United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of U.S. DEPARTMENT OF VETERAN AFFAIRS And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES	Case No. 20 FSIP 022

DECISION AND ORDER

BACKGROUND

This case, filed by the U.S. Department of Veterans Affairs (Agency, Management, or VA) on December 19, 2019, concerns over 40 articles in the parties' successor collective bargaining agreement. The mission of the Agency is to fulfill President Lincoln's promise "To care for him who shall have borne the battle, and for his widow, and his orphan" by serving and honoring the men and women who are America's veterans. There are three main components within the VA: the Veterans Health Administration (VHA), the Veterans Benefit Administration (VBA), and the National Cemetery Administration. The American Federation of Government Employees (Union or AFGE) represents over 270,000 bargaining-unit employees. It is the largest bargaining unit within the VA and in Federal-sector collective bargaining. The parties are governed by a 2011 national collective-bargaining agreement (national CBA) that expired in 2014 but is in a year-to-year rollover status.

BARGAINING HISTORY

The parties entered into a ground-rules agreement in April 2019, with the assistance of the Panel. They promptly turned to negotiations thereafter and exchanged proposals. From the end of May 2019 to the beginning of December 2019, the parties participated in approximately 60 bilateral-negotiation sessions that totaled nearly 480 hours of bargaining. During many of

these sessions, a Mediator from the Federal Mediation and Conciliation Services (FMCS) provided mediation assistance. From December 2nd to December 13th, the Mediator engaged the parties in 2 weeks of concentrated mediation.

Between December 2nd and 13th, the Agency submitted numerous revised articles to the Union. According to the Agency, many of these were revisions to proposals that were initially submitted in May 2019. The Agency requested any feedback or guidance from the Union by December 17. Having received no feedback, the Mediator released the parties on the 17th in Case No. 201911460059. Accordingly, on December 19, the Agency filed its request for Panel assistance.

ISSUES

In its request for assistance, the Agency identified 42 articles as remaining in dispute. In addition to the foregoing issues, there was some confusion as to whether the parties were at impasse over two Union-proposed articles on "Staffing" and "Phased Retirement." In its initial submission to the Panel, Management did not list either of these two articles in the list of disputed articles. The Union claimed the parties were not at an impasse over them, but the Agency disagreed. Instead, the Agency claimed it was simply seeking to strike these two articles. The Union also raised a number of challenges to the Panel's jurisdiction.

On March 18, 2020, the Panel voted to assert jurisdiction over all articles in dispute and to resolve this matter through a Written Submissions procedure. Given the volume of remaining issues, the Panel delegated authority to Chairman Mark Carter to conduct a conference call with the parties to discuss the path forward. This call was held on April 1st.[1]

On April 3, 2020, the Panel ordered the parties to provide the Panel with Written Submissions, supporting exhibits, and final offers by June 3, 2020. The parties were ordered to provide any rebuttal statements by July 5, 2020. After this April 3rd Order, the Union filed motions requesting to postpone the June 3rd due date because of pending information requests and, subsequently, to strike the Agency's June 3rd submission as

[1] During this call, the Union requested to postpone this matter until the "conclusion" of the Covid-19 pandemic. The Agency objected.

untimely. Chairman Carter, acting under his delegated authority, denied both motions.[2]

Preliminary Issues

I. Renewed Arguments

In its June 3rd submission, the Union raises several jurisdictional arguments that it had raised previously during the Panel's initial investigation. Specifically, the Union claims:

- Agency proposals stating that Management will agree only to adhere to "applicable law" waives the Union's right to bargain;[3]
- Dismissal is warranted due to pending Union Federal litigation concerning Management's decision to remove 9 articles from the CBA/bargaining due to alleged inconsistencies with Title 38 of the United States Code;[4]
- Multiple Agency proposals impermissibly waive the Union's ability to designate its chosen representative;[5]
- The Panel lacks authority to resolve any proposals that would require enforcement of President Trump's May 2018 Executive Orders concerning labor and personnel matters because the Union is pursuing negotiability appeals with the Federal Labor Relations Authority (FLRA);[6]
- "Many" Agency proposals are contrary to law and, therefore, are unenforceable;[7]

---

[2] The Union claims that, by denying its motion to postpone this matter due to pending information requests, the Panel "is fully aware that the Union has been denied the ability to present data supporting its positions." Union Position at 1 n.1. The Panel takes no position on the Union's contention.

[3] Union Position at 2-3.

[4] Union Position at 3. Title 38 covers the VA and its workforce.

[5] Union Position at 3-4.

[6] Union Position at 4-5.

[7] Union Position at 5.

The Union raised these arguments, or variations of them, previously in a brief submitted on January 27, 2020, as part of the Panel's investigation into jurisdiction. The Panel declined them when it asserted jurisdiction on March 18, 2020, and it will do so once again.

II. Pending Negotiability Appeals

The Union, in its rebuttal statement, claims that Management raised "twenty" arguments in its June 3rd Panel submission that alleged Union proposals interfere with various statutory management rights under 5 U.S.C. §7106(a).[8] As a result, the Union has now filed FLRA negotiability appeals over *each* of the 20 claims.[9] The Union avers that Management did not establish that any of the proposals Management challenged involve language that the FLRA has previously found to be negotiable. As such, the Union claims that the Panel must decline jurisdiction over these issues.

Per the FLRA's decision in *Commander, Carswell Air Force Base, Texas*, 31 FLRA 620 (1988)(*Carswell*), the Panel lacks the authority to assert jurisdiction over proposals that involve unresolved duty-to-bargain issues. However, under *Carswell*, the Panel may take jurisdiction when disputed proposals are based upon language that is "substantively identical" to proposals that have been found to be negotiable.

A review of the Agency's June 3rd Panel submission shows that it has indeed raised a number of management rights claims and other contrary-to-law objections. Until this submission, the Agency had not previously raised these issues with the Panel. Indeed, in a February 21, 2020, submission made during the Panel's investigation, the Agency stated that it "has not challenged the negotiability of *any* current [Union] proposal."[10] The Agency has not explained its seeming departure from this position.

More troublingly, many of the Agency's management rights and legal arguments are not fulsome ones. As will be discussed below, many of these arguments broadly allege that entire Union articles, or major portions of them, are contrary to various rights and/or laws. But, those arguments rarely identify the

---

[8] *See* Union Rebuttal at 4.

[9] *See* Union Rebuttal at 4.

[10] Agency Response to Union's Jurisdictional Position at 13, (Feb. 21, 2020) (emphasis in original).

specific language challenged or the specific legal theories involved. The FLRA's regulations for negotiability appeals place a burden upon agencies to actually identify challenged language and to provide specific legal theories. Indeed, in a recent appeal decision ruling against an agency, the FLRA excoriated that agency for failing to provide *any* arguments to support its claims of non-negotiability.[11] The Agency, then, finds itself in an odd position. Many of its proposals are based upon advancing principles of an effective and efficient government, yet many of its management rights and legal arguments fail to do the same. Or, as Member James Abbott adroitly noted in the foregoing case, "[m]achinations of this nature do not 'contribute[] to the effective conduct of public business,' or 'facilitate[] . . . the amicable settlement of disputes.'"[12]

In any event, the Union broadly requests that the Panel withdraw its jurisdiction over all 20 of the Agency's identified matters. This wholesale action is not warranted. After it issued *Carswell*, the FLRA clarified that Panel jurisdiction need not be withdrawn or declined in response to every potential jurisdictional challenge.[13] Instead, the Panel will discuss the issues, and appropriate conclusions, as warranted.

III. Stay Request

Citing pending litigation before a United States District Court in the District of Columbia Circuit concerning a constitutional challenge to the Presidential appointment of the current Panel Members, the Union requests that the Panel stay this matter until the conclusion of that litigation.[14] There is no expected date for a decision on any of these pending matters. Consequently, the Panel does not believe it would be appropriate to stay this matter due to this litigation. It is entirely possible that the court will rule against the Union on the

---

[11] *See AFGE, Local 3430 and U.S. Dep't of Health and Human Serv., Centers for Disease Control and Prevention, Nat'l Institute for Occupational Safety and Health, Morgantown, W.V.*, 71 FLRA 881, 886 (2020)(*AFGE, Local 3430*).

[12] *AFGE, Local 3430*, 71 FLRA at 886 (Concurring Opinion of Member Abbott).

[13] *See U.S. Dep't of the Interior, Bureau of Reclamation, Lower Colorado Region, Yuma, Arizona and NFFE, Local 1487*, 41 FLRA 3 (1991).

[14] *See* Union Rebuttal at 4 (citing NVAC v. FSIP, Case 1:20-cv-00837-CJN).

merits or dismiss the lawsuit altogether. Staying this dispute based upon speculation, then, would not be a productive use of the Panel's resources.

With the foregoing out of the way, the Panel now turns to addressing all 44 remaining articles.

CBA Duration

A. Agency Position

As an initial matter, the Agency provided no final offer for this article in its Panel briefings (this is one of 4 articles Management failed to provide). Its briefs are written in a manner to suggest that the Agency *does* have one, but there is none in the record. In its Order to the parties dated April 3, 2020, the Panel ordered both parties to provide their initial written arguments, exhibits, and final offers by June 3, 2020. Although the Agency provided a final-offer document, that document omits several articles without explanation (including "Duration"). When the Agency filed for assistance from the Panel in December 2019, it did include a final-offer document as an attachment. But this document only went through Article 16 and also omits "Duration." Moreover, the Agency has not claimed that the Panel should look to the December 2019 document for support of its position. Consequently, it is not entirely clear what precise language the Agency is proposing for this article.

In any event, it appears that Management has two primary points of contention. Those points involve: (1) requesting a 10-year duration period;[15] and (2) a dispute as to whether Management should have to pay to print copies of the CBA for the bargaining unit.[16]

The Agency argues that a 10-year period is warranted because of the time and costs associated with bargaining a new contract. The 2011 agreement took 8 years and $2 million to negotiate.[17] In this regard, the predecessor agreement was executed in 1997, expired 3 years later, and was not re-opened until 2003 when the Agency finally did so. History continues to repeat as the 2011 agreement was not re-opened – again by the

---

[15] *See* Agency Position at 5.

[16] *See* Agency Position at 5.

[17] Agency Position at 5 (citing "Memorandum from Assistant Secretary for Human Resources and Administration" at 1 (July 17, 2017)(ASH Memo)).

Agency – until 2017. This history shows that limiting negotiations to every 10 years allows the Agency and its workforce to stay focused on its mission. Contrary to the Union's claim, the Agency's headquarters does not have 19 officials dedicated to labor-relations matters.

On the topic of printing costs, Management claims that printing the 2011 agreement cost 2.3 million dollars, "with an additional $50,000 dollars/year for replenishment copies and distribution."[18] These costs should not continue to repeat.

B. Union Position

The Union proposes a 3-year term. The parties do not have a history of re-opening their CBA so frequently as to warrant concern that a 3 year-term would place the parties in perpetual negotiations. Moreover, a 10-year term would create an "old" contract that could lock the parties into place for a full decade regardless of whatever changes might arise in the Federal labor landscape. Management's insinuation of a distracted workforce ring hollow given that it has 19 dedicated labor-relations professionals on staff.[19] The Union also maintains that the Agency's $2 million figure for negotiations should be viewed with "skepticism" because it never provided an "accounting" for those figures.[20] And, the Agency saw 9 different Chief Negotiator changes during negotiations over the 2011 bargaining; so, the Agency is more than capable of causing its own bargaining delays. Management's proposed term is simply an attempt to "weaken" employee rights.

The Union believes it is appropriate to continue to have the Agency pay for costs associated with printing the CBA. Providing information to the workforce is actually more efficient than not providing it.

C. Conclusion

The Panel imposes a modified version of the Union's proposal. As alluded to earlier, there is only one set of proposals to resolve this issue in the record – the Union's. Accordingly, it is appropriate to use the Union's language as the basis for resolving the disagreement over this article.

---

[18] Agency Position at 5.

[19] *See* Union Position at 94 (citing https://www.va.gov/LMR/Staff_Directory.asp).

[20] Union Rebuttal at 49 n.146.

The main area of contention is the term of the agreement: the Union asks for the status quo, i.e., 3 years, and the Agency seeks to expand it, i.e., 10 years. This Panel has routinely imposed term durations of 7 years,[21] but it has yet to impose a 10-year term. Indeed, the Federal agency in *AFGE, Local 0033* requested such a term, but the Panel declined to adopt it. Instead, the Panel imposed a 7-year term.[22] If the Panel were inclined to grant such a term, the requesting party should have to provide sufficient evidence to demonstrate its appropriateness. Management has not done so here.

As with other duration disputes, the Agency provides arguments concerning costs, in this case a figure of $2 million for bargaining the existing contract. This figure arises from the 2017 VA ASH Memo. But, as the Union correctly notes, this memorandum does not provide any sort of cost breakdown or supporting data. And, curiously, the Agency did not provide a cost breakdown for *the current* negotiations that make up this dispute as other agencies routinely do. Management's data should not be ignored, but it is not as pivotal as Management portrays it to be.

On balance then, Management's position should not be accepted. But, neither is the Union's position acceptable to adopt. Although the parties have not often engaged in negotiations every 3 years, a 3-year term could create that possibility in the future. Such a possibility would strain the resources of the Agency. The Union has also not addressed recent Panel decisions imposing 7-year terms or why the Panel should depart from them. A 7-year term is most appropriate for resolution of this dispute.

The parties also disagree over whether the Agency should be responsible for costs associated with printing a CBA for the bargaining unit. The Union claims a critical document like the parties' agreement "should not be relegated to only a website."[23] But, the Union does not explain why such an arrangement would

---

[21] *See, e.g., EPA, Gulf Ecology Division and NAIL, Local 9*, 20 FSIP 033 (June 2020); *Army Corp of Engineers, Galveston District and AFGE, Local 0033*, 20 FSIP 019 (May 2020)(*AFGE, Local 0033*); *U.S. Dep't of Health and Human Servs., Indian Health Serv., Claremore Indian Hospital, Claremore, Oklahoma and AFGE, Local 3601*, 19 FSIP 031 (November 2019).

[22] *See AFGE, Local 0033*, 20 FSIP 019 at 25.

[23] Union Rebuttal at 50.

offend. To be sure, some employees may not have access to electronic communications. But, it also stands to reason that many employees *do* have such access. More importantly, the Union's members have access to the Union, which has the ability to provide its members with the contract in written, electronic or any other available format. Indeed, in the current climate of expanded telework (which is discussed in far greater detail below), it makes sense that many communications would occur digitally. As such, printing potentially thousands of superfluous lengthy documents would not be an efficient use of the Agency's resources.

Consistent with the above, the Union's language for "Duration" should be modified in Section 2 to state as follows:

> This Agreement shall remain in full force and effect for a period of **seven years**. It shall be automatically renewed for one year periods unless either party gives the other party notice of its intention to renegotiate this Agreement no less than sixty nor more than one hundred twenty days prior to its termination date. Negotiations shall begin no later than 30 days after these conditions have been met. If renegotiation of an Agreement is in progress but not completed upon the terminal date of this Agreement, this Agreement will be automatically extended until a new agreement is negotiated.[24]

In addition to this change, a new Section 6 should be added to the Union's language to address the printing issues. **This language should be included:**

> **Section 6**
>
> **The Agency shall not be responsible for printing this agreement.**

Article 1, Recognition and Coverage

---

[24] *See* Union Final Offer, Duration, Section 2 at 1. Section 2 also has language concerning the continuation of existing past practices and agreements. Elsewhere in this document, the Panel has rejected similar language located in other parts of the CBA. **Consistent with the foregoing, then, the final sentence of the Union's proposal in Section 2 will also be stricken.**

A. Agency Position[25]

Management's proposal outlines the scope of coverage of the CBA. But, its language also is intended to avoid defining the scope of various statutory rights.[26] The Agency's language further eliminates existing language that permits pre-decisional involvement (PDI). In this regard, Management contends that Executive Order 13,812, "Revocation of Executive Order Creating Labor-Management Forums" (2017) (Revocation Order) revokes the existence of collaborative labor forums and discourages PDI.[27] The Agency's language is not intended to waive any of the Union's rights; the Union may address any internal matters, such as designated points of contact, as it deems fit.[28]

B. Union Position

The Union proposes keeping "decades long" language in the CBA as this language simplifies the scope of coverage.[29] The Union is interested in receiving information about changes to the composition of the bargaining unit on a quarterly basis rather than a yearly basis so it can ensure that its unit remains appropriate. The Union is perturbed that, in Section 5, Management proposes striking language that unit petitions will be sent "only" to certain Union individuals.[30] This violates the Union's right to designate its chosen representative. Unlike Management's language, the Union's proposal does more than reiterate the Statute; it actually engages the parties in the process of collective bargaining.[31]

C. Conclusion

The Panel orders the adoption of Management's proposal. Management's proposal is intended to simplify coverage issues and nothing in the record supports a conclusion that it waives any of the Union's statutory rights. The Union has a concern that Management's Section 5 limits which Union representative will receive certain information. But, the language actually says that the information will go to the Union's national

---

25 Agency Final Offer at 1.
26 *See* Agency Position at 6-7.
27 Agency Position at 7.
28 *See* Agency Rebuttal at 7-8.
29 Union Position at 5.
30 Union Position at 7.
31 *See* Union Rebuttal at 7.

President or "his or her designee."[32] So, the Union still retains the ability to choose its representative. Finally, the Revocation Order is still in effect. This Order only specifically addresses labor forums. However, its import is clear: collaboration is discouraged. On balance, Management's proposal is most appropriate.

Article 2, Governing Laws and Regulations

A. Agency Position

As an initial matter, the Panel notes that the Agency's argument is full of references to its offer for this article. But, the Agency once again did not provide any language for Article 2 in its final offer document that was included in its written submissions to the Panel. The Agency did not explain this discrepancy in either its initial argument or its rebuttal statement. The Agency, however, did include a final offer for Article 2 as part of its exhibits when Management filed its initial request for Panel assistance *before* the Panel asserted jurisdiction.[33] But, the Agency did not explain if it is relying upon that exhibit or something else altogether.

On the merits, the Agency states that its "proposal" is intended to be effective and efficient by crystalizing one agreement. As such, it eliminates all existing agreements.[34] By contrast, the Union's proposal requires the parties to enshrine each and every existing agreement; this approach will only drain the Agency's resources as its employees must parse every single agreement to assess its impact upon the CBA. Management also proposes that any supplements be negotiated between the Agency's designee and the Union's President or its designee.[35]

B. Union Position

The Union is primarily interested in preserving the status quo. It reiterates governing authority and prohibits any waiver of statutory rights.[36] The Union's proposal also rejects the Agency's attempt to include a "zipper clause," which would prohibit bargaining over any matter not already covered in the contract. And, the Union's language agrees that the master

---

[32] Agency Final Offer at 1.
[33] *See* Panel Request for Assistance, Final Offer Exhibit at 2.
[34] Agency Position at 8.
[35] *See* Agency Position at 10.
[36] *See* Union Position at 8.

agreement supersedes all existing local supplemental agreements and "other agreements."[37] But, the Union does not believe that non-conflicting agreements should be terminated. The Agency's proposal is also inconsistent with procedures for statutory agency head review under 5 U.S.C. §7114(c).[38]

C. Conclusion

The Panel imposes a modified version of the Union's proposal. A robust analysis of this article is hampered by the Agency's failure to provide a definite final article. The Agency's arguments represent the existence of some sort of final offer. But, again, the Agency did not clarify this confusion in its submissions to the Panel. So, the Panel is left with attempting to guess what, if any, proposal is Management's final offer for Article 2. Thus, the Union's proposal – which *was* included in its June 3rd submission – should be used as the basis for resolving this dispute.

As to the Union's proposal, it is succinct and efficient. However, Section 3 of the proposal calls for any "prior benefits, practices and/or memoranda of understanding which were in effect on the effective date of this Agreement at any level [to] remain in effect unless superseded" by the CBA or the Statute.[39] To promote efficiency under one agreement, the Panel routinely imposes language that terminates existing agreements regardless of any perceived conflicts. The Panel should likewise take a similar approach in this dispute. Accordingly, the Panel will impose the below modified language for the Union's Article 2, Section 3 (new language in bold):

> Any prior benefits, practices and/or memoranda of understanding which were in effect on the effective date of this Agreement at any level shall **no longer** remain in effect.

Article 3, Labor Management Cooperation

A. Agency Position

The Agency proposes striking this existing article from the CBA. Article 3 effectuates collaboration and labor forums, topics that were eliminated by the Revocation Order. The

---

[37] Union Rebuttal at 7.
[38] *See* Union Position at 9.
[39] Union Final Offer, Article 2 at 1.

proposal also grants the Union additional official time independent of the CBA's designated article on this topic.[40] The Union's only data to defend the continued existence of partnerships are decades-old studies from prior administrations.[41] Management rejects the Union's claim that its data demonstrates that forums/partnerships provides a financial benefit to Management.

B. Union Position

The Union maintains that its proposal provides "tangible" benefits to the Agency's mission.[42] According to the Union, multiple studies demonstrate the success of partnerships.[43] As a result of collaborative efforts, the Union assisted the Agency with implementing several initiatives that benefited patient care and employee health.[44] The Union's proposal satisfies the Revocation Order because it provides a benefit to the taxpayer.

C. Conclusion

The Panel adopts Management's proposal. The Revocation Order is clear and unambiguous: agencies are to abolish labor forums. Although this Order does not specifically address PDI, it follows that they would be inconsistent with the policy goals of the Order.[45] The Union offers a number of studies to buttress forums and PDI, but many of them are decades old and do not appear to account for the Revocation Order. As such, Management's proposal should be adopted.

Article 4, Labor-Management Training

A. Agency Position[46]

The Agency proposes language that is more simplified than the current Article 4. The Agency's proposal provides the "flexibility to coordinate labor management training whenever

---

[40] *See* Agency Position at 11-12.
[41] *See* Agency Rebuttal at 9.
[42] Union Position at 10.
[43] Union Position at 10 (citations omitted).
[44] *See* Union Position at 11.
[45] In its rebuttal, the Union claims that the parties cannot be at impasse over the impact of the Revocation Order because the parties did not bargain it. *See* Union Rebuttal at 8. This ignores the fact that this dispute is doing precisely that.
[46] Agency Final Offer at 2.

[M]anagement and the Union agree the need exists, permits the use of [official] time when appropriate, and allows the [Agency] and the Union to share the costs of such training."[47] The Union's proposals burdens Management's operations because it provides the Union with the ability to sign off on joint labor-management operations and requires a wasteful expenditure of Management resources. Indeed, the Union's proposal grants the Union a "blank check" on official time.[48] Management would allow some level of cooperation, but the parties would be responsible for their own costs. This approach is also consistent with the Revocation Order. Joint trainings have provided the Agency's operations with no benefit. Finally, neither party is permitted to file grievances over this article.[49]

B. Union Position

The Union offers a modified version of the existing Article 4. Relying upon the studies discussed for Article 3, the Union claims that joint training provides the parties with tangible benefits. Thanks to Article 4, the parties created several joint trainings on various topics over the past several years.[50] So, it has been a success. The Union's language also does not include caps on official time because there is none under 5 U.S.C. §7131(d) (this section is discussed in greater detail in other articles that directly address official time). Moreover, the Agency has not demonstrated why Article 4 should be excluded from the grievance procedure.

C. Conclusion

The Panel imposes the Agency's proposal. The Union's arguments for adoption turn largely on the same studies it provided for Article 3, which the Panel rejected. Further, the Agency's offer does allow for mutually agreed upon training to improve the parties' relationship. So, the Agency's language meets some of the Union's interests.

Management's proposed Section 2 – which prohibits grievances for violations of Article 4 – is also challenged by the Union. As discussed below in greater detail, in *AFGE v. FLRA*, 712 F.2d 640 (D.C. Cir. 1983) (AFGE), the United States Court of Appeals for the District of Columbia held that any

---

47 Agency Position at 12.
48 Agency Position at 13-14.
49 *See* Agency Final Offer at 2.
50 *See* Union Position at 12.

proponent of a proposed grievance exclusion must "establish convincingly" in a "particular setting" that the exclusion is "reasonable."[51] The Agency has met this burden. Under its language, Management has discretion to make decisions concerning training. Given this discretion, it is not clear what the Union could challenge via grievances. Based on all the foregoing, Management's language is the most appropriate to adopt.

Article 5, Labor-Management Committee

A. Agency Position

The Agency agrees to allow language that would permit the parties, by mutual agreement, to establish a joint labor-management committee at the national level with costs paid by each party.[52] In 2019 alone, and for just two committee meetings, the Agency had to pay "travel to Washington, D.C, per diem, and 2,960 hours of official time for 37 Union officials at a cost of approximately $129,796."[53] And, 24 Management officials were taken away from their other duties to participate. Again, the Union's reliance upon its studies should be rejected.

B. Union Position

The Union, citing its previously discussed studies, again claims the existence of this committee provides a tangible benefit to the workforce.[54] The committee provides a useful forum for the exchange of ideas that benefits the Agency's mission. It also claims that the Agency's cited cost data concerns a completely different type of committee than the one envisioned under Article 5.[55]

C. Conclusion

The Panel adopts Management's proposal. Again, this dispute largely turns on the Union's evidence concerning the supposed benefits of various collaborative-type meetings. And, again, the Panel does not believe this evidence is persuasive. Accordingly, the Union's position should be rejected.

---

51 *AFGE*, 712 F.2d at 649.
52 *See* Agency Final Offer at 2.
53 Agency Position at 15.
54 Union Position at 12-13.
55 *See* Union Rebuttal at 9.

Article 7, Quality Programs

A. Agency Position

The Agency proposes striking this article in its entirety. The article allows the Union to participate in the development of Agency polices.[56] The article burdens the Agency's operations, creates undue levels of interference, and is inconsistent with the principals of the Revocation Order. The language of the article places a burden on the Union to ensure the successful implementation of Agency programs. This approach, according to Management, is just another backdoor for more official time. The Union wants more than a partnership; it wants "veto authority."[57]

B. Union Position

The Union proposes a modified version of the existing Article 7. The Government Accountability Office (GAO) issued a report in 2015 that criticized the Agency's efforts in establishing quality care and recognized that the Agency requires assistance.[58] The Agency's proposed strike of this article deprives employees, who are on the front line of providing veteran care, of their voice. The Union also claims that Management has alleged that the Union's proposal interferes with management rights and, as such, the Union has filed the above-referenced negotiability appeal.[59]

C. Conclusion

The Panel imposes Management's proposal. The Union makes much of its avowed importance to the policy crafting process, and relies heavily upon a 2015 GAO report that highlights various Agency deficiencies. Of course, the Union's Article 7 existed *when this report issued.* Thus, the Union's claim that only its Article 7 can alleviate the concerns identified in the report are not well taken. Management's proposal, then, is most appropriate.[60]

---

[56] *See* Union Final Offer, Article 7 at 1-2.

[57] Agency Rebuttal at 11.

[58] Union Position at 14 (citation omitted).

[59] *See* Union Rebuttal at 9.

[60] Based on this conclusion, it is unnecessary to address any potential management right argument.

Article 9, Classification[61]

A. Agency Position

The Agency's proposal eliminates burdensome language from the existing CBA but ensures classification decisions are made in accordance with "applicable law."[62] Management will provide position descriptions to employees when they are assigned to a new position and describe their various duties and responsibilities to them. The Union's proposal "restricts" Management's ability to assign work, determine the skills necessary for positions, and other personnel decisions.[63] And, as the Statute excludes classification matters from the grievance procedure, the Agency's proposal prohibits grievances when a position "change does not result in a reduction of pay or grade."[64]

B. Union Position

The Union offers a modified version of Article 9. Its Section 1 permits classification-related matters to be subject to the grievance procedure. The Agency has not satisfied its burden to demonstrate why this topic should be removed from that procedure.[65] Additionally, while the Statute may limit the Union's ability to grieve classification issues, the Union believes it is critical to retain language permitting for internal classification appeals.[66] The Union's proposal also outlines the processes through which "changes will be discussed, reviewed and amended, as well as standards for classification, the appeals process and the process for establishing new positions."[67] These "provisions" reflect what is required under an Agency handbook. The Union also argues that Management's reference to "restrictions" caused by the Union's proposal is a declaration of non-negotiability. So, the Union has filed a negotiability appeal.[68]

---

[61] Classification refers to "the analysis and identification of a position and placing it in a class under the position-classification plan established by OPM under chapter 51 of title 5, United States Code." 5 C.F.R. §511.101(c).

[62] Agency Position at 16-17.

[63] Agency Position at 17.

[64] Agency Position at 17 (citing 5 U.S.C. §7121(c)(5)).

[65] *See* Union Position at 15.

[66] *See* Union Rebuttal at 9-10.

[67] Union Position at 15.

[68] *See* Union Rebuttal at 9.

C. Conclusion

The Panel adopts Management's proposal. Under the Statute, parties are prohibited from grieving "the classification of any position which does not result in the reduction in grade or pay of an employee."[69] And, as noted, the term "classification" refers to placement of a position within an OPM-defined classification plan. As can be extrapolated from the foregoing, the classification process is one that pays heavy deference to managerial decision making. Indeed, interpreting the language of the Statute, the FLRA has long held that Congress and OPM have excluded a wide swath of classification-related decisions from the grievance procedure.[70]

With this background in mind, it is appropriate to accept Management's language.[71] The Agency's proposal calls primarily for the Agency to only provide employees with accurate position descriptions. This, of course, would effectuate the policies of an informed workplace that is familiar with what is expected of them. An informed workplace can, in turn, lead to less confusion and litigation over how to further the interests of the Agency. Such an environment would undoubtedly contribute to effective and efficient government operations. Further, under Section D of Management's proposals, "[c]lassifications which do not result in the reduction in grade or pay of an employee cannot be grieved."[72] This language accurately reflects the language of 5 U.S.C. §7121(c)(5) and, as such, is appropriate for inclusion.

The Union's proposal, by contrast, invites more confusion and complexity. For example, Section 1 of the Union's proposal calls for the Agency to "engage" the Union in the classification process, a process largely driven by Management prerogatives.[73] Additionally, the Union proposes new language that calls for bad-faith decisions involving inaccurate position descriptions to qualify for "liquidated damages."[74] In addition to being

---

[69] 5 U.S.C. §7121(c)(5).

[70] *See, e.g., U.S. Small Business Admin. and AFGE, Local 3841*, 70 FLRA 729, 730 (2018)(*SBA*).

[71] *See* Agency Final Offer at 2-3.

[72] Agency Final Offer at 3.

[73] *See* Union Final Offer, Article 9 at 1.

[74] *See* Union Final Offer, Article 9 at 1.

potentially illegal,[75] it is not clear why the Union now needs such a requirement in its contract. These are but a few of the examples that demonstrates the burdensome nature of the Union's proposal. Accordingly, it is appropriate to reject the Union's language and accept Management's proposal in full.[76]

Article 10, Competence

A. Agency Position

This article concerns when the Agency assesses what competencies are necessary to perform the duties of Agency positions. Management proposes retaining only the following existing language from Article 10 of the CBA:

> Competencies established for an employee's position shall be in writing and communicated to the employee when the employee enters a position or when a new competency is established for the employee's position.[77]

The Agency argues that only this limited language is appropriate because the remainder of the existing CBA article "imposes restrictions on the [Agency's] authority to establish the criteria to determine and assess an employee's competence."[78] Additionally, language that calls for the Agency to negotiate over the methods it uses to assess an employee's competence to do a particular job affects Management's right to assign work and direct employees.[79] Moreover, appraisals and competence assessments are an "examination" of an employee.[80] Examinations are one of the topics excluded from the grievance procedure pursuant to 5 U.S.C. §7121(c)(4).

---

[75] Under the doctrine of sovereign immunity, the Federal government cannot be held liable for a financial loss in the absence of express Congressional language that authorizes financial liability. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons and AFGE, Local 1302, Council of Prisons Local,* 65 FLRA 76, 77 (2010)(citations omitted). The Union has identified no such language in this instance.

[76] As none of the above analysis turns on statutory management rights, it is unnecessary to address the Union's claim concerning its negotiability appeal.

[77] Agency Position at 18; Agency Final Offer at 3.

[78] Agency Position at 18.

[79] Agency Position at 18-19 (citation omitted).

[80] Agency Position at 19.

B. Union Position

The Union's proposal provides the Agency "with maximum flexibility in establishing competencies, and offers modest procedures and appropriate arrangements regarding training, notice, scope, and usage."[81] The Agency's proposal eliminates training requirements; that action is inconsistent with the Government Employees Training Act, 5 USC Chapter 41 (Training Act).[82] The Union rejects the Agency's claim that the Union's proposal involves matters of "examination." Also, the Union again notes that it has filed a negotiability appeal in response to the Agency's management rights claim.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. As can be seen throughout the Union's proposal, the current CBA places certain requirements upon Management within the context of assessing competencies. For example, Management *must* train employees in various related aspects, prohibits supervisors from using certain employee information in a "punitive" manner, and prohibits the scope of competencies from "exceeding" certain criteria.[83] It is clear from this language that supervisors and managers must adhere to rigid requirements that could potentially impede the Agency's ability to quickly assess the competencies of certain positions. This problem alone is a sufficient basis for jettisoning the majority of Article 10.

As the Agency also accurately notes, proposed language "that establish[es] criteria for performance evaluations affect[s] management's rights to direct employees and assign work."[84] So, from a legal standpoint, the Union's proposals may also be problematic. Each of the foregoing two rationales, together or apart, serve as justification for rejecting the majority of the Union's language for Article 10. None of the Union's offered rationales provide a different conclusion. For example, its reliance on the Training Act is unsupported as it cites no language from this law, or applicable precedent, that outlines its actual requirements.

---

[81] Union Position at 15.

[82] Union Position at 16.

[83] *See* Union Final Offer, Article 10.

[84] *See, e.g., AFGE, Council of Locals 163 and U.S. Dep't of Defense,* 52 FLRA 1063, 1065 (1997) (citations omitted).

Notwithstanding the foregoing, language concerning grievances should be added to Article 10. Management makes a broad claim that, essentially, any grievance involving competency constitutes an employee "examination" and should therefore be excluded from the grievance procedure pursuant to 5 U.S.C. §7121(c)(4) which prohibits such grievances. Despite raising this claim twice in its briefing, the Agency offered no authority to support this proposition.[85] As already discussed, a party seeking to exclude a topic from a grievance procedure must establish their position is "reasonable." Given the lack of precedent, it is difficult to conclude that Management's position can be taken at face value. That being said, it is appropriate to remind the parties that there are indeed limitations on grievances. Accordingly, the Panel adds the following bolded language to Article 10:

> **Nothing in this language should be interpreted to prohibit grievances unless those grievances are inconsistent with this Agreement, 5 U.S.C. §7121(c)(4) or other applicable law.**

Article 11, Contracting Out

A. Agency Position

The Agency's full language for this proposal reads:

> The [Agency] may contract out any work it deems appropriate to carry out its mission efficiently and effectively. The [Agency] will fulfill its bargaining obligations as required by applicable law or government wide rule or regulation.[86]

Management argues that the existing Article 11 should be simplified in order to avoid burdening Management's operations. And, the Union's language interferes with the Agency's statutory right "to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted."[87] The contracting process is governed by other Federal laws, rules, and regulations, so it is unnecessary to include a litany of extra-contractual requirements.[88]

---

85 *See* Agency Position at 18; Agency Rebuttal at 12.
86 Agency Final Offer at 3.
87 Agency Position at 19 (citing 5 U.S.C. §7106(a)(2)(B)).
88 *See* Agency Position at 19 (citations omitted).

Management, however, agrees that it will adhere to any legal bargaining obligations that arise during the life of the CBA.

B. Union Position

The Union proposes a modified version of Article 11. The proposal is intended to provide procedures and appropriate arrangements should the Congressional moratorium on Office of Management Budget Circular A-76 (OMB Circular or Circular)[89] ever be lifted. The Agency's position that the parties will simply bargain in the future is inefficient and will inhibit Management's ability to quickly effectuate contracting-based decisions. So, for example, under the Union's proposal the Agency must provide the Union with "periodic" briefings concerning contracting decisions.[90] Another example is that the Agency must take steps to ensure that employees impacted by contracting decisions will still have positions made available to them.[91] Requiring ad hoc bargaining over these types of matters will inhibit the Agency's mission to provide patient care. And, as with other preceding articles, the Union has filed a negotiability appeal based upon the Agency's management rights representations. Finally, the Union argues that the Agency's proposal impermissibly delegates which level of Union recognition bargaining must occur at, i.e., national versus local.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. Much of the disagreement over this article turns on statutory management rights and the OMB Circular. As to the former, the Agency has the right to contract out and determine personnel; but that right is subject to the Union's ability to bargain procedures and appropriate arrangements.[92]

Regarding OMB Circular A-76, it is a Federal policy for managing public-private competitions to perform functions of the federal government.[93] The Circular states that, whenever possible, and to achieve greater efficiency and productivity,

---

[89] The Circular, and its status, is discussed in greater detail below.

[90] *See* Union Final Offer, Article 11, Section 1.

[91] *See* Union Final Offer, Article 11, Section 4.

[92] *See* 5 U.S.C. §7106(a)(2)(B); §7106(b)(2) and (3).

[93] Consolidated Appropriations Act 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2494 (2019).

the Federal government should conduct competitions between public agencies and the private sector to determine who should perform the work.[94] There is a current Congressional moratorium on the Circular based on a debate over what functions the Federal government should perform compared to what functions the private sector should perform.[95] In this dispute, the parties appear to be gearing their respective positions as to what should happen if and when this moratorium ends.

Although the parties disagree over the language that should be included within Article 11, neither party disputes that, depending upon the circumstances, the Union may have applicable bargaining rights. The Union's language includes a litany of requirements that it claims will quickly and effectively effectuate the Agency's mission, particularly in the event the moratorium on the Circular terminates. Yet, that claim appears to be based more upon speculation than anything else. That is, there is no reason to believe that the Union's specific language will immediately ameliorate any contracting-based decisions. But, on the other hand, the Agency's language explicitly establishes that the Agency must satisfy *all* bargaining duties when acting to contract out. So, Management's language provides an appropriate balance between the needs of the parties.

One concern the Union does have is that the Agency's language blurs the line for levels of recognition by delegating who must bargain over what matters. In order to address this concern, the Panel adds language to the Management's proposal that clarifies the language is not intended to waive any of the Union's rights under law. Thus, the following bolded language should be added to Management's proposal:

> The [Agency] may contract out any work it deems appropriate to carry out its mission efficiently and effectively. The [Agency] will fulfill its bargaining obligations as required by applicable law or government wide rule or regulation. **The Union retains all rights available to it under applicable law.**

Article 12, Details and Temporary Promotions

A. Agency Position[96]

---

[94] *Id.*

[95] *Id.*

[96] Agency Final Offer at 3.

The Agency's proposal defines "details" and "temporary promotions;" it also gives Management broad flexibility in deciding how the foregoing will be accomplished. The proposal also prohibits the Union from grieving either decision. The Union's proposal creates a system that is far too cumbersome and rigid, requires extensive bargaining, and generates needless litigation.[97] Management's proposal, then, should be adopted.

B. Union Position

The Union claims the parties never discussed the Agency's proposal and, in any event, the Agency never established why the Union's proposal is an onerous one. Management's proposal would deprive the Union of any ability to challenge improper Agency actions. The Agency has offered no evidence to support such a broad approach.

C. Conclusion

The Panel adopts a modified version of the Agency's proposal. Management's proposal offers an effective and efficient method of facilitating the fulfillment of workplace positions as necessary. This proposed process allows the Agency's mission to continue with minimal interference, which acts as a boon to the veterans of the United States military who avail themselves of the Agency's services. Nevertheless, Section 2.B and C would prohibit Union-filed grievances even though Management's Section 2.A acknowledges the Agency's obligations to adhere to all applicable laws.[98] Under Management's proposed approach, were the Management to fail to adhere to said law, the Union could conceivably lack the option to challenge that failure. **Accordingly, Management's proposed Sections 2.B and C should be stricken in their entirety, but the rest of its language will be imposed.**

Article 13, Reassignment, Shift Changes, and Relocations

A. Union Position

The Agency currently has 49,000 vacancies, an environment that has left employees feeling abandoned.[99] The Union's proposal does nothing more than establish commonsense procedures

---

[97] *See* Agency Position at 20-21.

[98] *See* Agency Final Offer at 3.

[99] Union Position at 18.

to be followed in filling those vacancies; it does "not seek to impinge on management rights by setting staffing and hours."[100] Management's proposed Section 1.B. is contrary to law because it "requires the [U]nion to agree to a matter being excluded under 38 U.S.C. 7422, when only the Secretary or designees can make such decisions."[101] The Union has included language in its proposal about locality pay because employees are entitled to their rightful salary.[102] Finally, as a result of Management's reliance upon management rights in its initial argument (discussed below), the Union has filed a negotiability appeal.

B. Agency Position

The Agency offers a modified version of the existing language that begin with a straightforward definition of "reassignment."[103] By contrast, the Union's language requires "burdensome documentation to make a simple reassignment, to respond to workload requirements with short term staffing, and even to accommodate an employee's own request."[104] Relying upon factors like seniority and volunteers "usurps managers' discretion to determine who is the right person for which job."[105] Additionally, the Union's cited 49,000 figure is "disingenuous;" only 6,000 of those vacancies are actually funded.[106] The Agency is also concerned about Union language that would permit permanent remote workers the ability to claim the locality pay of the locality of the duty station as opposed to that employee's remote location. Employees should not be permitted a windfall. And, Management opposes any language concerning collaboration due to the Revocation Order.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. As with several other articles, this is another instance in which the Union has claimed that its language is the only manner in which a grave concern – here, the number of vacancies – may be mitigated. But, once again, this appears to be a situation in which that concern arose while some form of the Union's language was already in place. These circumstances

---

100 Union Position at 18.
101 Union Position at 18.
102 Union Rebuttal at 11-12.
103 Agency Final Offer at 3-4.
104 Agency Position at 22.
105 Agency Position at 22.
106 Agency Rebuttal at 13-14.

bring to mind the old adage, "who made who?" It is not clear. As such, the Union's insinuation that its language is the *only* way to effectuate properly the purpose of the Agency's mission is unsubstantiated. Indeed, as the Agency's unrebutted claim demonstrates, the Union's contention that 49,000 vacant positions exist is an overinflated one.

The Union offers new language concerning remote employees, and apparently does so in large part to address the salary of full-time remote employees.[107] The Agency's language does not specifically address this topic but it does address relocation expenses in its Section 4.[108] This language can be modified slightly to address the Union's concern as follows (new language in bold):

> Section 4 - Relocation **and Remote** Expenses
>
> Payment of relocation expenses **and expenses for remote employees are** governed by the Federal Travel Regulations **and applicable law**.

The Union also objects to language in Management's Section 1.B that references 38 U.S.C. §7422.[109] Under 38 U.S.C. §7421, the Secretary for the Department of Veterans of Affairs has the authority to issue regulations for certain Title 38 employees[110] concerning their conditions of employment. However, pursuant to 38 U.S.C. §7422(b) and (d), this authority is subject to bargaining obligations under Chapter 71 of Title 5, *i.e.*, the Federal Service Labor Management Relations Statute (Statute), *unless* the Secretary concludes a bargaining topic touches upon a matter of "professional conduct or competence." The phrase "professional conduct or competence" is defined to include "direct patient care."[111] Stated differently, the Secretary can conclude that a matter is excluded from statutory collective bargaining obligations because it concerns "direct patient care." Under §7422, only the United States Court of Appeals for the District of Columbia Circuit has the authority to review the

---

107 *See* Union Final Offer, Article 13 at 4-8.

108 Agency Final Offer at 4.

109 *See* Agency Final Offer at 4.

110 As discussed previously, "Title 38 employees" refers to a group of medical-based employees that work for the Department of Veteran Affairs and, as such, are largely governed by a framework established by Title 38 of the U.S. Code. *See* 38 U.S.C. §7421(b).

111 38 U.S.C. §7422(c)(1).

merits of the Secretary's decision to exclude a topic from negotiations.[112]

The above statutory scheme exists regardless of what a contract may state. Indeed, as its plain language makes clear, this law supersedes contract so long as certain conditions are satisfied. In another recent CBA dispute involving a national VA union, the Panel declined to include language involving §7422 determinations because of this section's independent status.[113] **Consistent with this approach, the Panel will strike Management's Section 1.B.** In doing so, however, the Panel emphasizes that it is placing no limitation on the Agency's authority under §7422 or is otherwise diminishing the rights that flow from this statute in specific or Title 38 in general.

Article 14, Discipline

A. Agency Position

The Agency proposes a simplified article for the topic of discipline that better balances the needs of the Agency, veterans, the taxpayers, and the Agency's workforce. To that end, the Agency's proposal embraces the purpose and policy behind the Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act).[114] This law – discussed in greater detail below – was designed to allow the Agency to quickly and effectively process certain disciplinary actions so that the Agency may focus its resources on its vital mission. In addition to the Accountability Act, Management also relies upon the principles of Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (Removal Order). In particular, Section 4(b)(iii) of this Order calls for agencies to disavow the concept of "progressive discipline." The Agency has done just that.[115]

According to the Merit Systems Protection Board's (MSPB) own research, 88% of Federal agency supervisors agree that "fear of employee or Union retaliation, byzantine disciplinary

---

112 38 U.S.C. §7422(e).

113 *See U.S. Dep't of Veterans Affairs and NFFE*, 19 FSIP 024 at 4-5 (2019).

114 38 U.S.C. §714, et. seq.

115 Agency Position at 24; *see also* Agency Final Offer, Article 14, Section 1.C at 4 (stating that Agency is not required to use progressive discipline).

procedures, multiple appeals processes, and lack of support . . . prevented [F]ederal employees whose misconduct warranted disciplinary action or removal from their position from ever being disciplined or removed from their position."[116] And, independent research conducted by the GAO shows that only roughly 1% of the federal workforce is disciplined per year.[117] These figures are borne out by the experience of the Agency's own supervisory workforce. The bottom line is that, under the existing CBA, the Agency cannot effectively discipline its workforce: that is one status quo that should end.

Consistent with the foregoing, the Agency offers a number of revisions to the existing Article 14 that are intended to simplify and expedite the discipline process. For example, its proposal outlines an abbreviated timeline for both disciplinary and adverse actions.[118] Its proposal also delineates and defines discipline for purposes of Title 5, Title 38, and Title 38 hybrid employees. These definitions will provide supervisors with a clearer understanding of which disciplinary procedures apply to the affected employee. For example, in its Section 2, Management clarifies the standard of proof to be used in proving disciplinary actions, e.g., "substantial evidence" for Title 38 employees.[119] The Agency's language, in alignment with the Accountability Act and Removal Order, also prohibits grievances involving removals.[120]

B. <u>Union Position</u>

The Union argues for a modified version of the status quo that will still grant bargaining-unit employees to a discipline article that is robust *and* effective. For example, it would continue with the concept of progressive discipline, as agencies are permitted to use it if they wish; indeed, one of the

---

[116] Agency Position at 27 (citing Addressing Misconduct in the Federal Civil Service (December 2016)) (available at https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1363799&version=1369157&application=ACROBAT).

[117] Agency Position at 25 (citing "Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct," GAO-18-48 (July 2018) (available at https://www.gao.gov/products/GAO-18-48)).

[118] *See* Agency Final Offer at 5-7.

[119] Agency Final Offer at 4-5.

[120] Agency Final Offer, Article 14, Section 4.6 at 6.

Agency's own handbooks promotes that concept.[121] Even with the CBA in place, the Agency has seen an increase of firings by 60% thanks to the Accountability Act.[122] The Agency has a "shameful track-record" of conducting investigations; so the Union's language is necessary in order to enshrine various procedural protections.[123] The Union also wishes to maintain "Sections 7, 8, and 9 establishing how admonishments, adverse actions and suspensions and reprimands for Title 5 and Hybrid employees and separately, actions for Title 38 will be processed."[124] To protect employees, the Union also proposes staying suspensions of 14 days or less that may be taken to arbitration.[125]

Management has also failed to demonstrate the necessity of excluding removals from the grievance procedure. In the Union's view, the Agency's proposed exclusion is inconsistent with the Accountability Act because it states the requirements of the Act applies if a covered employee elects to pursue a grievance via a collective bargaining agreement procedure.[126] This language indicates that grievances concerning removals, then, are consistent with the Accountability Act. Moreover, the Agency has repeatedly lauded its ability to more effectively terminate employees from the VA work force thanks to the Accountability Act.[127] These boasts are inconsistent with the idea that removals "must" be excluded from the grievance procedure.

The Union is opposed to the Agency's proposal because it is premised upon broad misstatements and inaccurate information. The Union's own experience with the Accountability Act is that the Agency has yet to appeal any of the Act-related arbitrations that it has lost.[128] Were arbitration awards completely and

---

[121] *See* Union Position at 19 (citation omitted). The Union also notes that, based upon the Agency's claims, it has filed a negotiability appeal for Article 14 as well.

[122] Union Position at 19 (citation omitted).

[123] Union Position at 20.

[124] Union Position at 20-21. The Union also claims that Management's Panel submission included new language on this issue and, as such, the parties are not at impasse over it. *See* Union Rebuttal at 12.

[125] *See* Union Rebuttal at 13.

[126] *See* Union Position at 23.

[127] *See* Union Rebuttal at 12-13 (citing https://federalnewsnetwork.com/veterans-affairs/2018/03/under-new-accountability-act-va-employees-fear-onemistake-will-cost-them-their-jobs/).

[128] *See* Union Rebuttal at 14.

routinely inconsistent with the Accountability Act, as the Agency claims, the Agency would have had the ability to seek independent review. That the Agency routinely declines to do so says something about the merits, or lack thereof, of the Agency's position. Indeed, the Union repeatedly prevails in various discipline grievances.[129]

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. In the context of this dispute, the engine of discipline is driven by two pistons: the Accountability Act and the Removal Order.

The Accountability Act creates a unique structure of review for the Agency independent of grievance arbitration that is intended to balance the needs of the Agency, the taxpayer, veterans, and the VA workforce.[130] Congress enacted this law to permit the Agency to effectively and efficiently remove, demote, or suspend an employee for performance or misconduct issues and to grant those employees limited but expedited review with the MSPB.[131] This scheme requires a decision to be completed through the appeals process within six months; by contrast, arbitration can take upwards of 18 months to resolve.[132] Further, administrative law judges must be deferential to the Agency's decisions so long as they are supported by substantial evidence. And, more importantly to the universe of Federal-sector collective bargaining, Congress stated that this Act would "supersede" any inconsistent procedures in a collective bargaining agreement.[133]

As to the Removal Order, the Panel has recognized that it and two other accompanying Orders serve as important public policy. Section 3 of the Removal Order calls for Federal agencies to exclude removal grievances from a grievance procedure whenever "reasonable in view of the particular circumstances."[134] Yet, the Panel has recognized the significance of Federal court precedent concerning limitations on proposed grievance exclusions. In this regard, the United States Court of Appeals for the District of Columbia has concluded that a

---

129 *See* Union Rebuttal at 13.
130 *See* Agency Position at 59 (38 U.S.C. §714, et. seq).
131 *See* 38 U.S.C. §714(a)(1).
132 Agency Position at 60-61.
133 *See* 38 U.S.C. §714(c)(1)(D).
134 Executive Order 13,839, Section 3.

proponent of grievance exclusion must "establish convincingly" in a "particular setting" that this position is the "more reasonable one."[135] The Panel has harmonized this holding with the aforementioned language of the Removal Order by stating, in disputes before it, that the policies of the Removal Order may serve as circumstances that support excluding the topics covered by the Order.

It is appropriate to conclude that the Agency's proposal is largely responsive to the foregoing principles. The Agency's language provides a clear and concise roadmap for all interested parties to navigate the disciplinary process. It sets forth defined procedures and timelines. The language also leaves open the option for relying upon progressive discipline, but does not require it. This approach is consistent with FLRA case law and Panel decisions.[136] So, accepting much of Management's language is appropriate.

There are, however, appropriate modifications to make to Management's language. In Section 2.A.3 of Management's proposal, Management states that the standard of review for Title 5 and hybrid employees "shall be specific to the Authority used."[137] Yet, under Section 2.B.2 for Title 38 employees, the standard is "substantial evidence."[138] The Agency did not explain this differentiation. **Accordingly, Section 2.B.2 should be modified to remove "substantial evidence" and replaced with "specific to the Authority used."**

Additionally, in its proposed Section 5, Management proposes to exclude entirely part-time, temporary, intermittent, and probationary employees. Management offered no clear explanation why it did so. However, as discussed in the grievance procedure article below, there is indeed some limitations in place on certain categories of employees and grievances, e.g., probationary employees may not challenge

---

[135] *SSA and AFGE*, 19 FSIP 019 at 9-10 (2019)(*SSA*)(quoting *AFGE v. FLRA*, 712 F.2d 640,649 (D.C. Cir. 1983)).

[136] *See HHS, CDC and AFGE, Local 2883*, 19 FSIP 056 at 6 (citation omitted)(rejecting union proposal that required agency to rely upon progressive discipline). As the case law is clear that agencies are not required to bargain over progressive discipline, the Union's decision in this dispute to file a negotiability appeal on this topic does not deprive the Panel of jurisdiction.

[137] Agency Final Offer at 5.

[138] Agency Final Offer at 5.

removals. Accordingly, Management's language for Section 5 should be stricken in its entirety and replaced with the following bolded language:

> **Discipline for Part-time, Temporary, Intermittent, and Probationary Employees shall be addressed in accordance with applicable law.**

Finally, the Panel also parts ways with the Agency's request to exclude removal actions from the parties' negotiated grievance procedure as part of this article. This Panel has declined to grant such requested exclusions when the requesting party fails to demonstrate via empirical data that it would be "reasonable" to do so.[139] The Agency in this matter relies heavily upon the Removal Order and the Accountability Act, but provided little in the way of "real-world" data. That is, the Agency did not demonstrate how such grievances have impacted the Agency's operations. In the absence of such evidence, it is appropriate to conclude that the Agency has not established that excluding removal actions from the grievance procedure is "reasonable." **Accordingly, Management's Section 4.6 shall be stricken.**

Article 16, Employee Awards and Recognition

A. Agency Position

As an initial matter, the Panel notes that the Agency did not include a proposal for Article 16 in its Written Submission package to the Panel. Nevertheless, its written submission and rebuttal both appear to reference language as if Management did so. The Agency *did* include an Article 16 in its initial Panel request for assistance. But, Management does not clarify whether it is relying upon this proposal or something else altogether.

Turning to the merits of the Agency's position, the Agency argues that this article should focus on rewarding and motivating strong performers. Instead, the current contractual scheme creates a system in which numerous committees, Union representatives, and employees have agency in deciding whether

---

[139] *See, e.g., FCC and NTEU, Chapter 209*, 20 FSIP 054 at 8-9 (2020); *cf. U.S. Dep't of Transp., FAA and AFGE, Local 3313*, 19 FSIP 043 at 9-11 (2019)(ordering exclusion of removal grievances where agency demonstrated that such grievances had a history of fostering workplace disharmony).

certain types of awards should be granted to certain employees. That undermines Management's prerogatives and ability to motivate a successful workforce. The Union's reliance on various reports are hyperbole and are inapplicable. Finally, the Removal Order prohibits grievances over awards. As such, that topic should be excluded from the parties' negotiated grievance procedure.

B. Union Position

According to the Union, decisions concerning awards are substantively negotiable, so the Agency is not free to simply strike large swaths of the Union's language.[140] The GAO has lambasted the Agency for failing to maintain a proper awards system that appropriately accounts for the views of stakeholders, including the Union.[141] And, in several reports, the Agency's Inspector General found that the Agency "abused" the awards program.[142] The Union also wants to clarify that Management will set aside a portion of its budget for awards (although the Union's proposal does not specify a set amount), and that disciplined employees may still be eligible for awards. The Union further wishes to retain certain joint committees and ensure that the Agency adheres to certain Agency policies on awards.[143] The Union also opposes Management's request that this article exclude grievance challenges to decisions involving awards.

C. Conclusion

The Panel imposes a modified version of the Union's proposal. As noted previously, Management has failed to clarify the status of its final offer for Article 16. Accordingly, the Panel believes that it is appropriate to use the Union's final offer as the basis for resolving this dispute.

The Agency's primary concern appears to be with the Union's involvement in the awards process. The Union has offered a modified version of its proposal, but its Section 6 does call for the establishment of joint committees at the local level concerning awards. The record does not establish a need for

---

[140] Union Position at 24 (citing *NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir. 1986)).

[141] Union Position at 24.

[142] Union Rebuttal at 15 (citations omitted).

[143] *See* Union Position at 25; *see also* Union Final Offer, Article 16, Section 6, at 13-14.

such granular language. Moreover, in other disputes involving awards articles, the Panel has been reluctant to impose "limitations upon [an agency's] discretion to distribute performance and incentive awards . . . unilaterally."[144] To do so, the Panel has ruled, would needlessly trammel upon Management's prerogatives to reward, or not reward, performance. As such, the Union's language for its Section 6 should be stricken in its entirety.

The Agency also requests to prohibit grievances involving awards on the basis of the Removal Order. Section 4 of this Order states that grievance procedures "shall" exclude grievances involving "the award of *any* form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments."[145] Although the Panel has recognized the policy implications of this mandatory language, the Panel declines to rely on this language in this context. Instead, the Panel believes it is more appropriate to exclude these matters due to the aforementioned unique prerogatives in the field of awards. Accordingly, the following bolded language should be added to the Union's proposal:

> **Under this article, there shall be no grievances involving the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments**.

The remainder of the Union's language is appropriate. The Union's language calls for a portion of budget to be set aside for awards, but that is consistent with an agency's right to determine its budget. In this regard, a proposal is consistent with this statutory right so long as it: (1) does not set aside a specific amount; or (2) involves a "significant" amount of an agency's budget.[146] Management has not claimed either of the foregoing. Accordingly, on balance and with the exception of the revisions above and the understanding that Management's prerogatives take priority, the Union's proposal is most appropriate for adoption.

Article 18, Equal Employment Opportunity

---

[144] *See, e.g., Dep't Health and Human Services and AFGE, Local 1923*, 07 FSIP 167 (May 10, 2004).

[145] Executive Oder 13,839, Section 4(a)(ii)(emphasis added).

[146] *See, e.g., U.S. DHS, U.S. CBP,* 61 FLRA 113, 116 (2005).

A. Agency Position[147]

Management fully embraces the importance of equal employment opportunity (EEO) policies and absolutely believes in the paramount importance of providing related information, documents, and contract information to its workforce. Given this commitment, it is unnecessary to include contract language that simply duplicates existing Equal Employment Opportunity Commission (EEOC) rules and regulations as the Union essentially requests.[148] The Agency opposes the use of official time for EEO matters. Management has five field offices staffed with Agency employees who are responsible for internally processing EEO complaints.[149] These offices can guide employees through the EEO process, thereby making the use of official time for EEO matters unnecessary.

B. Union Position

The Union wants *more* information in this article to protect the EEO shield in place for employees. As the GAO has found, the Agency has among the highest rates of complaints of sexual harassment in the Federal government.[150] "Gutting" the existing language and agreeing to provide only documents and information does not offer the same level of protection as enshrining that information in the contract.[151] The Union disputes the significance of the availability of the Agency's EEO-related field offices. On its website, the Agency states these offices do nothing more than "advise and assist" with EEO complaints, but they do not represent employees.[152] EEOC regulations also permit non-Union employees to represent employees in EEO matters while on duty time.[153] The Agency's limitation on the Union's use of official time, then, is retaliation.

C. Conclusion

The Panel imposes Management's proposal. Management's language clearly and unambiguously states that the Agency will provide employees with a trove of EEO-related information, including contact information for those individuals employees

---

147 *See* Agency Final Offer at 7.
148 *See* Agency Rebuttal at 20-21.
149 *See* Agency Position at 29.
150 Union Position at 26.
151 *See* Union Position at 26-27.
152 Union Rebuttal at 16-17.
153 Union Rebuttal at 17 (citing 29 C.F.R. § 1614.605(b)).

should contact.[154] In light of the foregoing, the Union has ample protection should the Agency fail to fulfill any of these obligations, e.g., filing a grievance.

On the topic of official time, as discussed in greater detail below, the Statute provides mandatory grants of official time for collective bargaining and FLRA-related matters.[155] All other grants of official time are to be granted only when "reasonable, necessary, and in the public interest."[156] The Union, correctly, notes that eradicating discrimination is in the public interest. But, the Union does not sufficiently link this important goal to taxpayer-funded representation during duty hours. That is, it is not clear why paid representation during duty hours is the *only or best* way to effectively combat discrimination. Accordingly, it is appropriate to accept Management's limitation on official time for EEO matters.

Article 19, Fitness for Duty

A. Agency Position

The Agency proposes simplifying this article to state that Management will adhere to all applicable laws should it conduct any fitness-for-duty tests.[157] Management does not believe this topic needs to be complex: either employees can perform the duties necessary to assist veterans or they cannot. In addition to unnecessarily restating various legal requirements, Management claims the Union is attempting to rewrite legal requirements concerning physical examinations.[158] And, in any event, the Union's proposal is borderline superfluous because the Agency rarely conducts physical examinations. The Agency also disputes the Union's claim that Management declared the Union's proposal non-negotiable.

B. Union Position

As an initial matter, the Union claims that the Panel should withdraw jurisdiction over this article due to a pending negotiability appeal. Other than a general claim concerning

---

154 *See* Agency Final Offer at 7-8.
155 *See* 5 U.S.C. §7131(a) and (c).
156 5 U.S.C. §7131(d).
157 Agency Final Offer at 8.
158 Agency Position at 30 (citing 5 CFR §339 and 5 CFR §831.1205).

"management rights," the Union alleges that Management has never explained why the Union's proposal is non-negotiable.[159]

On the merits, the Union's proposal provides a comprehensive outline for physical-duty examinations. This is necessary because employees with disabilities are removed from the Agency at 4 times the rate of non-disabled employees.[160] The Agency's article fails to even explain what a fitness-for-duty examination is and is designed with one purpose in mind: to allow for illegal removals.

C. Conclusion

The Panel imposes Management's proposal. As an initial matter, the Panel should reject the Union's negotiability argument. Management disputes that it ever claimed the proposal was non-negotiable, and the record supports this contention.

On the merits, the Agency's language sufficiently addresses the Union's concerns by requiring the Agency to provide information. Moreover, the Union does not dispute the Agency's claim that these examinations rarely occur. Although the Union has provided data concerning termination rates for disabled employees, the Union has not linked them to fitness-for-duty examinations. And, in any event, the Union has other EEO-related options available. Accordingly, there is no basis for accepting the Union's proposal.

Article 20, Telework

A. Agency Position

The Agency proposes excluding this topic from the parties' agreement or the adoption of its "proposal."[161] Management fully embraces the importance of telework and its ability to enhance the workplace. Indeed, since the beginning of the Covid-19 pandemic, Management has doubled its telework capacity by 120,000 employees and telehealth assessments have increased by 1,000% (all of which was largely accomplished without Union involvement).[162] But, Management needs flexibility to manage its

---

159 Union Position at 26-27.

160 Union Position at 28.

161 *See* Agency Rebuttal at 22. As addressed below, Management's final offer submission to the Panel did not include language for Article 20.

162 *See* Agency Rebuttal at 21.

mission. The Telework Enhancement Act of 2010, 5 U.S.C. §6501 et. seq, (Telework Act) creates the ability to establish a telework pilot but it does not create a right to do so. Under the current agreement, supervisors are subject to grievances for rescinding or suspending telework.[163] The Agency actually wants to grant more opportunities to telework; indeed, it cannot understand why the Union offers language that prohibits employees from teleworking during the first 90 days of employment. Finally, Management notes that the FLRA recently held that telework can impact Management's right to direct employees' work.[164]

B. Union Position

The Union argues that Management's position demonstrates a "hostility" to telework.[165] Moreover, the Agency's proposal arguably grants Management "sole discretion" to mete out telework in violation of the Telework Act.[166] In short, the Union believes that Management's proposal gives employees little notice over changes to telework arrangements and also treats teleworking employees different from non-teleworking employees, e.g., requiring teleworking employees to make themselves reachable at nearly all times. The latter situation, the Union contends, violates the Telework Act. Relatedly, the Union claims that Management's language violates the AWS Act by placing limitations on employee scheduling options and telework. The Union argues the 90-day on limitation on telework for new employees is required by the Telework Act.

The Union's language strikes a balance between accomplishing the mission of the Agency and providing scheduling options for employees. Telework is particularly vital given the current global health emergency. In the days following the onset of the Covid-19 pandemic, the Agency was "lambasted" for refusing to allow certain employees to telework.[167] This blowback led to Management encouraging expanded telework. In addition to receiving $1.2 billion to expand telework options, the Agency has received 225,000 laptops "to support telework and telehealth initiatives" as well as more than 19,000 iPad

---

163 *See* Agency Position at 32.

164 *See* Agency Rebuttal at 22 (citing *NTEU and USDA Food and Nutrition Service*, 71 FLRA 703, 707-08 (2020)(*USDA*)).

165 Union Position at 29.

166 Union Position at 29.

167 Union Position at 32.

devices.[168] The Department also secured another $13 million for "additional software licenses and telework support."[169] The infrastructure for robust telework is now in place and it should stay that way.

C. Conclusion

The Panel imposes a modified version of the Union's proposal. As with several other articles in this dispute, the Agency failed to include *any* proposal in its final proposal document submitted to the Panel in June 2020. And, the Agency failed to explain this omission. Instead, it suggests in its rebuttal statement that the Panel could strike Article 20. This suggestion creates the impression that Management's omission of any language may have been intentional. But, it is difficult to say whether that is the case or whether the Agency is relying upon some other final offer like the one submitted in its initial Panel filing of December 2019. However, as noted above, the Agency's final offer in its initial filing only goes to Article 16. Thus, *there is no Agency final offer for Article 20 in the record*. It is, therefore, appropriate to use the Union's final offer as the basis for resolving this dispute.

The Union's language seeks to create a balance between the needs of a properly staffed workforce and the desire of employees to participate in telework. Importantly, the Union's language does not appear to treat telework as a "right." For example, Section 3 of the Union's proposal establishes criteria employees must satisfy and also establishes that the Agency is "responsible for determining which positions are appropriate" for telework.[170] The Union also offers exhaustive language as to when employees may be removed from telework.[171] Another example of the aforementioned balance may be found in Section 6.B. In this section, the Union agrees that teleworking employees *must* continue to work from their telework location if their main duty station is closed.[172] The Union's proposal recognizes the importance of the continuation of the Agency's mission. This is all the more critical in the light of the ongoing pandemic. Indeed, as can be seen throughout this document, the Agency argues that several of its proposals are warranted due to

---

168 Union Position at 33.
169 Union Position at 33.
170 Union Final Offer, Article 20, Section 3 at 4.
171 *See* Union Final Offer, Article 20 at 15-16.
172 *See* Union Final Offer, Article 20 at 9.

expanded telework. The Union's language, then, fosters an environment where telework is encouraged but not sacrosanct.

Notwithstanding the foregoing, there are aspects of the Union's proposal that should undergo alteration. The Union offers "suggested" language stating that the Agency "will not establish a permanent department-wide number of days per week for employees" to be on telework.[173] In an attempt to compromise, the Union proposes that employees will be "expect[ed]" to report to their duty station 1 to 4 days per week. However, this appears to be a compromise in name only as the Union's approach would seemingly prevent any hard limitations on the number of telework days. This language does not grant the Agency the flexibility it might need to physically staff its work place. **Accordingly, the "suggested language" paragraph on page 11 of the Union's final offer should be stricken in full.**

Another area that warrants alteration may be found in the Union's proposed Article 20, Section 18, which concerns local negotiations.[174] As discussed elsewhere, establishing a single document that sets forth the parties' contractual obligations throughout the country is most effective and efficient. The Union's proposed language would create a national standard for telework *and* mandate local negotiations over telework upon request. It is not clear why such an arrangement is necessary and could lead to a patchwork telework scheme. **As such, the Union's proposed Article 20, Section 18 should be stricken.**

Article 21, Alternative Work Schedules

A. Agency Position

The Agency argues that staffing in support of its mission is "dynamic" and can change "rapidly."[175] As such, Management maintains that it cannot be hampered by burdensome and inflexible scheduling language in the parties' agreement. The Union's ability to participate in negotiations should not eliminate the Management's ability to address scheduling challenges. Management cannot "guarantee" various options to the "fullest extent possible" because those requirements tie the hands of Management. Relatedly, Management cannot agree to posting schedules for certain employees 45 days or 2 weeks in

---

173 Union Final Offer, Article 20 at 11.

174 *See* Union Final Offer, Article 20, Section 18 at 19.

175 Agency Rebuttal at 23.

advance.[176] The Agency is opposed to language involving "seniority" because it often results in favoritism and inequitable scheduling.[177] And, Management cannot agree to detailed language involving scheduling procedures because that places too many hurdles on Management's ability to schedule its workforce.

The Agency disputes the Union's contention that it is attempting to force the Union to waive its ability to bargain adverse impact issues in the context of alternative work schedule (AWS) determinations. To the contrary, the parties have already litigated this issue while before the Panel.[178] It does not believe it has to issue an explanation for denying the use of compressed work schedules (CWS), and it should not have to grandfather anybody who is already on AWS. Management is also opposed to any definitions of "emergency" that would limit the Agency's ability to schedule employees during such an event.

B. Union Position

The Union's language is reasonable, and Management never offered any explanation for its own language during these negotiations. The Union wants to continue certain scheduling flexibilities and would not require employees to request AWS anew following the execution of the CBA.[179] The Union also proposes language concerning notice for scheduling changes in order to account for the employees' own scheduling needs. Relatedly, the Union has language concerning the scope of emergencies and schedule changes. The Union also has language concerning break periods.

In addition to the foregoing, the Union contends that several portions of Management's proposal are illegal.[180] In particular, it believes there is language that waives the Union's statutory right to bargain over AWS.

Finally, in its rebuttal statement, the Union also notes that Management altered language from what was submitted to the

---

[176] *See* Agency Position at 34.

[177] Agency Position at 33.

[178] Agency Rebuttal at 24 (citing *Department of Veterans Affairs, Charlie Norwood VA Medical Center, Augusta, Ga. and Local 217, American Federation of Government Employees, AFL-CIO*, 12 FSIP 003 (March 12, 2012) (*DVA, Augusta*)).

[179] *See* Union Position at 34-35.

[180] *See* Union Position at 36-37.

Panel when this request for assistance was filed in December 2019 and what Management submitted as part of its written argument in June 2020.[181] As such, the Union argues the parties are not at an impasse over Article 21.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. Much of this dispute turns on Management's need for scheduling flexibility to address the unique nature of its duties. That need has only increased in the middle of a global health emergency. The men and women of the VA's workforce are important. There can be no dispute of this fact. But, that importance makes their availability to the men and women of the United States military – and their loved ones – during a time of national crisis all the more critical. It is against this backdrop that only one axiomatic conclusion can be reached: Management's language must be adopted. Contract language that burdens Management's ability to make quick and efficient scheduling changes would hinder the Agency's ability to attend to the public in a time when the Agency's services are arguably needed the most. So, a general continuation of the status quo is not sustainable.

Notwithstanding the foregoing, there are potential issues concerning the Union's statutory right to engage in negotiations over AWS. Federal employees typically work 8-hour days, 5 days per week. The Federal Employees Flexibility and Compressed Work Schedules Act, 5 U.S.C. §6120 et seq., grants exclusive representatives the ability to bargain with agencies over permitting bargaining-unit employees to work on "compressed" work schedules, e.g., 10-hour days, 4 days per week. The placement and removal of employees on such schedules are subject to negotiations when those employees are represented by an exclusive representative, however.[182] Similarly, under the Act, Federal unions have the ability to bargain over "flexible" work schedules where bargaining-unit employees may alter how many hours a day they work so long as they work 80 hours in a bi-weekly pay period.[183]

---

181 *See* Union Rebuttal at 19.

182 *See* 5 U.S.C. §§ 6130, 6131.

183 *See* 5 U.S.C. §§ 6122, 6130.

In its initial argument,[184] the Union identifies the following Management language as inconsistent with the above framework:

- "The Department will allow employees to use AWS based on operational needs;"
- "Decisions on CWS will be made at management discretion;" and;
- "CWS may be suspended when employees are involved in travel or training, or other requirements which conflicts with their CWS schedule."[185]

The language in the first bullet point does not appear in Management's Article 21. A version of the second bullet point language appears as follows in Management's Article 21, Section 2.C.2.a: "Decisions on CWS will be made based upon valid operational need."[186] And, the final bullet point appears as quoted. The Agency's language in the last two bullet points presents a potential conflict with the framework of the Act as discussed above. In this regard, those proposals arguably grant Management unilateral discretion to make AWS decisions without Union involvement.

To rebut the above, Management maintains its language is "consistent" with the AWS Act. In support, however, the Agency cites solely to a Panel mediation-arbitration decision in *DVA, Augusta* in which then-Panel Chair Mary Jacksteit terminated multiple existing CWS schedules at a single VA facility. To ask whether a 2012 decision by an individual Panel Member involving a lone facility in Augusta, Georgia addresses adverse impact for nearly 300,000 bargaining-unit employees nationwide in 2020 in the context of master CBA negotiations is to answer the question.

To remain consistent with the law, the Panel makes the following bolded modifications to the last two bullet points:

- Decisions on CWS will be made **in accordance with applicable law**; and
- CWS may be suspended **in accordance with applicable law.**

---

184 Union Position at 36-37.
185 Agency Final Offer, Article 21, Section 2.E at 12.
186 Agency Final Offer at 11.

Finally, the Union argues the parties are not at an impasse because the Agency provided new language for this article in its June Panel submission. Even if that is true, the Panel has wide statutory authority to resolve disputes as it deems appropriate.[187] In those efforts, and after the Panel has asserted jurisdiction, the Panel and parties before it routinely alter language to bring matters to a resolution. Thus, this matter is appropriately before the Panel.

Article 22, Investigations

A. Agency Position

The Agency's sole language is as follows:

> When conducting investigations, the [Agency] will follow the procedures defined in applicable laws, government-wide rules and regulations, and [Agency] policy.[188]

Management acknowledges that employees have statutory rights during investigations. But, the Union's proposal goes beyond those rights. For example, the Union requests "advance notice" for interviews even though that is not required by law.[189] The Union's language also grants the Union access to a wide variety of free-use Agency materials and equipment, the ability to impede investigations, additional official time for local matters, and the ability to present information at Agency meetings.[190] This approach is inconsistent with the 2018 Trump Executive Orders.[191]

B. Union Position

The Union's language provides an orderly process that protects employee rights. This is necessary because the Agency is subject to "hundreds" of ULP's every year and routinely fails to acknowledge the Union's rights or provide necessary information.[192] The Union cannot participate in a meeting if it does not receive "advance notice," and most of its language is

---

187 *See* 5 U.S.C. §7119(c).
188 Agency Final Offer at 16.
189 Agency Position at 35-36.
190 *See* Agency Position at 36.
191 *See* Agency Rebuttal at 25.
192 Union Position at 37.

intended to foster the Union's role in the process.[193] Relatedly, the Union must have official time in order to participate in meetings. Finally, the Union notes that it has filed a negotiability appeal because the Agency has alleged the Union's proposal interferes with the Agency's right to determine internal security.[194]

C. Conclusion

The Panel imposes the Agency's proposal. Much of the parties' dispute turns on what the Agency is required to do in certain investigatory situations. As the Agency notes in its brief, employees have a statutory right to representation if they have a reasonable belief that an investigatory interview could lead to discipline.[195] And, they may be represented in other types of discussions as well. Management agrees that it must adhere to the foregoing framework, so the Union's detailed language is unnecessary.

The Agency also claims providing the Union with Agency resources would be inconsistent with President Trump's Executive Order on Union resources. Executive Order 13,837, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order) places limitations on an exclusive representative's ability to use free agency resources for representational purposes. And, the Panel has recognized the important public polices of this Order. Consistent with those policies, it is appropriate to reject the Union's language.[196]

Article 23, Merit Promotions

A. Agency Position

This article covers a variety of personnel actions, most of which involve the filling of vacancies.[197] Management offers a simplified version of the contract's existing article. According to Management, the status quo is too cumbersome and allows the Union to needlessly hinder the personnel process. For example, the current article creates "Competitive Action Panels" that consist of one Management official and *two* Union

---

193 *See* Union Rebuttal at 20-21.

194 *See* Union Rebuttal at 22.

195 *See* 5 U.S.C. §7114(a)(2).

196 The Agency's briefs do not appear to raise internal security issues as the Union claims.

197 *See* Agency Final Offer at 16.

officials.[198] The Union, then, can overrule a Management candidate selection decision. Another example is found in the contractual process for posting vacancy announcements. For both Title 5 and Title 38 Hybrid employees, the CBA requires announcements to be posted for 21 calendar days; by contrast, OPM recommends a period of 5 calendar days for Title 5 employees.[199] The timeframe under the CBA allows for an unwieldly number of applicants and a potential loss of qualified applicants who may find their prospects too daunting.[200]

The Agency's language is simplified and reinforces Management's discretion in the selection process. It reinforces the Agency's flexibility in its "ability to select, promote, and detail qualified employees."[201] So, the proposal should be rejected.

B. Union Position

The Union's proposal provides a fair procedure that consists of appropriate arrangements. Indeed, in 2017, just under 31% of the workforce believed that the Agency made fair merit promotions.[202] And, at least 70 employees throughout the country have prevailed on third-party actions stemming from unfair selection procedures.[203] Management's proposal deprives the selection process of transparency; for example, its proposed 5-day window for vacancies could prevent employees from learning about vacancies if they are on extended leave. Another example is that the proposal excludes Excepted Service employees from the coverage of the article.

The Union's proposal is fair and comprehensive. During negotiations, the Union repeatedly asked the Agency for examples on how the CBA burdened Management. The Agency could not offer any examples. The Union's proposal should be adopted.

C. Conclusion

The Panel imposes the Agency's proposal. The Agency's proposal emphasizes the importance of an expeditious selection process to fill positions that are vital to securing veteran

---

198 *See* Agency Position at 39.
199 *See* Agency Position at 38 (citation omitted).
200 *See* Agency Position at 38 (citation omitted).
201 Agency Position at 37.
202 Union Position at 37 (citation omitted).
203 *See* Union Position at 38.

care. The Union maintains that the Agency never offered examples of any burdens during negotiations. Yet, in the Agency's position set forth above, it is clear that the Agency has been unable to articulate verifiable burdens created by the CBA's language. The Union claims its language is necessary in order to assuage dissatisfied employees, citing unhappy employees from 2017, for example. But, the article was in place during that year, which suggests that the article is not the panacea that the Union claims it to be. Accordingly, the Agency's language is the most appropriate to adopt under these circumstances.

Article 25, Official Travel

A. Agency Position

The Agency is proposing to alter the existing CBA to remove language requiring the Agency to pay for official Union travel.[204] The Union would also ask for various travel-related items, such as prepaid phone cards. Instead, Management proposes adhering to applicable travel laws and regulations.[205] If it needs to provide items to the employee as part of official travel, such as prepaid phones, it will agree to do so.

B. Union Position

The Union claims the sole disputed issue is language that permits reimbursement for Union travel between Agency facilities.[206] Such language is necessary for the Union to successfully fulfill its representational duties. The Union has been forced to pay for other aspects of Union representation recently,[207] so it is critical that the Union receive at least some level of reimbursement. The Agency's representatives are reimbursed and receive travel funds when they travel for Agency duties, so it is only fair that the Union receive equivalent expenses.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. The Union makes much of a need for reimbursement for travel costs associated with travel between Agency facilities.

---

[204] *See* Agency Position at 39; Agency Final Offer at 20.
[205] *See* Agency Position at 40.
[206] *See* Union Position at 39.
[207] *See* Union Position at 40.

But, the Union has done little in the way of proving *the need for that travel.* As the Covid-19 pandemic has taught us all, face-to-face discussions, negotiations, etc. are not the only way to go about business. There is no reason why all the foregoing, and other related matters, cannot be conducted via video conference and telephone. Moreover, where travel for a face-to-face meeting is the chosen medium of the Union, the Union has not established it is financially unable to pay the proverbial freight. The lack of Union rationale, then, supports imposing the Agency's proposal with one important caveat.[208] If business is to be conducted by virtual and telephonic means, it stands to reason that employees may occasionally accrue call-related expenses. So, there should be language in the contract that permits recoupment of such expenses, if any. **Accordingly, this article should include the following new Section 9:**

> **Employees may request reimbursement for any duty-related phone-call expenses in accordance with applicable law.**

Article 26, Parking and Transportation

A. Agency Position

Parking at the Agency's facilities throughout the country is scarce and subject to budgetary constraints. Moreover, the parties agree that parking is not a right.[209] As such, the Agency cannot grandfather in free parking for the Union, particularly when many Union-designated spaces are going unused.[210] Free parking is also inconsistent with the Official Time Order. The Agency is willing to commit to making effort to provide secure parking, but it cannot guarantee such availability. Management will adhere to all applicable regulations involving parking that enumerates and prioritizes who has access to parking.[211] Moreover, as "telework increases," the Agency believes the need for parking will "decrease."[212]

---

[208] The Union's proposal is also arguably inconsistent with Executive Order 13,837, "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use," which instructs federal agencies to avoid paying for union-related expenses. But, neither party raised this argument.

[209] *See* Agency Position at 40.

[210] *See* Agency Position at 40-41.

[211] Agency Position at 41 (citing 41 CFR §102-74.305); *see also* Agency Final Offer at 23-24.

[212] Agency Rebuttal at 28.

B. Union Position

The Union opposes making parking paid unless the Agency is required to do so by law. The Union claims that, during bargaining, Management has never suffered harm from the current parking article. Moreover, the Union's language applies to Agency *bargaining-unit employees* and *not* Union representatives performing Union duties. Agencies have a statutory duty to ensure a hazard free workplace.[213] The Agency's proposal that calls for it to make only "reasonable efforts" to provide safety do not satisfy this standard. The Union also has a proposed system for reviewing parking infractions and requests that these infractions should not serve as a basis for discipline.[214] Indeed, the Agency's own policies permit two "courtesy warnings."[215]

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. The Union's primary concern appears to be unpaid parking for its employees. The Agency has acknowledged its responsibility to adhere to all applicable parking laws, rules, and regulations. However, it is also proposing to eliminate existing language in the agreement concerning cost-free parking for employees. While the Agency has not stated that it intends to now charge these employees, the Agency's deletion obviously paves the road for this option. The Agency, however, did not provide a sufficient basis for allowing this possibility. **Accordingly, the Panel orders the parties to add the following new Section 1.D to Management's language:**

> **Where employees are not being charged for parking at existing facilities that is available at the time this Agreement becomes effective, no charge will be initiated for the duration of this Agreement except where required by law.**

The Union is also rightfully concerned about safety. Management's Proposed Section 3 states "only" that Management will make "reasonable efforts" to provide safe parking.[216] This, the Union contends, is inconsistent with an agency's statutory

---

213 Union Position at 41 (citing 29 U.S.C. §654(a)).
214 Union Position at 42.
215 Union Rebuttal at 25 (citation omitted).
216 Agency Final Offer at 24.

mandate to provide safe and hazard-free work areas. Yet, it stands to reason that if an agency truly has such a statutory obligation, that duty would be subsumed within the Agency's contractual responsibility to make "reasonable efforts." The Union's concern, then, is addressed by Management's language.

Article 27, Performance Appraisal

A. Agency Position

The Agency's language clarifies that the Agency has primary authority to assess the performance of its workforce. And, the Agency will conduct all performance evaluations in accordance with "applicable law," which includes the Accountability Act.[217] The Accountability Act outlines a number of procedures and guidelines that account for the unique duties of the Agency, so the Agency is entitled to latitude in its evaluation of employees. Indeed, in 2016, the Federal Employee Viewpoint Survey demonstrated that only 29% of the workforce believed that the Agency took appropriate steps to address poor performers.[218]

The Agency's language also outlines what information it will provide to employees and reiterates its ability to assess the various qualifications necessary to perform the duties of a position.[219] By contrast, the Union's language largely cuts and pastes various portions of the Agency handbook. This approach is unnecessary and could also hinder the Agency's efforts to alter that handbook in the future if needed. Management is also unwilling to include language that defines the various levels of performance for employees. It is well within the Agency's statutory right to assign work and direct employees under 5 U.S.C. §7106(a).[220]

B. Union Position

The Union provides protections for its employees that Management's language does not. For example, 5 U.S.C. §4302(c)(5) requires agencies to provide underperforming employees with assistance in improving.[221] The Accountability Act did not eliminate this requirement and the Agency's attempt

---

[217] Agency Position at 42-43; *see also* Agency Final Offer at 24.

[218] Agency Position at 43 (citation omitted).

[219] *See* Agency Position at 43-44.

[220] Agency Position at 44.

[221] Union Position at 42-43.

to do so is illegal.[222] The GAO has found widespread performance deficiencies in the Agency's evaluation system; the Agency's efforts to trim the CBA will only exacerbate those conclusions.[223] The Union's changes all "shorten the article, rearrange it to make the article clearer, maintain processes which would necessarily have to be bargained at a later date, or include elements regarding communication and notice from the Department of Defense's successful Defense Performance Management and Appraisal Program."[224] The Union also disputes the 29% FEVS figure cited by Management: it believes this figure shows that the Agency is *too* draconian.

The Union is also puzzled by the Agency's objection to Union language that would prohibit the Agency from penalizing employees in their performance appraisals for Union activity. The Union believes that Management should want to fully embrace adhering to laws that prohibit illegal discrimination. The Union has also filed a negotiability appeal on the basis of Management's claim that the Union's proposals interfere with various statutory management rights.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. There are two primary disputes in this article: the breadth of Management's ability to unilaterally evaluate its workforce and the appropriate procedures the Agency must adhere to when it pursues performance-based actions against employees.

As to the first issue, the Agency tacitly argues that it is entitled to deference in the performance-evaluation process. This, of course, is accurate. The mission of the Agency, and its importance to providing care to the nation's veterans, places it in a unique sphere. This significance is reflected by the Accountability Act. And, as the Agency's unrebutted figures show, only 29% of the work force believes that the Agency effectively deals with poor performers. Against the backdrop of the Agency's mission, Congressional edicts in the form of the Accountability Act, and employee dissatisfaction, it is appropriate to conclude that Management's proposal is the most appropriate to adopt.

---

222 *See* Union Rebuttal at 26.
223 Union Position at 43.
224 Union Position at 43.

But, the Agency acknowledges its responsibilities to provide notice and information to the Union. Despite this acknowledgement, in its proposed Section 3.A, Management proposes that the Union "may make recommendations" only when Management proposes a new performance plan.[225] Although Management's ability to make such a plan is beyond reproach, the Union's counter-ability to bargain the impact and implementation of that plan in accordance with 5 U.S.C. §7106(b)(2) and (3) is black-letter law. Accordingly, this language should be modified as follows:

> When the [Agency] creates a new performance plan for covered employees, the union will be provided prior notice and may make recommendations, present supporting documents, **and may exercise its bargaining rights in accordance with law**. The [Agency], in the exercise of its exclusive management right, **and subject to the union's ability to bargain under applicable law,** will establish critical elements and performance standards for its employees.

Turning to the second main issue in dispute, the appropriate procedures for performance actions, the Agency aims to codify its ability to pursue such actions under the Accountability Act, Chapter 43 of the United States Code, and Chapter 71 of the Code. Under 5 U.S.C. §4303, an employee may be the recipient of a performance-based action for poor performance in a critical element; by contrast, 5 U.S.C. §7513 permits performance actions for performance or disciplinary reasons.[226] Each option has their own respective requirements, such as timelines and procedures, that are to be adhered to. In particular, as the Union correctly notes, under Chapter 43, an employee is afforded an opportunity to improve.[227] But, Chapter 43 does not define the length of time. The Agency has failed to rebut the Union's claim on this aspect. The Agency's seeming failure to address this requirement of Chapter 43 is problematic.

In its proposed Section 4, Management correctly notes that it has sole authority to decide whether to proceed under Chapter

---

[225] Agency Final Offer at 25.

[226] *See* "Performance-Based Actions under Chapters 43 and 75 of Title 5 – Similarities and Differences" (available at https://www.mspb.gov/studies/adverse_action_report/4_Performance-Based%20Actions.htm).

[227] *See* 5 U.S.C. 4302(c)(5).

43, Chapter 75, or the Accountability Act. Management also states that it will adhere to all "procedures" associated with each chapter.[228] But, as noted, the mandated performance review period under Chapter 43 does not provide a timeframe. The Union proposes 90 days. However, Section 2(a) of Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" instructs agencies to limit improvement periods. Consistent with the foregoing, the Panel adds the following bolded language to Management's Section 4.B:

> The [Agency] has the sole discretion to determine if an employee's unacceptable performance shall be addressed through the procedures identified in 5 C.F.R. §432, 5 C.F.R. §752, or 38 USC §714. **Should the Agency elect to proceed under Chapter 43, and in accordance with law, the affected employee will receive a 30-day performance improvement period.**

Article 29, Safety, Health, and Environment

A. Agency Position

Management proposes adhering to all applicable safety laws, rules, and regulations. Management has shown it is capable of doing so. Indeed, in 2 years, the Agency saw "a reduction of workplace illness and injury by 9.2%."[229] The Agency's language is clear, concise, and informative. It also sets forth common-sense employee responsibilities in terms of reporting hazardous conditions and describes what situations fall under Management's control. The Agency is adamantly opposed to the continuation of various "safety committees" that place the Union in a position of essentially co-managing the Agency's safety responsibilities.[230] This arrangement also grants the Union with unwarranted resources such as official time and travel. Between 2017-2019, the Union received $100,000 in travel expenses alone for safety conferences.[231]

The Agency also disagrees that its response to Covid-19 has been ineffective or warrants adoption of the Union's proposal. To begin with, the Union attempted to halt the Agency's efforts

---

[228] Agency Final Offer at 26.

[229] Agency Position at 45; *see also* Agency Final Offer at 26-27.

[230] *See* Agency Position at 46.

[231] Agency Position at 47 (citation omitted).

to implement Covid-19 related safety measures by insisting on first bargaining over that implementation.[232] But, the Agency has adhered to its legal obligations. Indeed, for VHA alone, there has been an infection rate of only 0.659%.[233] However, the current pandemic demonstrates the importance of individual employee responsibility as well. The Union's unsubstantiated claims of whistleblower retaliation do not alter this responsibility.

B. Union Position

This article is literally a "life and death matter" that the Agency should not be permitted to eviscerate.[234] The Agency has a legal obligation to provide a safe workplace;[235] shifting safety burdens to employees is inconsistent with this duty. The Union's language, by contrast, emphasizes Management's responsibility to adhere to various policies, including an Agency policy that actually calls for Union involvement on safety councils.[236] The Union wants to retain language that protects employees in and out of the workplace if they elect to pursue whistleblower claims.[237] Indeed, the Agency's boast of a reduced-injury workplace is only possible *because* of Union involvement and feedback. The Union also self-funds its travel for safety meetings; so the Agency's cited financial figures are false.[238] The Union also claims it has filed a negotiability appeal that the Union's proposal interferes with the Agency's ability to safeguard personnel.[239]

The Union is quite concerned about the impact of Covid-19 on the bargaining-unit employees that it represents. In the VHA, at least 2,348 employees have tested positive, 30 employees have died, and 2,889 employees have had to been quarantined.[240] The Agency has been unable to guarantee the availability of Personal Protective Equipment (PPE); indeed, the Agency's IG found that Management has acknowledged this shortfall.[241]

---

232 *See* Agency Rebuttal at 29.
233 Agency Rebuttal at 30.
234 Union Position at 44.
235 Union Position at 44 (citing 29 U.S.C. § 654(a)).
236 *See* Union Position at 47.
237 *See* Union Position at 49.
238 *See* Union Rebuttal at 27-28.
239 *See* Union Rebuttal at 28.
240 Union Position at 44.
241 Union Position at 45 (citation omitted).

C. Conclusion

The Panel imposes a modified version of Management's proposal. In the Panel's opinion, the resolution of this article turns on the "least-worst option." In the midst of a global pandemic, an agency that is focused on healthcare has offered general language outlining its health and safety obligations to its workforce. Moreover, it now places an affirmative burden upon employees to gauge the safeness of the work environment. The Union, also in the midst of a global pandemic, wants to maintain a novella-length article that has the potential to confuse employees as effectively as it could comfort them.

Despite the foregoing, Management's proposal, overall, provides a better template for resolving this dispute. It is more clear, concise, and focused. Management acknowledges its responsibilities to the law and its obligations concerning a safe work place. The Union's concerns about the Agency's potential failure to adhere to workplace laws can be enforced in a grievance challenging the Agency's failure to adhere to this article. Moreover, as the Union's recitation of evidence involving IG investigations show, employees are capable of seeking assistance when needed. That the Agency has eliminated specific language on whistleblower protections does not mean that employees may no longer avail themselves of that statutory right.

However, on the topic of councils/committees/partnerships, the Agency finds itself in a curious position. Management eschews any Union participation in Agency safety initiatives but would require individual employees to affirmatively monitor workplace hazards and alert Management of their existence. To be sure, there are several differences between the categories, such as travel cost, official time, and other Union related expenses. However, the concepts are similar in that they both require Agency employees on some form of paid duty time to engage Management in a dialogue over safety concerns. Management also defines certain conditions and expects employees to familiarize themselves with those definitions and to recognize them when they arise.[242] This requirement somewhat undercuts Management's concern about a complex contract article that could confuse employees. **Accordingly, the Panel believes it is appropriate to**

---

[242] *See* Agency Final Offer, Article 29, Section 2.B at 27 (defining the term "imminent danger" and placing obligations on employees to report such conditions).

add language that "encourages" employees to report general safety issues in Section 2.A instead of requiring them to do so. However, Management's language for Section 2.B, which states that employees "will" report "imminent danger situations" should remain as that language identifies a significant scenario. Accordingly, the following bolded changes should be made in Management's Section 2:

> **Section 2- Safety**
>
> A. In the course of performing their assigned work, employees will be alert to the presence of unsafe or unhealthy conditions. Employees will attend mandatory safety training provided by the Department. When such conditions are observed, **employees are encouraged** to report them to supervisory personnel and/or facility safety personnel, such as the Safety Officer. The employee may also notify a Union representative if the employee wishes to remain anonymous. That person **may** then immediately forward the information to the appropriate management official(s). Where an employee has notified the Department of an unsafe condition, the Department will review the matter as appropriate.

Article 31, Silent Monitoring

A. Agency Position

The entirety of the Agency's proposal reads as follows:

> The [Agency] may monitor any employee for any business purpose and in any manner consistent with federal law. The [Agency] shall post notice of such monitoring in each facility.[243]

This language provides Management with flexibility to monitor its workforce to ensure it complies with healthcare practices. But, it requires notice to the workforce as well. Under the current contract, Management's ability to monitor is limited to certain purposes and certain conditions.[244] This arrangement prohibits effective monitoring. The existing language also requires the establishment of a "task force" that has Union members. This task force contravenes the Revocation

---

[243] Agency Final Offer at 28.

[244] *See* Agency Position at 48.

Order and Official Time Order. Finally, the Union's insistence that the Agency's proposal raises constitutional issues is nothing more than a "red herring."[245]

B. Union Position

The Union proposes that monitoring is to be used primarily for ensuring that the public receives accurate information rather than for performance evaluation purposes.[246] This article was intended to focus solely on phone calls, but during negotiations, it became apparent that Management was using it to gather other types of information.[247] The Agency's expansion is unethical, abusive, and runs afoul of "constitutional mandates."[248]

C. Conclusion

The Panel imposes Management's language. It is axiomatic that the Agency should be able to monitor potential performance issues within its workforce. And, the Agency will post notice, so monitoring will not come as a surprise to the workforce. Management's proposal also states that monitoring must be "consistent" with Federal law. Thus, if the Union has "constitutional" concerns, it may raise challenges as appropriate.

Article 33, Temporary, Part-Time, and Probationary Employees

A. Agency Position

Management offers a simplified article that addresses Temporary, Part-Time, and Probationary employees in two categories: (1) Title 5 and Hybrid; and (2) Title 38.[249] Management's proposed article details various personnel actions that Management may take with respect to these positions. Recruitment, need, and assignments of these positions should be determined solely by Management. Congress has already provided these employees with ample protections: going beyond those protections is unnecessary. The Union's request to place additional restrictions on the aforementioned decisions

---

245 Agency Rebuttal at 31.
246 *See* Union Final Offer, Article 31.
247 *See* Union Position at 50.
248 Union Position at 49.
249 *See* Agency Final Offer at 28-30.

"unnecessarily restrict[s] the VA's ability to hire, assign, direct, and retain employees."[250]

B. Union Position

The Union offers a modified version of Article 33. Among other things, the Union's article defines when certain personnel actions may be taken,[251] outlines steps to be followed during disciplinary procedures,[252] and details types of performance information that must be provided to different types of employees.[253] The GAO has "chastised" the Agency's hiring practices, so a check must be in place to address those woes.[254] Even the Agency has assumed that Covid-19 could result in absenteeism of up to "40%."[255] Striking the Union's language now constitutes a "waiver" of various Union rights (the Union does not say which ones) and would require bargaining later (the Union does not say when).[256] The Agency had not previously raised claims concerning its "right to hire, assign, direct, and retain employees."[257] The Union notes that the Agency has not identified any actual language within the Union's article that is illegal. Nevertheless, the Union has filed a negotiability appeal on this claim.

C. Conclusion

The Panel imposes Management's proposal. As an initial matter, both parties raise claims concerning their respective rights. And, both parties fail to actually sufficiently explain those violations. Given that, it is unclear why the parties went to such lengths to raise those arguments.

On the merits, this article represents a number of "moving parts." It addresses three categories of employees: part-time, temporary, and probationary. And, each of these employees can further fall under one of three statutory schemes: Title 5, Title 38, or Hybrid. As can be seen, the foregoing arrangement creates a number of potential combinations, each of which can be strung out further depending upon how many additional procedures

---

250 Agency Position at 50.
251 *See* Union Final Offer, Article 33 at 2.
252 *See* Union Final Offer, Article 33 at 1-2.
253 *See* Union Final Offer, Article 33 at 3-4.
254 Union Position at 51.
255 Union Position at 52 (citation omitted).
256 Union Position at 52.
257 Union Rebuttal at 29.

are placed within the CBA. That is a recipe for chaos, particularly in light of the potential ongoing need to quickly fill vacancies during a global pandemic. Accordingly, on balance it is appropriate to accept Management's more concise language.

Article 35, Time and Leave

A. Union Position

The Union claims two issues remain in dispute: bereavement leave and leave without pay (LWOP) for Union activities.

As to bereavement, the Union claims that the Agency is attempting to limit the Union to sick leave *only* for bereavement purposes. Employees have a variety of other leave options, e.g., annual leave, and Management's attempt to limit leave options is irresponsible during a pandemic when employees may need sick leave for illnesses.[258]

Regarding LWOP, the Union claims that Management cannot lawfully treat LWOP as "hours of work" for duty purposes, and therefore track it, because it is not a work status where employees are performing duties.[259] The Union also vigorously disputes Management's insinuation that employees – many of whom are veterans themselves – will abuse LWOP for frivolous purposes. Granting LWOP is discretionary, but there are limited situations when it must be granted, e.g., medical treatment.[260] The Union maintains that Management will abuse its discretion to improperly deny LWOP requests.

B. Agency Position

The Agency's disagreement with bereavement appears to be one of placement. Management's proposal places this section in "Sick Leave," which is how it is treated by OPM.[261] The Union, by contrast, places it under "Funeral Leave." This needless distinction will only confuse the workforce.

---

[258] *See* Union Position at 53.

[259] *See* Union Position at 53 (citing *U.S. DHS, U.S. Customs and Border Protection and NTEU, Chapter 160*, 68 F.L.R.A. 846 (2015)).

[260] *See* Union Rebuttal at 29 (citing Executive Order Executive Order 5,396).

[261] Agency Position at 52; *see also* Agency Final Offer at 38.

On the topic of LWOP, Management's primary issue is simply relocating LWOP for Union purposes to the CBA article on official time. Management will still include language in Article 35 concerning its obligations to provide unpaid leave for medical treatment purposes.[262] But, Management must still maintain necessary discretion to ensure its mission is being fulfilled. That is, the Agency does not have the capability of acquiescing to every single request for LWOP.

C. Conclusion

The Panel imposes Management's language. On the topic of bereavement, it appears much of the disagreement turns on interpretation. But, as the Agency correctly notes, OPM largely treats bereavement leave as sick leave.[263] As such, Management's "placement" of this language is appropriate.

On LWOP, it would make sense to move the language on Union activities to the section involving Official Time as both topics involve Union duties. The Union argues that LWOP cannot be tracked legally, but its cited authority is unclear either way. Moreover, it makes sense to grant Management a degree of discretion in how it assigns LWOP. Accordingly, its language is most appropriate to adopt.

Article 37, Training and Career Development

A. Agency Position

The Agency proposes striking this article in its entirety because "[j]oint training infringes on the [Agency's] authority to assign work to employees based upon the needs of the [Agency]."[264] Management has sole responsibility for assessing the needs of its workforce. Union involvement in the training process invokes partnership principles that are inconsistent with the Revocation Order. In particular, the Agency is concerned about language permitting the establishment of local committees.

B. Union Position

---

262 *See* Agency Final Offer at 34-35.

263 *See* "Fact Sheet: Sick Leave for Family Care or Bereavement Purposes." (available at https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-for-family-care-or-bereavement-purposes/).

264 Agency Position at 52.

The Union proposes retaining a modified version of the existing article that calls for the Agency to acknowledge its responsibility to train the workforce. It also establishes local training committees.[265] In 2019, the GAO "chastised" the Agency for failing to remedy inadequate training which, in turn, can lead to deficient patient care.[266] Indeed, the Agency has lost at least one national grievance for failing to abide by this article.[267] The Agency has never previously raised Management rights claims. So, the Union has filed a negotiability appeal.

C. Conclusion

The Panel imposes Management's language. With a broad brush, Management has once again, essentially, painted the existing language it once agreed to as entirely non-negotiable. And, it has done so very late in the process of resolving this dispute. Questionable tactics aside, much of the Union's language places an affirmative duty upon Management to provide training to bargaining-unit employees.[268] And, training decisions do squarely fit within management's statutory right to assign work.[269] Accordingly, it is appropriate to accept Management's position to resolve this dispute.

Article 39, Upward Mobility

A. Agency Position

Here too the Agency proposes striking an existing article. The Agency is not opposed to upwards mobility; instead, it "only proposes eliminating AFGE's participation in upward mobility requirements."[270] Additionally, the Agency's upward mobility plan was replaced with an individual development plan.[271] The Union's proposal also impermissibly calls for the establishment

---

265 *See* Union Final Offer, Article 37 at 1.

266 Union Position at 54 (citation omitted).

267 Union Position at 54 (citation omitted).

268 *See, e.g.,* Union Final Offer, Article 37, Section 1.A at 1 (stating that the Agency "will provide training and career development opportunities to ALL employees of the bargaining unit." (emphasis in original)).

269 *See, e.g., NFFE, Local 1437 and U.S. Dep't of the Army,* 35 FLRA 1052, 1055 (1990) (citations omitted).

270 Agency Rebuttal at 32.

271 *See* Agency Position at 53.

of a committee. Finally, the Union's proposal infringes upon a number of management rights.[272]

B. Union Position

The Union proposes primary retaining existing language. Even today, the Agency's website retains a version of the development program plan; so clearly, there is still something in effect.[273] Again, the GAO has cited the Agency's failure to develop properly its workforce. It is clear that the Agency will not willfully adhere to its commitment to promote upward mobility. Indeed, the Agency's IG found in one instance that recruitment for a local Texas facility was made possible due to a "strengthened" upward mobility program.[274] And, again, the Union has filed a negotiability appeal in response to the Agency's numerous management rights arguments.

C. Conclusion

The Panel imposes a modified version of the Union's proposal. The Agency's primary source of disagreement appears to be the Union's involvement in the upward mobility process, particularly language that calls for the establishment of a joint committee. It is appropriate to strike this language. The Union, however, has provided evidence showing that even the Agency's IG acknowledges the importance of a strengthened mobility program. In light of that, the remainder of the Union's language should remain as is. Although Management raises a host of management rights claims, it fails to cite any particular language that is allegedly illegal. **Based on the foregoing, the Panel adopts the Union's language but strike Article 37, Section 3 which addresses the aforementioned committee.[275]**

In addition, the Panel will strike language in the Union's Section 1 that requires Management to hold "quarterly seminars" with employees to promote the upward mobility program. The Union offered very little evidence to demonstrate a need for such seminars in general, to say nothing of quarterly meetings. The existence of this article and whatever information the parties may choose to provide employees should be sufficient.

---

[272] *See* Agency Position at 54.

[273] *See* Union Rebuttal at 31 (citing https://www.va.gov/vapubs/Search_action.cfm).

[274] Union Position at 55 (citation omitted).

[275] *See* Union Final Offer, Article 37, Section 3 at 1.

Article 40, Within-Grade Increases (WIGI)

A. Agency Position

The Agency's language is clear, concise, and compact. The Union's proposal is lengthy, unnecessary, and often does nothing more than repeat existing Agency policies.[276] Management also argues that the Union's proposal infringes on a number of its rights, including the right to retain employees, discipline employees, and determine its budget.[277] For example, the Union's proposal prohibiting Management from using a WIGI denial for punitive purposes hinders its ability to run an efficient workforce.

Management also proposes eliminating the ability to grieve decisions involving WIGI's. According to Management, WIGI's constitute "examination[s], certification[s], or appointment[s]" within the meaning of 5 U.S.C. §7121(c)(4) which prohibits grievances over these types of matters. Additionally, a grievance exclusion here is warranted by Executive Order 13,839, Section 4(a)(i) which prohibits grievances over "the assignment of ratings of record."[278]

B. Union Position

The Union proposes retaining expensive language. Management's proposal undercuts its ability to recruit and retain because it "hollow[s] out the process employees rely upon for pay increases."[279] The Agency has defended an 11% budget increase, so any financial concerns ring untrue.[280] Management has not identified which language in the Union's proposal actually interferes with management rights. As such, the Union has filed a negotiability appeal over the Agency's claim.

The Union also disagrees with "hallowing out" grievance rights. Removing that matter from the grievance procedure will only increase the case load at the MSPB.

C. Conclusion

---

276 *See* Agency Position at 55.
277 *See* Agency Position at 55.
278 *See* Agency Rebuttal at 33.
279 Union Position at 56.
280 *See* Union Position at 56 (citation omitted).

The Panel imposes the Agency's proposal. The Agency's proposal calls for a simple application of the relevant legal authority.[281] The Union's proposal includes several procedures and requirements the Agency must adhere to in granting or denying WIGI's. Notably, as the Agency references, the Union's proposal prohibits the use of WIGI-denials for "punitive" purposes.[282] The Union's lengthier language induces a system of delays for awarding well-deserved pay increases. Again, the Union insinuates that its language is needed to address the Agency's recruitment woes. But, if this language has been in place during those woes, it stands to reason the Union's language would not ameliorate the foregoing conditions.

The Agency's argument to exclude WIGI's from the grievance procedure should be rejected. It argues that WIGI's cannot be grieved as a matter of law because they constitute "examination[s], certification[s], or appointment[s]" within the meaning of the Statute[283] and, as a result, cannot legally be grieved. The Agency provides literally no precedent to support this conclusion. This is unsurprising because no such precedent exists. Management also contends that Section 4(i) of the Removal Order prohibits WIGI-disputes because it prohibits grievances over "the assignment of ratings of record."[284] Here too, the Agency neglected to provide any authority defining WIGI's as the equivalent of an annual rating. In the absence of any other arguments, it is appropriate to reject Management's approach. Curiously, although the Agency argues that this matter should be excluded from the grievance procedure, there is actually *no language in Management's proposal concerning grievances.*[285] Nevertheless, the Panel clarifies that nothing in Management's language should be read as excluding this topic from the parties' grievance procedure.

Article 43, "Grievance Procedures"

A. Agency Position

The Agency proposes excluding three categories of actions from the parties' negotiated grievance procedure: (1) those items which are excluded as a matter of law under 5 U.S.C.

---

281 *See* Agency Final Offer at 39.
282 *See* Union Final Offer, Article 40 at 2.
283 5 U.S.C. §7121(c)(4).
284 Executive Order 13,839, Sec. 4(i).
285 *See* Agency Final Offer at 39.

§7121(c)(1)-(5)[286]; matters that arise under 38 U.S.C. §7422; and (3) 11 other topics that are also discussed below.[287] As to the second category, the Agency's language does nothing more than capture the statutory scheme under Title 38 of the United States Code that grants the Secretary of the VA the authority to exclude matters from the collective bargaining process.

As to Management's position for the items in the third category, the Agency contends they should be excluded because they hew too closely to Management's right to assign work under 5 U.S.C. §7106(a).[288] And, although the Agency offers a litany of reasons (some of which are discussed in greater detail below) for its proposed 11 exclusions,[289] it is chiefly concerned about its resources. The Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act) creates a unique structure of review for the Agency independent of grievance arbitration that is intended to balance the needs of the Agency, the taxpayer, veterans, and the VA workforce.[290] The existing grievance procedure also results in the Union losing most of its grievances at a cost of $5,990,027 for "meritless grievances."

Finally, in addition to its proposed exclusion, Management offers language concerning various procedures and processes for filing a grievance. Management's language is intended to facilitate a smoother grievance process. The current disciplinary scheme "weave[s] needless complexity into clear disciplinary and adverse action processes."[291]

B. <u>Union Position</u>

The parties' grievance procedure has been in place since 1997 and provides for multiple opportunities at informal resolution prior to litigation. Thus, it is effective and should be mostly retained. The Agency should be ordered to

---

[286] Under this statutory provision, no grievance procedure may allow grievances over: classification matters; political action disputes; adverse actions as set forth in 5 U.S.C. §7532; examinations, certifications, or appointments; and retirement, life insurance, and health insurance.

[287] *See* Agency Final Offer at 40-41.

[288] *See* Agency Position at 56-57 (citing *Department of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990)(*IRS*))

[289] *See* Agency Position at 58-59.

[290] *See* Agency Position at 59 (38 U.S.C. §714, et. seq).

[291] Agency Rebuttal at 34.

withdraw its proposal because "large swaths" of it are "unlawful."[292] The Agency's attempts to place limitations on how grievances can be processed, e.g., setting time limits, requiring certain information to be set forth in a grievance, violate statutory rights to process a grievance under 5 U.S.C. §7121.

The Union objects to the Agency's numerous proposed exclusions. They will actually strain other Federal government resources as they will force the Union and employees to clog the resources of those agencies, e.g., the MSPB, the EEOC, etc. Indeed, due to a lack of a quorum, the MSPB already has a backlog of over 2,500 cases awaiting resolution.[293] The MSPB procedure is more time consuming and involved; it further results in a reversal of VA decisions at a rate 4 times greater than other agencies.[294] So, it is not more efficient than arbitration.

The Union disputes the idea that the Supreme Court's decision in *IRS* prevents any grievances involving management rights.[295] Additionally, 38 U.S.C. §7422 does not grant standalone exclusion authority; rather, the VA Secretary must exercise it first. In addition to not actually listing any exclusions concerning "working conditions" in its proposal, the Agency's cited precedent has actually been overturned.[296] Other VA unions have broader grievance exclusions and an internal grievance system is available to non-Union employees: neither have created a divisive environment. It is also not surprising that most of the Union's grievances fail: the decision maker, of course, is the party charged with misconduct, i.e., the Agency. And, arbitration figures show more success. Finally, costs are not a major factor as the Agency insinuates: it is just as likely that costs arise because of the Agency's own malfeasance. The Agency's cited figure of $5,990,027 for "meritless grievances" is unclear: Management does not clarify whether this addresses grievances, arbitrations, or some combination of the two.[297] And, Management's figures fail to account for its own failures at arbitration.

---

[292] Union Position at 67; *see also* Union Position at 57-58 (identifying various allegedly illegal proposals).

[293] *See* Union Position at 60-61 (citations omitted).

[294] *See* Union Position at 62.

[295] *See* Union Rebuttal at 32-33.

[296] *See* Union Rebuttal at 34.

[297] *See* Union Rebuttal at 38.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. In terms of process and procedures for pursing grievances, Management's language creates a balanced and efficient approach. So, its language on that front should be adopted. The Union argues that various procedural requirements are per se illegal and warrant declination of jurisdiction altogether. The Union's approach creates a scenario in which virtually *any* proposed limitation on grievances is illegal. It seems realistic to conclude that Congress never envisioned such a scheme.

As to the proposed excluded topics, neither party contests that the CBA's grievance procedure *must* exclude those matters cited in 5 U.S.C. §7121(c)(1)-(5). As such, that language should obviously be adopted. Management's remaining two categories will now be discussed.

1. 38 U.S.C. §7422

Under 38 U.S.C. §7421, the Secretary for the Department of Veterans of Affairs has the authority to issue regulations for certain Title 38 employees[298] concerning their conditions of employment. However, pursuant to 38 U.S.C. §7422(b) and (d), this authority is subject to bargaining obligations under Chapter 71 of Title 5, *i.e.*, the Federal Service Labor Management Relations Statute (Statute), *unless* the Secretary concludes a bargaining topic touches upon a matter of "professional conduct or competence." The phrase "professional conduct or competence" is defined to include "direct patient care."[299] Stated differently, the Secretary can conclude that a matter is excluded from statutory collective bargaining obligations because it concerns "direct patient care." Under §7422, only the United States Court of Appeals for the District of Columbia Circuit has the authority to review the merits of the Secretary's decision to exclude a topic from negotiations.[300]

The above statutory scheme exists regardless of what a contract may state. Indeed, as its plain language makes clear,

---

[298] "Title 38 employees" refers to a group of medical-based employees that work for the Department of Veteran Affairs and, as such, are largely governed by a framework established by Title 38 of the U.S. Code. *See* 38 U.S.C. §7421(b).

[299] 38 U.S.C. §7422(c)(1).

[300] 38 U.S.C. §7422(e).

this law supersedes contract so long as certain conditions are satisfied. In another recent CBA dispute involving a national VA union, the Panel declined to include language involving §7422 determinations because of this section's independent status.[301] **The Panel will follow suit in this dispute and decline to include the Agency's language on this topic and strike its proposed Article 43, Sections 3.B and C.**[302] Again, however, the Panel emphasizes that it is not encroaching upon the Agency's ability to independently rely upon any authority under Title 38.

The Agency also broadly claims that the Accountability Act and 38 USC §7422 grants it broad, sole and exclusive discretion over all matters concerning discipline, leave, hiring, and training that cannot be challenged via grievance.[303] The Panel has already addressed §7422, and nothing in the Accountability Act supports Management's broad claim. Indeed, were the Agency's position accurate, it simply could have declared the Union's position non-negotiable. More curiously, Management provides no actual proposed language for these exclusions.[304] The Agency's arguments are once again the source of confusion.

2. Remaining Topics of Exclusion

The Agency proposes excluding the following topics from the negotiated grievance procedure:

> 1. Notices of expected behavior of any kind including, but not limited to: warnings; counseling; letters of expectation; and leave restriction letters;
>
> 2. Removal or termination of an employee;
>
> 3. Matters related to the content and rating of a performance appraisal or proficiency, including performance-based actions;
>
> 4. Disputes regarding any form of incentive pay, including cash awards; quality step increases; and recruitment, retention, or relocation payments;

---

301 *See U.S. Dep't of Veterans Affairs and NFFE*, 19 FSIP 024 at 4-5 (2019).

302 *See* Agency Final Offer at 40-41.

303 *See* Agency Rebuttal at 37.

304 *See* Agency Final Offer at 40-41 (listing proposed exclusions).

5. Disputes concerning the assignment of ratings of record;

6. Non-selection for promotion;

7. The separation of an employee during his or her probationary period;

8. Filling of supervisory or other positions outside the Union bargaining unit;

9. Disputes regarding the termination of temporary or term employees, including, but not limited to, a failure to provide two (2) weeks advance notice;

10. Disputes over appointments for Title 38 Hybrid employees appointed under the authority of 38 U.S. Code § 7401(3) or 38 U.S. Code § 7405(a)(1)(B);

11. Disputes regarding any request, grant, denial, tracking, or use of Official Time (OT).[305]

The bulk of the Agency's argument in support of exclusion turns on the applicability and purpose of the Accountability Act. Management states that Congress enacted this law to permit the Agency to effectively and efficiently remove, demote, or suspend an employee for performance or misconduct issues and to grant those employees limited but expedited review with the MSPB. This scheme requires a decision to be completed through the appeals process within six months; by contrast, arbitration can take upwards of 18 months to resolve.[306] Further, administrative law judges must be deferential to the Agency's decisions so long as they are supported by evidence. It makes no sense to grant arbitrators greater freedom than Congress granted the MSPB.

Congress's rationale for enacting the Accountability Act is on full display in the environment fostered by the existing grievance procedure. In Fiscal Year 2018, 4,618 grievances were filed in the Veterans Health Administration – a component of the Agency.[307] Management claims that the Union's grievances were

---

[305] Agency Final Offer at 41.

[306] Agency Position at 60-61.

[307] Agency Position at 62. Although the Agency cites to its "Exhibit 2," a review of the record shows that the actual

found to be "justified" only 17.28% of the time.[308] Moreover, Management notes that its decisions were overturned only 48 times at arbitration whereas the Agency's grievance findings were upheld in "98.74%" of cases. At an average cost of $1,568.07 per grievance, Management claims it spent $5,990,027 on "meritless" grievances.[309] In addition to being wasteful, the grievance process has facilitated a "toxic" environment that has made supervisors hesitant to initiate personnel actions.

The Agency also makes much of the Supreme Court's decision in *Department of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990)(*IRS*). According to the Agency, this decision held that "when an agency acts pursuant to a management right enumerated in 5 U.S. Code § 7106(a)," that agency "is insulated from the grievance requirements of [the Statute], and its actions are removed from the coverage of the Statute to the extent the decisions are in accordance with applicable laws."[310] Thus, Management believes it is justified in excluding a host of topics from the grievance procedure.

Management also relies upon the alleged statutory distinction between the terms "conditions of employment" and "working conditions." Under the Statute, an agency must bargain over changes in "conditions of employment." The Statute defines this term as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting working conditions*."[311] In 2018, the FLRA concluded that agencies are not required to bargain over a change to solely a "working condition."[312] In so doing, the FLRA rejected existing precedent that concluded there was no "substantive distinction" between the terms "conditions of employment" and "working conditions." However, recently, the United States Court of Appeals for the District of Columbia reversed the FLRA's 2018 decision after concluding that the FLRA's departure from existing precedent was "without sensible explanation" and not

---

exhibits with Management's cited information are Exhibits 36 and 36a.

[308] *Id.*

[309] *Id.* at 63.

[310] Agency Position at 57.

[311] 5 U.S.C. §7103(a)(14).

[312] Agency Position at 58 (citing *Department of Homeland Security, Customs and Border Protection, El Paso, Texas and AFGE, Nat'l Border Patrol Council, Local 1929*, 70 FLRA 501 (2018)).

"reasonable."[313] Thus, the court vacated the FLRA's decision and remanded it for further proceedings. The court issued this decision after the Agency submitted in its initial brief to the Panel, and it is not yet clear what action the FLRA will take on remand.

The Panel imposes six of the Agency's eleven proposed exclusions. The Panel has recognized the significance of Federal court precedent concerning grievance exclusions. It has acknowledged the United States Court of Appeals for the District of Columbia's conclusion that a proponent of grievance exclusion must "establish convincingly" in a "particular setting" that this position is the "more reasonable one."[314] The Panel has further clarified that Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (Removal Order) – and related Executive Orders – demonstrates important public policy that must be taken into consideration when resolving these disputes. That consideration, however, differs depending upon the exclusion that is involved. For example, the exclusions under Section 4 "shall" be implemented, but the removal exclusion under Section 3 turns on the circumstances.

As to these 11 proposed exclusions, the Agency leans heavily upon its grievance data. In this regard, the Agency provides a seemingly startling figure that shows VHA bargaining-unit employees prevailing only 17% of the time in grievances. By contrast, under the column labeled "# of Grievances Won," there is a figure of 65.9%.[315] Thus, this data shows a large Agency success rate. At least, that is true when the Agency is responsible for deciding whether the Agency violated the CBA or some other law, rule, or regulation. By contrast, a review of the figures for arbitration bears different fruit. Out of 400 grievances pursued to arbitration, 164 resulted in a hearing. While the Union failed in 51 of those disputes (or 12.8%), it *prevailed* in 48 cases (or 12% of the time).[316] So, Management's data shows that the parties are virtually on equal footing when before an independent decision maker. Moreover, aside from 9 other invoked-arbitration cases that settled, the Agency did not provide data to explain what happened to the nearly 250 other

---

[313] *AFGE, Local 1929 v. FLRA*, 2020 WL 3053410 (D.C. Cir. June 9, 2020)(*AFGE, Local 1929*).

[314] *SSA and AFGE*, 19 FSIP 019 at 9-10 (2019)(*SSA*)(quoting *AFGE v. FLRA*, 712 F.2d 640,649 (D.C. Cir. 1983)).

[315] *Id.*

[316] *See id.*

arbitration disputes. The Agency's insinuation, then, that the majority of arbitration decisions were favorable to the Agency is not a dispositive conclusion under the record.

Management's reliance upon the Supreme Court's decision in *IRS* is equally problematic. The Agency cites this decision for the apparent proposition that any exercise of a statutory management right is beyond the reach of a negotiated grievance procedure unless the Agency failed to act in accordance with "applicable law." In *IRS*, the Court concluded that a union could not abrogate Management's right to contract out duties by relying upon an Office of Management Budget publication. But, the Court never concluded that a grievance that involves *any* aspect of a management right is non-grievable. To be sure, a union may not challenge a direct exercise of a management right. But, per the Statute, unions are entitled to bargain aspects of that right, e.g., appropriate arrangements and procedures.[317] Indeed, since the issuance of *IRS*, the FLRA has rejected the suggestion that a matter may not be grieved if it involves a management right.[318] This precedent has never been overturned by a Federal court.

On the topic of overturned precedent, the Agency's reliance upon the distinction between "working conditions" and "conditions of employment" is in doubt. As noted, the D.C. Circuit Court of Appeals has overturned the FLRA's 2018 decision that clarified this distinction. It is not yet clear what action the FLRA will take, but given that the court found the foregoing distinction to be "without sensible explanation," its continued viability is in significant doubt. Additionally, although Management requests that disputes concerning "working conditions" be excluded from the grievance procedure, there is no actual language concerning this topic in its proposed Article 43.

Based on all of the foregoing, and combined with the structure of review for grievance exclusions arising under court and Panel precedent, the Panel concludes that *the* following proposed exclusions should be included in the parties' grievance procedure. As such, only these types of grievances will be

---

[317] *See* 5 U.S.C. §7106(b)(2) and (3).

[318] *See, e.g., AFGE, Nat'l Border Patrol Council, Local 1929 and U.S. Dep't of Homeland Sec., Customs and Border Protection*, 63 FLRA 465, 466-67(2009)(FLRA rejected claim that grievance was not substantively arbitrable because underlying personnel action involved the exercise of a statutory management right).

specifically excluded from grievance arbitration in this section of the contract for the reasons stated below:[319]

- **Article 43, Section 3.D.1:** "Notices of expected behavior of any kind including, but not limited to: warnings; counseling; letters of expectation; and leave restriction letters." The Agency has demonstrated that the burden upon Management in disputing these informal actions for this bargaining unit outweighs any hypothetical benefit those employees may receive in grieving such actions.

- **Article 43, Section 3.D.3:** "Matters related to the content and rating of a performance appraisal or proficiency, including performance-based actions." Allowing the Union the ability to grieve these matters could potentially interfere with the Agency's statutory right to assign work under 5 U.S.C. §7106(a)(2)(A).

- **Article 43, Section 3.D.4:**[320] "Disputes regarding any form of incentive pay, including cash awards; quality step increases; and recruitment, retention, or relocation payments." Incentive pay is an item that should be excluded under the Removal Order. As the Panel has done in the past, it will continue to recognize the policy consideration of the foregoing and impose this language.

- **Article 43, Section 3.D.5:**[321] "Disputes concerning the assignment of ratings of record." Again, this is another topic excluded under Section 4 of the Removal Order. This too should be adopted.

- **Article 43, Section 3.D.7:**[322] "The separation of an employee during his or her probationary period." The Panel has adopted similar language in other disputes

---

[319] Management also says that it is proposing eliminating grievances regarding overtime work, holiday work, compensatory time, and disputes regarding within grade increases or career ladder promotions. *See* Rebuttal at 36. None of these exclusions appear in Management's language.

[320] Agency Final Offer at 41.

[321] Agency Final Offer at 41.

[322] Agency Final Offer at 41.

because these types of grievances are illegal.[323] The Panel will adopt similar language here.

- **Article 43, Section 3.D.8:**[324] "Filling of supervisory or other positions outside the Union bargaining unit." As the Agency correctly notes, the FLRA has concluded that parties cannot bargain over procedures involving the filling of non-bargaining unit positions absent an agency's agreement to do so.[325] The Agency has not given that agreement. So, the Panel will exclude this topic from the grievance procedure.

Article 44, Arbitration

A. Agency Position

The Agency proposes simplified language that will discourage abusive arbitrations and ensure that arbitrators act solely within their delegated authorities. To accomplish the foregoing, the Agency proposes, amongst other things:[326]

- Bifurcating hearings when an arbitrability challenge arises;

- Requiring the party invoking arbitration to pay for *all* costs;

- Making the burden of proof for all arbitrations "clear and convincing" evidence unless required by statute;

- Failing to follow all timelines in the article or taking "reasonable and definitive steps to expeditiously pursue the arbitration procedures by having a hearing scheduled to be held within ninety (90) days of the case being invoked."

- Mandating that all arbitrations occur at the Agency's headquarters in Washington, D.C. unless it is more financially feasible to do so elsewhere or a teleworking employee is involved. If the dispute involves a

---

[323] *See, e.g., Fairchild Air Force Base,* 19 FSIP 070 at 12 (2020).

[324] Agency Final Offer at 41.

[325] *See, e.g., AFGE, Local 200 and FAA*, 68 FLRA 549, 550 (2015) (citations omitted).

[326] *See* Agency Final Offer at 45-49.

teleworker, the hearing will be at the official duty station of that employee.

Management believes all of the foregoing, and more, is necessary because the Union has long abused the arbitration process with frivolous disputes that take far too long to resolve. For example, one grievance involved the Union manipulating procedural issues to the point where even the arbitrator referred to the matter as "foolish."[327] One 3-day suspension action took around 2 years and $22,000 in arbitrator fees alone to resolve.[328] Management's culled data shows that, out of 400 arbitrations, the Union won 57 (14.25%) while the rest were either dropped or won by Management.[329] So, regular costs for Agency-won or withdrawn arbitrations alone amounted to $1,708,808.85 for just the VHA.[330]

B. Union Position

The Union proposes largely retaining its current language and believes Management has invented a fictitious parade of horribles to cripple the Union's ability to advance matters through arbitration. The Union views the Agency's proposals as inherently unfair and arbitrary. In response to some of the changes above, the Union alleges:

- Language involving bifurcation is unnecessary because arbitrators may already do that, and the Agency's scheme could potentially increase costs by increasing the number of hearings.

- The parties already pay for arbitration costs equally. Requiring the Union to pay for all costs would chill grievances seeking to hold Management accountable. It may also be illegal to force the Union to pay for Agency attorney fees.

- The generally recognized standard of proof for arbitration is "preponderance of evidence." Management offered no compelling reason to raise the burden.

- The Agency's 90-day requirement is confusingly drafted. In one section the language refers to 90 days of *holding* the

---

327 Agency Position at 67-68.
328 Agency Position at 69.
329 Agency Position at 68 (citing Agency Ex. 36).
330 Agency Position at 68 (citing Agency Ex. 36).

hearing, in another, the language refers to 90 days of *scheduling* the hearing.

- The Agency's language concerning locations of hearing is non-sensical and one-sided. If hearings can be held at a different duty station when a teleworking employee is involved, there is no legitimate rationale for not holding hearings at other duty stations/locations as a matter of course.

C. Conclusion

The Panel imposes a modified version of the Union's proposal. In a turn of events, it is the Agency that is seeking to expand the existing language of the parties' article. The Agency's arguments for doing so revolve around what it claims to be an inefficient process that has resulted in an enormous drain of Agency resources. A centerpiece of the Agency's argument is its spreadsheet of arbitration figures involving the VHA in 2019 that was discussed in Article 43.[331] This chart shows 400 invoked arbitrations, with 164 of them proceeding to a hearing. Of those that went to a hearing, "only" 48 – or 12% -- of those resulted in a loss for the Agency. Management's insinuation is that the remainder of the disputes resulted in a positive outcome for the Agency. Yet, this chart shows that the Agency prevailed only on 51 arbitrations that went to a hearing, or 12.8%. That is, the parties' win/loss record before an independent arbitrator is nearly in equipoise. Nine other cases settled, and it is not clear what happened to the other cases where arbitration was invoked. That is, it cannot be said that the overwhelming number of arbitral figures backs the Agency's claim.

Given the importance of the above figures to Management's argument, it cannot be said that the Agency's position is supported by the record. As alluded to above, throughout this dispute Management has insisted that straightforward proposals are necessary for effectuating the Agency's mission in an effective and efficient manner. The Union's proposal appears to be more straightforward, and the Agency has offered minimal justification to alter it. Accordingly, the Union's proposal is most appropriate to adopt in this dispute.

Notwithstanding the above, there is at least one item identified by the Agency that the Panel believes would be of a

---

[331] *See* Agency Exhibit 36.a.

benefit to the parties' arbitration process. In particular, Management proposes a scheme for bifurcation of grievability and arbitrability. The Panel believes it to be appropriate to impose this scheme because it could, in some cases, resolve arbitrations in an effective and efficient manner. Accordingly, the parties should add the new "Section 3 – Bifurcation" to Article 44:

> If a Party considers a grievance to be non-grievable or non-arbitrable, that issue shall be raised and determined as follows:
>
> 1. If a Party challenges the grievability or arbitrability of a grievance for any reason, the case shall be bifurcated. The arbitrability/grievability issue shall be decided by a threshold issue arbitrator who shall then be disqualified from hearing the arbitration (if any) on the merits of the grievance. The threshold question of grievability and arbitrability shall be reviewed by the submission of written briefs only. The threshold arbitrator shall be selected via arbitrator selection procedures identified in Section 2.A of this Article.
>
> 2. All questions of grievability and arbitrability shall be resolved before a hearing on the merits of the case is scheduled. A hearing on the grievance merits shall not commence prior to receipt of the arbitrator's decision on the threshold issue.
>
> 3. The threshold issue arbitrator shall have final authority to make all determinations regarding grievability and arbitrability.
>
> 4. If the threshold decision of arbitrability/grievability is not decided in favor of the Party challenging, after receiving the decision of the threshold issue arbitrator, a merits arbitrator shall be selected in accordance with this Article.

Article 45, Dues Withholding

A. Agency Position

The Agency's proposed language in Article 45 governs the procedures for automatically withdrawing Union dues from an employee's paycheck. Among other things, this language states

dues deductions will begin "as soon as operations allow."[332] The same standard applies when the amount of dues changes. Additionally, the proposal permits deductions only if an employee has used a form specified in the CBA and only if the employee's salary permits dues to be deducted after all other expenses have been deducted. Finally, an employee is required to submit an annual dues form within a specified timeframe at the one-year anniversary of submitting a dues-deduction form. A failure to do so will result in the Agency terminating the collection of that employee's dues. The Agency claims that, under the "law," employees have a "First Amendment" right to opt out of a dues agreement.5 U.S.C. 7102 serves to protect the rights of individual employees, not their representatives.

B. Union Position

The Union objects to the Agency's framework and largely wants to maintain the status quo. The Union views the Agency's framework as inconsistent with the statutory requirements of 5 U.S.C. §7115. This statutory provision requires an Agency to honor an employee's decision to request dues deduction. According to the Union, the Agency's proposed language allows the Agency to avoid this duty. The Union claims that several other comparable dues withholding schemes, such as TSP and FEGLI occur annually without controversy. The Union should be granted parity.[333] The Agency's proposed scheme is illegal and must not be adopted.

C. Conclusion

The Panel imposes the attached modified version of the Agency's proposal. The topic of dues is governed by 5 U.S.C. §7115. As relevant, it states:

> (a)If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any

---

[332] *See* Agency Final Offer at Article 45, Section 4.A at 50.

[333] *See* Union Rebuttal at 41.

> such assignment may not be revoked for a period of 1 year.
>
> (b)An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—
>
> (1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or
>
> (2) the employee is suspended or expelled from membership in the exclusive representative.

The above language states that agencies "shall honor" requests for dues deduction and "may not" revoke them for a period of 1 year. However, as acknowledged by Federal courts that have interpreted this provision, employees have a significant amount of autonomy under this language. As stated by the United States Court of Appeals for the District of Columbia, §7115 "was designed for the primary benefit and convenience of *the employee*. *The employee has the right to decide* whether to opt for withholding and to control the disposition of the funds so withheld."[334] Employee control is a feature, not a bug.

The FLRA recently reaffirmed this control via promulgation of a new dues regulation, 5 C.F.R. §2429.19, that allows an employee to revoke their dues deduction status after the conclusion of the 1-year period in 5 U.S.C. §7115(a). The regulation arose after a request for guidance by the OPM concerning the impact of the Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)(*Janus*) on the FLRA's dues precedent.[335] After a notice and comment period, the FLRA concluded that a change to its approach to dues revocation was warranted, hence the new regulation. In advancing this regulation, the FLRA Sought to "assure employees the fullest freedom in the exercise of their rights under the

---

[334] *AFGE, Council 214 v. FLRA*, 835 F.2d 1458, 1460 (D.C. Cir. 1987).

[335] *See* "Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Revoking Union-Dues Assignments," 84 Fed. Reg. 33,175 (July 12, 2019). In *Janus*, the Supreme Court held that mandatory "agency fee" arrangements for state public-sector unions are inconsistent with the First Amendment of the United States Constitution.

Federal Service Labor-Management Relations Statute including their rights under 5 U.S.C. 7102 and 7115, in matters directly affecting their pay."[336] In their final rule the FLRA was also careful to note that its reexamination of precedent and subsequent regulation was not a product of any holding within *Janus* but rather a statement on the application of statutory law.[337]

All of the foregoing demonstrates the importance of employee control in the dues deduction process, a value that is reflected in the Agency's proposal. It is, therefore, most appropriate to impose this language, albeit with some modification. For example, the Agency proposes that employees be required to affirmatively opt into paying dues after the expiration of the 1-year period of §7115(a). However, it is unclear whether such a proposed structure is consistent with the existing statute and regulation.[338] Similar alterations have been made to avoid other potential conflicts with 5 U.S.C. §7115, 5 C.F.R. §2429.29, and other applicable statutes and regulations.

Article 46, Local Supplemental Agreements

---

[336] *See* "Miscellaneous and General Requirements" Notice of Proposed Rulemaking 85 Fed. Reg. 15742 (2020.

[337] *See* "Miscellaneous and General Requirements" 85 Fed. Reg. 41169, 41170 (2020).

[338] In deciding this article, the Panel Majority applied the existing federal statutory and regulatory requirements. In its proposed language for dues deductions, we are mindful that the agency is seeking to protect the First Amendment rights of its employees under *Janus* and related court decisions. However, under 5 U.S.C. § 7115, Congress has directed that the agency "shall honor the assignment and make an appropriate allotment pursuant to the assignment." This statutory directive has been applied to government-wide regulations. To the extent the Agency believes that questions of constitutional or statutory interpretation arise in light of this statutory and regulatory framework, those questions are best handled in alternative venues.

Further, the Panel Majority notes that the OPM forms OPM SF-1187 and SF-1188 predate the U.S. Supreme Court's decision in *Janus*. As such, to the extent the agency believes these forms do not adequately advise its employees of their constitutional rights, it should seek revision of those forms by appropriate authorities.

A. Union Position

The Union argues that this article was already addressed by tentatively agreed to language in Article XX that the parties signed on August 27, 2019. This language states:

> When a local policy or procedure changes a condition of employment, the parties will negotiate it locally to the extent required by law.[339]

As a result of the above tentative agreement, the Union contends, the Agency may not put forth language in its proposed Article 46 that prohibits negotiations over "local supplemental agreements."[340] Likewise, the Agency cannot propose eliminating local past practices, MOUs, and MOAs without first bargaining at the local level. Because of Article XX, then, the Panel should order Management to withdraw its last best offer.

Additionally, the Union maintains that the Agency's offer for Article 46 is inconsistent with its own proposal for Article 21, Section 1.A on the topic of "Hours of Work and Overtime."[341] This language calls for "existing policies and practices [to] remain in effect unless in conflict or inconsistent with this article. Those facilities having locally negotiated agreements will continue to honor those agreements so long as they do not conflict" with the CBA.[342] Similarly, the Union claims that the parties' Article 35, Section 2(D) permits "practices and local agreements for resolution of annual leave disputes."[343]

B. Agency Position

The Agency proposes language that eliminates "antiquated local supplemental agreements (LSAs), MOUs, MOAs, and other side agreements and past practices."[344] Having all agreements focused in one master agreement will be more effective and eliminate confusion; indeed, according to the Agency's estimation, there

---

339 Union Exhibit 8.

340 Union Position at 75.

341 Union Rebuttal at 42 (citing Agency Final Offer at 9).

342 Agency Final Offer at 9.

343 Union Rebuttal at 42. To support this point, the Union cites "Attachment 17, VA Article 35." There is no Attachment 17 in the record that shows an Article 35.

344 Agency Position at 71; *see also* Agency Final Offer at 58.

are "thousands" of local agreements throughout the country.[345] Eliminating all these agreements will also allow Management personnel to coordinate one national approach to labor issues. The Agency also argues that its approach is buttressed by the distinction between "working conditions" and "conditions of employment."

The Agency disputes the Union's claim that Management's proposed Article 46 is inconsistent with Article XX. Management acknowledges it has a duty to engage the Union when legal obligations arise; that duty, however, is separate and apart from extinguishing existing agreements. Additionally, the Union's claim that the parties must bargain the extinguishment of every local agreement is facetious because the parties are currently bargaining that precise issue.

C. Conclusion

The Panel imposes a modified version of the Agency's final offer. Management proposes eliminating existing local agreements, local MOA's/MOU's, and local past practices. This dispute primarily turns on what the parties agreed to under Article XX (there is no disagreement that the parties signed off on this article). The plain language of Article XX permits local negotiations for changes in local "polic[ies] or procedures." The Union's primary point of contention is that Management's proposed Article 46 involves the proposed elimination of "local supplemental agreements." The Union's supposed conflict actually covers two different topics: "policies/procedures" versus "supplemental agreements." As such, these articles actually appear to be in harmony.

The Union points to at least one area of possible inconsistency: Article 21, Section 1.A. That section calls for existing policies to remain in effect barring a conflict with the CBA or Article 21. As noted above, Article XX appears to actually permit negotiations over changes to local policies and procedures. **Nevertheless, to address this possible inconsistency – and any other potentially unidentified inconsistencies[346] – the Panel adds the following new Section 4 to the Agency's final offer for Article 46:**

---

[345] Agency Position at 71.

[346] As noted above, the Union identifies language in Article 35, Section 2.D that allegedly permits the continuation of existing agreements. However, as the record does not show what

The language of this article applies unless other language in this agreement calls for the continuation of existing past practices, MOU's/MOA's, or local supplemental agreements.

Article 47, Mid-Term Bargaining

A. Agency Position

The Agency's language on Mid-Term Bargaining outlines the Agency's bargaining obligations for matters that arise during the life of the contract. The Agency will provide the Union with a written copy of the proposed change, and the Union will have an opportunity to provide its "written views and recommendations."[347] The parties will then "meet" – unless the Union does not respond – to discuss those views and recommendations. If the Agency does not agree with the Union's statements, it will provide the Union with a written justification for its "final action." The Agency's language further states that any "agreement" will be memorialized in writing, that either party may utilize the services of FMCS/FSIP, and that each party will be responsible for their own costs related to "negotiations."

Management believes the Union's proposal, which captures the status quo, is largely inefficient. For example, it calls for bargaining over "working conditions." But, as set forth above, Management believes bargaining over a change in working conditions is impermissible.

B. Union Position

The **Union** argues that the foregoing process is akin to "consultation" rather than "negotiations." In particular, the Agency's language states that the Agency will "engage" the Union with the duty to bargain arises; the proposal further states that the Union will provide "views and recommendations" after receiving notice, and that a failure to do so will result in implementation.[348] Thus, the Union argues that the Agency's proposed language waives the Union's statutory right to bargain. Since 2011, Management has proposed nearly 2,300 mid-term

---

this language is, it is difficult to tailor anything more specific to the Union's raised issue.

[347] *See* Agency Final Offer at 57-58.

[348] *See* Union Position at 75-76.

changes nationwide.[349] As such, the Union needs robust language that captures its bargaining rights. The Union also offers language requiring face-to-face negotiations in certain circumstances. It also has a robust Section 4 that addresses local mid-term negotiations.

C. Conclusion

The Panel imposes a modified version of the Union's language. Under the Statute, Federal agencies may exercise various statutory rights during the life of a contract.[350] However, in turn, exclusive representatives have the ability to negotiate aspects of those rights if they are not already addressed by law or contract.[351] Management's proposal states that the procedures in its proposal "will apply when the [Agency] creates a statutory duty *to engage* the Union."[352] The Agency's language appears to create a distinction between "bargain[ing]" and "engag[ing]." The Agency did not explain what, if any, significance attaches to this distinction.

Adding confusion to the above, the Agency's proposed language is unclear on what it permits. It uses terms like "negotiations" and references the FMCS/FSIP process. But, in Section 1. A-O, it speaks to a Union's ability to provide "views and recommendations" and nothing more. Moreover, Management's language implies that Management may proceed with a "final action" should it reject the Union's views. Based on the foregoing ambiguity, there is a colorable question as to whether this article waives the Union's statutory right to bargain.

The Agency is also focused upon the distinction between "working conditions" and "conditions of employment" discussed elsewhere. For reasons already discussed, that distinction is of questionable legal merit. Thus, Management's reliance upon this distinction should be rejected.

There are changes that should be made to the Union's language, however. To begin with, the Union's proposed Section 4 offers a process and procedure for local negotiations.[353] But, limitations on local negotiations have already been discussed

---

349 *See id.* at 76.
350 *See, e.g.,* 5 U.S.C. §7106(a).
351 *See, e.g.,* 5 U.S.C. §7106(b)(2) and (3); 5 U.S.C. §7117.
352 Agency Proposed Article 47, Section 1 (emphasis added).
353 *See* Union Final Offer, Article 47, Section 4 at 3.

and implemented in Article 46. **Thus, the Union's language for Section 4 is superfluous and should be stricken.**

The Union also offers language concerning mandatory "face-to-face" negotiations in its Section 2.D and E.[354] Obviously, such an arrangement is not ideal in an environment in which such meetings are discouraged due to health guidance. **Accordingly, the following bolded language should be added to the Union's language, and language concerning limitations on telephone negotiations in Section D should be stricken:**

> D. The parties may first attempt to reach agreement by conducting telephone negotiations. In addition the parties will meet FOUR TIMES face-to-face quarterly **unless one party has concerns related to Covid-19**. **If either party has such concerns, the parties will engage in non-face-to-face meetings.** Such negotiations should normally begin no later than 10 workdays after the Department chairperson receives the Union's demand to bargain.
>
> E. If the parties are unable to reach agreement, negotiations will normally proceed to face-to-face bargaining **unless one party has concerns related to Covid-19. If either party has such concerns, the parties will engage in non-face-to-face meetings.** When traditional bargaining is used, the Union's written proposal(s) will be submitted prior to bargaining SESSION. The parties retain the right to modify, withdraw, or add to any interests, concerns, or proposals they may have discussed or exchanged earlier.

Article 48, "Official Time"

A. Agency Position

The Agency argues for a position that is consistent with the mandate of 5 U.S.C. §7131(d) to ensure the use of official time is reasonable, necessary, and in the public interest. Its position is also consistent with Executive Order 13,837 "Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use" (Official Time Order).[355] Management's position further facilitates the Agency's statutory

---

[354] *See* Union Final Offer, Article 47, Sections 2.D and E at 2.

[355] *See* Agency Offer at 59.

duty to provide the utmost care for veterans and their loved ones. Providing this care is difficult when VA employees who are working for the Union instead of the Agency are ensconced in official time duties. In this regard, OPM data shows that, for Fiscal Year 2016 alone, the Union used 1,048,596 hours of official time at a salary cost of $49,142,863.90.[356] This impedes the Agency's mission. This money could be put to use for a wide variety of treatment-related options.[357] So, Management proposes a structure that balances the needs of the Agency with the Union's statutory duties. The Union will receive a cap of 176,296 annual hours. This figure accounts for the fact that the Agency cannot legally cap hours for activities under 5 U.S.C. §7131(a) and (c) even after the bank is exhausted.[358] This figure also accounts for the fact that, under Management's proposal, employees may request paid and unpaid leave to perform official time duties as well.[359]

For 2019 alone, the Union received $60,157,663.30 in Union dues. So, the Union has more than enough resources to devote to representation without the need to turning to taxpayer-funded representatives. Indeed, in that same year, the Union's "parent organization" AFL-CIO devoted $7,511,763 in Union dues just to lobbying efforts alone.[360] Given this, Management's proposal still provides for reasonable, necessary, and in the public interest official time but places an onus on the Union to carefully manage that time. Management's proposal also structures leave requests in a manner to ensure that supervisors are still left in a position to ensure workplace duties are accomplished.

In its rebuttal position, the Agency claims that the Union's reliance on financial disparities between the Union and Management is misplaced. The Agency has a workforce of 397,400 total employees to account for; its Office of Labor-Management relations *only* has a budget of $3.2 million.[361] And, the Agency has to devote resources to Union-initiated actions that are of the Union's own making.

---

[356] Agency Position at 75, fn.236 (citing https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/#url=2016).

[357] *See* Agency Position at 76-77.

[358] *See* Agency Position at 82.

[359] *See* Agency Position at 82.

[360] *See* Agency Position at 77 (citation omitted).

[361] *See* Agency Rebuttal at 41-42.

B. Union Position

The Union requests that several National Union representatives receive several thousand hours of official time per year; additionally, each local bargaining unit will receive 4.25 hours of official time per bargaining unit employee.[362] Additionally, several activities, such as EEO representation, will not count towards official time use.

The Union believes its position is warranted because it is a bargaining unit unlike any other in the galaxy of Federal sector collective bargaining. In addition to representing nearly 300,000 employees, it must deal with an Agency that has a penchant for rule abusage that is without equal in public service. Per GAO investigations, roughly 31% of reports of government abuse and waste arise from the Agency's operations.[363] This environment fosters a need for whistleblower activity and protection which can only be accomplished through robust official time usage. Union representation is but a fraction of the Agency's operating cost. For example, in Fiscal Year 2020 the Agency received a budget of $220.7 billion; accepting Management's cited official time figures as true shows that Union time amounts to only .02% of this budget.[364] And, in any event, the legislative history of the Statute shows that official time was authorized to place unions on the same footing with agencies in terms of labor resources.[365]

The Union also wishes to continue to permit official time for lobbying activity, which Management's proposal prohibits. The Union argues this topic is negotiable.[366] And, the Union would continue a practice that prohibits the charging of official time for EEO activities. The Equal Employment Opportunity Commission is proposing a new rule that will explicitly charge Union-EEO representation to official time, but the Union opposes this proposed change.[367]

In its rebuttal statement, the Union notes that the Agency's cited official-time figure of 1,048,569 hours for FY 2016 is inaccurate; that OPM figure includes official-time usage

---

362 *See* Union Offer, Article 48, at 11.
363 *See* Union Position at 78 (citation omitted).
364 *See* Union Position at 82.
365 *See* Union Position at 76-77 (citation omitted).
366 *See* Union Position at 84 (citation omitted).
367 *See* Union Position at 83.

for *all* VA unions.[368] Indeed, those figures show that official-time usage actually decreased from FY 2014 to FY 2016 by 11.49%.[369] The Agency's reliance on the Union's annual dues collection is unpersuasive; that figure arise from only *half* the bargaining unit.[370] The Union is legally obligated to represent the *whole* unit. Management's reliance on dues figures is particularly ironic given that Management is attempting to curtail dues collection as part of these negotiations.

C. Conclusion

The Panel imposes a modified version of Management's proposal. In this regard, the Panel accepts Management's proposal with the exceptions identified below concerning the amount of official time set forth in the article.[371]

The Union is statutorily entitled to official time under 5 U.S.C. §7131(a) and (c).[372] The crux of this dispute turns on official time that is permitted under §7131(d) of the Statute. In *Social Security Administration and AFGE*, 19 FSIP 019 (May 2019) (*SSA*), the Panel acknowledged that 5 U.S.C. §7131(d) provides for official time in any amount parties agree to be "reasonable, necessary, and in the public interest." However, the Panel also noted that it has authority to impose amounts when the parties cannot reach agreement. When imposing such decisions, the Panel clarified that it expects all parties to justify their proposed language on official time as "reasonable, necessary, and in the public interest." In the absence of such justification, the Panel has authority to impose a different amount.

Since the issuance of *SSA*, President Trump's May 25, 2018, Executive Orders that concern, among other topics, Federal-sector collective bargaining have gone into effect. These Orders provide an important source of public policy that the Panel may implement. Notably, Section 3(a) of the Official Time Order states that official time granted under §7131(d) should not be considered reasonable, necessary, and in the public

---

368 Union Rebuttal at 43.

369 Union Rebuttal at 44.

370 Union Rebuttal at 44.

371 In addition, to be consistent with the Statute, all references to "taxpayer funded union time" should be changed to "official time."

372 These sections of the Statute grant official time for collective bargaining and FLRA-related matters, respectively.

interest if it exceeds 1 hour per bargaining unit employee. This figure, however, must also account for the size of the bargaining unit and "the amount of [official] time anticipated to be granted under sections 7131(a) and 7131(c)" of the Statute.[373] The Panel has the authority to award an amount of time that differs from this Order. But, the party moving for such time has the burden described above to demonstrate that their requested time is reasonable, necessary, and in the public interest.

As to the amount of official time that should be permitted in the CBA in this dispute, neither party's proposal satisfies the above framework. The Union wishes for several thousand hours of official time for several Union officials, potentially large banks of hours for local unions (4.25 hours per local employees), and the ability to request *more* time pursuant to §7131(d). According to the Union, the Agency's perceived deficiencies can only be remedied through the use of Agency-funded Union release time. In reality, there is insufficient evidence in the record that links large banks of official time with successful efforts to combat government waste, fraud, and abuse. To be sure, whistleblowers play a vital role throughout the Federal sector. But, the Union has not linked Agency-funded official time to whistleblower efforts or effectiveness.

The Union's request for lobbying time is unwarranted. To be sure, this *is* a negotiable topic of bargaining. But, negotiability is not the same as acceptance. That is, the Panel has no legal obligation to impose language on this topic. As to the Union's concern about EEO-representation time, this Panel has previously concluded that this item may be subtracted from banks of official time.[374] The Panel should do so once again.

The Agency's position also requires modification. The Agency proposes a bank of 176,296 hours.[375] The Agency justifies offering this amount of time, in part, on the grounds that it is assumed that the Union will need to go above its proposed bank and need to utilize official time under 5 U.S.C. §7131(a) and (c), which the Agency cannot refuse. The Agency proposes to combine time for activities under 7131(a), (c), *and* (d). This mixture will create confusion for those who have to rely upon and administer official time under this article. Official Time for purposes of 7131(a) and (c) should not be

---

[373] Executive Order 13,837, Sec. 3(a).

[374] *See SSA*, 19 FSIP 019 at 21-22.

[375] *See* Agency Position at 81-82.

subject to the bank. However, the Agency has made a compelling case that it is reasonable, necessary, and in the public interest to limit the use of 7131(d) official time in order to direct Agency resources that would otherwise be allocated to official time to a "wide variety of [patient] treatment-related options." **Accordingly, the Panel will add the following language to Management's proposed article:**

> **In Section 5(C)(2) add: "The Department shall allocate, and the Union shall be able to use, up to a combined total of 176,296 hours for all Union Officials within the Department per fiscal year for official time under 5 USC § 7131(d)."**
>
> **Add Section 5(C)(3): "The Union may use official time for collective bargaining activities under 5 U.S. Code § 7131(a) and for proceedings before the FLRA under 5 U.S.C. § 7131(c) as consistent with those provisions of federal law.**

Consistent with the above changes, the Panel will also make these additional revisions:

- **In Section 5(H), the Panel will strike: "Repeated or serious abuse of official time may result in disciplinary action ~~as well as suspending use of official time for the duration of the Agreement~~."**

- **In Section 5(F) the Panel will strike: "Unused individual or combined bank hours allocated to a fiscal year shall be forfeit at the end of that fiscal year and shall not roll over to any subsequent fiscal year. ~~The annual allocation available for Union activities governed by 5 U.S. Code §7131(a) and (c), which exceed the allotted bank of Official time hours during a fiscal year (or prorated fiscal year, during the first year of this Agreement) shall be charged against the bank of 176,296 allocated for the following fiscal years. The Union may continue to use 5 U.S. Code § 7131(a) and (c) time even if such time exceeds the maximum hours under this Agreement."~~**

- **The Panel strikes the entirety of Section 5(I): ~~"The Union may continue to use 5 U.S. Code § 7131(a) and (c) time even if such time exceeds the maximum official time hours~~**

~~**otherwise available under this Agreement. Employees may not continue to request 5 U.S.C. 7131(d) time."**~~

Turning to other issues in this article, the Union is opposed to the Agency's proposed cap on official-time usage, i.e., limiting employees to spending no more than 20% of duty time in an official-time status.[376] The Official Time Order establishes a maximum cap of 25%.[377] However, given the unique and vital mission of the Agency, and in light of an ongoing global medical emergency, the Panel believes it is appropriate to accept Management's proposed lower figure to increase workplace availability.

Management also proposes prohibiting the Union from using official time to pursue "grievances" and "arbitrations."[378] Section 4.v of the Official Time Order explicitly prohibits the use of official time for these activities.[379] The Union does not address this requirement or the Agency's related language. As such, it is appropriate to permit the language to remain.

Finally, language in Management's Section 5.H would require the Agency to bring issues concerning official time abuse solely to the Council President.[380] The Union believes this language interferes with its ability to designate a designated representative. **To address this concern, the Agency's language should be modified as follows (changed language in bold):**

> **"**Alleged abuses of official time shall normally be brought to the Council President **or their designee**."

Article 49, Rights and Responsibilities

A. Agency Position

The Agency offers a simplified version of the existing article. Under its language, Management agrees to allow the Union to provide representation at:

> 1. At any formal discussion between one or more representatives of the Department and one or more bargaining unit employees concerning a grievance or

---

376 *See* Agency Final Offer, Article 48, Section 5.C.1 at 61.
377 *See* Executive Order, 13,387, Section 4(ii).
378 *See* Agency Final Offer, Article 48, Section 5.D, at 61.
379 *See* Executive Order 13,387, Section 4.v.
380 *See* Agency Final Offer at 62.

> any personnel policy or practices or other general conditions of employment, as provided for in 5 U.S.C. 7114(a)(2) and applicable regulations.
>
> 2. Any examination of an employee in the unit by a Department representative in connection with an investigation if, (i) the employee reasonably believes that the examination may result in disciplinary action against the employee, and (ii) the employee requests representation as provided for in 5 U.S.C. 7114(a)(2) and applicable regulations.[381]

In addition to the above, the Agency agrees to provide other types of information to the Union concerning the foregoing meetings as well as other types of meetings conducted by Management. The Agency's language is intended to reflect the law under the Statute. In particular, Management's language operates under the distinction created between "working conditions" and "conditions of employment."

The existing CBA language, according to Management, results in an abusive relationship between the Union and supervisors that hinders workplace supervision. Management acknowledges that the Union has certain statutory and legal rights to represent bargaining-unit employees if certain conditions are satisfied. But, those rights are not unlimited, and Management is under no obligation to acquiesce to every Union request. Management has also struck any language that involves partnership/councils as inconsistent with the Revocation Order.

B. <u>Union Position</u>

The Union proposes retaining modified language that is more robust than what has been promulgated by Management. The Union's language provides clear guidance for its workforce and should be followed. The Union is concerned that Management will attempt to abuse whistleblowers if the Union's representational capabilities are reduced.[382] The Union also wishes to retain language concerning Union representation at formal discussions and investigatory meetings. The Union has had to file 100's of ULP's to enforce these rights; eliminating existing contract language will only exacerbate this problem.[383] For similar reasons, the Union needs specific language regarding the types

---

381 Agency Final Offer at 64.
382 *See* Union Position at 85.
383 *See* Union Position at 85.

of information that Management will be required to provide. The Union cannot accept language that it believes calls for it to waive various statutory rights. The Agency's distinction between "working conditions" and "conditions of employment" is now moot for reasons discussed elsewhere in this decision.

C. Conclusion

The Panel imposes Management's language. This dispute turns primarily upon the Union's representational rights under 5 U.S.C. §7114. The first right concerns the ability to represent bargaining-unit employees at "formal discussions," which are meetings "concerning any grievance or any personnel policy or practices or other general conditions of employment."[384] The second right, the so-called "Weingarten" right, permits the Union to participate in investigatory meetings where a bargaining-unit employee has a "reasonable" belief the meeting could lead to discipline and the employee requests representation.[385]

Management's language appears to copy verbatim the language from the Statute. That is, the Agency acknowledges the Union's statutory rights in the foregoing situations. As such, the Union's concerns about the Agency supposedly straying from its statutory responsibilities are misplaced. That the Agency does not wish to accept the Union's requested additional limitations does not lead to a conclusion that the proposal is somehow illegal. And, given the Union's admission that it routinely files a number of ULP's over these issues, the Union appears to be familiar with the steps necessary to validate potential violations of its rights. Finally, the parties' dispute over "working conditions" and "conditions of employment" is a red herring: Management's language copies the statutory language that references "conditions of employment."[386] Any dispute, then, is one of interpretation that may be addressed when the time is appropriate, e.g., grievances, ULP's.

Article 50, Surveillance

A. Agency Position

The Agency proposes as follows:

---

[384] 5 U.S.C. §7114(a)(2)(A).

[385] *See* 5 U.S.C. §7114(a)(2)(B).

[386] *See* Agency Final Offer at 64 (quoting 5 U.S.C. §7114(a)(2)(A)).

> A. The [Agency] may conduct surveillance of any employee, by any means allowable under federal law, for any purpose allowed by federal law.
>
> B. The [Agency] shall post a notice of surveillance in each facility.[387]

The Agency provides only rebuttal argument because its initial argument "was inadvertently omitted from its" initial submission.[388] In any event, the Agency argues that it is a "bad idea" to permit the Union to have a role in surveillance decisions. Management has never engaged in "widespread" illegal surveillance; to the contrary, even the Agency's IG has acknowledged that widespread performance monitoring is now commonplace.[389] Requiring local bargaining and forcing the Agency to provide a litany of surveillance-related information will only hinder the Agency's information-gathering capabilities.

B. Union Position

The Union's language prohibits the Agency from using surveillance "for monitoring employees' attendance or related activities at the worksite."[390] The Agency wants to engage in "widespread, illegal, and deeply unethical recording of veterans' healthcare."[391] The Agency's own Inspector General reprimanded the Agency for improperly recording veteran healthcare at one facility and recommended that the Agency develop a policy to address that situation.[392] Despite concurring with this suggestion, the Agency seeks to radically scale back the existing article on this topic. Needless to say, such a proposed action is inconsistent with its earlier concurrence.

C. Conclusion

The Panel imposes a modified version of the Agency's proposal. The Union's plain language places limitations upon what Management may surveil. Even setting aside potential

---

387 Agency Final Offer at 65.
388 Agency Rebuttal at 43 n.143.
389 Agency Rebuttal at 43 (citation omitted).
390 Union Final Offer, Article 50, Section A at 1.
391 Union Position at 87.
392 *See* Union Position at 87 (citation omitted).

management rights issues, the plain language of the Union's proposal hinders workplace surveillance. The IG report discussed above arose due to patient-care issues; the Union's language would jeopardize Management's ability to monitor these types of events. Moreover, Management's language calls for it to adhere to applicable law. Thus, the Union could potentially file a grievance were the Agency to stray from any legal obligations. The Union's language, then, should be rejected.

However, the Agency does not dispute the Union's assertion that Management "concurred" with the IG that it should develop a policy to address surveillance. It is not clear from the record whether that policy was ever adopted. In the event that Management does create such a policy, the Union should be afforded its full statutory rights to engage in negotiations. **Accordingly, the following Section 3 should be added to Management's Article 50:**

> **Should the Agency elect to enact any new additional surveillance policies, the Union will be afforded an opportunity to bargain in accordance with law.**

Article 51, Use of Agency Facilities

A. Agency Position

Under the Agency's proposal, Management will not provide free or discounted office space to the Union. But, it will provide meeting space and bulletin boards for Union usage.[393] For 2018 alone, the VHA had 238 Union offices nationwide, occupying 227,512 square feet of office space, at a total annual cost of $8,303,096.[394] Management does not agree to distribute hard copies of the CBA as doing so for the last agreement cost the Agency $2.3 million.[395] The savings from all the foregoing can be used for other areas of patient care. Moreover, the Union's claim that it needs dedicated office equipment "obliterates" the Union's arguments in favor of telework concerning the ability of employees to work effectively elsewhere.

Management argues that "the AFGE/NVAC President's Salem medical center office suite is the proverbial 'glass house'

---

393 *See* Agency Position at 85.

394 Agency Position at 85 (citation omitted).

395 Agency Position at 87 (citation omitted).

picture of a 'sprawling executive suite.'"[396] In this regard, it notes:

> It occupies half a hospital wing (mirroring the Director's suite) and boasts 5179 sq. ft. of office space and a 557 sq. ft. outdoor patio -- specifically: 599 sq. ft. for National President Alma Lee's personal office, 2457 sq. ft. for the Local AFGE, a spacious kitchenette (225 sq. ft.), a copy/shredder room (269 sq. ft.), conference room (827 sq. ft.) with adjacent outdoor patio (557 sq. ft.), and various staff offices and private bathrooms -- well exceeding GSA space standards.[397]

B. Union Position

Even assuming that the Official Time Order applies, the Union maintains that it is still entitled to cost-free office space.[398] In this regard, several other non-Federal entities have cost-free use of Agency facilities throughout the United States.[399] Additionally, the Union's use of office space is nominal. Indeed, the GAO found that only .11% to .65% of office space, depending on the location, is utilized for representational activities.[400] And, the Agency spends $7 million annual just to upkeep *vacant* office space; the Union's cost is but a drop in the bucket to this.[401] Finally, most Union office space is located solely in administrative areas. As such, any claim that such space may be converted to patient care space is exaggerated. The Agency's opposition to printing CBA's is non-sensical because doing so is a fraction of the Agency's budget. Additionally, not every Agency employee has access to a computer.[402]

C. Conclusion

---

396 Agency Rebuttal at 44.

397 Agency Rebuttal at 44.

398 Under Executive Order 13,837, Section 4(iii), agencies may not permit the use of "free or discounted use of government property" when such use "is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations."

399 *See* Union Position at 88-89; *see also* Union Rebuttal at 46.

400 *See* Union Position at 90 (citation omitted).

401 *See* Union Position at 90 (citation omitted).

402 *See* Union Rebuttal at 47.

The Panel imposes a compromise proposal that is based upon the language the Union submitted. The Official Time Order, Executive Order 13,837, is clear: free or discounted office space is not to be provided to an exclusive representative unless such space is made available to other non-government entities. In this dispute, the Union has provided unrebutted evidence that other non-government entities currently utilize non-cost Agency office space. The Agency has not claimed that it intends to alter this arrangement. However, the Agency has also provided unrebutted data that, at least for its VHA component, the Union's space use does not exceed 227,512 square feet of office space.[403] **The Panel balances the foregoing information, along with Management's ability to alter arrangements consistent with the Union's statutory right to bargain, and will order the imposition of the following language for Section 1.A:**

> **The Union shall be entitled to continue to use existing office space up to either 227,512 square feet, or, the amount of square footage the agency currently makes generally available without charge for non-agency business by employees when acting on behalf of any single non-Federal organization if that space is less than 227,512 square feet. If the space provided to any single non-Federal organization is less than 227,512 square feet, or becomes less than 227,512 square feet, the Agency may reduce the free allotted space provided to the Union for office space after providing notice to the Union of the Agency's intention to reduce the provided office space to the Union and negotiating over the impact of the implementation of that action if requested by the Union. The agency may offer additional office space to the union at fair market value.**

The Union has not demonstrated a need for its continued cost-free access to Agency equipment, vehicles, or printing costs associated with the CBA and other agreements. The Union provided little data or need for any of the foregoing. Additionally, with respect to items like existing government-wide literature, it is not clear why only the Agency should be responsible for providing these items. Accordingly, the following items should be stricken from the Union's final offer

---

[403] *See* Agency Brief at 85.

for Article 51: **Section 1.B, Section 3, Section 4, Section 6, Sections 8-12.**[404]

Article 56, Title 38 Hybrids

A. Agency Position

The Agency proposes striking existing language on this topic. Its proposed Article 23 on Merit Promotions already addresses hiring and promotions for Title 38 hybrid employees.

B. Union Position

The Union believes its language should remain because it provides a useful resource for Agency management officials and employees alike. The foregoing parties are "frequently confused" by the mixed nature of Title 38 hybrid employees, so it makes no sense to eliminate a source of information for the Agency's workforce.[405] Additionally, the Union argues that 38 U.S.C. §7403(h) mandates collaboration in certain circumstances.[406]

C. Conclusion

The Panel imposes the Agency's proposal. The Union raises general concerns about confusion that could arise were the existing language on this topic to disappear altogether. But, the Union offered no specific examples as to how this language currently aides the workplace.

Moreover, as the Agency notes, Article 23 also addresses this topic. The Union alleges that this is insufficient, in part, because 38 U.S.C. §7403(h) calls for mandatory collaboration. In particular, this language states that, for a certain category of Title 38 employees, if the VA Secretary uses promotion and advancement authority he or she must plan any system with the "collaboration [and] the participation of, exclusive employee representatives of such occupational category of employees."[407] Management's imposed Article 23, Section 1 states that any actions taken under Article 23 "shall be taken

---

404 *See* Union Final Offer, Article 51.
405 Union Position at 91.
406 *See* Union Rebuttal at 47.
407 38 U.S.C. §7403(h).

in accordance with applicable law."[408] As such, the Union's concern is addressed.

Article 63, Research Grants

A. Agency Position

Management proposes striking existing language on this article altogether. The existing language restricts the Agency's ability to timely and efficiently discover innovations and make new advances in medical research and patient care. Funding for fiscal year 2019 alone was $2.69 billion with 105 active research sites nationwide, and 3,611 funded principal investigators.[409] And, Agency researchers must go through a lengthy and detailed process in order to engage in clinical research.[410] Adding to the foregoing with contractual language that would require negotiations when funds are just granted only burdens this process further.

B. Union Position

In addition to claiming that the parties did not sufficiently bargain this proposal, the Union claims Management did not justify its position. So, the Union's proposal should be adopted. Moreover, the Union claims that Management never provided language for Article 63; instead, it provided argument in support of Article 64, an article that the parties already signed.[411]

C. Conclusion

The Panel imposes the Agency's proposal. Management provided a comprehensive explanation of the unique complexities that surround the research process, complexities that exist even without *extra* layers that arise from the CBA. The Union did not dispute significantly the foregoing. Management's proposal is more appropriate to adopt.

Article 66, Technology for Administering, Tracking and Measuring VBA Work

A. Agency Position

---

408 Agency Final Offer at 16.
409 Agency Position at 88.
410 *See* Agency Position at 88.
411 *See* Union Rebuttal at 48.

This article concerns agreements that the Agency made with respect to using technology to track and monitor duties for employees who are a part of the Veterans Benefits Administration. Several years ago, Management transitioned from paper to electronic monitoring in order to ensure that the needs of the Agency were being fulfilled in a timely and efficient manner. Management entered into an agreement with the Union after waiving its right to not negotiate over permissive topics of bargaining under 5 U.S.C. §7106(b)(1);[412] Management no longer wishes to waive those rights. Additionally, this language was also entered into pursuant to Executive Order 13,522 "Creating Labor-Management Forums to Improve Delivery of Government Services." This Order, however, was superseded by the Revocation Order. Accordingly, there is no solid basis for permitting this language to remain in the agreement.

B. Union Position

The Union proposes retaining existing language. Management's proposed striking of this language eliminates contractual appropriate arrangements and procedures concerning the exercise of Management's rights regarding technology. The existing language all covers various aspects of how Management will go about monitoring aspects of employee performance, so the Union's language covers mandatory topics of bargaining and should remain.[413] The Union has also filed a negotiability appeal in response to Agency negotiability arguments.

C. Conclusion

The Panel imposes the Agency's language. Most of the disagreement between the parties is a legal one: does the Agency have to bargain over the impact and implementation of its rights concerning technology? The answer, of course, is yes. But, the Union poses the wrong question. Just because the Agency *could* do something, does not mean that they *should*. Aside from arguments concerning the Union's ability to bargain procedures and appropriate arrangements, the Union offers minimal justification for its proposal on the merits. Most of

---

[412] Under 5 U.S.C. §7106(b)(1) states that "at the election of the agency," that agency may bargain "technology." However, even if the agency declines to negotiate technology, it must still negotiate the impact and implementation of the exercise of that right.

[413] *See* Union Position at 91-92.

the justification that is offered centers around speculation about what the Agency might do in the future. But, this line of argument is insufficient to support adoption of the Union's position.

Article 67, Skills Certification

A. Agency Position

The Agency proposes striking this article in its entirety. This article applied to a skills certification process within the VBA that no longer exists. Indeed, were it to arise in the future, it would be a new process altogether.[414] And, were this to happen, the Agency agrees it would "honor" any future bargaining obligations.[415]

In its rebuttal statement, the Agency reiterates that, in its Panel jurisdictional brief, Management informed the Panel that Article 67 was never properly incorporated into the CBA to begin with and is "unenforceable."[416] Management does not address the Union's claim concerning the ground rules that is discussed below.

B. Union Position

Under the parties' ground rules, each party had to submit their proposals within 30 days of executing the foregoing agreement.[417] In its May 2, 2019, submission of proposals while the parties were bargaining, the Agency did not include its proposal on Article 67. As such, the Union argues that the Panel does not have jurisdiction over this issue. On the merits, the Union's language offered only minor revisions to existing CBA language. Management has offered no substantive rebuttal, so the Union's position should be adopted.

C. Conclusion

The Panel imposes Management's position. The Union claims Management never provided a counter proposal; the Agency claims it did provide one, namely, a proposal to strike the Union's

---

414 *See* Agency Position at 91.

415 Agency Position at 92.

416 Agency Rebuttal at 46 n.156. Unhelpfully, the Agency did not cite the page of the jurisdictional brief that it now relies upon.

417 *See* Union Position at 93.

language. It is unnecessary to resolve this disagreement because, on the merits, the Union offered little justification for the adoption of its proposal. Taking as accurate the Union's claim that it made only modest modifications, the Union still has not explained why it is necessary for those modifications, or Article 67 in general, to exist within the four corners of the CBA. Nor has the Union claimed that it would be deprived of future opportunities for negotiations should they arise. Accordingly, the article should be rejected.

Management also argues that there never actually was an enforceable article 67 in the CBA.[418] To the extent there is any remaining disagreement on this topic, the Agency is free to argue that claim moving forward as necessary.

Article XX, Phased Retirement (new article)

A. Agency Position

The Agency is opposed to inclusion of the Union's newly suggested article. The Agency already has existing policies on phased retirement; the Union's proposal would only confuse those policies and put additional burdens in place by requiring future negotiations.[419] Additionally, a number of provisions in the Union's suggested language are inaccurate, confusing, and contradict other existing laws and Agency policies.[420] Additionally, for a number of reasons that are set forth in the Agency's brief, the Union's proposal creates ambiguity over how certain mentor-related duties will be accomplished during the work day.[421]

B. Union Position

According to the Agency's own Inspector General, the Agency has had a staffing shortfall of 49,000 employees for *years*.[422] Additionally, "96% of VHA facilities severe occupational shortages and 39% of the facilities reporting at least 20 severe occupational staffing shortages."[423] Instead of taking concrete steps to address these shortcomings, the Agency's primary plan of action appears to be to simply encourage potential retirees

---

418 *See* Agency Jurisdictional Position at 15.
419 *See* Agency Position at 92.
420 *See* Agency Position at 92-93 (citations omitted).
421 *See* Agency Position at 94.
422 Union Position at 97-98 (citation omitted).
423 Union Position at 98 (citations omitted).

to stay aboard longer. This is tenuous and not sustainable. Even the Agency acknowledges the importance of phased retirement; it rolled out its own program in 2016-17. But, even as February 2020, the plan had only 33 enrollees.[424] The Agency needs a "partner" to facilitate a successful rollout of phased retirement. The Union is just that partner. Finally, the Union notes that it has filed a negotiability appeal in response to Management's claims.

C. Conclusion

The Panel imposes Management's proposal and orders the Union to withdraw its proposal. The Union has raised laudable concerns and valid critiques about the Agency's rollout of its phased retirement system. But, the Panel does not sit as an omniscient human resources department whose purpose is to second guess the effectiveness of every agency initiative. Moreover, the Union has not linked its proposal to its tacit claim that the proposal is the *only* way to improve the effectiveness of phased retirement within the Agency. Accordingly, its proposal should be rejected.

Article XX, Staffing (new article)

A. Agency Position

The Agency opposes the inclusion of the Union's new language. This proposal reiterates many of the labor-forum themes from the Labor Forum Order that, as discussed above, has now been rescinded.[425] As such, it would be inappropriate to adopt the proposal. The proposal turns the Union into a "co-manager" and restricts a number of Agency statutory responsibilities.[426]

B. Union Position

Around 168 Agency medical centers throughout the country are facing staffing shortages, and no solution is in sight.[427] These staffing issues create patient-care issues. They also lead to decreased morale. Numerous entities, e.g., the Agency's IG, Congress, have been unable to force the Agency into addressing its shortfall. The Panel should take this

---

424 Union Position at 98 (citation omitted).
425 *See* Agency Position at 94-95 (citations omitted).
426 *See* Agency Position at 95.
427 Union Position at 96 (citation omitted).

opportunity to do so by adopting the Union's language. The Agency represented this proposal to be at impasse, which means they de facto assumed it to be negotiable.[428]

C. **Conclusion**

The Panel imposes Agency's proposal. Once again, the Union has offered laudable language to address a genuine concern facing the Agency. But, again, the Union asks the Panel to act as some sort of overseer to the Agency's hiring processes. Indeed, the Union goes so far as to insinuate that the Panel should act where Congress has failed. There may be valid critiques to levy against the Agency's global activities, or lack thereof, but the Panel should decline to resolve them as part of an insular dispute over contract negotiations. Further, once again, the Union has not linked its language to an accomplishment of its overall goals. The Union's language, then, should be rejected.

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 in the above Panel majority opinion.

Jonathan Riches
FSIP Member

November 5, 2020
Washington, D.C.

---

428 *See* Union Position at 97.

Chairman Mark Carter, Member Andrea Newman and Member David Osborne concurring in part and dissenting in part:

We respectfully dissent from the determination of the majority of the Panel regarding Article 51 concerning the use of Agency facilities. Further Chairman Carter and Member Newman dissent from the determination of the majority of the Panel regarding Article 48 concerning Official Time.

Because the Chairman has dissented from these portions of the decision and order he has abstained from composing any portion of the decision and order regarding those articles and has delegated his authority to execute the majority decision and order to Member Riches.

Mark A. Carter, FSIP Chairman

November 5, 2020
Washington, D.C.

ARTICLE 45 - REVISED AGENCY PROPOSAL FOR DUES WITHHOLDING

Section 1 - Eligibility and Assignment
To make a voluntary allotment for the payment of Union dues, an employee must:
1. Be an employee in the unit covered by this Agreement;

2. Have a regular net salary, after other legal and required deductions/garnishments, sufficient to cover the amount of the authorized allotment for dues;

3. Have no other current allotment for the payment of dues to a labor organization;

4. The employee must personally submit an SF-1187 Office of Personnel Management (OPM) or form. The employee must personally submit the completed OPM form to the Agency Labor Relations dues point of contact.

Section 2 - Precedence of Payment
The Department shall deduct dues only for those pay periods where the employee's net salary, after other legal and required deductions, is enough to cover the amount of the authorized allotment for dues.

Section 3 - Limitation of Allotment
An employee may authorize an allotment of only those dues which are the regular and periodic dues required and certified by the Union for that employee. Initiation fees, special assessments, back dues, fines, and similar items are not considered dues and shall not be deducted.

Section 4 - Processing of Dues Deduction
A. The Department shall withhold dues on a biweekly basis conforming to the regular pay period.

B. Annually, the Agency shall inform employees of their right to participate or not participate in union activity, including the right to request or not request dues deduction and the payment of union dues.

Section 5 - Assignment Revocation

A. If an employee revokes his or her authorization for the Department to deduct Union dues from their pay, the Department will stop deducting such dues as soon as federal law and regulation allows.

B. An employee's dues allotment shall immediately terminate upon the following conditions:

1. When an employee is temporarily or permanently assigned out of the bargaining unit;
2. Upon submission of an SF-1188 consistent with federal law.

C. The Department shall review all current dues allotments to ensure that all dues withholdings conform to federal law and this Agreement and to correct any errors.

Section 6 - Termination of VA Dues Allotments

A. If the Authority determines the bargaining unit is not appropriate, all assignments and allotments shall be immediately terminated.

B. In addition, the Department shall terminate an individual employee's dues allotment when:
1. The employee ceases to be a member in good standing of the Union;
2. The employee is reassigned or transferred out of a bargaining unit, or otherwise excluded from the bargaining unit;
3. The employee is retired from the Department; or
4. The employee is separated from the Department.

C. Termination of allotments as required by (A) shall be effective on the first full pay period following receipt and necessary processing of the appropriate notice by the designated Agency Labor Relations dues point of contact. Terminations as required by (B) shall be effective as of the date of separation. However, when separation occurs during a pay period, the Department shall withhold the allotment from the employee's salary for that pay period.

Section 7 - Union Responsibility

It is the responsibility of the Union to:
A. Certify on the OPM form the amount of dues to be withheld each pay period;

B. Certify to the designated Agency Labor Relationship dues point of contact the change in the amount of Union dues after the Union has voted to increase or decrease membership dues (changes will not be implemented until the first complete pay period following the 30 calendar days after receipt of the notice of change);

C. Promptly notify the Agency Labor Relations Union dues point of contact when an employee with an allotment ceases to be a member in good standing with the Union;

D. The Union shall provide promptly notify the Agency Labor Relations dues point of contact if any erroneous payments are made and timely notify the Agency Labor Relations dues point of contact when any changes occur;

E. The Council President or designee shall make the necessary certifications required by this Section for the Union; and,

F. All employee dues allocated to the union shall be deposited in to a single account identified by the Union, and the Department will publish a monthly report of the total dues and dues

contributed from each VA local.

Section 8 – Responsibility of the Department

A. It is the responsibility of the Department to Ensure payment of properly allotted dues to the Union's account.

B. If an employee authorizes the deduction of union dues from their pay, the Department is obligated to withhold the amount from the employee and pay it to the Union.