

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

FEDERAL COMMUNICATION COMMISSION

And

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 209

Case No. 20 FSIP 054

DECISION AND ORDER

BACKGROUND

This case, filed by the Federal Communication Commission (Agency or Management) on May 22, 2020, concerns several articles and 159 proposals in the parties' successor collective bargaining agreement. The Agency is an independent Federal agency overseen by Congress that regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia, and U.S. territories. The Agency is managed by five commissioners, appointed by the President of the United States and confirmed by the Senate, with one commissioner selected by the President serving as Chairman to lead the Agency. The National Treasury Employees Union (Union) represents Agency employees in two separate bargaining units. The first unit includes all professional General Schedule employees of the Agency, nationwide. The second unit includes all nonprofessional General Schedule and Wage Grade employees of the Agency, nationwide. The Union represents approximately 836 Agency employees: 509 professional employees and 327 nonprofessional/Wage Grade employees. The parties' current CBA, executed in 2014, applies to both units.

BARGAINING HISTORY

The parties have a lengthy bargaining history. In brief, the parties exchanged proposals between December 2019 and February 2020. They met face-to-face in early March 2020 before the Covid-19 pandemic came into full swing. From mid-March to mid-May, the parties engaged in telephonic bargaining. But, the Union noted it was doing so "under protest." On May 7th, the Agency provided its final offer and requested mediation assistance for May 13-May 15. On May 13, 2020, the parties had joint-bargaining with the assistance of a Federal Mediation and Conciliation Services Mediator. During this session, the Agency emphasized that its final offer was its true final offer and requested that the Union accept it. The parties met again the next day with the Mediator and, as the parties could not make movement, the Mediator ended the session and gave the parties several days to work amongst themselves. The parties made no additional movement, so on May 19th, the Mediator released the parties.

On July 22, 2020, the Panel asserted jurisdiction over all issues in dispute save for several proposals that were the subject of an ongoing FLRA negotiability. As to the issues properly before it, the Panel directed the parties to submit them to the Mediator for 2 weeks of concentrated mediation to be followed by Written Submissions on any remaining issues.¹ During mediation, the parties settled one article and nearly 90 proposals. Thereafter, the parties timely submitted their Written Submissions to the Panel.

ISSUES

Article 33, Safety and Health

I. Union Position

The Union disputes only one portion of this article - Section 4.D. The Union requests that, if an employee's "health records" are accessed, the Agency will provide notice to an employee if it is *permitted* by law.² By contrast, Management proposes that it will notify the employee only if notice is *required* by law.³ In other words, under the Union's approach,

¹ The Panel's Order informed the parties that any remaining issues could be resolved "article by article."

² Union Agency Comparison at 1.

³ See Union Position at 2.

Management *must* generally notify the employee even if it has no legal obligation to do so (aside from the contract).

Under law, an employee is entitled to receive the foregoing information upon request; and the Agency also has a legal obligation to upkeep this data.⁴ This information is incredibly sensitive, so it makes sense that the Agency should inform the employee when it is accessed. To hold otherwise would place employees in a situation where they have to make regular inquiries. Under the Union's approach, Management need only provide a one-sentence notice to employees that their information has been accessed.⁵ This does not create a major administrative burden.

II. Agency Position

The Agency would provide notice only when legally obligated to do so. The Union does not define "health records," so that term could encompass a number of items. The Agency's approach protects employee confidentiality and also does not create any "unnecessary administrative burdens."⁶

III. Conclusion

The Panel will adopt the Union's proposal. The parties agree that the confidentiality of an employee's medical information is important. However, Management would only protect that confidentiality if required by law. The Agency asserts that adopting the Union's proposal would create an undefined burden upon the Agency. However, adopting Management's position could create an even greater burden because employees would have to regularly place requests with Management concerning access to their records if they had any concerns. On balance, then, the Union's proposal is most appropriate to adopt.

Article 38, Negotiated Grievance Procedure⁷

I. Agency Position

⁴ See *id.* (citations omitted).

⁵ See *id.* at 3.

⁶ Agency Position at 2-3.

⁷ See Agency Compare at 2 (listing differences between parties' Article 38).

The Agency's proposed language for this article falls broadly into two categories: (1) procedures associated with filing a grievance; and (2) grievance exclusions.

A. Procedures

The Agency first proposes three procedures to be followed during the course of processing grievances. It proposes: (1) allowing issues of timeliness and grievability/arbitrability to be raised at any time;⁸ (2) a requirement to provide certain information with the grievance or face "nullification" of the grievance;⁹ and (3) timeframes for Management to provide responses to Step 1 grievances (10 days if a meeting is held, 20 if no such meeting occurs).¹⁰ The Agency's argument for each of these positions essentially boil down to ensuring an effective and efficient negotiated grievance procedure that allows a grievance to proceed unabated.¹¹

B. Grievance Exclusions

The Agency proposes excluding a number of topics under the parties' negotiated grievance procedure:

- It proposes eliminating grievances where an employee has not experienced "objective harm" because such grievances are a frivolous waste of the Agency's resources.¹² By way of example, it cites a grievance where an employee asked for the removal of a supervisor because the supervisor held a mid-year performance review 21 days late.¹³
- Challenges to "prefatory" language in the contract will not be permitted because the Union has "repeatedly" filed frivolous claims over these matters.¹⁴
- Grievances involving performance ratings, incentive pay, and performance-improvement-plans (PIPs). The first two matters are excluded by Executive Order 13,839 "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (Removal Order).

⁸ Agency Attachment D, Article 38 Comparison at 1.

⁹ *Id.* at 2.

¹⁰ *See id.*

¹¹ *See id.* at 1-2.

¹² *See* Agency Comparison, Section 2.B at 2.

¹³ *See* Agency Brief at 3 n.7.

¹⁴ *See* Agency Comparison, Section 2.C.2 at 2.

PIP exclusions are not addressed in this Order, but PIP challenges provide few benefits: either an employee improves or does not.

- All "adverse actions" arising under 5 U.S.C. §4303 and §7512. "Adverse actions" include removals, and the Removal Order calls for agencies to exclude them. So, the Agency's proposal and arguments are focused primarily upon that. Other forums - such as the Merit Systems Protection Board (MSPB) - have more expertise in addressing removals, which is consistent with Congress's ideal approach to resolving these types of disputes. Other forums also have more defined procedures to adhere to, something that is lacking in the grievance process. One removal grievance alone can raise costs of over \$73,000 in representation costs and \$7,136 for time spent with deciding officials alone.¹⁵ Finally, the Agency claims all the foregoing applies "equally" to excluding the global topic of "adverse actions."¹⁶
- Any and all matters where the Union has other statutory or regulatory options.¹⁷ The Union has a history of filing numerous "frivolous" grievances that involve matters that can be addressed in other forums.¹⁸ Actions involving prohibited personnel practices (PPP's)¹⁹ under 5 U.S.C. §2302(b)(1) are better suited for the MSPB, the Office of Special Counsel (OSC), or the Equal Employment Opportunity Commission (EEOC).²⁰ Similarly, discrimination claims should be pursued before the EEOC because the Union routinely abuses the process with claims that do not arise to the level of discrimination.²¹
- Grievances involving unfair labor practice (ULP) charges.²² This includes disputes over information requests and rights arising under the Statute if those rights are in the agreement and are "derivative" of the Statute. In these

¹⁵ See Agency Brief at 7 n.21, 8.

¹⁶ See *id.* at 8-9.

¹⁷ See Agency Comparison, Section 3.H at 3-4.

¹⁸ See Agency Brief at 9.

¹⁹ See Agency Comparison, Section 3.H.1 at 3.

²⁰ See Agency Brief at 9-10.

²¹ See *id.* at 10 (citing Agency Attachment L which discussed reasonable-accommodation grievances that did not arise to the appropriate standard).

²² See Agency Comparison, Section 3.H.3 at 2.

negotiations alone, the Union has filed three "frivolous" ULP grievances on topics like allegedly illegal "permissive" topics of bargaining.²³ The Union also has a habit of filing late-information requests solely to stall bargaining. As to "derivative" claims, the Agency argues this approach is consistent with recent FLRA case law that prohibits grievances and ULP's over the same "issue" under 5 U.S.C. §7116(d).²⁴ Management argues that an FLRA investigator could work with the parties to narrow or settling ULP claims as part of the ULP process. That option is not available under grievances.

II. Union Position

The Union opposes the Agency's language and seeks to largely maintain the status quo. The Union wholesale rejects the Agency's language concerning procedures that will govern the grievance process. Allowing the Agency to raise timeliness/grievability/arbitrability challenges at *any point* would be inefficient.²⁵ And, permitting the Agency to "nullify" a late-filed or incomplete grievance is "without precedent" in the parties' bargaining history or other comparable agreements.²⁶ Management's language is overly technical and should be rejected.

As to the exclusions, the Union objects to a proposed scheme that would exclude more than 40% of existing types of claims from the grievance procedure.²⁷ Between September 2017 and April 2019, the Union filed only 43 grievances, or roughly 8.6 grievances per year.²⁸ It is a fair and simple process that has not burdened the Agency's operations. Under established Federal Court and FSIP precedent, the Panel *must* impose a broad-scope grievance procedure unless a party moving for exclusion(s) establishes "convincingly" that their position is the most reasonable one under the circumstances.²⁹ The Union contends that the Agency has not met this standard in the following sense:

- As to the Agency's proposed exclusions for grievances that would not result in "objective harm" or that involve

²³ See Agency Brief at 11.

²⁴ See Agency Brief at 12 (citations omitted).

²⁵ See Union Brief at 5.

²⁶ See *id.*

²⁷ See *id.* at 6.

²⁸ See *id.* at 3, 6 n.3.

²⁹ *Id.* (citations omitted).

"prefatory" CBA language, the Union notes that an arbitrator could still have to assess whether such grievances fall under these categories. And, if a grievance ultimately does not, that would have meant an extra and unnecessary hearing that increased costs/resources. This approach is not effective or efficient.³⁰

- The Union objects to the Agency's reliance upon the 2018 Trump Executive Orders. The Union claims that, during bargaining, Management claimed it was making proposals that were merely parallel to the Orders "sua sponte" and, in any event, the Union is currently challenging the legality of the Orders before the FLRA.³¹
- Regarding claims that could be pursued in other forums, the Union claims that some forums, such as the MSPB, have limited jurisdiction.³² As such, they would not be able to provide the Union with relief in all circumstances. And, both the MSPB and FLRA Office of General Counsel have had vacancies in place since 2017 that have prohibited either from functioning with no end date in sight.

III. Conclusion

The Panel will impose a modified version of the Agency's proposal. Regarding the portions of the Agency's proposal involving procedural aspects of the grievance process, the Panel believes that the Agency has justified their inclusion. Establishing clear timeframes and mandates on what is required in the grievance will allow the parties to bring grievances to a swift and efficient conclusion. This is particularly important given some of the data provided by Management concerning costs. As noted above, even one removal grievance alone may amount to over \$73,000 in representation costs and \$7,136 for time spent with deciding officials alone.³³

Turning to Management's proposed grievance exclusions, the Panel has recognized the significance of Federal court precedent that addresses grievance exclusions.³⁴ The Panel has acknowledged the United States Court of Appeals for the District of

³⁰ See *id.* at 3-4.

³¹ See *id.* at 7 n.4.

³² See *id.* at 7.

³³ See Agency Brief at 7 n.21, 8.

³⁴ Curiously, the Agency did not address this precedent or even acknowledge its existence.

Columbia's conclusion that a proponent of grievance exclusion must "establish convincingly" in a "particular setting" that this position is the "more reasonable one."³⁵ The Panel has further clarified that the Removal Order - and related Executive Orders - demonstrates important public policy that may be taken into consideration when resolving these disputes. That consideration, however, differs depending upon the exclusion that is involved and the factual basis of the moving party. **With that framework in mind, the Panel decides as follows for the proposed exclusions:**

- As to the Agency's proposals concerning "objective harm" and "prefatory" language, the Panel rejects them. Both proposals could potentially require an arbitrator to weigh in on whether a grievance satisfies either standard. Rather than ameliorate litigation, then, they could exacerbate it. **Accordingly, the Union's proposals for Section 2.B. and 2.C.2 should be adopted.**³⁶
- Regarding the Agency's language on performance issues, the Panel imposes Management's language that excludes challenges to performance ratings and incentive pay consistent with prior analysis by the Panel.³⁷ However, with regard to PIP exclusions the Agency has not provided evidence that grievances on this topic have created an inefficient workplace. So, that matter should not be excluded. **Accordingly, the Panel adopts Management's language for Section 3.G except for "The issuance of a performance improvement plan (PIP)."**³⁸
- **The Panel declines Management's language in Section 3.H.2 for "adverse actions."**³⁹ Most of Management's arguments focus on removal actions, but the term "adverse actions" encompass a wide variety of actions that begin with suspensions of 14 days or greater. Section 3 of the Removal Order speaks to removals in specific but not adverse actions in general.⁴⁰ With this policy in mind, the Panel has rejected proposals that call for exclusions of "adverse

³⁵ See, e.g., *Department of Def., Dep't of the Air Force, Malstrom Air Force Base and AFGE, Local 2609, 20 FSIP 040 at 5 (June 2020)(Malstrom).*

³⁶ See Agency Comparison at 2.

³⁷ See *Malstrom*, 20 FSIP 040 at 6-7.

³⁸ Agency Comparison at 3.

³⁹ *Id.*

⁴⁰ See Executive Order 13,839, Section 3.

actions" when supporting arguments focus primarily upon "removals."⁴¹

- **On ULP exclusions in Section 3.H.3, the Panel strikes Management's language.** The Agency argues that the Union has abused grievance ULP's during these negotiations by filing three "frivolous" grievances concerning items such as whether Agency proposals involve permissive topics of bargaining.⁴² But, this assessment comes solely from the party who opposes the grievances, i.e., the Agency. The Agency also claims that the Union is abusing grievance ULP's for information requests. It cites primarily a single 2018 information-request related to a removal grievance that was filed at the "11th hour" of an arbitration. Yet, the record shows this grievance was filed *four-to-five* weeks before the arbitration.⁴³ Finally, the Agency offers language that would require any grievances involving violations of CBA language that mirrors the Statute to be pursued as ULP's. The Agency argues the FLRA has clarified that such claims are not "materially" different.⁴⁴ But, the Agency's cited precedent merely addresses the standard to be used under 5 U.S.C. §7116(d), which bars grievances and ULP's over the same "issue."⁴⁵ This argument does not support adoption of Agency's position.
- **As for the remaining language in Management's Section 3.H, the Panel will not order its adoption save for Section 3.H.4.** Management argues that all matters with statutory or regulatory avenues for review should be excluded, primarily, because Congress created better suited forums for those types of claims. This argument is flawed because, if Congress believed other forums were more appropriate, it could have limited grievances when it enacted the Statute. But, it did not. Indeed, this Panel has rejected this argument in other grievance-exclusion cases.⁴⁶

⁴¹ See, e.g., *Malstrom*, 20 FSIP 040 at 6 (citation omitted).

⁴² Agency Position at 11.

⁴³ See Agency Attachment M at 9.

⁴⁴ See Agency Position at 11-12 (citations omitted).

⁴⁵ As relevant, 5 U.S.C. §7116(d) states "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

⁴⁶ See, e.g., *NASA, Kennedy Space Center and AFGE, Local 513*, 20 FSIP 029 at 13 (May 2020).

The Agency also argues that it has been inundated with "often" frivolous grievances that could have been filed elsewhere, or 46 since 2016. The Agency provides a single-page chart showing these grievances, but that chart contains little else other than numbers.⁴⁷ Management did, however, provide evidence that it is inundated with "reasonable accommodation" discrimination claims. Moreover, it noted that the parties agreed to contract language that already addresses the topic of reasonable accommodation.⁴⁸ **As such, the Panel orders the adoption of Management's proposed exclusion for discrimination claims in Section 3.H.4 and striking the Union's language for Section 2.E that also addresses this topic.⁴⁹ Consistent with the above analysis, however, the Panel will also strike the remainder of the Agency's proposed exclusions in Section 3.H.**

Article 39, Arbitration

I. Agency Position

The Agency proposes numerous changes to the existing article on arbitration that are designed to make it more efficient. Among other things, the changes include:

- Requiring parties to gather information concerning arbitrators within 5 days (as opposed to 10);⁵⁰
- Timeframes to hold an arbitration hearing: the parties will seek a new arbitrator if they are unavailable within 6 months and an arbitration will generally be considered withdrawn if it cannot be held within 1 year of invocation.⁵¹
- A "loser/winner" pays arrangement for grievances.⁵²
- Several proposals requiring a pre-hearing meeting, clarification of when certain issues may be raised, and a

⁴⁷ Agency Attachment K.

⁴⁸ See Agency Position at 10. The Agency also provided a 138-page supporting document that contained various related grievances.

⁴⁹ See Agency Comparison at 2-3.

⁵⁰ See *id.* at 6.

⁵¹ See *id.* at 7, Management Section 1.D.

⁵² See Agency Comparison at 7, Section 2.A.

requirement to provide information as a part of a grievance.⁵³

- Requirements for attorney-fee requests, including what information must be in them and what an arbitrator must issue in his or her award. The Agency also reiterates its loser/winner pays structure.⁵⁴

In addition to the above, the Agency renews its concerns about tardy Union-filed information requests and their impact on arbitration hearings. As discussed in the grievance article, and citing the 2018 information-request experience discussed above, the Agency believes that the Union relies upon late-filed information requests to hinder grievances/arbitrations. Although there is language in the CBA prohibiting arbitrators from considering claims/issues that are not raised in an appropriate fashion, the 2018 arbitrator ignored that language and allowed the Union to "join" a dispute about an untimely information request with the underlying grievance.⁵⁵

The Agency offers language that would prohibit the foregoing scenario from happening again. Notably, in its proposed Section 3.H, an arbitrator would be prohibited from considering issues involving information requests unless those issues were raised in the first step of the grievance.⁵⁶ Relatedly, in its Section 1.G, Management emphasizes that there will be no delays due to pending information requests.⁵⁷ The Agency notes that the parties already have reached tentative agreement on language that would prohibit a party from raising new issues that were not raised in the initial step.⁵⁸ It would not be appropriate to allow a "carve out" for information requests. And, in any event, Management's Section 1.D allows an arbitration matter to remain open for longer than a year if there is pending litigation over an information request.⁵⁹ Further, the Union may "join" a separate grievance over information requests into an underlying grievance: but it must file grievances.

⁵³ See *id.* at 8, Management Sections 3.A, G, and H.

⁵⁴ See *id.* at 9, Management Sections 6.C, D, and E.

⁵⁵ See Agency Position at 14.

⁵⁶ See Agency Comparison at 8.

⁵⁷ See *id.* at 7.

⁵⁸ See Agency Position at 14-15.

⁵⁹ See *id.* at 15; see Agency Compare at 7.

II. Union Position

The parties' existing article is simple and has served the parties well: indeed, there has been only one arbitration hearing within the past 5 years.⁶⁰ The Union believes that Management has proposed a needlessly complex system akin to the Federal Rules of Civil Procedure that all but requires legal training to adhere to and comprehend. The various limitations proposed by Management would impose a "heavy burden" upon the Union as it is often the moving party.⁶¹ This Panel has rejected arbitration articles that would create a complex process where the moving party has not demonstrated a need for said complexities.⁶²

Management also offered inherently contradictory language. Despite proposing that the Union provide information upfront concerning its grievance so that the parties could be fully informed, Management also proposed that it may raise arbitrability arguments at any point.⁶³ And, the Agency imposes improper limitations on an arbitrator's ability to interpret the CBA.⁶⁴

The Union opposes the Agency's proposed information-request limitations. It is the Union's experience that the Agency repeatedly fails to provide appropriate information in response to requests.⁶⁵ Moreover, Management's proposed scheme could result in multiple proceedings over an underlying grievance and related information requests. Such an approach is inefficient.

III. Conclusion

The Panel will impose a compromise article. The Agency provided information in the form of an affidavit and chart that shows numerous grievances lingering for months at a time prior to arbitration hearings.⁶⁶ Thus, there appears to be a problem under the parties' existing agreement when it comes to timely processing disputes. That the parties may have had only 1 arbitration hearing in 4 years is immaterial: the issue is that

⁶⁰ Union Position at 8.

⁶¹ See *id.* at 9-10.

⁶² See *id.* at 10 (citing *EPA and Nat'l Ass'n of Indep. Labor, Local 9*, 20 FSIP 033 at 19 (June 26, 2020)).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 11.

⁶⁶ See Agency Attachment H at 10-13.

the parties have trouble *getting to the hearing*. Thus, this matter differs from the Panel's decision in *EPA*, 20 FSIP 033, and it is appropriate to accept most of the Agency's proposals.

However, in an attempt to address concerns over late-raised issues, the Agency has proposed a scheme that could create more problems than solutions. Its proposed Section 3.H prohibits a filing party from raising certain issues during arbitration if they were not raised in the initial grievance.⁶⁷ But, in Management's 3.G, a non-filing party is not held to the same standard. Rather, they may raise a litany of issues "at any time during the arbitration process."⁶⁸ The Agency's proposed scheme could still allow late issues to arise, issues that could complicate the processing of an arbitration. By contrast, the Union's proposed Section 3.J states that "[i]ssues not raised by the Parties during the grievance procedure may not be raised by either Party or the Arbitrator."⁶⁹ Thus, the Union's language appears to more cleanly address the prohibition of late-filed issues.

Relatedly, the Agency's proposals for information requests could also create a contradictory arbitration scheme. As an initial matter, the Agency again relies primarily upon only one instance in which there was a "late" request, i.e., around 4-5 weeks prior to a hearing. Even were this event as significant as Management claims, the Agency's own proposed scheme under its Section 1.D permits arbitration to be postponed if there is ongoing litigation over information requests.⁷⁰ And, the Agency acknowledges that the parties have tentatively agreed to language that permits parties to "join" separate grievances; so, the Union could later add an information-request grievance to a separate disciplinary grievance, for example.⁷¹ Given the foregoing carve outs, it is not clear what benefit accrues from Management's Sections 1.G or 3.H that limits the Union's ability to raise information-request disputes during arbitration.⁷² To the contrary, all these sections may lead to confusion.

Based on the foregoing, the Panel will impose the following:

⁶⁷ See Agency Comparison at 8.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *id.* at 7.

⁷¹ See Agency Position at 15.

⁷² See Agency Comparison at 7, 8.

- Strike Management Sections 1.G and 3.H;⁷³
- Adopt the Union's Proposed Sections 3.G and 3.J;⁷⁴
- Accept the remainder of the Agency's proposals.

Article 45, Midterm Negotiations⁷⁵

I. Agency Position

The parties' dispute over this article revolves around two issues contained in three proposals. The first issue concerns Union requests for information made pursuant to 5 U.S.C. §7114. According to Management, and as already discussed, the Union has a "history" of delaying negotiations by making cumbersome, late-filed information requests.⁷⁶ Thus, Management proposes that information requests will delay negotiations only by "mutual agreement."

The second issue concerns whether parties are required to provide counter proposals prior to the first bargaining session. Management proposes that the parties should. Such an arrangement will lead to more productive and fulfilling negotiations. Additionally, as this article concerns mid-term negotiations, the obligation to provide counter proposals will usually fall primary upon the Agency. So, the Union's reluctance is misplaced.

II. Union Position

The Union proposes that proposals will be due 10 days after the Agency responds to a pending information request. The Union's position allows the Union to approach negotiations fully informed and facilitates good-faith negotiations as mandated by the Statute. Indeed, a failure to provide necessary information may result in a bad-faith bargaining ULP.⁷⁷ Moreover, the Union's proposals do not actually require Management to provide information within 10 days: it must only *respond* within 10 days. Creating a system where a third-party adjudicator could order

⁷³ See *id.*

⁷⁴ See *id.* at 8.

⁷⁵ See Agency Comparison at 10 (listing comparison between parties' final offers).

⁷⁶ See Agency Position at 16 (citation omitted).

⁷⁷ See Union Position at 13 (citation omitted).

the parties to resume negotiations at a later date is not efficient.

Regarding counter proposals, the Union contends that it is not an efficient system to require counter proposals before the parties have even discussed initial proposals. Moreover, an obligation to "pass[] proposals" by email prior to face-to-face negotiations is bad-faith bargaining.⁷⁸ The Union is "entitled" to "explain its proposals" before any submission of counter proposals.⁷⁹

III. Conclusion

The Panel will impose Management's proposal. The Agency has provided a scheme that will facilitate smooth and timely mid-term negotiations. Under its proposed scheme, negotiations may continue regardless of pending information requests and the parties will also be encouraged to formulate counter proposals sooner. These are laudable goals and the Panel should support them by adopting Management's language.

The Union's arguments largely revolve around the possibility of bad-faith ULP's. But they are just that: possibilities. For example, in *EOIR*, the FLRA did uphold an administrative law judge's conclusion that an agency committed a ULP by insisting on an exchange of proposals by email prior to face-to-face negotiations. However, in that case, the judge also found that the ground rules unambiguously called for face-to-face negotiation and, as such, the agency violated its bargaining obligations by insisting on email negotiations in lieu of in-person negotiations.⁸⁰ The FLRA did not, as the Union insinuates, create a per se rule that email negotiations prior to in-person negotiations is bad-faith bargaining. To the contrary, the analysis of *EOIR* turned on what was required under the contract. Moreover, although Management's proposal calls for an exchange of counter proposals before the first scheduled negotiation session, nothing in the language prohibits the parties from contacting each other beforehand to discuss proposals. Based on all the foregoing, Management's proposal is appropriate to adopt.

⁷⁸ *Id.* at 14 (citing *DOJ, EOIR, NY and AFGE, Local 286*, 61 FLRA 460, 466 (2006)(*EOIR*)).

⁷⁹ *Id.*

⁸⁰ See *EOIR*, 61 FLRA at 466.

Article 46, Telework⁸¹

I. Agency Position

The Agency acknowledges that the Telework Enhancement Act of 2010 (Telework Act) encourages telework in the Federal workplace. However, this law also instructs agencies to ensure that telework does not "diminish" an agency's operations.⁸² Consistent with this mandate, Management has offered proposals on several topics that concern telework:

- Management 4.B.5 allows supervisors to exclude an employee from telework when they have time and attendance issues.⁸³ Remote work makes it more difficult to monitor an employee in the workplace. So, employees with attendance challenges should not have free reign of telework.
- Management 4.C.1.(b) and 5.B.5(a)-(b) provide "concrete" factors to be used when evaluating whether to permit telework.⁸⁴ These factors balance the needs of the Agency's mission and the ability of an employee to actually perform remote work. The current agreement lacks guidance on this topic, which creates confusion in the workplace.⁸⁵
- Management 5.B.6⁸⁶ grants authority to subcomponents of the Agency to establish a variety of limitations on telework in order to ensure workplace needs are met. However, supervisors must still act consistent with the CBA. This language ensures that the ability to disapprove telework is not limited to an employee's immediate supervisor as the Union erroneously claims.⁸⁷ Management's approach is designed to maximize the needs of each "shop."
- Management 5.C establishes telework agreement durations of 1 year and requires employees to submit renewals 10 business days prior to expiration.⁸⁸ This language closely matches the status quo and provides all interested parties

⁸¹ See Agency Comparison at 11 (listing difference between parties' final offers).

⁸² Agency Position at 17 (quoting 5 U.S.C. § 6502(b)(1)).

⁸³ See Agency Comparison at 11.

⁸⁴ See *id.* at 11-12.

⁸⁵ See Agency Position at 17.

⁸⁶ Agency Comparison at 12.

⁸⁷ See Agency Position at 18.

⁸⁸ See Agency Comparison at 13.

with an opportunity to assess the effectiveness of telework for an individual employee. The Union has offered no "legitimate" criticism of this approach.⁸⁹

- Management 5.F grants supervisors latitude to adjust telework schedules due to "diminished" performance.⁹⁰ This language allows for an "open dialogue" between employees and supervisors.
- Management 6.D clarifies that telework agreements which permit more than 3 telework days per week are intended to be temporary in nature.⁹¹ The current agreement lacks guidance on this topic. Management's language will provide needed instruction for the workforce and ensure the mission of the Agency may be met.
- Finally, Management 6.I concerns locality pay and telework. It discourages employees from relocating outside of their assigned duty station, teleworking, and continuing to receive higher locality pay. Under 5 C.F.R. §531.605,⁹² an employee must report to their duty station at least twice per pay period.⁹³ The Agency's language discourages changing locations by reminding an employee that the Agency has the legal authority to recuperate overpayments of locality pay under 5 U.S.C. §5584.⁹⁴

⁸⁹ See Agency Position at 18.

⁹⁰ Agency Comparison at 13.

⁹¹ Agency Position at 19; see also Union Attachment at 51-52.

⁹² With respect to teleworking employees, 5 C.F.R.

§531.605(d)(1):

If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite. However, in the case of such an employee whose work location varies on a recurring basis, the employee need not work at least twice each biweekly pay period at the regular official worksite (where the employee's work activities are based) as long as the employee is regularly performing work within the locality pay area for that worksite.

⁹³ Agency Position at 20.

⁹⁴ Agency Comparison at 14. The cited statutory provision grants agencies discretion to waive, or not waive, overpayments

II. Union Position

The Union proposes to strike most of the Agency's language and offers substantive counter proposals for only two of the issues discussed above. Management's proposed framework is arbitrary and creates needless barriers to telework. This approach is puzzling in light of Management's response to the Covid-19 pandemic: it has authorized continued telework through June 2021.⁹⁵ The Panel has acknowledged that the Telework Act calls for the establishment of telework programs, and any changes thereto, to be negotiated.⁹⁶ The parties reached agreements on several topics regarding telework, yet the Agency's remaining proposals seek to undermine the agreed-upon framework altogether. Rather than creating a uniform policy on telework, the Agency's language will lead to "arbitrary, ongoing, constantly shifting eligibility requirements."⁹⁷ It is insufficient for Management to claim it "may" need flexibility in the future.

Addressing the individual Management proposals discussed above, the Union offers the following:

- The first four bullet points discussed above in Management's position create various "arbitrary" restrictions on telework.⁹⁸ Management's proposals create a litany of excuses that would allow supervisors to revoke or alter telework agreements. This approach undermines the parties' otherwise agreed-upon telework scheme by, for example, permitting Management to subject telework participation to undefined "certain conditions or expectations."⁹⁹ These kinds of limitations make telework "impractical."
- Management 5.C, which requires evaluations of telework agreements after 1 year, is unnecessary because other portions of the telework article address telework evaluations. Additionally, this proposed scheme will lead

of appropriated funds to employees when certain conditions are satisfied.

⁹⁵ See Union Position at 14.

⁹⁶ *Id.* at 15 (quoting *SSA, Office of Hearing Operations and NTEU, Chapter 224, 19 FSIP 023* at p. 4 (2019)(*SSA, OHO*)).

⁹⁷ *Id.*

⁹⁸ See *id.* at 15-16.

⁹⁹ *Id.* 16 (citing Management Proposal 5.B.5.b).

to grievances because it grants supervisors too much discretion to unilaterally terminate telework after a year.

- Management's language for 5.F, which permits telework restrictions for "diminished" performance, is arbitrary and conflicts with Article 15 of the agreement, "Performance Appraisal Program."¹⁰⁰ In this regard, the Agency's reliance upon "diminished performance" creates a new tier of performance to be used to evaluate workplace performance. Such a scheme has no place in the parties' article on telework.
- The Agency's language for Section 6.D concerning limitations on 3-day telework schemes is "arbitrary" and deprives supervisors of discretion to implement telework arrangements that could benefit the workplace.
- The Union opposes Management 6.I concerning locality pay because it is unnecessary. The Agency already has the authority to discipline employees who engage in fraud. The extra language, then, is superfluous.

III. Conclusion

The Panel will impose Management's proposal. Through their negotiations, the parties were able to reach agreement on numerous global aspects regarding telework, including "types of telework, eligibility criteria, approval procedures."¹⁰¹ But, disagreement remains over primarily granular aspects of telework that involve potential restrictions on telework. The current telework article in the parties' agreement contains numerous such restrictions.¹⁰² Management's proposals merely add to or clarify them. They do not create the seismic shift in the parties' telework scheme that the Union portrays. The parties and employees should already have an understanding that telework participation can be limited. And, evaluating whether an employee should continue to telework does not lead to the de facto creation of a new performance tier as the Union claims. Indeed, the Union offers no authority for such a proposition. Further, although no language in the current agreement references the Agency's ability to recuperate improper locality pay, the addition of such language makes sense because it does

¹⁰⁰ *Id.* at 17.

¹⁰¹ *Id.* at 15.

¹⁰² See Basic Negotiation Agreement, Article 46 at 10-11.

nothing more than place employees on notice about existing authority.

Based on all the foregoing, Management's language should be imposed. The Agency's language merely clarifies the existing scope of telework participation. As such, the Union's reliance upon SSA, OHO and its discussion about altering a telework program - which is not binding to begin with - is misplaced.

Article 48, Effective Date, Duration, and Termination¹⁰³

I. Agency Position

There are three main areas of disagreement in this article. The first issue concerns the duration of the agreement. Management proposes a duration of 7 years. For these limited negotiations alone, and just for the Agency's own bargaining team, the Agency has incurred bargaining costs of \$212,719.¹⁰⁴ As bargaining was limited to 7 articles, these costs will only increase when a larger portion of the agreement becomes open.

The next disputed topic involves bargaining aspects of the agreement when it is reopened (or not reopened). The Agency proposes that the CBA will rollover for 2 years should neither party choose to reopen it for successor negotiations during the applicable timeframe. Management argues that this approach promotes stability because it leaves the agreement in place for a longer period than 1 year should it expire. Relatedly, for any "reopener" negotiations that arise during the mid-point of this agreement (which will be limited to 2 articles), neither party will be able to reopen any articles that are a part of this FSIP dispute. The parties have already devoted significant resources to bargain these articles, it does not make financial sense to do so again so soon after the agreement is executed.

Finally, the Agency includes language involving ground rules for bargaining the reopening of the agreement. The Agency offers language concerning time limits for exchanging proposals and procedures to be followed in ground-rules negotiations.¹⁰⁵ Of particular significance, the Agency also proposes that either party may request FMCS assistance after 60 days of negotiations

¹⁰³ See Agency Comparison at 15-16 (describing differences between parties' proposals).

¹⁰⁴ Agency Position at 20.

¹⁰⁵ See Agency Comparison Document at 16.

and, thereafter, either party may seek Panel assistance.¹⁰⁶ The Agency notes that this last proposal is the only ground rules proposal the Union has specifically objected to.¹⁰⁷ Management believes its proposals are necessary to promote effective and efficient bargaining because it provides a defined framework for the parties to adhere to.

II. Union Position

With respect to duration, the Union maintains a term of 5 years is appropriate. This language reflects the parties' status quo and has served the parties well; indeed, the parties needed only 7 weeks of bargaining for this matter (including Panel ordered mediation). During negotiations over this article, the Agency provided no data concerning financial impact of a 5-year term. The Panel has ordered 7-year terms when agencies have been able to demonstrate a significant burden.¹⁰⁸ The Agency has not done so here.

With respect to reopening the agreement, the Union contends that the Agency has never provided sufficient rationale to justify a 2-year rollover period. Indeed, this Panel has approved of 1-year periods in other matters because it permitted the parties to more quickly address potential inefficiencies in an agreement.¹⁰⁹ Relatedly, the Union argues that it would be inefficient to bar the parties from bargaining over any of the articles that are part of this Panel dispute during mid-term reopener negotiations. Neither party can say with any confidence that there will be no difficulties that arise from these articles in the future. So, it makes little sense to prematurely foreclose negotiations on the articles.

Finally, the Union opposes Management's ground-rules proposal concerning FMCS and FSIP assistance. Although the Union agreed to some ground rules provisions during negotiations, it cannot accept the foregoing language. The Agency's proposed 60-day window for bargaining is an artificial construct and a potential indicator of bad-faith negotiations because good-faith

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* (noting Union would not agree to other proposals unless Agency struck its proposal concerning FMCS and Panel assistance).

¹⁰⁸ See Union Position at 19 (citations omitted).

¹⁰⁹ See *id.* at 20 (citations omitted).

bargaining calls for meeting as often as necessary to reach agreement.¹¹⁰

III. Conclusion

The Panel will impose a modified version of this article. The Panel will first impose Management's language for duration, i.e., a 7-year term. Management has provided data demonstrating that 7 months of bargaining for 7 articles resulted in over \$200,000 in costs for Management's bargaining team alone. Those costs could increase exponentially if larger portions of the agreement are subject to future negotiations. Accordingly, it is appropriate to adopt Management's position on this topic.

As to reopener language, the Panel accepts this language as well. The Agency argues a 2-year rollover period would promote stability because it would leave the agreement in place for a longer period of time. Such a timeframe would also ameliorate costs. These arguments are persuasive and support adoption of Management's position.

Finally, on ground rules, the Panel accepts the Agency's language with the exception of its proposal for FMCS/FSIP assistance, i.e., Section 5.D. As an initial matter, the Union has not contested any of Management's other proposals for this issue. Indeed, the Agency's (unrebutted) summary of the parties' disagreement for this topic states that the Union wished to strike all ground-rule proposals "unless the Agency agreed] to withdraw its proposal for Section 5.D."¹¹¹ The implication, then, being that the Union would accept all of Management's ground rule proposals were Management to drop its language for 5.D. The Panel does not believe that Section 5.D is necessary. The Agency has not claimed that, in the absence of contract language, it would be unable to seek FMCS or FSIP assistance when it believes the situation warrants it. Accordingly, Management's language for Section 5.D should be withdrawn. As that language is no more, and consistent with the Union's willingness to accept all other language, the rest of Management's ground-rules language should be imposed.

In summary, for Article 48, the Panel will accept all of Management's language with the exception of Section 5.D which should be withdrawn.¹¹²

¹¹⁰ See Union Position at 21 (citing 5 U.S.C. §7114(b)(3)).

¹¹¹ See Agency Comparison Document at 16 (emphasis added).

¹¹² See *id.* at 16.

ORDER

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



Mark A. Carter
FSIP Chairman

September 28, 2020
Washington, D.C.