transition; consistent with the 2-year tour for veteran educators and the Panel's order to apply the updated grievance timeframes. That will

provide an opportunity for employees to consider the impact of this housing change as they are renewing their employment contracts.

- Article 47, Section 5 – Allowances

The parties are very close in their language, except the Agency clarifies that the regulations that the parties are referring to is the DOD regulations. The DOD regulations specify the procedures and employee allowances and the movement of household goods. The Panel orders the parties to adopt the Agency's Section 5.

- Article 48, Section 1 – Travel

The parties disagree over the references to the regulations. As discussed above in Article 2, the Panel ordered the parties to adopt language that government-wide regulations and the DOD regulations in effect upon the effective date of the CBA apply. The Union proposes that the government-wide regulations apply. The government-wide regulations will apply because of the language imposed in Article 2. Both parties propose that DOD regulations will also apply. It is useful to clarify which regulations applies. The Panel orders the parties to adopt the Agency's proposal for Section 1.

- Article 48, Section 2 – Government Transportation and Transient Facilities

Where an employee has been approved by the Agency to attend a meeting of a technical, professional, scientific, or other similar organization, the parties agree that the Agency may provide the transportation and access to a transient Government facility for the employee in order for them to attend the meeting. However, the Agency expresses concerns about the use of the benefit that may not be in accordance with the DOD regulations and the Agency proposes to limit access to the transportation or facilities only when the employee is actually in duty status. The Union argues that limiting the access is impractical because at some points during the travel and stay the employee will actually be "off duty", but still on authorized travel. The Panel orders the parties to adopt the Union's proposal, with modification.

- Article 48, Section 3 – Medical Evaluation

The parties acknowledge that medical emergencies occur that may require a medical evacuation. The Agency's language commits to providing the entitlement to transportation at government expense in accordance with DOD regulations. The Union's proposal explains the entitlement in more detail, in a way that may or may not be consistent with the regulations. The Panel orders the parties to adopt the Agency's proposal for Section 3.

- Article 48, Section 4 – Travel for Emergency

The Agency offers a commitment to provide access to travel in accordance with DOD regulations. The Union provided no counter or argument to this commitment to

follow the regulations. The Panel orders the parties to adopt the Agency's proposal for Section 4.

- Article 48, Section 5 - Renewal Agreement Travel (RAT)

Under the DOD Joint Travel Regulations, a civilian employee, and the civilian employee's accompanying dependent, are eligible to receive travel and transportation allowances for returning home between tours of duty outside of the continental United States. The RAT-eligible employees may travel at any time following completion of the school year at the end of their tour at their overseas permanent duty station (PDS) to their United States RAT location, before moving to start their next tour of duty.

Under the prior CBA, employees were not required to use the Agency travel management system to book their RAT travel, but instead could book their own travel outside of the system, that may be cheaper. The Agency proposes that all travel be booked through the Agency system. As the Agency is paying for the travel, it is reasonable for the Agency to manage all travel through one system. The Panel orders the parties to adopt the Agency's proposal for Section 5, with modification to focus on the system and the regulations.

- Article 48, Section 6 – RAT, Duty Status

Employees are authorized renewal agreement travel (RAT) when they complete their prescribed tour of duty. The Agency added language to clarify that the employee's duty days begin when they actually arrive at their duty station. This clarification was added as a result of an arbitrator's decision interpreting the regulations consistent with the Agency's position. The Panel orders the parties to adopt the Agency language for Section 6.

- Article 48, Section 8 – RAT Destination

The Government Travel Regulations (JTR, Section 055002) provides that a civilian employee or dependent is authorized to perform RAT from their overseas duty station to the civilian employee's actual residence at the time of assignment. In the alternative, the employee may also be authorized to perform RAT to a location other than the civilian employee's actual residence, as long as the RAT destination is in the same country as the actual residence. Either destination is an official travel destination. (JTR Section 055009.)

The Agency's proposal limits the travel authorization to the employee's place of actual residence at the time of assignment to the overseas duty station. That is not consistent with the regulations. The Union's proposal mirrors the JTRs. The Panel orders the parties to adopt the Union's proposal for in Section 8.

- Article 53 (Agency)/59 (Union), Section 1 – Duration of the CBA

The Union proposes that the duration of the CBA be 1 year, with automatic roll-overs. The Union argues that because the terms are new and significantly different from the prior, 31-year CBA, the parties may need to negotiate changes where things are not working as expected. The Agency argues that a 1-year term would be unreasonable, inefficient, and burdensome on the Agency and taxpayer. The Agency also argues that 1 year is not sufficient time to assess the effectiveness of new terms under the new CBA.

The Agency proposes a 5-year duration. The Agency argues that negotiating a full CBA is a significant cost to the Agency. This term negotiations cost $456,243.91[15] in Union participation and $652,198.85 in management participation. These costs don't include the expense of training personnel on the new terms of the CBA. The Panel orders the parties to adopt the Agency's proposal regarding the duration of the CBA.

- Article 53 (Agency)/59 (Union), Section 2 – Notification of Reopening and Rollover of Term

Section 2 addresses notification of reopening the CBA and rollover of the terms. The Union's terms are rollover of the prior CBA. The Agency attempts to identify specific dates for reopening. However, those dates are established without knowing the specific date the CBA will go into effect. The Panel orders the parties to adopt the Union's proposal for the reopener window.

The Agency also seeks to terminate permissive matters when there is notice to reopen. Either party is free to notify the other party that it intends to terminate permissive matters upon notice of reopening, unless that has already been waived by agreement. The Panel has consistently determined that it will not force a party to waive its rights. The Panel will not order the parties to adopt the Agency's proposal regarding permissive topics of the bargaining in the CBA.

The Agency seeks to apply government-wide regulations to the CBA in 5 years, even if the contract is not reopened. Under the Agency's proposal, even if neither party seeks to reopen the contract, the Agency would preserve the opportunity at that time (annually) for the Agency to conduct an agency head review of the contract. 5 USC 7114 (c) provides that an agreement between a union and an agency is subject to approval by the head of the agency. The agency head is required to approve the agreement within 30 days of the date of its execution if the agreement is in accordance with the provisions of the statute and other applicable laws, rules, or regulations. If the agency head fails to approve or disapprove the agreement within the 30-day window, the agreement takes effect and becomes binding on the parties. If the agency head disapproves an agreement, the union may file a negotiability petition with the Federal

[15] Ground rules bargaining was $98,400 of that $456,243.91.

Labor Relations Authority, challenging the agency head's determination that a provision is unlawful.

Generally, an automatic renewal provision of a contract provides that the contract shall continue in effect after its expiration date if no action to amend or terminate it is taken within a specified period prior to its expiration date. However, a contract with an automatic renewal or "rollover" provision is still subject to agency head review upon renewing itself. *Kansas Army National Guard*, 47 FLRA 937 (FLRA 1993, Kansas National Guard). In *Kansas National Guard*, the FLRA clarified the effect of automatically renewing a CBA. The Authority found that the use of automatic contract renewal dates was consistent with efficient and effective government because it preserved the time and resources that would be expended in renegotiating collective bargaining agreements where the parties deemed such to be unnecessary. The Authority found, however, that an automatically renewed agreement was still subject to agency head review under 5 USC 7114 (c) because governing laws and government-wide regulations might have changed during the term of the agreement. The Authority held that for automatically renewing collective bargaining agreements, the execution date (for purposes of triggering the time limits for agency head review) was the date on which no further action was necessary to finalize a complete agreement. The Panel orders the parties to adopt the Agency's proposal regarding applying government-wide regulations established later.

Finally, in Section 2, the Agency seeks to impose ground rules for bargaining the next CBA in 5+ years. The Agency argues that it took 5 years for these parties to reach agreement over their ground rules. As discussed in the Bargaining History above, the Panel issued a decision imposing ground rules on these parties (Case No.19 FSIP 001). The ground rules imposed by the Panel established a process and timeframe for negotiations to proceed: an initial 6-week face-to-face bargaining session; followed by a potential 12 additional weeks of bargaining based upon the number of articles opened. At the conclusion of the 18 weeks, either Party had the option of extending negotiations by up to one week. The Panel also imposed a 30-day period for mediation, unless otherwise directed by FMCS. The Panel orders the parties to adopt the ground rules used to negotiate this successor CBA, including the provisions agreed to and the provisions imposed on the parties in FSIP Case No.19 FSIP 001, unless they conflict with the terms of this CBA, they are matters where the Panel did not assert jurisdiction[16], or the parties mutually agree to negotiate new ground rules upon the reopening this CBA in 5+ years.

- Article 53 (Agency)/59 (Union), Section 2 – Copy of the CBA

The Agency proposes that the CBA be available online. The Union proposes that the Agency provide the Union and the employees with printed copies of the CBA in each location. The Panel orders the parties to adopt the Agency's proposal, modified to remove the reference to printed copies. That language is not necessary.

[16] In its procedural determination letter, the Panel determined that it would assert jurisdiction over Agency Article 53, Section 2D, items #9, #13, and #24.

ORDER

Pursuant to the authority vested in the 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

September 8, 2020
Washington, D.C.

Attachment

Side-by-Side of Proposals, with Panel Ordered Language