

RE-ISSUED WITH CORRECTION

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL JOINT COUNCIL OF
FOOD INSPECTORS, COUNCIL 45

Case No. 21 FSIP 002

ARBITRATOR'S OPINION AND DECISION

The U.S. Department of Agriculture (USDA), Food Safety and Inspection Service (Agency or FSIS) located in Washington, D.C. filed a request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, concerning a dispute from negotiations over a successor collective bargaining agreement (CBA). The Agency's mission is to protect the public's health by ensuring the safety of meat, poultry, and processed egg products. The American Federation of Government Employees, National Joint Council of Food Inspectors, Council 45 (Union) represents a bargaining unit consisting of approximately 6,300 food and consumer safety inspectors located throughout the country. The parties are covered by a CBA that became effective on June 13, 2008, and was signed for a three-year duration. The agreement has continued to roll over in one-year increments and remains in effect until a successor CBA is reached.

BACKGROUND AND PROCEDURAL HISTORY

In June 2019, the parties initiated ground rules negotiations, executing a ground rules agreement on August 9, 2019. Thereafter, the parties engaged in successor CBA negotiations on the following dates: September 17 to 20 and September 23 to 26, 2019; October 8 to 10 and October 16, 2019; November 5 to 7, 2019; December 3 to 6 and December 9 to 12, 2019; January 14 to 16, 2020;

and February 4 to 7 and February 10 to 13, 2020. During the negotiations, the parties reached some agreements over provisions within different articles, but could not reach full agreements on any of the 43 articles that were in dispute. As a result, the parties enlisted the services of the Federal Mediation and Conciliation Service (FMCS) in June 2020.

The parties engaged in mediation assistance with FMCS on the following dates: June 23 to 25, 2020; June 30 to July 1, 2020; July 21 to 23, 2020; July 28 to 30, 2020; August 11 to 13, 2020; August 24 to 27, 2020; September 1 to 2, 2020; September 10, 2020; and September 22 to 24, 2020. During the parties' mediation sessions, they reached agreement over three articles, but prior to receiving a release from the FMCS mediator, the Agency filed a request for assistance with the Panel on October 9, 2020.

On November 11, 2020, the Union argued that the parties were not at an impasse due to three unfair labor practice (ULP) charges it filed against the Agency, a grievance, a negotiability dispute, and because the parties did not fully bargain over the 16 articles during negotiations. On December 15, 2020, the Panel considered the Union's arguments and rejected them. Accordingly, the Panel asserted jurisdiction over the 40 articles in dispute, finding that the parties sufficiently bargained to impasse in accordance with its Regulations.¹ On December 28, the Panel ordered that the parties resolve the dispute by a Mediation-Arbitration procedure with the undersigned. The parties participated in three days of Mediation-Arbitration on January 15, 19, and 21, 2021. Based upon the Mediation-Arbitration proceeding, the parties are directed to follow the language ordered below.

POSITIONS OF THE PARTIES AND ORDERS

1. Article: Assignments and Rotations of Assignments

General arguments

The Agency generally asserted the Union's proposals for this article implicated the Agency's right to assign work under § 7106 of the Federal Service Labor-Management Relations Statute ("the Statute"), but did not explain specifically what language in the Union's proposals infringed on its rights or how it did so. Conversely, the Union disputed the Agency's view, contending without elaboration that its proposals did not violate § 7106.

¹ 5 C.F.R. § 2470.2(e).

Section 1: Policy

- a. Summary of proposals:** The Union wishes to ensure that "[c]urrent rotation patterns, and durations, remain in effect" and to require that employees [receive] sufficient training to perform the duties assigned" before being assigned to a position. By contrast, the Agency wants rotations to "be determined by supervision at the local level in conjunction with the BUE's and the appropriate Union representative."
- b. Agency argument:** The Agency explained that it wants the flexibility to start over without inherited rotation patterns and determine new patterns going forward at the local/plant level. The Agency does not want to have to bargain every change in rotation patterns, which occur frequently.
- c. Union argument:** The Union contended that, if past rotation patterns are discontinued, there should be a mechanism for re-determining the rotation patterns to avoid overly disrupting conditions of employment.
- d. Order:** **The parties shall adopt the Agency's proposal in full.** The parties did not exhibit a clear understanding of current rotation patterns. Re-determining such patterns at the local level, as the Agency seeks to do, will permit a reevaluation and help ensure rotation patterns align with the Agency's interest in fulfilling its mission.

Section 2: Definitions

- a. Summary of proposals:** The Agency wishes to define "rotation" as "a series of assignments *within an establishment*" (emphasis added). The Union disagrees with this modifier and seeks to define/establish a "rotation pattern" under which employees rotate through assignments at plants "within a defined geographical area" and "on a regularly scheduled basis."
- b. Agency argument:** Rotations occurring within a geographic area may cross circuit boundaries, which can cause administrative problems like placing employees under different supervisors, creating additional paperwork and requiring the movement of agency equipment.

- c. **Union argument:** Cross circuit rotations do not occur often and are not a problem. Rotating inspectors among multiple plants can prevent inspectors from becoming overly familiar with plant employees and bring fresh eyes/perspectives to bear in each plant which, in turn, helps ensure food safety.
- d. **Order:** The Agency's ability to manage its workforce and accomplish its mission are better served by its proposal, which the parties shall adopt in full.

Section 3: Assignments

- a. **Summary of proposals:** Both parties seek to permit employees to trade assignments "if mutually agreed to by the involved inspectors, and subject to approval of the immediate supervisor(s)." The Agency seeks to require employees desiring to trade assignments to request to do so "at least two (2) weeks prior to the effective rotation date." The Union would only require employees to submit their requests "as soon as [the] practical/need/desire for the trade [is] known." Additionally, the Union would require supervisors to respond to requests to trade assignments in writing and, if the request is denied, to inform the Union of the denial in writing with "an explanation of why it was denied."
- b. **Order:** During the Mediation-Arbitration, the Union indicated it might be able to agree with the Agency's proposal, but ultimately declined to do so without explanation. The Agency's proposal permits it to better manage its workforce by requiring employees to request to trade shifts two weeks in advance. Further, the Union's proposal would unnecessarily burden the Agency by requiring supervisors to provide written explanations for the denial of any trade shift requests. **Accordingly, the parties shall adopt the Agency's proposal in full.**

Section 4: Modifications to assignments

- a. **Summary of proposals:** The Union seeks to require the Agency to notify it at least 30 days prior to modifying, adding or eliminating any assignment(s). Such notice would include "all decision-making documents, and correspondence, used in the decision-making process as

they relate to the proposed change." The Union would also require the Agency to "meet to discuss the proposed change" with the Union and provide employees with at least 10 days' notice before changing any assignment(s). The Agency provides no counter.

- b. Agency argument:** The Union proposal would negatively affect the Agency's ability to fulfill its mission. It would be onerous to discuss every change in assignments. Management retains the right to assign work and needs flexibility.
- c. Union argument:** The Agency has a known and thorough process for changing assignments. It has the ability to inform the Union of its decision-making in advance. The Union might be open to the Agency providing less than the 30 days' notice in its proposal.
- d. Order: The Union shall withdraw its proposal.** The Union failed to adequately justify the need for its proposal in light of the impositions it would place on Agency time and resources.

Section 6: Volunteers for Relief and Night Assignments

- a. Summary of proposals:** The Agency's proposal specifies that it would rely on volunteers to fill relief and night assignments "[t]o the extent possible," provided the immediate supervisor approves and it results in no additional cost to the Agency. The Union seeks to retain "current volunteer policies and practices," but also would establish such policies if they don't exist. The Union's proposal would provide a more detailed process for soliciting and selection of volunteers and require the Agency to provide the Union with notices of volunteer opportunities, interest, and selection.
- b. Order:** During the course of Panel proceedings, the parties informed the undersigned they had reached agreement on this article. **Accordingly, the parties shall adopt the following agreed-upon language for this section:**

To the extent possible, volunteers shall be used on relief and night assignments, if acceptable to the immediate supervisor and at no additional expense to the Agency. Volunteer policies and practices

effective at the time of implementation of this Agreement will remain in effect.

Section 7: Data requests

- a. Summary of proposals:** The Union seeks to provide a contractual right to request and receive "all information related to [rotation] trade[s]," including "the number of denials and any all [sic] reasons for the denial" "as often as it deems necessary." The Agency provides no counter.
- b. Order:** During the course of Panel proceedings, the parties informed the undersigned they had agreed to not adopt the Union's proposal. **Accordingly, the undersigned orders the Union to withdraw its proposal for this section.**

2. Article: Detail and Pull Pattern

General arguments

The Agency generally asserted the Union's proposals for this article implicated the Agency's right to assign work under § 7106 of the Statute, but did not explain specifically what language in the Union's proposals infringed on its rights or how it did so. Conversely, the Union stated it was not intending to interfere with the Agency's right to assign work. The Union noted that the Agency may have an obligation to bargain over actions which sufficiently effect conditions of employment.

Section 1: Policy

- a. Summary of proposals:** The Union proposes a specific list of information that the Agency must provide to an employee regarding an assignment. The Union also seeks to provide that "[f]ull time Inspectors will have the first opportunity to accept a detail." In contrast, the Agency's proposal would only require that it provide "sufficient information" to an employee regarding a detail.
- b. Agency argument:** The Agency believes it already generally provides the information included in the Union's proposal and that there is not a need to list that in the CBA. The Union's overly specific proposal may create the potential for grievances if the Agency

does not provide any of the listed information for some reason.

- c. Union argument:** Each district handles travel orders differently; a standardized version including all important information would be an improvement.
- d. Order:** The parties acknowledge the significance of the information being provided to employees, and the Agency could not provide a compelling reason for not listing the information in the CBA. However, the issue is also addressed in the "Official Travel" article, which is a more appropriate location for determining the content of travel instructions. The Union failed to adequately justify the need for granting full time inspectors the first opportunity to accept a detail, which may also implicate the Agency's right to assign work under § 7106 of the Statute. **Accordingly, the parties shall adopt the Agency's proposal in full.**

Sections 2 and 3: Definition, Out of Duty Station Details

- a. Summary of proposals:** The primary differences in this section involve whether employees on detail will be guaranteed a return to their duty station once every two weeks, as the Union proposes, or once every three weeks, as the Agency proposes. Additionally, while the Agency would permit supervisors to consider volunteers for details, the Union would require the use of volunteers "[a]bsent a particularized need for specific skills or qualifications." The Union also seeks to require the Agency to "brief the Union when there is a need to make a variation from the Agency maintained detail roster."
- b. Agency arguments:** The Agency would like to rely primarily on volunteers for out-of-duty station details, but also wants to protect its right to assign work. The Agency could agree to stronger language regarding a preference given to volunteers.
- c. Union arguments:** The Union would prefer that employees be permitted to return to their duty station every two weeks instead of three, which is the current practice, but does not have any particular objections to the current practice and could live with it.

- d. Order:** During the course of the Panel proceedings, the Union informed the undersigned it had decided to accept the Agency's proposals for Sections 2(a) and 3.

The parties shall adopt the Agency's proposal for Section 2 in full, and the Agency's proposal for Section 3 modified as follows:

"Supervisors ~~may consider~~ will endeavor to find qualified volunteers before directing employees.

BUEs will be permitted a return trip to their duty station every third (3rd) weekend in cases where details out of the duty station are for extended periods of time.

The Agency will notify the Union when there is a need to make a variation from the Agency maintained detail roster."

Section 4: Pull Patterns

- a. Summary of proposals:** The Union seeks to retain current pull procedures and require the Agency to bargain over any changes implemented mid-term. The Agency seeks to give supervisors authority to determine pulled employees provided "pull patterns are done in an equitable manner."
- b. Agency argument:** Modernization has reduced the need for pull patterns. Existing pull patterns are old/reached by mutual agreement in different ways around the country and should be uniform. The Agency wants to retain its right to assign work and does not want to have to bargain over changes to pull patterns.
- c. Union argument:** Employees need consistency and stability. The Agency has not shown that existing pull patterns are not working.
- d. Order:** **The parties shall adopt the Agency's proposal in full.** The parties should be permitted to reevaluate and reestablish pull patterns to create a uniform system and confirm that it is administered in a way that does not hinder the Agency's ability to fulfill its mission.

Section 5: Vacant Assignment

- a. **Summary of proposals:** The Agency proposes that "Supervisors shall determine the position to be covered," while the Union counters that "Detailed employees shall fill the vacant assignment."
- b. **Agency argument:** The Agency acknowledges that detailed employees should fill vacant positions but wanted to emphasize its right to assign work.
- c. **Union argument:** If an employee is detailed, they should fill the vacant position that is the subject of the detail.
- d. **Order:** As the parties agreed during the Mediation-Arbitration to blend the two proposals, they shall adopt the following language for this section:

"Unless otherwise directed by their supervisor, detailed employees shall fill the vacant assignment."

Section 6: Details to Higher Graded Positions

- a. **Summary of proposals:** The parties agree that "Details to higher-graded positions shall be consistent with current Agency rules, regulations and policies." However, the Union seeks to enshrine these rules into the CBA, while the Agency prefers to simply reference them.
- b. **Argument summary:** The parties agree that there is no substantive difference between the proposals. The dispute revolves around whether to simply reference applicable authorities for a shorter CBA, as the Agency seeks to do, or spell out the requirements of the applicable authorities for a longer CBA, as the Union proposes.
- c. **Order:** During the course of Panel proceedings, the Union agreed to accept the Agency's proposal for this section. **Accordingly, the undersigned orders the parties to adopt the Agency's proposal in full.**

Section 8: Reprisal

- a. Summary of proposals:** The Agency seeks to strike this section from the CBA. The Union seeks to retain this section, which directs that the Agency "not use details as a form of reprisal for Union activity, the current holding of a Union office, the past holding of a Union office, Whistleblowers, EEOC complaints, grievances, or any other right granted by the law or the contract."
- b. Order:** During the course of Panel proceedings, the Union agreed to the Agency's proposal to strike this section. **Accordingly, the parties are directed to strike this section.**

3. Article: Drug Free Workplace

Section 1: Policy

- a. Summary of proposals:** The parties proposals share many similarities. However, the Union's proposal would provide that employees working in states that have legalized the use of drugs like cannabis would not be found to be in violation of Agency policy by the use of such drugs.
- b. Order:** During the course of Panel proceedings, the Union agreed to accept the Agency's proposal. **Accordingly, the parties shall adopt the Agency's proposal in full.**

4. Article: Health and Safety

Section 1: Policy

- a. Summary of proposals:** The parties' proposals are substantively similar, except that the Union's proposal would obligate the Agency to maintain a workplace free from both "recognized" and "emerging" hazards.

Section 2: Agency responsibilities

- a. Summary of proposals:** The parties agree on much of this section, but the Union's proposal goes into more detail than the Agency's. Specifically, the Union would require the Agency to post various notices, at least some of which it is required to post by other authorities. The Union's proposal also allows employees "to decline to

perform an assigned task" if they possess a "reasonable belief" that it would pose "an imminent danger of serious bodily harm or death. Further, the Union would require the Agency to provide "adequate welfare facilities, space, light, ventilation, cooling and heat in both the office and the plant," as well as hearing protection to "employees exposed to excessive noise levels." Finally, the Union would require the Agency to notify "industry officials" and the Union safety committee of "unsafe and unhealthy conditions" at industry facilities and to "take such action as is necessary... to ensure compliance with established health and safety laws and regulations."

Section 4: Employee responsibilities

- a. Summary of proposals:** The Agency seeks language stating that employees have "a primary responsibility and obligation to know and comply with safety rules and practices." The Union disagrees with inclusion of this language. The Agency seeks to provide that employees have a responsibility to "promptly report unsafe working conditions/practices" to their supervisors and comply with Agency policies regarding the use of personal protective equipment, and that failure to do so "may result in disciplinary action." The Union objects to the inclusion of this language.

Section 5: Safety committees

- a. Summary of proposals:** While both parties agree to establish circuit-level safety committees, the Agency believes they should meet at least semi-annually, while the Union would like them to meet at least quarterly. The Agency seeks to require that the two Union members of each committee be from the applicable circuit; the Union opposes this requirement. Further, the Union proposes regular training for safety committee members on duty time with paid travel and per diem. Finally, the Agency seeks to require the committees to follow Agency policy regarding safety committees, while the Union objects to the inclusion of this requirement.

Section 6: Investigations

- a. Summary of proposals:** The parties' proposals are identical except that the Agency wishes to provide

travel and per diem expenses only for "a Union representative *from within the circuit* to accompany the OSHA inspector(s) conducting inspections *within that circuit*." The Union objects to this limitation.

Section 8: Reports

- a. Summary of proposals:** The parties agree that the Agency shall provide the Union with accident reports, safety inspection reports and industrial hygiene reports upon request. However, the Union proposes to strike language in the Agency's proposal requiring the Agency to provide such reports to "the appropriate *circuit health and safety committee*" (emphasis added), seeking instead that the Agency provide the reports "to the appropriate safety committee."

Section 10: Plant Reviews by Environmental Health and Safety Specialists

- a. Summary of proposals:** The Agency proposes to "provide for an exit interview with the In-Plant Union representative" at the close of plant safety reviews. However, the Union seeks advance notice from the Agency of such reviews and the "ability to attend and be actively involved in the review" on duty time.

Section 11: Introduction of new chemicals

- a. Summary of proposals:** The Union seeks to add a requirement for the Agency to conduct "an air quality study" before "the introduction of new chemicals into any facility where unit employees work or have the possibility of working" and after such introduction. The Union also seeks to obligate the Agency to "ensure proper ventilation prior to the introduction of any chemical use in facilities where unit employees work or have the possibility of working." Finally, the Union would require the Agency arrange for a review of "[e]xisting plants that use chemicals" in which "employees work or have the possibility of working."

Section 12: Use of firearms by establishments

- a. Summary of proposals:** The Union seeks to enshrine in the contract existing Agency policy regarding the use of

firearms "to render an animal unconscious prior to slaughter."

Order: During the course of Panel proceedings, the parties informed the undersigned they had reached agreement on this article. **Accordingly, the parties shall follow the agreed upon language.**

5. Article: Hours of Work

Section 1: Policy

a. Summary of proposals: The parties agree that work schedules will be "in accordance with... Government-wide regulations and Agency policy and directives." However, the Union seeks to include a lengthier statement of what applicable regulations require than the Agency's more streamlined approach.

The parties also agree that employees may not "perform on-line post-mortem inspection duties" more than 10 hours per workday and may not perform "off-line inspection duties" for more than 12 hours in a workday. However, the Agency's proposal includes an exception to these hourly limits in cases when an employee's supervisor determines extra time is necessary "to accomplish the Agency's mission." In such cases, the Agency will "normally" seek to use volunteers before requiring employees to work the extra hours. The Union opposes this exception. The Union also proposes to specify that employees will have at least 10 hours between work shifts.

b. Agency argument: Its proposal is effectively current practice. While employees may sometimes need to work beyond the daily hourly work limits, it's not the norm. Unforeseen circumstances may necessitate fewer than 10 hours between shifts. The Agency experiences high turnover and needs to retain its right to assign work to make sure it can accomplish its mission.

c. Union argument: It is unsafe to have employees working as many as 18 hours a day and then have little time between shifts. However, the Union acknowledges that the matter is one of management rights.

- d. Order:** The parties generally agree that the Agency has the right to set hourly work limits and schedules, and to create exceptions to them if necessary to fulfill its mission. However, the Union's safety concerns are not to be taken lightly. **Accordingly, the parties shall adopt paragraph A of the Agency's proposal in full, and shall adopt paragraph B of the Agency's proposal modified as follows:**

"The maximum cumulative time a BUE may perform on-line post-mortem inspection duties is ten (10) hours per work day. The maximum time a BUE may be assigned to perform off-line inspection duties (e.g., in a pay status) is twelve (12) hours per work day. Employees will have 10 full hours between shifts.

~~Maximum cumulative times for Inspectors are subject to the following exception:~~

~~When determined by~~ These limits may be suspended on a case-by-case basis if the immediate supervisor, based upon the Agency's staffing needs, ~~BUEs may be utilized beyond the ten (10) and/or twelve (12) hours~~ determines suspension is appropriate to accomplish the Agency's mission. Volunteers normally will be used before non-volunteers are required to work ~~longer than the maximums~~ beyond these limits.

Section 2: Lunch period

- a. Summary of proposals:** Though the Union's proposal is lengthier, the parties agree that an employee's lunch period is unpaid, may last from 30 minutes to one hour, and agree on the applicable regulations governing lunch periods.

The Union proposes that on-line inspectors' lunch periods "shall be scheduled to coincide with the plant's scheduled lunch break" and that lunch periods shall remain "relatively consistent" once established. The Union's proposal also restates applicable regulations and specifies in detail the range of time during the workday that off-line inspectors may take their lunch break.

- b. Agency argument:** The Agency did not express substantive concerns with most of the Union's proposal, but would prefer to simply reference applicable regulations and policies governing lunch breaks instead of explaining them in detail, as the Union proposes to do. The Agency doesn't disagree with the Union's goal of syncing employees' lunch breaks with those of the plant/establishment, but does not want to do so if it would violate applicable regulations.
- c. Union argument:** The Union acknowledges that its proposal largely tracks the regulations cited by the Agency, but wants to ensure lunch breaks for online inspectors coincide with those of the plant they are assigned to.
- d. Order:** The Union did not make a compelling argument for spelling out applicable regulations governing lunch breaks in detail within the CBA. Further, the parties agreed with the goal of syncing lunch breaks for on-line inspectors with those of the plant they are assigned, provided doing so did not violate applicable regulations. **Accordingly, the parties shall adopt the Agency's proposal in full, with the following addition:**

"Unless doing so would conflict with the above-referenced regulations, on-line slaughter inspectors' lunch periods shall be scheduled to coincide with the plant's scheduled lunch break."

Section 3: Agency relief breaks

- a. Summary of proposals:** The parties agree that employees performing certain tasks shall receive 30 minutes of total break time during each eight-hour workday and generally agree on the parameters governing how break times are scheduled. The parties also agree that the Union shall be notified if staffing shortages prevent employees from taking break time. The current CBA provides for a mandatory, 10-minute break for every two hours of overtime. The Agency's proposal would change this by allowing supervisors to decide whether to authorize a 10-minute break for every two hours of overtime worked. The Union's proposal would mandate a 10-minute break for every 1.5 hours of overtime worked. Finally, the Union seeks to require that break times be regularly scheduled and be in addition to any plant breaks.

- b. Order:** During the Mediation-Arbitration, the parties agreed to language for this section, however, the last two paragraphs need to be edited for clarity. **Accordingly, the parties shall adopt the following agreed-upon language, modified as follows:**

"The parties recognize that relief breaks to BUEs from performing inspection duties are desirable. A total of thirty (30) minutes of break time in an eight (8) hour day shall be given. The immediate supervisor shall determine the scheduling of the break time. The break time authorized under this section cannot be scheduled as a thirty (30) minute block, extend the lunch period, arrive after the scheduled start, or shorten the work day. If overtime is scheduled for a two-hour period, an additional ten (10) minute break may be authorized by the immediate supervisor.

Where staffing or the Agency's mission would prevent providing the relief breaks, e.g., where it is not feasible to provide the break time due to a temporary staffing shortage, ~~the~~ the supervisor shall advise the local Union representative of the reasons an exception exists."

Section 4: When Plants Do Not Operate for All or Part of the Day

- a. Summary of proposals:** In cases in which a plant does not operate "for all or part of a day," the Agency simply proposes that "the supervisor will assign work as appropriate or grant leave requests." The Union, on the other hand, proposes a lengthier and more detailed list of options available to supervisors, but all appear to be encompassed by the Agency's more streamlined language.
- b. Order:** During the course of Panel proceedings, the parties agreed to strike this section. **Accordingly, the parties shall withdraw their respective proposals and strike this section from the CBA.**

Section 5: Flexible and Compressed Work Schedules

- a. Summary of proposals:** The Union's proposal, to which the Agency provided no counter, references various applicable laws and regulations governing compressed work schedules (CWS). The Union's proposal would require that the Agency implement CWS by "work unit," defined as "all unit employees assigned to an official establishment or rotation pattern." To establish a CWS, a majority of employees in a work unit would need to vote in favor of establishing one in a Union-administered vote and then receive Agency approval for the CWS.
- b. Agency argument:** The Agency desires to retain existing CBA language governing CWS.
- c. Union argument:** The Union explained that it desired to maintain current practices governing CWS and believed its proposal aligned with existing CBA language.
- d. Order:** During the discussion in the Mediation-Arbitration, the parties expressed a desire to keep current practices in place and agreed to keep the language from the previous CBA governing CWS. **Accordingly, the parties shall adopt the following agreed-upon language:**

"The parties agree that employees may use flexible and compressed work schedules to principally improve productivity, provide greater Agency service to the public, enhance employees' lives, and conserve energy, based on governing regulations and policy, in accordance with the following conditions:

- a. The work unit for purposes of this Section will include all unit employees assigned to an official establishment or rotation pattern, where appropriate.
- b. A majority of unit employees in the work unit must vote to adopt the compressed workweek and be approved by the Administrator before it will be implemented.

c. The employees in the work unit involved shall hold an election by simple majority. The vote will be by secret ballot and conducted by a Union representative who will certify the results in writing to the appropriate Front Line Supervisor/Regional Import Supervisor, as applicable. An Agency representative may explain the type of compressed work schedule and answer related questions prior to the vote.

d. Upon written request, and if the District Manager, OFO/Director, IID or their designees, as applicable, determines that participation by an employee in a compressed work schedule would impose a personal hardship adverse impact on such employee, the District Manager, OFO/Director, IID or their designees, as applicable, shall make every effort to reassign such employee to a non-compressed work schedule assignment within his/her commuting area for which the employee is qualified.

e. Employees participating in a compressed work schedule shall have an eighty (80) hour biweekly basic work requirement and a daily and weekly basic work requirement consistent with governing regulations and the type of compressed work schedule established.

f. Employees participating in a compressed work schedule will be entitled to all existing holiday and premium pay benefits including overtime pay for hours in excess of the basic work requirement.

g. Employees participating in compressed work schedules who are required to work on a holiday, Sunday, or nights, as part of the compressed work schedule, will be entitled to holiday, Sunday, or night differential pay, as appropriate, under the provisions of Title 5, United States Code, as presently applied.

In accordance with governing regulations, the Administrator may terminate a compressed work

schedule if it has caused an adverse impact on Agency operations. Except for a hardship exemption, an individual unit employee or group of employees within a work unit will not be excluded from the compressed schedule once the employees in the work unit have voted to participate in the program.

The contents of this Section shall constitute the total agreement between the parties with respect to a compressed work schedule for unit employees."

Section 6: Preparatory or Concluding Activity

- a. Summary of proposals:** The Union proposed to strike this section from the CBA, and the Agency provided no counter. The parties failed to provide the disputed language in question.
- b. Order:** During the Mediation-Arbitration, the parties agreed there was no need for this section and agreed to strike it. **Accordingly, the parties shall strike this section from the CBA.**

6. Article: Merit Promotions

Section 1: Policy

- a. Summary of proposals:** The parties agree on the general principles governing the merit promotion plan, and that it will be administered consistently and without discrimination. However, the Union's proposal would prevent discrimination on the basis of sexual orientation, this language is missing from the Agency's proposal. While the Agency proposes that "[p]romotions to positions within the bargaining unit for which unit employees are eligible to compete" be governed by DR 4030-335-002, the Union counters that they be governed by "the Agency's Merit Promotion Plan, including the Online Promotion System, and this Agreement." The Union's proposal would provide for paid relocation for "[a]ll employees selected from a merit promotion application/certificate." It would also require the Agency to contact every employee on a merit promotion application/certificate if it "chooses to contact one person as a form of interview for a job or position" and

to provide employees with 48 hours' notice before an interview.

- b. Agency argument:** The Agency does not object to acknowledging that the merit promotion plan shall not be administered in a way that discriminates on the basis of sexual orientation. The Agency does not want to cut and paste all applicable laws, rules, and regulations governing merit promotion into the CBA, and prefers to simply cite them as appropriate. The Agency already provides paid moves for promotions and should not have to provide paid relocation for lateral moves; doing so is against Department regulations. HR has a process for ranking applicants and highlighting people to interview. Often, the Agency does not interview anyone but, if it did, it would interview everyone. Requiring 48 hours' notice of an interview could create an administrative headache for the Agency and is not necessary; supervisors are used to arranging time for inspectors to interview and can do so if needed.
- c. Union argument:** The Agency should not discriminate on the basis of sexual orientation in administering the merit promotion plan. The Union doesn't necessarily object to just citing the applicable Department regulation governing merit promotion. Requiring the Agency to interview all candidates if it interviews one might implicate management rights, but not interviewing all candidates would not be a fair merit promotion process. On-line inspectors need advanced notice of an interview to schedule time off.
- d. Order:** The parties agree the Agency should not discriminate on the basis of sexual orientation in administration of merit promotions. The Agency's stated interest in a streamlined CBA which simply references the applicable department regulation, instead of restating its requirements, was reasonable, and the Union did not furnish a compelling reason to adopt its lengthier, but not substantively different, proposal. Further, the Union did not provide a justification for requiring the Agency to pay for employees' lateral relocations. Instead, the Union was primarily concerned about employees' ability to apply for a lateral move through USAjobs.gov, an issue not directly reflected in the parties' proposals. The Union also did not adequately justify requiring an all-or-nothing interview

process, which it acknowledged may implicate the Agency's rights under § 7106 of the Statute, or requiring 48-hours' advanced notice of an interview. **Accordingly, the parties shall adopt the Agency's proposal, modified as follows:**

"The parties agree that Merit Promotion Principles shall be applied in a consistent manner without discrimination in regards to political affiliation, race, color, national origin, sex, sexual orientation, marital status, politics, membership or non-membership in an employee organization, age, or disability."

Section 2: The Online Promotion System

- a. Proposal summary:** The Union's proposal, to which the Agency offered no counter, would require and regulate the use of the Online Promotion System for "permanent fulltime Inspector positions that are filled on a periodic basis," including consumer safety inspector, egg product inspector, and import/export inspector.
- b. Agency argument:** The Agency does not utilize its own "online promotion system," instead relying on USAJobs.gov. The positions listed in the Union's proposal are no longer accurate.
- c. Union argument:** The Union acknowledged its proposal was intended to refer to USAjobs.gov and was there for informational purposes.
- d. Order:** The Union stated its proposal was merely intended to provide information, but the Agency persuasively countered that the Union proposal was vague and possibly inaccurate. **The Union shall withdraw its proposal for this section.**

Section 3: Application Procedure

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, describes the merit promotion application process, including the use of USAjobs.gov. It would also give employees up to four hours of duty time to complete job applications and require the Agency announce certain bargaining unit jobs for at least 21 days.

- b. Agency argument:** The Agency opposes having to grant employees four hours of duty time to apply for a merit promotion. The current practice is to post bargaining unit jobs for 14 days. The Agency states that Departmental regulations and presidential guidance direct the Agency to streamline the hiring process.²
- c. Union argument:** The Union acknowledged that the description of the merit promotion application process in its proposal was there for informational purposes and not intended to be a substantive provision.
- d. Order:** The Union failed to justify why a description of how to apply for a merit promotion through USAjobs.gov was a necessary component of a contractual agreement between two parties that have no authority over the website. Further, requiring the Agency to permit employees to use half-a-workday to apply for a merit promotion could inhibit the Agency's ability to fulfill its mission and is contrary to the Statute's goal of "an effective and efficient Government."³ Finally, the Agency is already struggling to implement directives to streamline the hiring process and should not be required to lengthen the job posting period. **The Union shall withdraw its proposal for this section.**

Section 4: Timeframes for Filing Applications

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, provides that merit promotion applications be submitted by the deadline posted in the vacancy announcement and requires that jobs will be announced "for a minimum of 21 calendar days."
- b. Order:** During the course of Panel proceedings, the Union agreed to, and shall, withdraw this section.

² See DR 4030-335-002, which provides that jobs shall be posted a minimum of five days. See also, *Presidential Memorandum, Improving the Federal Recruitment and Hiring Process*, May 11, 2010, which directs Agencies to "reduc[e] substantially the time it takes to hire mission-critical and commonly filled positions."

³ 5 U.S.C. § 7101(b).

Section 5: Evaluating and Ranking Employees

- a. **Summary of proposals:** The Union's proposal, to which the Agency offered no counter, would require the Agency to utilize "[a]utomated systems for evaluating and ranking candidates," provide employees with "guidance" and "technical support" on the use of the automated promotion application system, and allow employees or the Union to request "records used as a basis for ranking and selecting employees" in promotion action "being grieved by the Union."
- b. **Agency argument:** The Agency already provides information to the Union regarding its ranking and selection of employees and does not see the need for the Union's proposal.
- c. **Union argument:** Employees should have access to technical support when applying for jobs.
- d. **Order:** The Union acknowledged that its proposal regarding "automated systems" referred to USAjobs.gov and that, as the Agency does not administer this website, it cannot meaningfully assist with technical support. The parties also acknowledged that § 7114(b)(4) of the Statute may provide a means for the Union of accessing the records described in its proposal. **As the Union has not adequately justified the need for its proposal, the Union shall withdraw its proposal for this section.**

Section 6: Referral of Candidates for Promotion

- a. **Summary of proposals:** The Union's proposal, to which the Agency offered no counter, would provide that: (1) "Up to ten (10) candidates with the highest ranked scores" be "referred as 'best qualified' for each vacancy filled"; (2) "When more than one (1) vacancy can be filled from the promotion certificate, up to three (3) additional candidates [be] certified for each additional vacancy"; and, (3) "The promotion certificate list[] the best qualified candidates alphabetically."
- b. **Order:** During the Mediation-Arbitration, the Union indicated it might be willing to withdraw its proposal, but ultimately declined to do so without explanation. **Absent a compelling reason for inclusion of the provision, the Union shall withdraw its proposal.**

Section 7: Notification of Selection

- a. Summary of proposals:** The Union's proposal, to which the Agency provides no counter, requires the Agency to provide employees with the ability to electronically track their application and determine: (1) "If they were considered for a specific promotion"; (2) "If they were found eligible"; (3) "Who was selected"; and (4) "The reason for non-selection." Lastly, it requires the selecting official to notify employees considered for a vacancy and allows the employee to "ask the supervisor to provide suggestions for improvement that may enhance the employee's chances for career advancement."
- b. Order:** During the Mediation-Arbitration, the Union acknowledged that USAjobs.gov, which the Agency does not manage, already provides the application tracking functionality the Union seeks. The Union also agreed to strike paragraph (b) of the section regarding employee notification by selecting officials. **There is, therefore, no remaining justification for the proposal, and it shall be withdrawn by the Union.**

Section 8: Complaints

- a. Summary of proposal:** The Union's proposal, to which the Agency offers no counter, would specify that complaints involving merit promotion be resolved via the negotiated grievance procedure "or a complaint of discrimination."
- b. Order:** During the Mediation-Arbitration, the Union acknowledged this section is informational only and of no substantive effect. Grievances are addressed in a separate article. **In the interest of efficiency, the Union shall withdraw its proposal for this section.**

Section 9: Exceptions to Merit Promotion

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, enumerates five circumstances in which "[c]ompetitive merit promotion procedures do not apply."
- b. Order:** During the Mediation-Arbitration, the parties acknowledged this section is merely a restatement of existing regulations and of no substantive effect. The

dispute turns on a philosophical difference of opinion between the parties regarding the purpose of a CBA. The Agency views the document primarily in substantive, legal, and technical terms. While the Union shares this view, it believes the agreement should also serve as an informational guide for employees, which leads the Union to propose non-substantive language restating external authorities that also have a bearing on the workplace. The undersigned views CBAs as one of many authorities governing federal employment. Fundamentally, their purpose is to supplement these authorities with additional arrangements regarding conditions of employment in specific workplaces, not to serve as a compilation or restatement of all applicable laws, regulations, and policies. Indeed, attempting to memorialize such authorities in federal CBAs in any systematic way would render the agreements confusing, unwieldy and often out-of-date. Consequently, the Panel has often imposed streamlined contract language that avoids unnecessary restatements of external legal authorities and the undersigned will continue to do so here.⁴ **To prevent an unnecessarily lengthy and cumbersome CBA, the Union shall withdraw its proposal.**

7. Article: Overtime

General arguments

The Agency asserted that its ability to manage overtime is protected by § 7106 of the Statute as a management right. As the undersigned has elected to impose the Agency's proposals for this article, except where it expressed a willingness to modify them, it is not necessary to analyze the Agency's legal arguments. The Union pointed out that it has a pending ULP against the Agency for changes it made to overtime practices. However, the Panel already considered and rejected this argument.

Section 1(a): Responsibility for Overtime

- a. Summary of proposals:** The Agency seeks to reserve the right to assign overtime, citing management's right to assign work under § 7106 of the Statute, and would allow supervisors to "combine overtime assignments during

⁴ See, e.g., *NLRB*, 20 FSIP 072 (2020); *HHS, NIH*, 20 FSIP 038 (2020); and *DOC, NOAA, NWS*, 20 FSIP 021 (2020).

periods of reduced inspection coverage requirements when they deem it operationally necessary."

The Union's proposal, however, would provide that any overtime required "is the responsibility of the [employee] covering the position," except in certain situations. It also states that employees shall receive overtime for work done on a Sunday if they "are assigned to a position on Monday."

- b. Agency argument:** The Agency does not want to make substantive changes to overtime practices, but does want to reserve authority to handle overtime to the district managers as a matter of management rights and being able to fulfill the Agency's mission.
- c. Union argument:** The Union points out that FSIS work differs from other jobs in that employees do not work in a centralized setting, and instead work primarily in the field at plants/establishments. Inspectors have standardized tours of duty and are assigned to particular plants, but because they must work whenever the plant is operating, they may need to work overtime to fulfill their responsibilities. The decision to work overtime should be theirs. The Union also contends that its proposal more closely aligns with current practice, which it believes does not need to be changed.
- d. Order:** In order to fulfill its mission, the Agency needs to be able to manage and assign overtime. Employees do not have the right to determine when/whether working overtime is appropriate. If the Agency wants to provide discretion to employees to work overtime if the demands of their assignment make it necessary, the Agency may choose to do so. But it would not be appropriate to preemptively and universally delegate such authority to individual employees via the CBA. **Accordingly, the parties shall adopt the Agency's Section 1(a) in full.**

Section 1(b): Responsibility for Overtime

- a. Summary of proposals:** The parties agree that the Agency will "make a concerted effort to provide sufficient relief from... overtime work" if employees are required to work six days per week for three consecutive weeks, and may excuse an employee from an overtime assignment upon request if there is another qualified employee

available. However, the Union seeks to add language establishing that an employee "in an 8-hour leave status" on a Friday "will not normally be assigned to overtime work on Saturday." Additionally, the Union proposal adds a new requirement that supervisors "post irregular overtime notices in the USDA offices in conspicuous locations before the end of the shift" and provides that failure to do so would free employees of any obligation to work the overtime.

- b. Agency argument:** Being able to assign work is a core management right, even if it means an employee must work overtime on a Saturday. The Agency is not opposed to notifying employees of irregular overtime, but does not want to agree to mandatory posting requirements and does not want to lose the ability to schedule overtime if the posting does not occur as prescribed by the Union.
- c. Union argument:** The Union does not want an employee who has taken leave on a Friday with the intent to have a three-day weekend to be called in to work on a Saturday. Employees should be notified of irregular overtime.
- d. Order:** The Agency deserves the ability to assign work as necessary to fulfill its mission. While the Agency should not be prevented from assigning overtime due to failure to follow a particular posting protocol, it should ensure employees are notified of irregular overtime. **The parties shall adopt the Agency's Section 1(b) in full, with the following addition:**

"Agency supervisors stationed at slaughter facilities will ensure employees are notified in advance of irregular overtime."

Union Section 1(e)⁵: Responsibility for Overtime

- a. Summary of proposals:** The Union's proposal, which has no counterpart in the Agency's proposal, provides, "The equalization of overtime procedure applies to the above provisions."
- b. Order:** During the Mediation-Arbitration, the Union agreed to strike Section 1(e). **Accordingly, the Union shall withdraw this proposal.**

⁵ Identified here as 1(e) pursuant to the side-by-side document provided to the Panel by the parties. If listed sequentially, it would be 1(c).

Union Section 1(f)⁶: Responsibility for Overtime

- a. Summary of proposals:** The Union's proposal for Section 1(f), which has no equivalent in the Agency's proposal for Section 1, states that, "[m]eal periods are the only periods of non-pay status during an BUE's assignment to overtime work."
- b. Agency argument:** The Agency does not object to this provision on substantive grounds but believes it to be unnecessary as it is reflective of current practice.
- c. Union argument:** This is reflective of current practice.
- d. Order:** In the interest of a streamlined CBA, the Union shall withdraw this non-substantive, informational proposal.

Union Section 1(g)⁷: Responsibility for Overtime

- a. Summary of proposals:** The Union's proposed Section 1(g), which the Agency opposes without offering a counter, would require that any employees "contacted" by the Agency during an emergency while on leave will be paid at least two hours of overtime.
- b. Agency argument:** The Agency already compensates employees for a minimum of two hours' overtime if they are called back into work, but objects to providing an automatic two hours' overtime for something that could be as simple as answering a phone call. However, the Agency is willing to pay overtime for the actual amount of time spent by employees responding to Agency communications while on leave.
- c. Union argument:** Requiring employees to respond to an Agency communication while they are on leave is work for which employees deserve to be compensated.
- d. Order:** It would be contrary to the interests of an "efficient and effective government"⁸ to require the

⁶ Identified here as 1(f) pursuant to the side-by-side document provided to the Panel by the parties. If listed sequentially, it would be 1(d).

⁷ Identified here as it is in the side-by-side document provided to the Panel by the parties. If listed sequentially, it would be 1(e).

⁸ 5 U.S.C. § 7101(b).

Agency to automatically pay two hours' overtime to employees contacted while on leave due to an emergency situation. However, as the Agency acknowledges, it is not unreasonable to compensate employees for the actual time spent responding to the Agency's communication. **Accordingly, the parties shall adopt the Union's proposal, modified as follows:**

"In the event that an emergency arises and the Agency contacts a BUE that is in an approved leave status (annual, sick, etc.) or while in a non-pay status, the BUE will be compensated at a ~~minimum of two (2) hours of~~ overtime rates for the actual time spent responding to the Agency communication, measured in 15-minute increments."

Section 2: Voluntary Overtime Replacement:

- a. Summary of proposals:** Both parties agree that employees wishing to volunteer to work overtime may place their names on a roster of such employees. While the Agency's proposal would allow supervisors to "utilize the roster to obtain a qualified replacement," the Union would allow employees to find their own replacements using the roster in the event the employee "elects to not work overtime associated with their position/assignment."
- b. Order:** The Union's proposal presumes adoption of its proposal for Section 1(a), which would grant employees responsibility for managing their own overtime, a necessary precondition to its proposal here to allow employees to find their own replacements if they "elect[] to not work overtime." However, because I have ordered adoption of the Agency's proposal for Section 1(a) of this Article, it would be incongruous to order the Union's proposal here. **The Parties shall adopt the Agency's proposal for this section.**

Section 3: Equalization of Overtime

- a. Summary of proposals:** The parties agree that "Distribution of overtime shall be fairly and equitably assigned by the supervisor among eligible and qualified BUEs." The Union's proposal would retain current policies and practices regarding overtime distribution, though it also includes a contingency proposal if current processes are "no longer practicable or a change

is required" which largely mirrors the Agency's proposal.

- b. Agency argument:** Overtime distribution policies have evolved over a long period of time, with differences spread across various locations. People may no longer even know what the overtime distribution policies are. It is time to standardize these practices and avoid having a patchwork of various policies around the country.
- c. Union argument:** There's nothing wrong with current practices.
- d. Order:** The parties' proposals are quite similar. The only real difference is the Union's desire to maintain the current unknown patchwork of overtime distribution practices. However, the procedure for distributing overtime outlined in the Union's contingency proposal, in the event current practices are changed, is substantively the same as the Agency's proposal. **Absent a compelling reason to maintain current practices, which the Union did not provide, the parties shall adopt the Agency's proposal in full.**

Section 4 (Agency and Union): Overtime and premium pay; Section 5 (Union): Call Back; Section 6 (Union): Time Spent on Standby Duty or in an On-Call Status

- a. Summary of proposals:** The entirety of the Agency's proposal for Sections 4-6 provides, "[I]n assigning standby duty or on-call status, the Agency shall comply with 5 CFR 551." The Union's proposals for these sections are much lengthier explanations of the Agency-cited regulations.
- b. Agency arguments:** The Agency disfavors general language and prefers to cite specific authorities for greater precision. However, the Agency doesn't object to the inclusion of the Union's language for Section 4.
- c. Union arguments:** The Union acknowledged that its proposals were merely restatements of applicable regulations, there for informational purposes.
- d. Order:** The parties have no substantive dispute over these proposals, merely philosophical differences about

how much detail about outside legal authorities to include in the CBA. Both acknowledged the Agency's legal obligations would remain unchanged even if none or either parties' proposals were adopted. However, it would not unduly complicate the CBA to include some acknowledgement of the applicable laws governing overtime, and the parties have expressed openness to more condensed language incorporating aspects of both of their proposals. **Accordingly, the parties shall adopt the Agency's proposal for Sections 4-6 with the following addition:**

"Employees shall be compensated for overtime – including appropriate premium pay and differentials for Sunday, holiday, and nights – at those rates permissible under appropriate laws, rules, and regulations."

Section 7: Appeals

- a. Summary of proposals:** The Union's proposal is to maintain language from the current CBA providing that violations of the overtime article are "both grievable and arbitrable" under the negotiated grievance procedure. The Agency proposes to strike this section.
- b. Order:** Federal court precedent holds that the party advocating a limited scope grievance procedure, as the Agency seeks to do here, "must establish convincingly that, in the particular setting, its position is the more reasonable one."⁹ **In this case, the Agency did not justify the need to limit the scope of the negotiated grievance procedure with its proposed new exclusion.**

8. Article: Performance Management

Section 1: Overview

- a. Summary of proposals:** The Agency proposes streamlined language specifying that it will "administer the Performance Management program in accordance with 5 USC Chapter 43, 5 CFR. Part 430, and DR 4040-430." The Union's lengthier proposal notes that performance evaluations will be "administered in accordance with applicable laws, regulations, and internal guidelines"

⁹ *AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983).

and establishes other general criteria for the administration of performance evaluations.

- b. Agency argument:** All of the components of the Union's proposal are encompassed by the statutes, government-wide regulations and Department regulations cited in the Agency's proposal.
- c. Union argument:** The Union can accept the Agency's proposal if it can verify that the authorities it cites do, indeed, encompass the requirements listed in the Union's proposal.
- d. Order:** As this dispute concerns whether to cite or restate applicable laws and regulations, and would not materially affect the parties or employees, the parties shall adopt the Agency's more streamlined proposal, consistent with my reasoning above.

Section 2: Critical Elements and Performance Standards

- a. Summary of proposals:** The Agency proposes a short section acknowledging it will follow 5 CFR Part 430 when determining "the number of levels of performance for each critical element, and when determining whether a rating level will have a written performance standard." The Union's proposal is far more detailed, requiring, among other things, that:
 - employees receive "a copy of the performance elements and standards for their position" and an opportunity to discuss them with management each appraisal cycle;
 - the agency will provide employees with "all the tools necessary to perform their job based on the requirements set in the standards;"
 - ratings be "communicated in writing;"
 - ratings and progress reviews be of "adequate length" and occur "in a conducive, related environment, ensuring privacy and without interruption," including phone calls, with an opportunity for employees to ask questions;
 - the agency will consider whether an employee has been "assigned additional duties" or "work[ed] out of their normal job classifications."

- b. Order:** As with much of the contract, this dispute concerns, in part, whether to cite or restate applicable laws and regulations. Further, the Union's proposal is both overly prescriptive and vague, such that even a supervisor's phone ringing during a progress review could be trigger a grievance. **Accordingly, the parties shall adopt the Agency's more streamlined proposal, consistent with my reasoning above.**

Section 3: Communications

- a. Summary of proposals:** Under the Agency's proposal, supervisors are "normally" to "discuss and issue the performance plan with each employee" within 30 days of hire, rating period, and reassignment and, thereafter, inform employees of any changes in the performance plan. Further, informal progress reviews/discussions are to occur at the close of the appraisal period and throughout the appraisal period. Employees may not receive a performance rating until after working at least 90 days under a performance plan.

Under the Union's proposal, performance discussions would take place "at appropriate times," with at least one progress review during the appraisal period. The Union would also require the Agency to provide "appropriate assistance" if an employee is rated below "fully successful." Further, employees would receive at least 72 hours' notice before a progress review/rating, and such reviews would be required to be of "adequate" length and occur "in a conducive environment" and "without interruption." The Union's proposal also includes various aspirational language about the tone and tenor of discussions between employees and supervisors.

- b. Agency argument:** The Agency's proposal simply reflects the requirements of the statutes, government-wide regulations and departmental regulations referenced in its Section 1 proposal. Forcing the Agency to provide a specific amount of advanced notice of progress reviews would be overly burdensome, but the Agency is open to providing some advanced notice.
- c. Union argument:** Current CBA language provides that employees shall receive 24 hours' notice of progress reviews. The Union would like to expand this to 72 hours'

notice because it can take time to prepare the necessary information for a progress review.

- d. Order:** The main point of contention for this section involved the amount of advanced notice employees will receive for progress reviews and performance ratings. The Agency indicated a willingness to accept language obligating it to provide as much advanced notice as possible, and the Union indicated this could be acceptable. **Accordingly, the parties shall adopt the Agency's proposal in full, with the following addition:**

"f. The Agency will provide employees as much advanced notice of a progress review and/or rating as is practicable."

Section 4: Rating of record

- a. Summary of proposal:** The Union's proposal, to which the Agency offered no counter, states that employees must work for at least 90 days before receiving a performance rating and be provided with at least 72 hours' notice of a yearly performance rating. The Union would also require the Agency to provide a written explanation to an employee if their rating was lowered from the prior year.
- b. Agency argument:** Supervisors and employees already have multiple informal performance discussions and employees receive written performance ratings and written notices before being placed on a performance improvement plan. It would be unnecessarily burdensome to provide written explanations every time an employee's rating was lowered. Such explanations make even less sense under the current system in which ratings are conducted pass/fail.
- c. Union argument:** Employees deserve some form of formal, written explanation as to what caused their performance rating to be lowered. The pass/fail rating system may be rescinded in the future in favor of the previous, five-tiered ranking system.
- d. Order:** The portion of the Union's proposal requiring that employees work for 90 days before a performance rating was already included in the Agency's proposal for Section 3. The question of advanced notice of

performance reviews/ratings was also already resolved under Section 3. It makes little sense to require the Agency to provide a written explanation for reducing an employee's performance rating from "pass" to "fail" when a failing rating is likely to trigger written notice of the employees' placement into a performance improvement plan anyway. The Union offered only speculation that the five-tier rating system may return in the future and, even if it does, the Agency argued persuasively that providing written explanations of every change in performance ratings would be unnecessarily burdensome. **Accordingly, the Union shall withdraw its proposal.**

Section 5: Addressing Unacceptable Performance

- a. Summary of proposals:** Under the Agency's proposal, supervisors "may" issue employees a "Demonstration Opportunity Plan" (DOP) if an employee's performance is unacceptable. The DOP must warn the employee that reassignment, demotion, or termination may result unless their performance rises to "an acceptable level," typically within 30 days. Supervisors must offer assistance to help employees improve their performance during a DOP period, and provide employees with a written evaluation of the employee's performance at the end of the period. No grade reduction or removal action can occur prior to completion of the DOP period.

The Union's proposal would require that the Agency meet with and counsel employees about performance issues before "initiating a Performance Improvement Plan (PIP)." If the employee's performance does not improve after counseling, the Agency may place them on a PIP and must warn them of the consequences of a failure to improve. Employees would be provided an opportunity to resign in place of termination and, if reassigned or reduced in grade, must be given "a list of vacant positions within the district" and "nearby districts to choose from."

- b. Agency argument:** Pre-improvement plan counseling is not necessary because performance discussions occur regularly throughout the year. Employees should not be surprised to be placed on an improvement plan. The Agency is open to ensuring a discussion takes place about performance before an employee is placed on an improvement plan but does not want to create a new step

in the process. Employees can resign at any time and do not need to be provided a special opportunity to do so.

- c. Union argument:** The Union is not set on pre-improvement plan "counseling." Its main concern is that employees have an opportunity to meet and discuss their performance issues with their supervisor before being placed on an improvement plan.
- d. Order:** The Union's desire to ensure that employees have a chance to discuss their performance with their supervisor prior to placement on an improvement plan and the Agency's reluctance to add a new meeting to the existing performance review/rating schedule can be balanced by simply requiring that a supervisor have a discussion about an employee's unacceptable performance prior to placing the employee on an improvement plan. There is no reason this discussion can't take place at a regular performance review. **Accordingly, the parties shall adopt the Agency's proposal in full, with the following modification:**

"At any time during the rating period, if the supervisor identifies that an employee's performance in one or more Critical Elements is at the Unacceptable level, the supervisor will discuss the matter with the employee. The discussion may occur during or in addition to a regular performance review. Thereafter, the Supervisor may officially notify the employee of the Critical Elements for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance with the issuance of a Demonstration Opportunity Plan (DOP)."

Section 6: Performance Improvement Plan

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, outlines the content of PIPs in greater detail and provides that employees will typically have 90 days under a PIP to demonstrate acceptable performance. The Agency would be obligated to "make sure the PIP is successful" by providing the employee with things like "training, coaching, and mentoring."

- b. Agency argument:** The current CBA specifies that employees on a PIP will have 60-90 days to demonstrate acceptable performance. The Agency would prefer a 30-day period consistent with Executive Order 13839.¹⁰
- c. Union argument:** The Union wants to include extra details in the CBA so employees understand what a PIP is and how it works, but acknowledges this is for informational purposes only and not a substantive dispute. The Union did not explain why it wanted to change the PIP period from 60-90 days to a minimum of 90 days.
- d. Order:** The parties acknowledged that most of the Union's proposal would not meaningfully change the Agency's practice regarding DOPs/PIPs. Further, neither party adequately justified its position regarding the length of employee improvement plans. **Accordingly, the Union shall withdraw its proposal and the parties shall adopt the following language for this section:**

"Employees on a demonstration opportunity plan/performance improvement plan will be afforded 60 days to demonstrate acceptable performance in the critical element(s) in which they are considered to be performing at an unacceptable level."

Section 7: Grievances

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, provides that "violations of the performance management system may be grieved under the negotiated grievance procedure."
- b. Order:** Federal court precedent holds that the party advocating a limited scope grievance procedure, as the Agency seeks to do here, "must establish convincingly that, in the particular setting, its position is the more reasonable one."¹¹ In this case, the Agency did not justify the need to limit the scope of the negotiated grievance procedure with its proposed exclusion. **The parties shall adopt the Union's proposal.**

¹⁰ Executive Order 13839 was rescinded on January 22, 2021 pursuant to Executive Order 14003: Protecting the Federal Workforce.

¹¹ *AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983).

Section 8: Performance Based Actions

- a. **Summary of proposals:** The Union's proposal, to which the Agency offered no counter, acknowledges that employees who have failed to adequately improve at the conclusion of a PIP may be "reassigned, placed in a lower-graded position, or removed." Demoted employees must be provided with a new performance plan within 14 days. Employees facing demotion or termination must receive 30 days' advanced notice and 10 days to respond to/contest the notice in writing or at an "oral conference." The Agency would be required to provide the employee with a final written decision.
- b. **Agency argument:** The provisions of the Union's proposal are covered by the authorities included in the Agency's Section 1.
- c. **Union argument:** The Union could not say whether its proposal would be covered by the Agency's language.
- d. **Order:** Since the Agency's proposal for Section 1 was adopted to help condense the contract, it would make little sense to impose the Union's lengthy proposal here instead of simply allowing the cited authorities to govern. **The Union shall withdraw its proposal for this section.**

Section 9: IPPS Reviews

- a. **Summary of proposals:** The Union's proposal, to which the Agency offered no counter, provides that employees be provided with five days' notice, in writing, of "all questions and Topics" that will be discussed by the Inspector(s) at an in-plant performance system (IPPS) review. Employees participating in an IPPS review shall have the right to Union representation if more than one Agency representative will be in attendance. Finally, "IPPS reviews will not be given more weight than a progress review when an employee is rated."
- b. **Order:** During the course of Panel proceedings, the parties agreed to, and shall adopt, the following language:

"Employees will be provided with all questions and Topics, in writing, that will be asked/discussed of

the Inspector(s) at least 5 working days prior to the IPPS review session.

IPPS reviews will be conducted in accordance with FSIS Directive 4430.3.

IPPS reviews will not take the place of progress reviews, nor will they be held simultaneously with a progress review.

In the event that more than one management personnel will be conducting/Attending the review the employee shall have the right to Union Representation.

IPPS reviews will not be given more weight than a progress review when an employee is rated, (direct supervision observation, indirect supervision observation) etc."

Section 10: Security Level Changes

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, would provide employees who no longer qualify for the security level required of their position an opportunity to downgrade "to the nearest job to the employee" that matches their security level. Such employees "will be given the opportunity to retrain for another job at agency time and expense."
- b. Order:** During the course of Panel proceedings, the Union agreed to, and shall, withdraw its proposal.

9. Article: Reassignments

Section 2: Voluntary Internal Placement of Bargaining Unit Employees

- a. Summary of proposals:** The Agency proposes that employees seeking reassignment must have first completed their probationary period and served in their present capacity for at least one-year (the Union agrees), and then request to be included on a "Voluntary Internal Placement" (VIP) list. Though the parties agree on some aspects of the application process, the Agency's proposal would require that employees' applications include a "one (1) page statement which demonstrates the

employees' knowledge, skills and abilities." The Agency's proposal would also require that employees with continued interest in reassignment annually resubmit application packages for inclusion on the list. The parties agree that employees will have three days to accept or decline a reassignment offer, and that declination shall result in removal from the list, though the employee may reapply. The parties also agree that, if the employee accepts the reassignment, they must serve in the new position for at least one year before submitting another reassignment package. Finally, the Agency proposes, and the Union appears to generally agree, that "[s]elections from the Voluntary Internal Placement list are at the discretion of the selecting official based on qualifications and are not made on a first come, first serve basis."

In some respects, the Union's proposal takes a different approach to regulating what it refers to as the "voluntary placement program" under which, subject to certain eligibility requirements, employees could seek "voluntary reassignments, voluntary demotion, and noncompetitive re-promotion." Among other things, the Union's language would allow for employees to "job swap" with the approval of the district manager and prohibit bargaining unit employees from being placed on the same voluntary internal placement lists with non-bargaining unit employees. The Union also lists in detail duties of the Human Resources Field Office. The Union's proposal also allows employees to "request hardship consideration for voluntary placement."

- b. Order:** During the course of Panel proceedings, the parties agreed to language for this section, though it contained several errors. **The parties shall adopt the following agreed-upon language, with the following corrections:**

"a. Full-time inspection positions are permanent jobs in the locations to which employees are assigned. The Voluntary Placement Program applies to all employees in the collective bargaining unit, and allows for:

1. Voluntary placement of bargaining unit employees to a position for which they are qualified and trained under the provisions

of this Article. This includes voluntary reassignments, voluntary demotion, and non-competitive re-promotion.

2. Consideration for employees who incur unexpected hardships in their personal lives.

3. Non-bargaining unit employees will not be placed on a voluntary placement list(s) with Unit employees.

b. Definitions

1. Job Swap. Employees in similar or identical jobs in different locations may arrange to exchange jobs. The District Manager must approve a job swap.

c. Exceptions

1. Involuntary reassignments in localized work reductions.

2. Voluntary placements within the same duty station. (EXAMPLE: Moving from one (1) plant to another within the duty station.)

EXCEPTION: If a local practice does not exist, the Voluntary Placement Program is used.

3. Job swaps where employees in similar or identical jobs in different locations arrange to change jobs. Job swaps are subject to local practices within the district.

d. Eligibility

1. All bargaining unit inspectors, unless prohibited by restrictions in ~~item (e), of this section below~~ this agreement, are eligible to apply for voluntary movement to any other inspection position at the same grade that they currently hold or have previously held, including voluntary demotions.

2. Noncompetitive re-promotion applicants must have previously held higher grade positions on a permanent basis. Applicants

may be considered for re-promotion to the highest grade previously held.

e. Submitting Requests for Voluntary Placement

1. ~~The eEligible employees:~~ (a) ~~Cshall~~ completes FSIS Form 4335-3, Employee Request for Reassignment Within Field Operations. Employees interested in any location within a state may show the state or cities or counties. Employees may indicate availability for up to five 5 locations. If the agency elects to develop lists below the state level the agency will notify the bargaining unit of these changes. The agency will ensure that employees will be placed on all appropriate lists. BUE's shall recertify annually by resubmitting the Reassignment Package prior to the anniversary of the initial enrollment date. Employees that have access to an agency issued computer must ~~may~~ submit the Reassignment Package electronically via the approved agency system. Employees ~~with or~~ without access to an agency issued computer may submit the Reassignment Package via fax to 1-833-840-9220, or via mail the Reassignment Package directly to:

~~(b) Submits the completed form to:~~
 USDA, FSIS, HROD, HUMAN RESOURCES
~~USDA, FSIS~~
 920 2nd Avenue South
 Suite 1300
 Minneapolis, MN 55402"

Section 3: Reassignment of BUEs in Work Reduction Situations

a. Summary of proposals: The Union and Agency proposals differ in some respects regarding how reassignments will be handled during a reduction-in-force. The parties differ in how the "competitive area" will be defined for purposes of measuring distance from the affected plant to others in the same area; the Agency prefers to measure distance as the crow flies, while the Union prefers using driving distance, with a Union official on official time accompanying the Agency staff measuring the distance.

Further, the Union seeks to include language permitting employees to "select available locations within the commuting area based on their standing on the retention roster" and would require the Agency to provide to the Union hard copies "of all retention rosters sent to each district." Otherwise, the proposals appear quite similar, though the Agency's language is more concise.

- b. Order: During the course of Panel proceedings, the Union agreed to accept, and the Parties shall adopt, the first paragraph, subsection (a), and subsections (b)(2)-(4) of the Agency's proposal. The parties also agreed to, and shall adopt, the following language for subsection (b)(5):**

"The agency will provide, to the Council President, all retention rosters sent to each district."

Further, the parties agreed to, and shall adopt, the following language for subsection (c):

"An employee who has been involuntarily reassigned as a result of a work reduction shall be given the first opportunity to return to his/her original position or a similar position, at the employee's expense, if such position is reestablished in the commuting area from which he/she was reassigned. At the time of the work reduction, employees shall be provided with instructions for applying for return rights. A request for return rights must be submitted on FSIS form 4335-3 within sixty (60) days of the effective date of the reassignment. Entitlement to return rights remains in effect provided the employee maintains an active request on file (updated annually) and does not turn down an offer of the same or a similar position in the commuting area from which he/she was reassigned. A BUE who has been involuntarily reassigned as the result of a work reduction and who follows the return rights procedures shall be given first opportunity to return to his/her original position or a similar position at the BUE's expense, if such position becomes available in the commuting area from which he/she was reassigned."

Finally, during the Mediation-Arbitration, the Union could not provide a compelling reason to oppose, and

expressed a willingness to consider, the Agency's proposal for subsection (b)(1). **Accordingly, the parties shall adopt the Agency's proposal for subsection (b)(1).**

10. Article: Workplace Bullying/Harassment

Section 1: Objective

- a. **Summary of proposals:** The parties' proposals lay out aspirational language that is similar in tone and goals about the desired workplace environment, but varied in the precise terms used. While the Agency notes that it will abide by Departmental Regulation (DR) 4200-001, Workplace Violence Prevention and Response Program, the Union's proposals does not reference the regulation. Finally, while the Agency agrees that "violent behavior of any kind or threats of violence, either implied or direct, against persons or property will not be tolerated," the Union seeks language providing that the "Agency will not *in any instance* tolerate bullying behavior" (emphasis added).
- b. **Agency argument:** The article should be renamed "Workplace Harassment," which is broader and more encompassing than the existing title, "Workplace Bullying."
- c. **Union argument:** There should be some reference to "bullying" in the section. The Union expressed an openness to accepting the rest of the Agency's language.
- d. **Order:** During the Mediation-Arbitration, the parties agreed to rename the article "Workplace Harassment" instead of "Workplace Bullying." **During the course of Panel proceedings, the parties agreed to, and shall adopt, the following language for this section:**

"The Parties agree to mutually establish and maintain a work environment that is safe, positive, respectful, and productive, and free of conduct or language that may contribute to harassment and/or workplace violence.

In accordance with Departmental Regulation (DR) 4200-001, "Workplace Violence Prevention and Response Program," bullying, violent behavior of any kind or threats of violence, either implied or

direct, against persons or property will not be tolerated."

Section 2: Definition

- a. Summary of proposal:** The Union proposes to define "bullying" as "repeated, health-harming mistreatment of one or more people" and includes "[t]hreatening, humiliating or intimidating behaviors," "[w]ork interference/sabotage that prevents work from getting done," and "[v]erbal abuse." The Agency objects to this definition, preferring to be guided by the Departmental Regulation cited in Section 1, and offers no language for Section 2.
- b. Order:** During the Mediation-Arbitration, the Agency agreed to accept, and the parties shall adopt, the Union's proposal for this section.

Section 3: Reporting incidents

- a. Summary of proposals:** The Agency proposes language directing employees to "immediately report" incidents of "harassment and/or workplace violence" "in accordance with FSIS Directive 4735.4, Preventing Harassment and Workplace Violence."

For its part, the Union's proposal provides that employees should report bullying to their supervisor "before the conduct becomes severe or pervasive" and are "encouraged" to report bullying "as soon as possible." The Union proposes that an employee should be able to have a report of bullying filed on their behalf. Further, the Union's proposal would require the Agency to respond to reported bullying by "initiat[ing] an inquiry, address[ing] any inappropriate conduct, assist[ing] the affected employee, and act[ing] to prevent any retaliation by the bully or bullies." Lastly, the Agency is prohibited from retaliat[ing] against any employee for reporting workplace bullying."

- b. Agency argument:** The Agency believes that the actions required of management by the Union's proposal upon receipt of a complaint are covered by the Agency's reference to FSIS Directive 4735.4 and that this portion of the Union's proposal is therefore unnecessary. During the Mediation-Arbitration, the Agency agreed to include

the portion of the Union's proposal allowing for third-party filing of reports of bullying.

c. Order: During the course of Panel proceedings, the parties agreed to, and shall adopt, the following language:

"Employees who believe that they have been subjected to harassment and/or workplace violence incidents instigated by other FSIS employees or outside entities should immediately report it in accordance with FSIS Directive 4735.4, 'Preventing Harassment and Workplace Violence.'

If an employee is reluctant to report the bullying a report can be filed on their behalf. All employees have the right to file FSIS Form 4735.4."

11. Article: Communications

General arguments

The Agency contended that it has a right to determine its budget which could be implicated by having to bear the expense of printing copies of the CBA for employees. The Agency also argued its right to assign work could be implicated and contended it has the right to manage line employees and their ability to access a computer off-the-line to view the CBA. As the undersigned has directed adoption of the Agency's proposal for other reasons, it is not necessary to address these arguments.

Section 3: Distribution of agreement

- a. Summary of proposals:** In the event the Union submits a tentative agreement to a membership ratification vote, the Agency proposes requiring the Union to take responsibility for the distribution of the tentative agreement to the members. After the agreement is ratified, the Agency agrees to distribute an electronic version to those employees with Agency computers, and a hard copy to employees without.

The Union's proposal would require the Agency to print and distribute hard copies of the CBA "in quantities necessary for ratification purposes." Thereafter, the Agency would be required to send copies of the CBA to

all slaughter establishments, to create and distribute an electronic version of the CBA, and to reprint and redistribute the CBA if any error is discovered.¹²

- b. Agency argument:** The Agency has been modernizing and increasing access to electronic devices, which limits the need for a printed CBA. The Agency prints very little of anything and maintaining the CBA in electronic form will save money. Printing hard copies would cost between \$11,000 to \$15,000. Even if there are three employees per electronic workstation, only one employee can be off-the-line at a time anyway, and supervisors are capable of managing operations to provide employees with necessary access.
- c. Union argument:** Merely having access to the CBA via the Agency's intranet is insufficient and would require employees to take time off-the-line to view the CBA on an Agency computer. Not all employees have an Agency computer and, in other cases, as many as three employees may have to share the same computer/electronic workstation. Generally, accessing a computer in slaughter facilities can be a challenge. The Agency's intranet is difficult to access from personal devices.
- d. Order:** The Agency has agreed to provide all employees with access to the CBA, either by accessing the Agency intranet via an electronic workstation, or by providing a hard copy to employees without a computer. Printing thousands of copies of the CBA would be an unnecessary expense and would not further the Statute's goal of "effective and efficient Government."¹³ However, to increase employees' ability to access the CBA digitally, on and off the clock, the Agency should also post an electronic version of the Agreement on its publicly accessible website. **Accordingly, the parties shall adopt the Agency's proposal in full, with the following modifications:**

"Upon ratification, an electronic/digital version of the Agreement will be made available for all BUEs with agency-issued computers via the Agency's intranet. The Agency will distribute a hard copy to

¹² In the submissions to the Panel, most of the Union's proposed language was struck. However, the Union confirmed that it only intended to strike the first paragraph of subsection (b) of its proposal.

¹³ 5 U.S.C. § 7101(b).

those without computers. Subsequently the Agreement will be available in electronic/digital version (i.e. .pdf) on the Agency's website."

12. Article: Disciplinary and Adverse Actions

Section 1: Purpose and policy

- a. Summary of proposals:** The parties' submissions to the Panel did not include proposals for Section 1 of Article 12. However, during the course of Panel proceedings, the parties informed the undersigned they reached agreement on the following language:

"The parties agree that the objective is to correct and improve employee conduct and/or performance so as to promote the efficiency of the Agency. Where appropriate, the parties agree to the concept of progressive discipline designed primarily to correct and improve employee behavior. Bargaining unit employees shall be the subject of disciplinary and/or adverse action only for just cause. Performance actions will be labeled and acted upon as performance, not misconduct.

When there is a proposal for action sent to LERD for review, the affected employee(s) will be notified in writing the day the proposals ~~is~~ are sent to LERD. The employee will be notified in writing of the allegations.

Nothing shall be placed in the evidence file that does not relate to a specification.

Previous allegations that have not been proven shall not be considered or mentioned in any proposal.

Stale discipline shall not be considered or mentioned in a proposal.

Definitions

- a. Disciplinary Action - a written reprimand, or a suspension from duty for fourteen (14) calendar days or less.

b. Adverse Action - a suspension for more than fourteen (14) calendar days, furlough without pay for thirty (30) calendar days or less, removal, or involuntary demotion in grade or pay.

c. Informal Actions - includes oral warnings, oral admonishments, and written letters of caution as opposed to letters of instruction or similar issuances that are considered guidance to employees, the purpose of which are to inform or clearly convey practices, procedures, or instructions.

d. Formal Action - includes letters of reprimand, suspensions without pay, involuntary reduction in grade or pay, removals, or furloughs of thirty (30) days or less."

Section 2: Formal actions

a. Summary of proposals: The parties agree that letters of reprimand cannot be retained in an employee's personnel file for more than two years. While the rest of the Agency's proposal is quite short, simply noting that employees will be advised of their rights when provided with a "notice of proposed disciplinary or adverse action," the Union's language is far more detailed.

Under the Union's proposal, employees facing a disciplinary action must be notified in advance of the proposed suspension and evidence relied upon by the Agency, provided with 10 days to request an in-person oral conference, and provided with a copy of the final, written decision. Employees facing an adverse action must receive 30 days' advanced notice of the proposed action and evidence relied upon by the Agency, provided with 10 days to require an oral conference. The requirements for advanced notice may be "curtailed" when there is reason to believe an employee has committed a crime. Finally, employees operating under a last chance agreement shall not be terminated "automatically" without observation of their "rights under the law."

b. Agency argument: The Agency would prefer to streamline the CBA by referencing applicable regulations instead of reciting them at length. It would also like the option to conduct oral conferences virtually to reduce the cost associated with in-person oral conferences, which cost the Agency \$18,400 in 2018 and \$16,000 in 2019. The

Agency already notifies employees of their rights in the disciplinary action letter; not all employees have the same rights, as it varies based on the circumstances.

- c. Union argument:** All of the Union's proposal is current language, except the last provision about automatic termination. Employees are not well-versed in adverse/disciplinary actions and need to have easy access to information about their rights.
- d. Order:** The Agency's proposal allows for a more streamlined CBA, acknowledges the Agency's obligation to provide employees with information about their rights when issuing a notice of proposed disciplinary or adverse action, and will help save money and advance the statutory goal of an "effective and efficient Government."¹⁴ **Accordingly, the parties shall adopt the Agency's proposal in full.**

Section 3: Representation

- a. Summary of proposals:** The parties agree that an employee will be provided with two copies of any proposed formal action and accompanying evidence file, but the Union seeks to be able to demand an electronic copy of the evidence file as well. Both parties agree that an employee may choose to be represented by the Union or other representative but, while the Agency's proposal requires the employee's designation of representative to be made in writing and signed, the Union's proposal would allow the designation to be made without a signature, if in writing, or orally. Further, the parties disagree about how oral conferences will be conducted; the Agency seeks virtual conferences while the Union wishes the employee to be able to choose between virtual and in-person conferences. Once a representative has been selected, the Agency seeks to provide that the scheduling of disciplinary proceedings "shall not be delayed," while the Union objects to this provision. Finally, the Union seeks to receive "sufficient notice" of and an opportunity to be present at any disciplinary action, with travel expenses and official time provided by the Agency; the Agency objects to this provision.

¹⁴ 5 U.S.C. § 7101(b).

- b. Agency argument:** The Agency already provides two copies of proposed formal actions so the employee can share with the Union and provides electronic versions upon request. The Agency doesn't require a signature for designation of representative, but believes it is important for there to be a written designation to confirm and memorialize the employee's choice. Virtual oral conferences would reduce travel costs, which can approach \$20,000 per year, and COVID-19 has shown that remote conferences can be conducted effectively. The "shall not be delayed" language is important to remind all parties to keep the process moving. The Agency did not object to the Union's language requiring official time in "all cases where known discipline is delivered."
- c. Union argument:** Prior to installation of electronic devices, current practice has been for the BUE to orally designate their representative to their supervisor. Current practice is that disciplinary action oral conferences are done telephonically while adverse actions are handled face-to-face. Virtual oral conferences in plant settings are not very private (the Agency counters that employees can go elsewhere, while the Union points out that work devices cannot be removed from the plant). Union reps don't generally have a track record of delaying the process. The Union stated that it has the statutory right to be present when discipline is administered to an employee.
- d. Order:** Overall, the Agency's proposal is the more reasonable and best advances the goals of an "effective and efficient government,"¹⁵ but the parties also agree with various aspects of each other's proposals. The Agency's proposal also provides employees the ability to obtain a Union representative. **Accordingly, the parties will adopt the following modified version of the Agency's proposal:**

"a. An employee shall be provided with a second copy of any proposed formal action, including the evidence file, for the purpose of informing his or her Union representative, if the employee so chooses to be represented by the Union. Upon request, the Agency will provide the designated

¹⁵ *Id.*

representative an electronic copy of the evidence file.

b. An employee may be represented by the Union or other representative of his or her choice. Designations will be in writing ~~and signed by the employee.~~ Designations received electronically from the employee will suffice as proper designation. Once the designation has been made, all contacts and correspondence will be through the representative.

c. In the event of a proposed adverse action, the oral conference will be held via teleconference or video conference.

d. In instances where an employee designates a union representative, the scheduling of an oral conference or the proceedings of the disciplinary action case shall not be delayed.

e. Official time will be paid by the Agency for all cases where known discipline is delivered."

Section 5: Evidence file

a. Summary of proposals: The Union's proposal, which the Agency opposes but does not counter, would require that all allegations against an employee be "supported by evidence" and that all evidence relied on to take or propose action "be contained in the evidence package provided to the employee and the representative."

b. Order: The parties agree that the Union's proposal is informational only and not substantive. **Consistent with the interests of a streamlined CBA, the Union shall withdraw its proposal.**

Section 6: Outside activities

a. Summary of proposals: The Union's proposal provides that "[a]ctivities that are not directly related to the job of the employee shall not be considered in a disciplinary action or adverse action."

b. Arguments: The parties did not provide much substantive argument on this section, though there was some

confusion about whether this provision was included elsewhere in the CBA.

- c. Order:** The language does not appear elsewhere in the CBA. **Accordingly, the parties shall adopt the following modified version of the Union's proposal which balances employees' right to their private lives with the Agency's need to manage its workplace and accomplish its mission:**

"Activities that are not directlyreasonably related to the job of the employee shall not be considered in a disciplinary action or adverse action."

Section 7: Splitting suspension

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike from the existing agreement, provides that, "[w]henever possible, the agency will split discipline of more than one week between pay periods."
- b. Order:** During the Mediation-Arbitration, the parties agreed to, and shall, adopt only the first sentence of the Union's proposal, which reads, "Whenever possible, the agency will split discipline of more than one week between pay periods."

13. Article: Dues Withholding

General arguments

The Agency contended that it cannot stop and automatically restart deductions as employees enter and exit the bargaining unit; employees must reauthorize the deductions upon re-entering the unit. Overall, the Agency wishes to streamline this article and ensure it follows applicable law.

Section 1: General

- a. Summary of proposals:** The parties agree that employees have the right to voluntary payroll deduction of union dues and that such deductions will be governed by § 7115 of the Statute and the LMA. However, the Agency's proposal obligates the Union to inform employees "of the voluntary nature of dues withholding and the conditions governing a BUE revocation of dues withholding." In

contrast, the Union's proposal limits an employees' ability to revoke authorization for dues withholding to the 30-day period prior to the anniversary of the employee joining the Union.

- b. Order:** The Agency's proposal is both more streamlined and better recognizes and protects the voluntary nature of employees' decision to authorize payroll deduction of Union dues. Further, the Union's proposal includes a restriction on employees' ability to revoke such authorization that has been rendered illegal by a government regulation recently adopted by the Federal Labor Relations Authority.¹⁶ **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"In implementing the dues deduction program, the Employer and Union will be governed by the provisions of 5 USC 7115, 5 CFR § 2429.19, and this Article."

Section 2: Supply of forms

- a. Summary of proposals:** The parties agree that the Union shall be responsible for distributing SFs 1187 to employees to authorize dues deductions, but disagree about whether to include the process of obtaining an SF 1188 to cancel dues deductions in the LMA; the Agency favors inclusion while the Union opposes it.
- b. Order:** While the Agency's proposal is slightly longer than the Union's, this is due to the Agency continuing its practice of linking to outside resources and authorities, in this case, the SF 1188 employees can use to revoke authorization for dues deductions. However, if the SF 1188 is to be hyperlinked in the CBA, the SF 1187 should be as well. **Accordingly, the parties shall adopt the following modified version of the Agency's proposal:**

"The Union will be responsible for the distribution of Standard Form (SF) 1187, available online at https://www.opm.gov/forms/pdf_fill/sf1187.pdf, for the use by an eligible member of the Union who wishes to authorize the deduction of his/her dues.

¹⁶ 5 C.F.R. § 2429.19.

Standard Form 1188 will also be available through the Union, the appropriate Human Resources Office, or online at www.opm.gov/forms/pdf_fill/sf1188.pdf for employees who wish to revoke the allotment as described in Section 4."

Section 3: Requesting dues withholding

- a. Summary of proposals:** The Agency proposal requires employees to submit SFs 1187 on their own, while the Union's proposal would permit anyone to submit an SF 1187 on employees' behalf and would require the Agency to furnish the contact information for appropriate submission of SFs 1187. The parties agree deductions will begin "no later than two pay periods following receipt of Standard Form 1187."
- b. Order:** The Agency's proposal best protects employees' right to make their own decisions about authorizing Union dues withholdings by prohibiting third parties from submitting an SF 1187 on an employee's behalf. However, the Union's proposal to require the Agency to furnish the contact information for SF 1187 submission is reasonable and appropriate. **Accordingly, the parties shall adopt the Agency's proposal, modified as follows:**

"In order to initiate dues withholding, a BUE must complete and sign an SF- 1187. BUEs must themselves submit the completed, signed, and certified SF-1187 forms to the appropriate Human Resources Office for concurrence, at no expense to the Agency. The Agency will provide contact information to where/who the SF-1187 can be mailed, faxed or emailed in the Human Resource Office. The Union, its representatives, or another individual may not submit the forms on the BUE's behalf. Dues will be withheld beginning no later than two pay periods following receipt of Standard Form 1187.

Section 4: Termination of dues withholding

- a. Summary of proposals:** The parties agree that dues deductions shall terminate automatically in the event of the Union's loss of exclusive recognition and if an employee separates or transfers from the bargaining unit. The Agency proposes that deductions shall also

terminate automatically if an employee temporarily transfers to a position outside the bargaining unit and will only resume if the employee submits another SF 1187 upon return to the bargaining unit; the Union disagrees, countering that deductions shall cease "[w]hen an employee ceases to be eligible for inclusion in the Union." Finally, the Agency proposes to cease deductions if an employee is no longer a Union member in good standing; the Union opposes inclusion of this provision.

- b. Order:** The Union agreed to subsections 1(a) and 1(c) of the Agency's proposal. The Union opposes the Agency's subsection 1(b), but the Panel noted in a previous decision that an Agency proposal similar to this, "provides employees with the fullest control over the authorization of dues withholdings, best protects employees' statutory right to 'freely' choose to 'join' or 'refrain from' joining a union and will therefore be adopted."¹⁷ The Union's opposition to subsection 1(d) of the Agency's proposal is also unavailing, as the Statute requires that dues withholdings "shall terminate" if "the employee is suspended or expelled from membership in the exclusive representative."¹⁸ **Accordingly, the parties shall adopt the Agency's proposal in full.**

Section 5: Correction of errors

- a. Summary of proposal:** The parties agree that errors in dues withholdings are to be adjusted after the error is discovered. However, while the Agency's proposal states the correction will occur "as soon as practicable," the Union seeks to require that corrective action occur after no more than two pay periods. Further, the Union's proposal would allow the Union's designee to inform the Agency of errors while, under the Agency's proposal, only notice by the Union would trigger the Agency's obligation to correct the error. Lastly, the Union's language requires the automatic resumption of withholdings when employees return to the bargaining unit from non-pay status, when an employee is reinstated into the bargaining unit after an improper separation.
- b. Order:** The Agency's proposal remains consistent with the practice of requiring an employee to affirmatively authorize dues deductions when re-entering the

¹⁷ NLRB, 20 FSIP 072 (2020).

¹⁸ 5 U.S.C. § 7115(b)(2).

bargaining unit. This is both easier to administer administratively than attempting to automatically restart previously authorized withholdings and better protects employees' statutory rights to authorize such withholdings voluntarily. However, the Union's proposal to allow its "designee" to alert the Agency of errors in dues withholding is reasonable. **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"The Employer agrees that the total error in the amount of dues withheld from BUE shall be adjusted as soon as practicable after the Employer has discovered the error or has received written notification of the error from the Union or the Union's designee ~~of the error.~~"

Section 6: Disputes

- a. Summary of proposals:** The parties' submissions to the Panel indicate this section is at impasse, but fail to provide language for the respective proposals. During the course of Panel proceedings, the Agency indicated that it had moved to strike this section, which involves disputes over dues withholding.
- b. Agency argument:** Resolving disputes over dues withholding is the sole function of the Federal Labor Relations Authority (FLRA).
- c. Order:** In the absence of proposed language from the Union, the parties will adopt the Agency's proposal to strike this section from the CBA.

14. Article: Employee Rights and Responsibilities

Section 1: Accountability; Section 2: Access to union and management officials; Section 6: Use of agency equipment and resources; Section 7: Personnel files and records

- a. Order:** During the course of Panel proceedings, the parties informed the undersigned they had reached agreement on these four sections. **Accordingly, the parties shall follow the agreed upon language.**

Section 5: Industrial disputes and civil disorders

- a. Summary of proposals:** The Union proposes detailed procedures, communications, and behavioral requirements for inspectors and supervisors to follow in the event of a "strike or civil disorder" at a regulated plant. The Agency counters with a more minimalist proposal simply directing employees to "communicate with their supervisor and await further instructions" and obligating the Agency to "notify the NJC Chairman or designee of the establishment and procedures for reporting."
- b. Agency argument:** Employee safety is paramount. The Agency does not disagree with the Union on substance and just wants to streamline the CBA.
- c. Union argument:** The Agency's proposal recognizes strikes or labor unrest at regulated plants, but does not contemplate broader civil unrest inspectors may face when traveling between plants. Substantive procedures are needed to protect employees.
- d. Order:** The Agency did not offer any material objection to any of the Union's proposal and indicated a willingness to try and reach agreement with the Union. The Agency provided a counterproposal to the Union incorporating much of the substance of the Union's language and omitting some of its overly prescriptive aspects, but the Union declined to accept it. Nonetheless, the Agency's counterproposal is a reasonable compromise that establishes clear, appropriate procedures without becoming too detailed to account for varying circumstances. **Accordingly, the parties shall adopt the Agency's counterproposal in full, which provides:**

"In the event of a strike or civil disorder at a regulatory establishment, employees will communicate with their supervisor and await further instructions. As soon as practicable, the Agency will notify the appropriate Council President and NJC Chairman or designee of the establishment and procedures for reporting.

Employees are responsible during the plant strike periods for reporting to work as scheduled and performing assigned inspection duties unless otherwise directed by their supervisor. In the

event the direct supervisor is not available, employees are to contact their District Manager or designee for further instruction.

If a plant strike date is announced in advance, agency officials shall meet with plant management and officials of the striking union to make definite arrangements to assure the safety of the inspection workforce.

If the plant strike is affected without prior notice and an employee(s) is confronted with a picket line in reporting for work, he/she shall approach the line, produce proper identification, state his/her responsibility for reporting for work, and request that he/she be allowed access. If access is refused, employee(s) shall leave the picket line area and promptly report the facts to the supervisor by phone."

Section 9: Parking

- a. Summary of proposals:** The parties agree that the Agency will "make a reasonable effort to obtain parking spaces for inspectors at official establishments." However, the Union's language goes further, requiring the parking space be properly marked to prevent use by non-Agency employees and that, "wherever possible," employees with duties at multiple locations or with a "permanent physical disability" be provided parking at their worksites. Lastly, the Union's proposal permits employees to seek guidance from the Agency if they suspect their safety may be at risk in an assignment area and, in cases of "documented" unsafe conditions, requires the Agency to "take appropriate action... to address the safety and well-being of Agency personnel."
- b. Agency argument:** Districts, supervisors and plant operators presently work out parking arrangements. Plants are privately owned, meaning there is no way for the Agency to control or secure parking. The Agency does not oppose the second or third paragraphs of the Union proposal, however.
- c. Union argument:** Inspectors' parking spaces get taken if not marked, which causes strife at the plant. Plants can be located in areas with high crime, and cars have been

vandalized. No designated parking is available at some plants.

- d. Order:** The Agency correctly pointed out that it cannot ensure or regulate parking at private facilities. **However, the Agency did not oppose, and the parties shall adopt, the following modified version of the Union's proposal:**

~~"The Agency shall make a reasonable effort to obtain parking spaces for inspectors at offices and official establishments. This shall include proper marking to preclude use by other than Agency employees. Employees having inspection duties at more than one location or those having a permanent physical disability will be provided parking spaces at such locations, whenever possible."~~

An employee who believes his/her personal safety or property may be in jeopardy because of the area of his/her assignment shall may contact the supervisor for advice and guidance.

Where there are documented instances, whether written or verbal, of unsafe conditions involving FSIS personnel in parking areas owned and provided to FSIS employees by establishments, the Agency shall take appropriate action, as necessary, within existing authorities to address the safety and well-being of Agency personnel."

Section 10: Personal rights

- a. Summary of proposals:** The Agency proposes to strike this section, which the Union proposes to retain. The Union's proposal obligates the Agency to inform new employees of their right under the Statute to Union representation at any formal discussion with management regarding employment conditions and at any examination of the employee, pursuant to an investigation, which the employee reasonably believes may lead to discipline. The Union's proposal also reiterates that employees "shall have the protection of rights afforded all Federal employees" and specifies such rights and other aspirational goals at length.

- b. Agency argument:** The Agency believes the Union's proposal is covered by existing law and would unnecessarily lengthen the CBA.
- c. Union argument:** The Union acknowledges that the Agency already distributes an annual notice to employees of their right to Union representation, as required by law.¹⁹ The Union points out its proposal is included in the previous CBA.
- d. Order:** The Agency is already statutorily obligated to notify employees of the representational rights and the Union agrees that it does not. The remainder of the Union's proposal consists generally of vague, aspirational goals for the nature of the workplace or statements of the Agency's obligation to follow "applicable law" in various respects. Overall, the Union could not show how inclusion of its lengthy proposal was of material benefit. **Accordingly, the Union shall withdraw its proposal for this section.**

Section 11: Freedom from reprisal

- a. Summary of proposal:** The Union proposes to list the employee rights protected by § 7102 of the Statute, while the Agency objects that reciting these rights in the CBA are unnecessary.
- b. Agency argument:** The Agency indicated that it was open to including a condensed version of the Union's proposal that references 7102 of the Statute with a short explanation.
- c. Order:** The parties acknowledge that the Union's proposal creates no new protections for employees beyond what they are already afforded by the Statute. However, the Agency indicated it was open to including a condensed version of the Union's proposal that references § 7102 with a short explanation. **The Union subsequently condensed its proposal, a modified version of which the parties shall adopt as follows:**

"Each employee, without exception, has the right under 5 U.S.C. § 7102 to, freely and without penalty of reprisal, ~~to~~ form, join and assist a labor

¹⁹ 5 U.S.C. § 7114(a)(3).

organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. The Agency shall take the action required to assure that employees are apprised of their rights and that no interference, restraint, coercion, or discrimination is practiced to encourage or discourage membership in the Union.
~~5 U.S.C 7102"~~

Section 12: Employee pay

- a. Summary of proposals:** The Union's proposal, to which the Agency objects on the grounds that it is "covered by governing laws and regulations," states that "[e]mployees are entitled to timely payment of salary and travel expenses" and a "[r]easonable amount of time" to handle payroll paperwork, directs the Agency to provide certain information and notices to employees regarding their compensation, and observes that payroll procedures must "be in accordance with governing regulations" and that the Agency "will bargain to the extent required by law."
- b. Agency argument:** The Agency doesn't control pay, but could accept parts of the Union's proposal, specifically subsections (a) (as long as "travel expenses" is struck) and (e).
- c. Union argument:** Pay and time off are very important subjects to employees.
- d. Order: During the Mediation-Arbitration, the parties agreed to, and shall adopt, the following modified version of the Union's proposal:**
- "a. Employees are entitled to timely payment of salary. Agency officials will assist employees in expediting payment where processing is delayed.
- b. Reasonable amount of time will be given to bargaining unit employees to prepare, complete, submit and validate the time & attendance per pay period, while in a pay status."

Section 13: Retirement and resignation

- a. Summary of proposals:** The Union's proposal, to which the Agency objects on the grounds that it is "covered by governing laws and regulations," acknowledges employees' right to retire or resign, including prior to termination, "in accordance with prevailing regulations" and obligates the Agency to furnish employees with retirement planning information upon request.
- b. Order:** During the course of the Mediation-Arbitration, the Agency accepted the Union's proposal, which the parties are directed to adopt.

Section 15: Mass fare subsidy

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike from the CBA, would permit employees apply for a transit benefit/fare subsidy and would obligate the Agency to reimburse employees for "all fees and transponders or any other method used by any governing entity where a BUE will be traveling on any chargeable roadways, bridges, etc. as part of their duties."
- b. Order:** During the course of Panel proceedings, the Union agreed to, and shall, withdraw its proposal for this section.

Section 17: Tort/indemnification

- a. Summary of proposals:** The Union's proposal, which the Agency opposes on the grounds that it is already covered by the Federal Employees Liabilities Reform and Tort Compensation Act of 1988, states that employees are protected by the Act while performing their official duties and make request indemnification pursuant thereto "in accordance with applicable guidelines."
- b. Order:** During the Mediation-Arbitration, the parties agreed to, and shall, adopt the first paragraph of the Union's proposal, which reads:

"In the performance of his/her duties, or when acting within the scope of his/her employment, the employee is entitled to protection under the Federal Employees Liabilities Reform and Tort Compensation Act of 1988, (P.L. 100-

694).

Section 18: Agency meetings

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike from the CBA, entitles employees to duty time and paid travel for "[a]ny meetings away from the facility, scheduled by the Agency, which employees are required to attend."
- b. Order:** During the course of Panel proceedings, the Union agreed to, and shall, withdraw its proposal for this section.

Section 19: Use of telephones

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike from the CBA, permits employees to use phones in "establishments in government occupied space" on a "limited use basis" if "allowed by the establishments, and where the use is at no cost."
- b. Order:** During the mediation-arbitration, the Agency agreed to, and the parties shall, adopt the Union's proposal, in full.

Section 20: Nursing mothers

- a. Summary of proposals:** The Union's proposal, which the Agency contends is covered by existing federal law, provides a process for nursing mothers to "request accommodations for the purpose of expressing and saving milk in private while at the workplace."
- b. Order:** The parties' dispute was not substantive; they agreed the goal was simply to recognize the Agency's obligation to follow the law, but differed about how much detail to include. During the mediation-arbitration, neither party was sure of the appropriate legal citation. **Accordingly, the parties shall adopt the following language for this section:**

"As required by 29 U.S.C. § 207(r) and in accordance with any other applicable law or rule, the Agency will provide employees who are nursing mothers with breaks and accommodations for the purpose of expressing and saving milk in private while at the workplace."

15. Article: Equal Employment Opportunity

Section 2: EEO complaints

- a. **Summary of proposals:** The parties agree that, "[i]n the matter of EEO complaints, the Agency shall follow 29 CFR 1614" but, while the Agency's proposal includes a commitment to follow 5 U.S.C. §7114(a)(2)(A) as well, the Union's proposal strikes the statutory reference in favor of an extended explanation of the Weingarten rights provided by the Statute.
- b. **Order:** During the course of Panel proceedings, the Union agreed to, and the parties shall adopt, the Agency's proposal in full.

Section 3: Affirmative Employment Program Plan

- a. **Summary of proposals:** The Union's proposal, which the Agency proposes to strike from the CBA, would require the Agency to maintain an affirmative action plan as "required by EEOC regulations." Further, the Union's proposal obligates the Agency to allow the Union to review, and possibly bargain over, the plan before it is submitted to the EEOC. Further, the Union would be provided the right to "submit its views with respect to the Affirmative Action Program Plan for individuals with disabilities and disabled veterans."
- b. **Agency argument:** The Union's proposal is generally required by existing law. The Agency states, however that it is not provided to the Union for comment.
- c. **Union argument:** The Union states that it has been provided with the plan to review.
- d. **Order:** During the mediation-arbitration, the parties indicated they could agree to (a) of the Union's proposal and require the Agency to provide a copy of the Affirmative Employment Program Plan to the Union after its submission to the EEOC. When the Agency subsequently provided the Union language to this effect, however, the Union stated it could not agree. **Nonetheless, the Agency's compromise proposal is reasonable, shall be adopted by the parties, and reads:**

"Establishment and implementation of the Affirmative Employment Program Plan is required by EEOC regulations. The Agency will continue to provide overall management support and budgetary planning to achieve affirmative action objectives throughout the Activity, as outlined in Title 29 CFR 1614.102.

The Agency shall provide a copy of the final plan to the Union."

Section 5: Information and data

a. Summary of proposals: The Union's proposal, which the Agency proposes to strike from the CBA, would require the Agency to furnish employees with "information describing the Affirmative Employment Program Plan and the EEO complaint procedure." Further, the proposal obligates the Agency to annually furnish the Union with certain statistical data about the workforce and filed discrimination complaints.

b. Order: During the Mediation-Arbitration, the parties indicated they could likely agree to adopt subsection (a) of the Union's proposal in exchange for striking (b). However, the Agency subsequently provided a compromise proposal to the Union proposing to strike (a) of the Union's proposal – as it wants to avoid having to distribute printed copies of the plan to employees – and agreeing to a narrower version of (b). **The parties shall adopt the following compromise proposal:**

"a. The Agency shall make available to employees information describing the Affirmative Employment Program Plan and the EEO complaint procedure.

b. The Agency agrees to annually furnish the Union with statistical data concerning discrimination complaints filed by bargaining unit employees."

Section 6: Mediation/alternative dispute resolution

a. Summary of proposals: The Union's proposal, which the Agency proposes to strike from the CBA, grants/acknowledges the Union's right to be present "on official time and expenses" at any mediation of EEOC complaints filed by employees, "in accordance with 5 U.S.C. §7114(a)(2)(A)."

- b. Agency argument:** The Union's proposal is unnecessary as it is required by statute. The Agency would prefer a shorter contract.
- c. Union argument:** The Union states that it is important to highlight that this process exists.
- d. Order:** The parties agree that the Agency would be obligated to provide official time for EEOC complaint mediation regardless of whether this proposal is included in the CBA. Further, the Agency's proposal for Section 2 of this article already acknowledges that it will abide by 5 U.S.C. §7114(a)(2)(A). **Accordingly, the Union shall withdraw its proposal for this section.**

Section 7: EEOC committees

- a. Summary of proposals:** The Union's proposal, which the Agency proposes to strike from the CBA, states that, "Any EEOC committees where unit members are present will be appointed by the Union."
- b. Agency argument:** Any employee should be able to participate on these volunteer committees, not just those selected by the Union.
- c. Union argument:** The Union should get to select employees to participate on these committees.
- d. Order:** During the course of Panel proceedings, the Union suggested it would agree to withdraw its proposal for this Section.²⁰ However, the Union subsequently rejected a counterproposal offered by the Agency. **As the Union provided no compelling reason to limit employee participation on EEOC committees to those selected by the Union, it shall withdraw its proposal for this section.**

²⁰ During the Mediation-Arbitration, the Union did not indicate it was willing to consider withdrawing its proposal for Section 7, but subsequently informed the undersigned that it would do so. However, the Union did not follow up with the undersigned to confirm. It is possible that the Union intended to inform the undersigned that it was willing to withdraw its proposal for Section 8 (per below) and indicated Section 7 by mistake. However, the undersigned would have resolved these two sections the same way regardless.

Section 8: Settlement agreements

- a. **Summary of proposals:** The Union's proposal, which the Agency seeks to strike from the CBA, directs the Agency to bargain with the Union as required by the Statute when an EEOC settlement changes conditions of employment, but also provides that such settlements may not conflict with the CBA. Lastly, the Union's proposal grants it the right to be present "on official time and expenses" for settlement discussions and to review any agreement before it is executed.
- b. **Agency argument:** EEOC settlement agreements are already covered by Title 29 CFR 1614. The Agency does not want to contradict or add to these regulations.
- c. **Union argument:** The Union agrees that at least parts of its proposal are covered by existing law. The Union wants the ability to review EEOC settlements.
- d. **Order:** The first paragraph of the Union's proposal is unnecessary as it merely recognizes the Agency's statutory obligation to bargain over changes to conditions of employment. The second paragraph is similarly unnecessary. The third paragraph, providing the Union access to EEOC settlement proceedings on official time, is arguably addressed at least in part by 5 U.S.C. §7114(a)(2)(A). **The Union indicated that it would be willing to consider withdrawing its proposal and, absent a compelling reason to keep it, the Union shall withdraw its proposal for this section.**

16. Article: Furlough

Section 1: Policy

- a. **Summary of proposals:** The parties agree that, "[i]n the event of a furlough, the Agency shall comply with... applicable government-wide laws and regulations." The Agency's proposal lists such authorities more specifically than the Union, however. Also, the Union's proposal would require the Agency to "provide hard copies of relevant information" to employees in the event of a furlough.
- b. **Order:** During the course of Panel proceedings, the parties informed the undersigned they had reached

agreement on this Section. **Accordingly, the parties shall follow the agreed upon language.**

Section 2: General information

- a. Summary of proposals:** The parties agree that employees "may be required to work in the event of a government-wide shutdown" and would be "retroactively paid" to the extent permitted by law. Both parties also concur that the Agency will "put forth a concerted effort to expedite processing requests for outside employment" in the event of a furlough. The parties also agree that the Agency will provide certain information to employees in the event of a furlough, though the Union seeks to require the Agency to provide the same type of information to employees for a shutdown furlough that it would provide in the event of administrative furlough, such as the reason for the shutdown, the employees excepted and not excepted, and the expected date of the shutdown. This information may be harder to provide in the event of a shutdown furlough, however, and the Agency's proposal would only require it to provide "the excepted time frames, if known" in the event of a shutdown furlough. The Union's proposal goes to great lengths to describe procedures that would govern in the event of a furlough, as indicated in the attached side-by-side document.
- b. Order:** During the Mediation-Arbitration, the Union indicated that it might be able to accept the Agency's proposal. However, the Union subsequently informed the undersigned without elaboration that, after further review, it was unable to accept the Agency's language. Aspects of the Union's proposal are covered by existing laws and regulations. Further, the Union's proposal, particularly regarding shutdown furloughs, is overly prescriptive given the difficulty of putting in place procedures for inherently unpredictable circumstances. The Agency persuasively argued that it needs the flexibility to respond to these challenging circumstances and the directives of agencies like the Office of Personnel Management. **Absent a compelling reason to impose any particular part of the Union's lengthy proposal, the undersigned directs the parties to adopt the Agency's proposal in full.**

17. Article: Labor-Management Meetings

Section 1: Purpose

- a. Summary of proposals:** While the parties agree to conduct regular labor-management relations (LMR) meetings, they disagree about a number of details regarding how the meetings will be conducted. The Union proposes that, when the parties fail to finish the discussion of agenda items at a scheduled LMR "a common interest meeting will be scheduled within 30 days, with the meeting taking place no later than 45 day of the completion of the LMR meeting in order to complete the remaining LMR agenda items." The Agency proposal contains no similar language.

While the Agency proposal would require the parties to "submit up to 5 topics at least 20 calendar days before the meeting" to prepare an agenda, the Union's proposal only requires the exchange of topics occur five days in advance and contains no limit on the number of topics that can be considered.

- b. Agency argument:** The Agency may not have many/any topics to raise and doesn't want that to be considered a violation of the advanced notice requirement. Even if the Agency doesn't have topics to raise, it still wants to be able to engage with the Union via LMRs.
- c. Union argument:** The Union doesn't necessarily oppose the Agency's language, but doesn't think the Agency can abide by its own terms. The Agency has failed to provide topics for discussion at LMRs in the past.
- d. Order:** The advanced notice requirement and topic limitation for LMR meetings was the main point of contention, though the parties appeared to generally agree on the intent behind providing advanced notice. **The parties shall adopt the Agency's proposal in full, modified as follows:**

"Each party shall submit up to 5 topics at least 20 calendar days before the meeting to prepare. If a party has topics it would like placed on a meeting agenda, it shall submit them to the other party at least 20 calendar days before the meeting. No party may add more than 5 topics to a meeting agenda."

Topics are to be specific for the office, i.e., management will address HQ-related topics at the HQ meeting and District related topics at each District LM meeting. Topics will be addressed as an overarching presentation to share policy and operational matters that are applicable to FSIS employees."

Section 2: Common interest meetings

- a. Summary of proposals:** The Agency proposes to strike this section from the current LMA, while the Union's language appears duplicative of that provided for Section 1.
- b. Order:** The Union's proposal for Section 2 is very similar, if not identical, to its proposal for Section 1. **Accordingly, the Union shall withdraw its proposal for this section.**

Section 3: Headquarters LM meetings

- a. Summary of proposals:** The Agency proposes that Agency and up to eight Union officials will meet face-to-face in Washington, D.C. one to two times per fiscal year for a period of three days. The Union's proposal seeks two guaranteed D.C. meetings each fiscal year for three days and attended by eight Union officials. The Union also proposes that the meetings be transcribed at the Agency's expense and that, if the agenda items are not fully discussed in the time allotted, a follow-up meeting will be scheduled within 30 days. Union officials would attend on official time and have their travel costs paid by the Agency, which would again pay for the meeting to be transcribed.
- b. Agency argument:** The Agency is seeking to minimize travel costs and, consequently, does not want to agree to more than one in-person meeting per year. The Agency would be open to guaranteeing an additional virtual meeting each year, however.
- c. Union argument:** The Union would prefer multiple in-person meetings but did not offer material objections to the Agency's proposal.

- d. Order:** The parties' main dispute involves the frequency of the headquarters LMR meetings and whether they will occur in-person or virtually. The Agency's desire to minimize travel costs advances the goals of an "effective and efficient Government"²¹ and the Union did not provide compelling justification for multiple, in-person meetings. Still, the parties should have the flexibility to conduct additional meetings virtually upon mutual agreement. **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"Agency officials shall meet with the National Joint Council (NJC) (or Union) at least twice per fiscal year, once face to face at the Agency's Washington, DC office, ~~one (1) time per fiscal year~~ and once virtually. The meetings shall be scheduled Tuesday, Wednesday, and Thursday beginning at 8:00 a.m. and concluding at 4:30 p.m. each day. Up to a total of eight (8) Council President or his/her designee, may attend the face to face meeting. If appropriate, upon mutual agreement, ~~one (1)~~ additional meetings may be held ~~per fiscal year~~ via face to face or video conference."

Section 4: District labor management meetings

- a. Summary of proposals:** The Agency proposes that each district will meet with up to nine Union representatives from councils and locals 1-2 times per fiscal year. The Agency shall determine the location and duration of the meetings "based upon effective use of tax-payer money."

Under the Union's proposal, district meetings would occur three times each fiscal year with the "location, date, time, and duration... determined by mutual agreement" and the nine participating Union officials on official time and participating "at the Agency's expense."

- b. Agency argument:** The Agency would like to minimize travel costs by reducing the number of meetings. The Agency is open to guaranteeing a second, virtual meeting, with more upon mutual agreement.

²¹ 5 U.S.C. § 7101(b).

- c. Union argument:** Real progress is made at the meetings. More than just one per year is needed.
- d. Order:** The parties' dispute, proposals, and positions are very similar to those of Section 3 above, and a similar resolution is justified here. **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"Each District shall meet ~~face to face~~ with at least one (1) representative per corresponding Council(s), ~~one (1) time~~ twice per fiscal year, once face to face and once virtually. ~~with~~ The location and duration of the face to face meeting shall be determined by the Agency, based upon effective use of tax-payer money. Union representation will reflect a maximum of up to nine (9) representatives, which may be a combination of corresponding council presidents and local presidents (or designees) in order to provide appropriate representation of the bargaining unit. If appropriate, upon mutual agreement, ~~one (1) additional meetings shall~~ may be held ~~per fiscal year~~ via face to face and/or video conference."

Section 5: Joint contract training

- a. Summary of proposals:** The Union's proposal, which the Agency proposes to strike from the LMA, would require an in-person "joint contract training face-to-face session between the OFO Head Quarter Management and District Managers along with the 8 Council Presidents within 60 days of the signing of the agreement." Further, the Union would require that "joint District face-to-face training sessions... take place with the Deputy District Managers, Front Line Supervisors along with Council Presidents and Local Presidents within the District jurisdiction at the first LM meeting after the signing of the agreement or within 90 days." The proposal also calls for in plant "work Unit meetings" with "supervisory personnel and Union Representatives to provide training of applicable articles to that level for discussion within 90 days of signing the agreement." Travel expenses related to the above trainings would be borne by the Agency.
- b. Agency argument:** Joint training might be beneficial in theory, but can be problematic because the parties may

not agree on interpretation of the contract. This was a problem with the last contract. It may also be logistically difficult and costly to arrange. Each party should train their own side on the new CBA.

- c. Union argument:** Part of the reason for joint training is to help get the parties on the same page about what the contract means and hopefully avoid grievances down the road.
- d. Order:** The Agency argued persuasively that joint training could pose practical challenges and contended it has not worked well in the past. If the parties have disagreements about what the CBA means, they can resolve them informally or via the negotiated grievance procedure. During the course of Panel proceedings, the Union indicated it could agree to withdraw its proposal. **Accordingly, the Union will withdraw its proposal for this section.**

18. Article: Leave

General arguments: The parties' approaches to this article differ more in style than in substance. The Agency prefers a condensed article which relies primarily on referencing applicable laws, rules, and regulations governing various types of leave. For its part, the Union would prefer a more extended explanation of the kinds of leave available to employees. Where the differences between the parties' proposals are not substantive, the undersigned will impose the Agency's more concise language.

Section 1: Policy

- a. Summary of proposals:** The Agency's proposal recognizes that it will "follow all applicable laws, rules, Departmental Regulations, and Agency Directives pertaining to leave." It also links to the applicable authorities governing leave. The Union's proposal also recognizes the Agency's obligation to follow applicable leave, but does not cite specific authorities and contains an assortment of provisions governing leave generally.
- b. Order:** Overall, the Agency's more concise proposal is preferable. However, the Agency's proposal lacks several references to applicable authorities that the parties

agreed should be included. **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"The Agency shall follow all applicable laws, rules, Departmental Regulations, and Agency Directives pertaining to leave.

Additional guidance may be found at the following links:

FSIS Directive 4630.2 Rev 2 - Leave

DR 4060-630-01 - Creditable Service for Annual Leave Accrual

DR 4060-630-02 - Leave Administration, Excused Absence and Administrative Leave

OPM Fact Sheets - Leave

5 CFR 603.403, Medical Documentation Supporting Evidence

Investigative and Notice Leave 5 USC § 6329b(b)(1)

5 CFR Part 550 - Pay administration

5 CFR Part 630 - Absence and leave

29 U.S.C. Chapter 28 - Family and Medical Leave

29 CFR Part 825 - Family and Medical Leave

5 CFR 630.1206(b) - Substitution of paid leave"

Section 2: Annual leave

- a. Summary of proposals:** The Union's proposal requires Agency supervisors to "make reasonable efforts to satisfy the leave requests of employees." The Agency's proposal states that employees are responsible for scheduling annual leave in writing "as necessary to prevent any unintended loss at the end of the leave year;" the Union's proposal says this is the responsibility of the employee *and* supervisors. The Agency's proposal allows for leave to be cancelled for operational needs; the Union's proposal only allows cancellations in "emergencies." Both proposals

acknowledge that "[b]oth the needs of the employee and the Agency will be considered prior to any cancellation" of leave and that employees shall generally submit notice of leave cancellation at least 72 hours' in advance. However, the Agency's proposal provides that leave cancellation requests submitted less than 48 hours' in advance "may be approved at the option of the supervisor," while the Union's proposal only provides the supervisor this discretion if the cancellation is requested less than 72 hours in advance.

The parties agree that "extended" leave requests should be "requested as far in advance as possible," but the Union would require supervisors to provide "a definitive written response as to whether the leave is granted or denied." The Agency's proposal would require that employees on leave familiarize themselves with "location and reporting requirements for the upcoming administrative workweek" before returning to work. The Union's proposal would: give employees with scheduled leave for a full work week the day before their leave and the two days after their leave off; ensure that employees' scheduled leave shall carry over if they transfer to another duty station; would allow employees to preemptively use leave they would earn during the year; gives full-time employees priority over part-time employees for scheduling leave; and would grant employees in a plant "not operating during a holiday" the "first opportunity to be duty free."

- b. Order:** The Agency's proposal is generally the more reasonable, but should be modified to require supervisors to confirm or deny leave requests in writing, as the Union seeks. **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"c. Extended periods of annual leave should be requested as far in advance as possible so that overall consideration can be given to workload and staffing needs. Supervisors will provide a definitive written response as to whether the leave is granted or denied."

Section 3: Tardiness

- a. Summary of proposals:** The parties agree that only the immediate supervisor may "excuse tardiness." However, the Union's proposal states that any leave the employee must take to make up for tardiness will be in 15-minute increments. The Agency's proposal would require employees who know they are going to be late to notify their supervisor "as soon as possible" and specifies that employees absent without authorization "shall have their absence recorded as absence without official leave (AWOL)." The parties agree that the Agency will distribute information to employees about how to report anticipated tardiness, though the details differ slightly.
- b. Order:** The only major difference between the two proposals is the Agency's reasonable requirement that employees who know they are going to be late notify their supervisor. **The parties shall adopt the Agency's proposal in full.**

Section 4: Annual leave scheduling

- a. Summary of proposals:** The Agency seeks to create a standardized process for scheduling annual leave, while the Union seeks to maintain past practices. However, in the event past practices must be changed, the Union proposes a process for scheduling annual leave that shares many similarities with the Agency's proposal.
- b. Agency argument:** There are many past practices involving annual leave scheduling; each district may have multiple past practices. The Agency is not aware of them all. Due to Agency reorganization, some districts were combined, merging multiple past practices. Greater uniformity within districts would be helpful.
- c. Union argument:** Current practices are not broken. The Agency's proposed subsection 3(a) would preclude newer employees from getting leave during high demand times. The Agency's proposed subsection 3(b) would prevent employees from using leave they've accrued.
- d. Order:** The Agency's desire to reset past practices regarding leave scheduling is justified and will not prevent the parties from implementing regionally

customized practices in the future. Given that the parties are not even aware of all such past practices, starting with a clean slate will enable the parties to implement practices that make sense today. However, the Union persuasively argued against basing annual leave on seniority and preventing employees from using more leave than they could accrue in a year, which would prevent them from using leave carried over from previous year(s). **Accordingly, the parties shall adopt the Agency's proposal, except for subsections (3)(a) and (b).**

Section 5: Sick leave

- a. Summary of proposals:** The Agency seeks to strike the existing section explaining sick leave, while the Union seeks to retain it.
- b. Agency argument:** This section is covered by the regulations and authorities cited in the Agency's section 1. Reiterating these provisions at length is unnecessary; the Agency prefers a streamlined CBA.
- c. Union argument:** The Union believes the information is important to include in the CBA.
- d. Order:** In the interest of a concise CBA, the Union shall withdraw its proposal.

Section 6: Sick leave restrictions

- a. Summary of proposals:** The parties' proposals govern how sick leave abuse will be handled and allow for employees to be placed on restricted sick leave in certain circumstances, which would trigger medical documentation.
- b. Order:** During the course of Panel proceedings, the Union agreed to, and the parties shall adopt, the Agency's proposal.

Section 7: Leave without pay

- a. Summary of proposals:** The Agency seeks to strike the existing section, while the Union seeks to retain it.

- b. Agency argument:** The Agency acknowledged that it would include a reference to 5 CFR 630.1206(b) in its Section 1.
- c. Union argument:** The Union acknowledged that its proposal was already covered by existing laws and regulations and there for only informational purposes.
- d. Order:** Consistent with above orders and a streamlined CBA, the Union will withdraw its proposal for this section.

Section 8: Family and medical leave

- a. Summary of proposals:** The Agency seeks to strike the existing section, while the Union seeks to retain it.
- b. Agency argument:** The Agency acknowledged that it would include a reference to the Family and Medical Leave Act in its Section 1.
- c. Union argument:** The Union acknowledged that its proposal was already covered by existing laws and regulations and there for only informational purposes.
- d. Order:** Consistent with above orders and a streamlined CBA, the Union will withdraw its proposal for this section.

Section 9: Maternity/paternity leave; Section 10: Excused Absence (Administrative Leave); Section 11: Military leave; Section 12: Adjustment of Work Schedules for Religious Observances; Section 13: Hazardous weather leave

- a. Summary of proposals:** The Agency seeks to strike these existing sections, while the Union seeks to retain them.
- b. Agency argument:** The Agency would like a streamlined CBA.
- e. Union argument:** The Union acknowledged that its proposals were already covered by existing laws and regulations and there for only informational purposes. It indicated a willingness to withdraw its proposals provided they were covered by the authorities listed in the Agency's section 1.

- c. Order:** Consistent with above orders and a streamlined CBA, the Union will withdraw its proposals for these sections.

Section 14: Emergency leave

- a. Summary of proposals:** The Agency seeks to strike the existing section, while the Union seeks to retain it.
- b. Order:** During the Mediation-Arbitration, the Agency agreed to, and the parties shall adopt, the Union's proposal in full.

Section 15: Court leave; Section 16: Voting; Section 17: Voluntary leave transfer program; Section 18: Leave for Preventative Health Care Screenings

- a. Summary of proposals:** The Agency seeks to strike the existing sections, while the Union seeks to retain them.
- b. Order:** During the course of Panel proceedings, the Union agreed to, and shall, withdraw its proposals.

Section 19: Holiday leave

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, provides that, "When an Inspector's plant is not working on a holiday, or plant(s) on an assignment, the Inspector will be allowed to take the holiday leave."
- b. Agency argument:** Supervisors may need to assign an inspector to work at a nearby plant even if their typical plant is closed for the day.
- c. Union argument:** This is current practice in some districts.
- d. Order:** The Agency needs to be able to manage its workforce in a way that accomplishes the Agency's mission. Though some districts may choose to give inspectors the day off when their assigned plant is closed, the Agency should not be required to do so. **The Union shall withdraw its proposal.**

Section 20: Data request

- a. **Summary of proposals:** The Union's proposal, which the Agency seeks to strike, would allow the Union to "request any and all information needed regarding leave."
- b. **Order:** During the mediation-arbitration, the Union acknowledged that it could probably obtain the information under § 7114 of the Statute. **The Union agreed to, and shall, withdraw its proposal.**

19. Article: Negotiation of Local Agreements

Section 1

- a. **Summary of proposals:** Both parties agree that local supplemental agreements may be bargained at the local/circuit level. The parties also agree that local bargaining may only involve "matters specifically applicable to the respective Local/Council," that the Agency and Union must agree to subjects for local bargaining, and that the national CBA supersedes any locally negotiated agreements. The parties agree that, except by mutual agreement, local negotiations will take place at the local district office.

The Union's proposal includes a non-exclusive list of subjects that can be locally bargained and ties the duration of any locally negotiated agreements to the term of the CBA, unless otherwise agreed to in a memorandum of understanding (MOU). The parties also differ over the process for ensuring locally negotiated agreements align with the CBA. The Agency's proposal grants the parties seven days to resolve a conflict between a local agreement and the CBA and requires that all such conflicts be resolved before "finalization" of the CBA. The Union, however, would require the parties to notify each other "within 15 work days following execution of the supplemental agreement" if they believe it to be in conflict with the CBA. The parties would then, within another 15 days, "discuss the provisions in question following notification in an effort to resolve the dispute..."

- b. **Agency argument:** The Union's example list of subjects that local agreements can address is unnecessary, as is the Union's language tying locally negotiated contracts

to the duration of the CBA. Local agreements are subject to Agency head review and cannot be executed before being reviewed.

c. Union argument: The Union did not have substantive responses to the Agency's points and indicated it might be able to accept the Agency's proposal, though it subsequently declined to do so.

d. Order: The parties shall adopt the Agency's proposal in full.

20. Article: Official Time

Section 1: Policy

a. Summary of proposals: The Agency's proposal notes that, while "[e]ach employee's foremost responsibility is the completion of the duties of his/her Agency position of record," the Statute permits union representatives to use "limited amounts" of official time. The Union's proposal, which is current CBA language, provides far more background information about official time, its definition, and how it is to be used. Some parts of the Union's proposal, such as identifying which Union officials are eligible for official time, are addressed elsewhere in the Agency's proposals for this article.

b. Order: The parties shall adopt the Agency's more simplified proposal.

Section 2: Designation

a. Summary of proposals: The Agency's proposal, to which the Union offered no counter, would require that the Union "maintain an updated list of all designated union representatives" and that only employees on the list "will be authorized to use union time."

b. Order: The Union raised no substantive objection to the Agency's proposal, and the parties acknowledged that they had agreed to a similar requirement in Article 40. **Accordingly, the parties shall adopt the Agency's proposal.**

Section 3: Release from duty for representational matters

- a. Summary of proposals:** The parties' proposals outline the process for requesting, approving, and recording official time.
- b. Agency argument:** The Agency acknowledged that requiring Union representatives to request official time seven days in advance is too much and was willing to accept two days' notice unless something prevented the Union from requesting it sooner. The Agency also agreed to strike the part of its proposal requiring Union representatives to inform their supervisor, "using the method determined by the supervisor," when they return from official time. Finally, the Agency did not wish to defend its proposal requiring the Union to reimburse the Agency for the costs of correcting inaccurate official time entries by Union representatives.
- c. Union argument:** The Union did not strongly justify its proposal to guarantee Union representatives "access to unit employees and their working conditions at any time deemed necessary by the Union." Similarly, the Union agreed to strike its proposal granting official time to "attend the AFGE Legislative conference(s)."
- d. Order:** During the course of Panel proceedings, the parties agreed to various aspects of each other's proposals and to withdraw aspects of their own. **Based on these agreements, and the judgement of the undersigned, the parties shall adopt the following modified version of the Agency's proposal:**

"a. Each Union representative will be required to complete an electronic request for official time in the Agency's Time & Attendance System two (2) workdays in advance. In the event the Union representative's position is not incorporated into the system, the Union representative is required to submit a written request to their immediate supervisor within two (2) workdays prior to the release from duty. Each Union representative will be required to submit a request for official time two (2) workdays in advance, except in circumstances where such advanced notice is not possible. Requests shall be submitted in the Agency's Time & Attendance System unless the Union

representative's position is not incorporated into the system, in which case the Union representative is required to submit a written request to their immediate supervisor.

b. The completed request shall specify:

1. In reasonable detail the tasks the representative will undertake;
2. The number of hours to be used;
3. Where and when the official time will be used;
4. How the tasks are related to Union business; and
5. A telephone number and email address where the employee can be reached.

c. Requests that do not contain sufficient information for management to assess whether the request is consistent with law, regulation, and the terms of this Agreement will be denied.

~~d. Request for Official Time must be submitted to the employee's first line supervisor (or higher-level supervisor if the first line supervisor is unavailable) at least seven (7) days in advance of when the Official Time is requested to be utilized, except in circumstances where such advanced notice is not possible (e.g. an impromptu Weingarten Interview, a Formal Discussion that is noticed one day in advance, management directed notification requiring the need for official time).~~

~~ed. Approval from an authorized supervisor/management official must be obtained by an employee prior to their engaging in union time as a representative. Any employee who uses union time without advance supervisory/management approval will be considered absent without leave and subject to appropriate disciplinary action. The employee will immediately inform the supervisor when he/she returns to work after completion of the representational activity using the method determined by the supervisor.~~

~~fe. If management is unable to approve a request for union time, the reason for denial will be~~

provided. If an operational need does not permit the employee to use the union time when requested, management will generally make a reasonable effort to allow the employee to use the requested union time within two workdays, keeping in mind the interests of the union, as well as the needs of the employer.

~~g.f. An employee serving as a Union Representative is responsible for accurately recording union time on their time and attendance for pay purposes. An employee's failure to accurately record union time on their time and attendance creates a financial burden on the agency, as the agency will incur a cost to correct the time and attendance record. In such an instance, the Union will reimburse the agency for the actual cost of processing the correction."~~

Section 4: Provisions for Union Time

- a. Summary of proposals:** The parties' proposals establish the amount of official time that shall be available to Union officials. The Agency seeks to establish an official time bank of 5,040 hours, down from 15,000 under the current CBA, while the Union seeks a bank of 22,000 hours. The Agency would like to cap the amount of time any employee can spend on official time at 25%. The Union wants unlimited official time, not charged to the bank, for several kinds of activities.
- b. Agency argument:** The Agency has not historically tracked official time use, but began researching and tracking it more in recent years and determined the Union was using more official time over the life of the prior contract, from about 11,000 hours in 2008 and 2009 to 23,000 in 2015 and 2016, and then down to about 13,000 in 2019 and 2020. The Agency believes the Union's proposal for 15,000 hours is too much, but acknowledged that its own proposal of 5,000 is "kind of low" and would have been higher but for Executive Order 13837. The size of the bargaining unit has declined slightly over the life of the prior contract, from about 6,500 to 6,300. The Agency wants all of its bargaining unit employees to work most of the time on Agency business.

- c. Union argument:** The prior CBA provided a bank of 15,000 hours. This is a necessary amount of time for representational purposes. The Agency inappropriately counts § 7131(a) and (d) time towards the bank. The Agency claims it wants bargaining and other processes to proceed faster, but limiting employees to 25% official time would slow things down. The Union asserts that the higher up employees go, the more time they might need to spend on representational activity. The Union states that the cap is arbitrary; Union officials in leadership need to be able to spend a lot of time on certain activities.
- d. Order:** Aspects of the Agency's proposal were clearly and admittedly shaped by Executive Order 13837, which the Panel has consistently recognized as an important source of public policy regarding official time use. However, the Order was rescinded by a subsequent Executive Order during the Panel proceedings in this case and can no longer be relied upon.²²

Nonetheless, the Statute continues to provide a framework governing official time. Under § 7131(a), unions are entitled official time to engage in collective bargaining negotiations and, under § 7131(c), unions are entitled to official time to participate in proceedings before the Federal Labor Relations Authority. Finally, § 7131(d) allows additional official time "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest."

By definition, the parties' presence before the Panel means they have failed to "agree" on the amount of discretionary official time that is appropriate. As it falls to the undersigned to resolve the parties' impasse over official time by, effectively, deciding what they shall "agree" on, the undersigned must also observe the statutory directive that official time beyond what is required by the Statute be "reasonable, necessary and in the public interest." Also applicable to official time impasses is the Statute's directive that it be interpreted "in a manner consistent with the requirement of an effective and efficient Government." Accordingly, unless the undersigned can be persuaded that additional

²² Executive Order 14003: Protecting the Federal Workforce.

official time meets these statutory criteria, it should refrain from imposing it.

Turning to the parties' proposals, neither side has convincingly shown that its proposal satisfies these statutory requirements.

The Union's proposal seeks a bank of 22,000 hours of discretionary official time, with automatic renegotiations for more if the bank dips below 4,000 hours. Due to apparently contradictory language in the Union's proposal, it is not clear whether official time under § 7131(a) and (c) will count towards the bank. Further, the Union's proposal would require that official time for the following activities would not count towards the hours in the bank:

- "[a]ttendance at labor management meetings;"
- "[t]ime in connection with statutory (e.g., MSPB and EEOC) appeal procedures in which the Union is designated as the representative;"
- "[a]ttendance at the recognized events to which the Union has been invited by the Agency;" and
- "[a]ttendance at the Health and Safety Committee activities".

When questioned, however, in each case the Union essentially argued that it would be unfair for the Union to have to charge its bank for time spent on these activities, but it could not articulate how unlimited official time for these purposes and in these amounts would be "reasonable, necessary, and in the public interest," much less promote "effective and efficient government." The Union could offer no justification for increasing the official time bank from 15,000 to 22,000 when the Union has managed to use less than 15,000 hours in recent years.

The Union did, however, make a reasonable argument that limiting Union officials to spending no more than 25% of their time on official time could limit their ability to interact with the Agency and perform the Union's necessary functions, and even slow or delay Union's ability to participate in negotiations or meetings with the Agency or timely complete other functions.

For its part, the Agency all but conceded that its proposal for a bank of 5,040 hours for discretionary official time was too low. However, the Agency reasonably argued in favor of the 25% cap by pointing out that employees employed by the Agency should be engaged in advancing the Agency's mission at least most of the time.

A more reasonable approach than either party's proposal would be to impose a bank of 10,000 hours from which all official time will be deducted and require that no employee spend more than 50% of their duty time on official time. The Union utilized about 11,000 hours of official time in fiscal years 2008 and 2009. Though this amount increased over the life of the CBA, it began tapering off again significantly once the Agency began to keep closer track of the amount of time being used. Further, the number of employees in the bargaining unit has decreased since 2008. A bank of 10,000 hours is halfway between the current 15,000-hour bank and the Agency's proposed 5,000-hour bank, and is comparable to the amount per bargaining unit employee the Union used in previous years. Further, preventing Union representatives from spending more than 50% of their time on union business acknowledges the Agency's goal of ensuring public employees are working for the public, while also recognizing that certain Union officials need to devote significant amounts of their time to representational work. Based on the evidence before the undersigned, this approach is the most "reasonable, necessary, and in the public interest."

Finally, the Union's proposal notes that the time Union officials spend "representing employees in statutory EEO complaints" is considered official time under EEOC regulations. However, during the Panel proceedings the EEOC rescinded this regulation, though it is unclear if the rescission has officially taken effect.²³ If the rescission does take effect before implementation of the CBA, the Union's proposal would be rendered out of date. If the existing regulation ultimately remains in place, it will apply whether the CBA acknowledges it or not. Either way, inclusion of the Union's language is unnecessary.

²³ *Final Rule - Official Time in Federal Sector Cases before the Commission*, <https://www.eeoc.gov/final-rule-official-time-federal-sector-cases-commission>.

Accordingly, the parties shall adopt the following modified version of the Agency's proposal:

"A. Consistent with 5 U.S.C. 7131 and this Agreement, union representatives will be granted union time, subject to availability as described below, for only the following representational activities:

1. Term Negotiations (T&A Code 35) - to negotiate a collective bargaining agreement, in accordance with 5 U.S.C. 7131(a).
2. Mid-Term Negotiations (T&A Code 36) - to negotiate over issues raised during the life of a term agreement, in accordance with 5 U.S.C. 7131(a).
3. Preparation for Term and Mid-Term Negotiations (T&A Code 35 or 36) authorized under 5 U.S.C. 7131 (d).
4. General Labor-Management Relations (T&A Code 37) - perform miscellaneous representational activities authorized under 5 U.S.C. 7131(d), subject to availability of hours in the Union Bank as described below.
5. Dispute Resolution (T&A Code 38) - to appear in proceedings before the Federal Labor Relations Authority during such time as an employee would otherwise be in a duty status, in accordance with 5 U.S.C. 7131(c).

B. Union Bank. Total of available hours of union time per fiscal year for activities covered by 5 U.S.C. 7131 (d) ~~is calculated by four fifth hour per bargaining unit employee, for a total of 5,040~~ shall be 10,000 hours as of October 1. Unused union bank hours do not carry over into the next fiscal year.

C. A union representative may request leave without pay to engage in union activities (LWOPUA) that would be permitted under 7131(d). LWOPUA does not count against the union bank. No agency employee shall be permitted to spend more than 250% of their established annual tour of duty on union time, LWOPUA, or any combination thereof. Management will consider requests for LWOPUA and determine whether

to grant the leave without pay. The denial of LWOPUA for union representational activities cannot be grieved or disputed in any forum.

D. Union reps who reach the 250% cap will be authorized union time in accordance with sections 7131(a) and 7131 (c) of Title 5, U.S.C., that do not count against the bank total. Time for these activities are charged to the union bank for that fiscal year. However, if the union bank has been exhausted, time will be charged to the union bank for the following fiscal year (or years)."

Section 6: Tracking of official time

- a. Summary of proposals:** The Agency seeks to strike the existing section, while the Union's proposal would provide that official time is tracked "using the Time and Attendance System" in place when the contract is executed, but would specify that Union officials need not use the system to request official time in advance. It would also require the Agency to track official time use and provide reports to the Union.
- b. Order:** Tracking and requesting official time was previously resolved under Section 1 above. However, the Agency expressed an openness to keeping the Union apprised of its official time use, and it is reasonable for it to do so. **Accordingly, the parties shall adopt the following section of the Union's proposal:**

"The Agency will be responsible to keep a running total of official time hours used to generate a report. That report will include the hours, Union Personnel name and code used for Official Time. The Agency will share the report each pay period to the NJC Chairperson or designee."

Section 7: Allegation of abuse of official time

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, addresses how alleged abuses of official time will be handled.
- b. Order:** As the proper reporting of official time was already addressed and resolved via Section 3 above, the Union's proposal is unnecessary and shall be withdrawn.

Section 8: Training

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, would obligate the parties to conduct joint training "on the interpretation and application of the terms of this Agreement" and authorize bank-exempt official time for the Union to participate.
- b. Order:** As the issues of joint training and authorized uses of official time have been resolved in Article 15, Section 5 and Section 4 of this Article, respectively, the Union's proposal is unnecessary and shall be withdrawn.

21. Article: Position Classification

Section 1: Classification of position

- a. Summary of proposals:** The Parties agree that bargaining unit positions will be classified according to Office of Personnel Management classification standards. The only difference is that the Agency's proposal also cites applicable laws and regulations, while the Union's does not.
- b. Order:** During the Mediation-Arbitration, the Union agreed to, and the parties shall, adopt the Agency's proposal.

Section 2: Position description

- a. Summary of proposals:** The parties agree that the Agency will maintain a file of all classified position descriptions and that classified positions are established by the Agency.

The Union seeks to be provided with the file automatically on an annual basis. The Union's proposal also lists the positions. Further, the Union's proposal regulates the content of "[p]osition descriptions furnished to employees," outlines a process, consistent with "appropriate rules and regulations," for employees to contest the classification of their position, and requires the Agency to periodically review positions to ensure proper classification.

- b. Order:** During the Mediation-Arbitration, the Agency stated it was willing to provide the Union with position descriptions as long as it is not in hard copy. The Agency does not want to list the positions in the CBA, however, as they can change. The Union offered no compelling justification for its proposal. **Accordingly, the parties shall adopt the following modified version of the Agency's proposal:**

"The Agency shall maintain a comprehensive file of position descriptions of all classified positions in the bargaining unit which it shall make available to the NJC Chairman, or designee annually. Classified positions are established after review and approval by the Agency."

Section 3: Effective date

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, would specify that "[r]eclassification actions shall be effective on the first pay period following final approval of the personnel action."
- b. Order:** The Agency was concerned that the Union's proposal requiring a specific timeframe for processing reclassification actions could pose administrative challenges. **However, during the course of Panel proceedings, the parties agreed to accept, and shall adopt, the following modified version of the Union's proposal:**

"Reclassification actions shall be taken as soon as administratively possible."

Section 4: Employees Affected by a Re-classification Action

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, requires the Agency to "notify the Union in writing prior to the effective date of any reclassifications actions whether or not the actions result in an obligation to bargain in accordance with the law or the contract."
- b. Order:** During the Mediation-Arbitration, the Agency indicated that it could accept the Union's proposal as

long as grammatical errors were corrected. **Accordingly, the parties shall adopt the following modified version of the Union's proposal:**

"The Agency agrees to notify the Union in writing prior to the effective date of any reclassifications actions, whether or not the actions result in an obligation to bargain ~~in accordance with the law or the contract.~~"

Section 5: Position upgrades

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, specifies that, "In the event that the agency determines that a position is to be upgraded, the employee that is holding that position currently... will receive the upgraded position without having to apply."
- b. Agency argument:** The Agency would typically allow employees to remain in reclassified positions, but is not sure that position "upgrades" are the same as reclassifications. The Agency does not want to potentially limit its right to assign work.
- c. Union argument:** During the Mediation-Arbitration, the Union indicated it might be willing to withdraw its proposal, but subsequently declined to do so.
- d. Order:** **Absent a compelling reason to include the provision, which the Union did not provide, the Union shall withdraw its proposal.**

22. Article: Recognition and Coverage

Section 2: Governing laws and regulations

- a. Summary of proposals:** The parties both acknowledge the Agency will "be governed by existing laws and government-wide rules and regulations as defined in Title 5, U.S.C., Chapter 71 of the Statute, by published Agency policies and regulations in existence at the time the Agreement is effectuated." They also agree that the law or government-wide regulations in effect when the agreement takes effect "shall supersede any conflicting provisions of this Agreement." The parties disagree

about whether the agreement will supersede past practices.

- b. Agency argument:** The Agency asserts that it does not know how many past practices there are at FSIS. They go back as far as the 1980s. Managers and supervisors are not aware of them. The Agency would like the opportunity to start over, as many practices are out of date.
- c. Union argument:** The Union states that there are a multitude of past practices at FSIS. The Union has provided all past practices to the Agency and would like to maintain them. The Union believes it is important for the workforce to maintain cohesion and consistency, and it states that the way to do that is by continuing to honor the past practices in place.
- d. Order:** The Agency argues convincingly that the number and age of past practices justifies removing them across the board and allowing the parties to start over and develop practices that address the issues faced by the Agency and employees today. **The parties shall adopt the Agency's proposal in full.**

Section 3: Management rights

- a. Summary of proposals:** The Agency's proposal, which the Union wishes to strike, notes that, "[t]he Agency retains all rights as stated in Title 5 U.S.C. Section 7106."
- b. Agency argument:** The Agency wants to be consistent in citing applicable laws, rules, and regulations in the agreement.
- c. Union argument:** The Union states that there is no need to reiterate management rights, since they exist in Statute regardless. The Union contends that excluding the Agency's proposal would help streamline the contract.
- d. Order:** The Agency's proposal, which cites applicable law without restating it at length, is consistent with its general approach to the agreement, of which the undersigned approves. The Union's opposition to the Agency's one-sentence proposal, based on the Union's purported desire to streamline the contract, is

inconsistent with its other proposals. **The parties shall adopt the Agency's proposal.**

23. Article: Reduction in Force and Transfer of Function

Section 2: Applicable laws and regulations

- a. Summary of proposals:** Both parties' proposals list the applicable laws and regulations governing reductions-in-force (RIFs) and transfers of function. The Union, however, would like to specify that the version of the laws and regulations in effect at the time the agreement is executed are what shall govern through the life the agreement.
- b. Union argument:** Instead of just referencing laws or regulations in the contract and allowing the contract to be changed as those authorities change, the Union wanted to lock in the language of the regulations and policies in effect at the time of agreement.
- c. Agency argument:** The Agency suggested the parties had agreed to remove the dates from the contract and index them separately, though it's not clear that the Union agreed. The Agency agreed to add a reference to 5 CFR Part 330, Subpart F to the list of authorities governing RIFs.
- d. Order:** The parties should, to the extent possible, be governed by applicable laws and regulations. **Therefore, the parties shall adopt the Agency's proposal, modified to include "5 CFR Part 330, Subpart F - Agency Career Transition Assistance Plan CTAP for Local Surplus and Displaced Employees" to the list of laws and regulations the Agency shall follow in the event of a RIF or transfer of function.**

Section 3: Union notification; Section 4: Definitions; Section 5: Filling of vacancies; Section 6: Waivers; Section 7: Employee notification; Section 8: Content of notices

- a. Summary of proposals:** The Union's proposals, which the Agency proposes to strike, would restate existing regulations governing RIFs.
- b. Order:** The parties agree that the Union's proposals for these sections are not substantive; the Agency would be

required to follow these procedures whether these provisions are included in the agreement or not. **Accordingly, in the interest of a more concise agreement, the Union shall withdraw its proposals.**

Section 9: Employee official personnel files

- a. Summary of proposals:** The Union's proposal involves employee and Union access to employees' official personnel files.
- b. Order:** The Agency did not object to the Union's proposal *per se*, but would prefer not to include it if it is addressed by existing regulations. **As the parties were unsure of whether it was addressed elsewhere and did not disagree on substance, the parties shall adopt the Union's proposal.**

Section 10: Records

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, requires the Agency to "maintain all lists, records, and information pertaining to actions taken under this Article for two (2) years.
- b. Order:** The Agency indicated it would follow applicable laws and regulations, but it did not want to agree to anything contradicting or adding to them. Records retention is addressed by laws and regulations.²⁴ **As the Union did not provide a compelling justification for the proposal, it shall be withdrawn.**

Section 11: Retention registers; Section 12: Retention standing ties; Section 13: Release from competitive level; Section 14: Employee response to specific notice; Section 15: Impact of Details and Temporary Promotion

- a. Summary of proposals:** The Union's proposals, which the Agency proposes to strike, would restate existing regulations governing RIFs.
- b. Order:** The parties agree that the Union's proposals for these sections are not substantive; the Agency would be required to follow these procedures whether these provisions are included in the agreement or not.

²⁴ See, e.g., 44 U.S.C. Chapter 31; 44 U.S.C. Chapter 33; and 36 C.F.R. 1222.

Accordingly, in the interest of a more concise agreement, the Union shall withdraw its proposals.

Section 16: Transfer of function

- a. Summary of proposals:** The Union's proposal, which the Agency proposes to strike, would list the Agency's obligations towards employees and the Union "[i]n the event of a possible transfer of function."
- b. Order:** During the Mediation-Arbitration, the parties agreed to, and shall, adopt the last paragraph of the Union's proposal, which reads:

"The Agency shall meet with the Union to discuss transfer of function, either by the Agency or any other Government entity, when such transfer of function has been determined to any degree of certainty."

Section 17: Employee Use of Official Time and Agency Facilities

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, would grant employees "who are identified as surplus or displaced under Career Transition regulations" a "reasonable amount" of duty time to look for work.
- b. Agency argument:** Employees already have these rights elsewhere in the contract. All USDA employees have the right to "limited use" of Agency facilities for job searching under Department policy.
- c. Union argument:** The Agency's article on the use of resources does not cover use of Agency computers; it is appropriate to include it here.
- d. Order:** As a general rule, employees on duty time should be working to fulfill the Agency's mission. Unless provided for by law, rule, regulation, or Agency policy, allowing employees to search for alternative employment on duty time should not generally be viewed as advancing the statutory goals of an "effective and efficient government."²⁵ **The Union shall withdraw its proposal.**

²⁵ 5 U.S.C. § 7101(b).

**Section 18: Re-promotion Rights of Affected Employees;
Section 19: Reemployment Priority Rights of Affected Employees**

- a. **Summary of proposals:** The Union's proposals, which the Agency proposes to strike, would restate existing regulations governing RIFs.
- b. **Order:** The parties agree that the Union's proposals for these sections are not substantive; the Agency would be required to follow these procedures whether these provisions are included in the agreement or not. **Accordingly, in the interest of a more concise agreement, the Union shall withdraw its proposals.**

24. Article: Use of Official Facilities

Section 1: General

- a. **Summary of proposals:** The parties' proposals both state that Union use of the "Agency's communication resources shall not interfere with the mission or operation of the Agency." The Union's proposal also specifies that the use of such resources "will not violate the law, advocate violating the law, or contain items relating to partisan political matters."
- b. **Order:** During the course of the Mediation-Arbitration, the Union agreed to, and the parties shall, adopt the Agency's proposal.

Section 3: Use of bulletin boards

- a. **Summary of proposals:** The Agency proposes to "maintain" space for a Union bulletin board "at each headquarter plant." The Union proposes that the Agency "provide" an "exclusive bulletin board" for the Union "in Agency owned or controlled facilities."
- b. **Agency argument:** The Agency asserted that many plants have only 1-2 inspectors present and no supervisor. The Agency stated that supervisors should not have to drive around to small plants every time there's something to post. The Agency is not opposed to keeping existing bulletin board space or providing bulletin boards in new

locations. But in some places, there is not space for a bulletin board.

- c. Union argument:** The Union wants to make sure the Agency is obligated to "provide" – not just "maintain" space for – a bulletin board at each establishment.
- d. Order:** The Agency's proposal represents a willingness to furnish bulletin board space to the Union where reasonable. The Agency should not be required to furnish the Union with its own "exclusive" bulletin board at every location employees work, as this would not be in the interests of an "effective and efficient government" and the Union did not provide a compelling reason why it would be necessary to do so.²⁶ **The parties shall adopt the Agency's proposal.**

Section 4: Distribution

- a. Summary of proposals:** The parties' proposals govern the circumstances under which the Union may "distribute materials to employees."
- b. Order:** During the course of the mediation-arbitration, the Union accepted, and the parties shall adopt, the Agency's proposal.

Section 5: Use of equipment

- a. Summary of proposals:** The parties agree that the Union "shall be afforded access to Agency equipment so long as there is no conflict with the performance of official functions and equipment is available." However, the Union seeks to require the Agency to provide a Union filing cabinet at all district offices. The Union's proposal would also specifically permit Union officials to use Agency computers, fax machines, and copiers.
- b. Agency argument:** There's no need to be as specific as the Union's proposal. Three of the 10 districts already have provided the Union with filing cabinets, and the Agency is willing to provide filing cabinets to the Union at the other seven.

²⁶ *Id.*

- c. Union argument:** Filing cabinets may not be covered by "Agency equipment." The Union acknowledged that its language imposes an affirmative obligation on the Agency to purchase/provide a filing cabinet if it did not have one to make available. The Union states that some districts do not presently have file cabinets for the Union. The Union did state that the references to computers, faxes, and copiers are not as critical.
- d. Order:** The Agency has already agreed to provide the Union with file cabinets, making the Union's proposal unnecessary. **Further, during the course of Panel proceedings, the Union agreed to, and the parties shall, adopt the Agency's proposal.**

Section 8: Meeting space

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, would permit the Union to use "government owned or leased space" to conduct "meetings held outside business hours, provided space is available and use of such space does not conflict with the performance of official functions."
- b. Agency argument:** The Agency does not control privately-owned plants/establishments and cannot force them to allow the use of space by the Union after hours. The Union is free to work out arrangements for after-hours meetings with the plants directly if it wants.
- c. Union argument:** This is current language and it does currently happen, provided it's permitted by the establishment. The Union wants to be able to use Agency space for Union-only meetings outside business hours.
- d. Order:** The Agency raised reasonable objections to the Union's proposal and pointed out that the Union may still hold meetings at plants/establishments if it can make arrangements with the owner(s). **The Union shall withdraw its proposal.**

Section 9: Bargaining unit employee information

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, would require the Agency to annually provide the Union with an electronic list of the bargaining unit employees.

- b. Order:** The Agency asserted, and the Union did not dispute, that the Union would have access to employee lists under § 7114 of the Statute. **Accordingly, the Union's proposal is unnecessary and shall be withdrawn.**

25. Article: Awards

Section 1: Policy

- a. Summary of proposals:** The Agency's proposal acknowledges the importance of an awards program and states that it will be administered with applicable – and cited – laws and regulations. The Union's proposal consists of aspirational language about the purpose of the awards program and the principles by which it shall be administered.
- b. Order:** The parties articulated no substantive disagreement on this section, and the Union expressed a potential willingness to accept the Agency's proposal. **As the Agency's proposal continues its consistent and reasonable practice of citing applicable governing authorities in a concise way, the parties shall adopt the Agency's proposal.**

Section 2: Awards programs

- a. Summary of proposals:** The Agency's proposal explains the awards program in general terms, reserves its right to exercise discretion in issuing awards, obligates the Agency to administer awards without discrimination and in accordance with applicable law, and lists examples of the award types. The Union's lengthier proposal lists and defines the award types in detail, directs supervisors to inform employees of a monetary award before they are paid, allows employees to choose between monetary and time off awards, and acknowledges employees may not receive awards for representational work done in their capacity as Union officials.
- b. Order:** The parties articulated no substantive disagreement on this section, though the Agency indicated it had created a new awards program which it needed flexibility to implement. **Accordingly, the parties shall adopt the Agency's proposal.**

Section 3: Statistics

- a. **Summary of proposals:** The parties agreed that the Agency shall annually provide the Union with "information on awards granted to bargaining unit members, including a breakdown by grade level and type of award." The only dispute involved whether the Agency should have to break down the awards by district.
- b. **Order:** During the mediation-arbitration, the Agency explained that the awards data would be furnished by the individual districts, meaning there would be no need to include a field specifying which district an award was given in. **The Union agreed to, and the parties shall, adopt the Agency's proposal.**

26. Article: Conflict of Interest

Section 1: Policy

- a. **Summary of proposals:** The parties generally agree on this provision, which governs the ethical obligations of public employees. However, the Union seeks to remove a reference to "Executive Orders" from the list of authorities that may establish "principles of ethical conduct" for employees. Also, the Union seeks to strike language in the Agency's proposal noting that, "as a regulatory agency," the Agency is "governed by supplemental laws and regulations" and its employees may consequently be "held to a higher ethical standard than other employees of the Executive Branch."
- b. **Agency argument:** The Agency's proposal is current language. Executive orders must still be followed whether included in the CBA or not.
- c. **Union argument:** The only material dispute is over the reference to Executive Orders. The Union states that Executive Orders are more fluid than laws or regulations, and the Union does not want to tie to contract to external authorities that may change.
- d. **Order:** The Union provided no compelling reason to exclude the reference to executive orders as a potential source of ethical conduct requirements. **The parties shall adopt the Agency's proposal for this section.**

Section 2: Applicable Laws, Regulations, and guidance

- a. **Summary of proposals:** The Agency's proposal, which the Union seeks to strike, would list the rules, regulations, and directives governing ethical conduct.
- b. **Agency argument:** The Agency favors streamlining the contract, but thinks it is still appropriate to cite and link to external regulations.
- c. **Union argument:** The Union believes it is unnecessary to include these references and believes omitting them would streamline the CBA.
- d. **Order:** This proposal is consistent with the Agency's approach to the rest of the contract in that it lists, without restating at length, the applicable authorities. The undersigned has endorsed the Agency's approach above and will do so again here, the Union's purported desire for a streamlined agreement notwithstanding. **The parties shall adopt the Agency's proposal.**

27. Article: Fitness for Duty

Section 1: Scope

- a. **Summary of proposals:** The Agency's proposal provides that it will "administer a fitness for duty program in accordance with 5 C.F.R. Part 339." The Union's proposal is non-substantive.
- b. **Order:** The parties failed to articulate a substantive dispute regarding this section. However, the Agency noted that it would like to reference appropriate Department regulations in addition to the government-wide regulation, but could not do so because it is presently working on implementing a fitness for duty program and does not yet have the policies to cite. **Accordingly, the parties shall adopt the following modified version of the Agency's proposal:**

"The Agency shall administer a fitness for duty program in accordance with 5 C.F.R. Part 339 and applicable FSIS directives."

Section 2: Pre-existing conditions; Section 3: Medical determination; Section 4: Procedures; Section 5: Counseling

Section 8: Application of requests

- a. **Summary of proposals:** The Union's proposals, which the Agency seeks to strike, addresses fitness for duty procedures.
- b. **Agency argument:** The Agency believes the Union's proposals are all covered by government-wide regulations and are not necessary to restate at length.
- c. **Union argument:** The Union acknowledges that its proposals do not establish new employee rights but believes that employees should have easy access to the information by including it in the CBA.
- d. **Order:** The parties agree that the Union's proposals are not substantive; the Agency would be required to follow these procedures whether these provisions are included in the agreement or not. **Accordingly, in the interest of a more concise agreement, the Union shall withdraw its proposals for these sections.**

28. Article: Government Travel Management Services

Section 1: Use of Government Travel Management Services

- a. **Summary of proposals:** The parties agree that "[e]mployees with electronic access will use the electronic travel system (ETS) to make travel arrangements, request travel authorization, and file travel claims for reimbursement as required by federal travel regulations." However, the Union would also like to permit employees to secure lodging reservations directly, "provided the government rate is met."
- b. **Agency argument:** The Agency acknowledged that employees currently do sometimes make travel arrangements directly for various reasons. However, the Agency still wants the agreement to align with applicable regulations requiring the use of the electronic travel system. The Agency stated that employees would not be disciplined for going outside the system.
- c. **Union argument:** The Union wants to be able to book directly, outside the ETS in some cases, which happens periodically now. Sometimes the hotels that need to be booked are not in the ETS.

- d. Order:** The parties did not dispute that existing policy requires travel arrangements to be made via the ETS and that employees periodically book travel outside the system anyway. In effect, the Agency's proposal represents the status quo. **Rather than add legitimacy to a practice that the parties acknowledge may violate government regulations, the parties shall adopt the Agency's proposal and are free to continue handling departures from these regulations informally.**

Section 2: Government credit cards

- a. Summary of proposals:** The parties' proposals simply list the applicable regulations and directives governing government credit cards, though there are some differences of opinion about whether certain authorities should be cited.
- b. Agency argument:** The Agency's cited references are current, though some of the older directives will probably be rewritten.
- c. Union argument:** The Union is unsure about how some of the cited authorities apply to the bargaining unit.
- d. Order:** During the Mediation-Arbitration, it was pointed out that this section lacked any introductory language placing the list of authorities in context. The Agency subsequently provided some introductory language. Though the Union did not accept the Agency's proposal, it was unable to articulate a compelling reason not to. **Accordingly, the parties shall adopt the Agency's proposal, with the addition of the following introductory paragraph:**

"Employees engaged in official travel shall be considered for issuance of a Government credit card for charging reimbursable official travel-related expenses. Employees approved for the Government credit card shall abide by the credit agreement issued with the card, including the requirement that charges be paid by the due date specified on the billing statement. Use of the Card for Personal Use is Prohibited. Travel and credit card use shall be governed by the following government-wide regulations and policies listed below:"

Section 3: Travel advances

- a. **Summary of proposals:** The parties' proposals address the circumstances under which the Agency shall issue travel advances.
- b. **Agency argument:** The Agency wants to limit the use of travel advances and reserve its authority/discretion in this area. It would like to bring the contract into alignment with existing agency policies.
- c. **Order:** During the course of Panel proceedings, the Union agreed to, and the parties shall, adopt the Agency's proposal.

29. Article: Hazardous Pay

Section 1: Policy

- a. **Summary of proposals:** The Union's proposal, to which the Agency offers no counter, obligates the Agency to compensate employees "performing hazardous work" at the "maximum pay differential" provided for in government-wide regulations.
- b. **Order:** During the course of Panel proceedings, the Agency agreed to accept the first two sentences of the Union's proposal, a compromise the Union indicated willingness to consider. **Absent a compelling reason to do otherwise, the parties shall adopt the following two sentences of the Union's proposal, which read as follows:**

"The Agency agrees that employees performing hazardous work as defined in 5 CFR Part 550, Subpart I, shall be compensated at the maximum pay differential rate set forth in such regulations. However, hazard pay differential may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of the position.

Section 2: Union responsibilities; Section 3: Agency responsibilities

- a. **Summary of proposals:** The Union's proposals, to which the Agency offered no counters, outline the process by

which the Union and Agency will determine whether a "local work situation" qualifies for hazard pay.

- b. Order:** The parties acknowledged that these provisions exist in the current CBA. The Agency provided no substantive objections to these sections and indicated it could accept them. **Accordingly, the parties shall adopt the Union's proposals for these two sections.**

Section 4: Exposure

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, would provide that employees receive hazard pay when "assigned work that potentially places their health at risk." The Union lists exposure to "Brucellosis, Zika Virus, chemical exposure" as examples of such situations.
- b. Agency argument:** The Agency states that this is a new proposal not in the current contract. The Agency objects to designating exposure to these specific viruses as triggering hazard pay. The Agency has already worked out how it will handle exposure to these viruses without complaint from the Union. Thus, the Agency states that the parties should just abide by applicable regulations.
- c. Order:** **As it did not justify or explain the need for this provision, the Union shall withdraw its proposal.**

30. Article: Pilot programs/projects

General arguments

The Agency initially indicated that it objected to the Union's proposals for this article, which was not included in the prior CBA, as non-negotiable on the grounds that it infringes on the Agency's right to assign work.²⁷ It noted that past discussions with the Union over pilot projects were informal. After some discussion, the parties appeared to accept that the Agency does not have to bargain with the Union over whether to implement a pilot a program, but could be required to engage in impact and implementation bargaining over the effects of the program on employees' conditions of employment.

²⁷ 5 U.S.C. § 7106.

Section 1:

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, provides non-substantive introductory language for the article.
- b. Order:** The parties articulated no substantive dispute over this proposal. **The Union's proposal shall be adopted.**

Section 2 and Section 3:

- a. Summary of proposals:** The Union's proposals, to which the Agency offered no counter, obligate the Agency to provide the Union advanced notice of and an opportunity to discuss new pilot programs.
- b. Order:** During the Mediation-Arbitration, the parties agreed in principle to incorporate the Union's proposed Section 3 into a modified version of the Union's proposed Section 2. **Accordingly, the Union shall withdraw its proposal for Section 3 and the parties shall adopt the Union's proposal for Section 2, modified as follows:**

~~"At least 45 days, p~~Prior to implementing any type of new pilot program the Agency will provide written notification to the NJC Chairperson of the Agency's intent. Written notification will include, ~~but not limited to~~ at least the:

1. Nature of the pilot program
2. Scope of the program
3. Anticipated duration
4. Grades ~~e~~affected
5. Locations ~~e~~affected
6. Desired outcome of the program
7. ~~Any documents, reference material, worksheets, computations, or similar used in the development of the pilot program.~~

~~The above list is not all inclusive, nor does it in any way waive, hinder, or restrict the rights of either party.~~

Following receipt of the Agency's notice, the parties will arrange a teleconference briefing to discuss the proposed program."

Section 4 and Section 5:

- a. Summary of proposals:** The Union's proposals, to which the Agency offered no counters, would acknowledge the Agency's obligation to engage in mid-term bargaining over pilot projects if appropriate.
- b. Order:** During the mediation-arbitration, the parties acknowledged that this was merely a restatement of the Agency's existing statutory obligations. **The Union agreed to, and shall, withdraw its proposals.**

31. Article: Arbitration

Section 1: Invoking arbitration

- a. Summary of proposals:** The Agency would like the parties to be required to invoke arbitration within 30 calendar days of conclusion of the grievance procedure, whereas the Union would like a window of 25 workdays. The Union would also like to permit service via fax. The Agency's proposal requires that the invocation of arbitration contain certain information.
- b. Agency argument:** The Agency wishes to keep the arbitration process moving along with shorter deadlines.
- c. Union argument:** The Union states that it does not hurt the Agency to permit more time for invoking arbitration. Also, the Union states that the information the Agency wants to have included in the invocations will be included anyway; it's not necessary to require it in the contract.
- d. Order:** 30 days is a sufficient amount of time for the parties to decide whether they want to invoke arbitration. If the Union wishes to and has the ability to provide service of invocation via fax, and the Agency has the ability to receive service using that method, there's no reason for it not to be a permissible method. Finally, the Agency's proposed content requirements for invocations of arbitration will help ensure clarity. **Accordingly, the parties shall adopt the Agency's proposal in full, with the following modification:**

"Service will be by express/overnight, electronic mail, regular mail, facsimile, or hand delivery pursuant to Article -- of this Agreement."

"The ~~written~~ notice invoking arbitration shall also state whether"

Section 2: Arbitrator Appointment - Traditional Arbitration Panels

Subsection A: The parties agree the Agency shall maintain a panel of arbitrators for each "district office" though, in the event the Agency reorganizes in the future, the Agency would like to add the phrase "or similar organizational unit." Further, while the Union argues that the panels should consist of five arbitrators - down from 6-7 arbitrators under the present CBA - to help prevent the parties from frequently ending up with the same arbitrator, the Agency argues for panels of three arbitrators for each of its 10 districts as that would be easier to administer. However, the Union points out that, however many arbitrators are on a panel, the parties will only ever need to pay for one at a time. **The parties shall adopt the following modified version of the Union's proposal:**

"The parties shall maintain an existing panel of Arbitrators for each one of the Agency District Offices or similar organizational unit. Each Agency District Office or similar organizational unit shall be comprised of five (5) Arbitrators."

Subsection B: The parties' proposals for (B) are nearly identical, except that the Union's proposal omits the Agency's references to "similar organizational units" and includes a provision - to which the Agency agrees - directing the Agency to provide the tracking sheet of arbitrators to the Union upon request. **The parties shall adopt the following modified version of the Union's proposal:**

"B. On the effective date of this Agreement, the total Arbitrators for each Agency District Office or similar organizational unit will be selected and established. Placement of the Arbitrators will be determined to the extent possible based upon the states they are located within the Agency District

Office or similar organizational unit, in order to minimize litigation costs. The Arbitrators will be placed per each Agency District Office or similar organizational unit panel in alphabetical order using their last name and selected in turn for the duration of this Agreement. The Agency shall track the order of Arbitrators selected to hear cases and provide the tracking sheet to the NJC Chairperson or designee upon request."

Subsection C: The parties' proposals are effectively the same. **During the Mediation-Arbitration, the Agency agreed to, and the parties shall, adopt the Union's proposal for (C).**

Subsection E: The Agency seeks to require that an arbitrator will be selected within 45 days of the invocation of arbitration. The Union opposes this deadline but could not provide a good reason for its opposition. **The parties shall adopt the Agency's proposal.**

Subsection G: **The Agency agreed to, and the parties shall, adopt the Union's proposal.**

Subsection H: The parties agree that "If possible, the Arbitrator shall hear a case within one hundred and twenty (120) calendar days" of their appointment. If the arbitrator fails to hear the case within that time, the Agency proposes they be removed from the panel, while the Union proposes that the arbitrator will be "placed at the bottom" of the panel selection list if they can't hear the case within one year of selection. The Union could offer no good reason for leaving an arbitrator on the list who couldn't hear a case for over a year. **The parties shall adopt the Agency's proposal, modified to replace the word "council" with "district," consistent with the rest of the section.**

Subsection I: The parties' proposals governing the process for reviewing and replenishing the panels are similar, though the Union's is more detailed. The parties shall adopt the Union's proposal, modified as follows to reflect elements of both proposals:

"The parties shall review and replenish the panels annually, during the anniversary month of the

effective date of the Agreement. At that time, each party may request in writing to remove one Arbitrator from ~~each agency district office panel~~ the list, propose the addition of, or and jointly select replacement Arbitrator(s) to replenish the panels. ~~And establish a process to strike and select any cases previously assigned.~~ In addition, the parties may at any time mutually agree to discontinue the service of Arbitrators on the panels and select others to replace them."

Subsection J: The parties' proposals are nearly identical, except that the Union's proposal uses terminology the parties previously agreed to. **The parties shall adopt the Union's proposal.**

Subsection K: The Union proposes, and the Agency provided no reason to oppose, allowing the parties to "seek the services of the FMCS to select new Arbitrators or create a list of proposed names and a striking process to obtain replacements." **The parties shall adopt the Union's proposal.**

Section 3: Arbitrator Appointment - FMCS Process

Subsection D: During the Mediation-Arbitration, the Union agreed to, and the parties shall, adopt the Agency's proposal specifying that the process of striking arbitrators shall begin within 30 days of FMCS furnishing the list.

Subsection E: During the Mediation-Arbitration, the Union agreed to, and the parties shall, adopt the Agency's language with the following modification:

"Each party shall strike one Arbitrator from the FMCS list until such time only one Arbitrator remains. The Agency shall maintain a striking log to reflect which party strikes first on each case. The list shall be shared with the Union NJC Chairperson or designee whenever the FMCS process is used to hear a case."

Subsection G: The parties' proposals are quite similar. During the Mediation-Arbitration, the Agency indicated it had no substantive objection to the Union's language. **The Parties shall adopt the Union's proposal.**

Section 4: Arbitration costs

- a. Summary of proposals:** The Agency's proposal, to which the Union offered no counter, provides that the Agency will pay travel costs associated with witnesses and union representatives "in accordance with applicable law." Travel costs for non-Agency personnel shall be borne by the respective parties. The party causing a postponement or cancellation shall bear the associated costs. All other costs associated with an arbitration hearing shall be split evenly between the parties.
- b. Order:** During the Mediation-Arbitration, the Union failed to raise substantive objections to the Agency's proposal. After the Mediation-Arbitration, the parties reached agreement on Subsections D and H of the Agency's proposal, and the parties shall adopt the remainder of the Agency's proposal as well. **Accordingly, the parties shall adopt the following language for this section:**

"D. Witness Travel Expenses: If travel is necessary for a bargaining unit employee witness approved by the Arbitrator to testify, the parties agree that travel expenses of such witnesses will be paid at Agency expense in accordance with applicable law.

E. Union Representative Travel Expenses: If travel is necessary for a designated Union Representative representing the grievant in the arbitration proceedings, the parties agree that travel expenses will be paid for by the Agency in accordance with applicable law and shall be limited to one Union Representative.

G. Non-Agency Travel Expenses: If travel is necessary for a non-Agency witness(s) approved by the Arbitrator to testify, each party will be responsible to cover such travel expenses.

H. Cancellation: If either party wishes to postpone or cancel a hearing, that party shall pay the full costs associated with the postponement/cancellation unless the parties agree otherwise."

Section 5: Participation in Arbitration Proceedings

- a. Summary of proposals:** The Agency's proposal specifies that official time "may" be authorized for Union representatives to participate in arbitration hearings, while the Union's proposal states that such time "will" be authorized. The parties' proposals contain the same distinction regarding duty time participation by the grievant and approved witnesses. Further, the Agency wishes to limit the purposes for which duty time may be used in relation to an arbitration, while the Union proposes no such limitations. Finally, the Agency's proposal would direct the parties to "cooperate in scheduling participation in arbitration hearings" so as to "minimize disruptions to the workplace."
- b. Agency argument:** The Agency indicated that it wanted official time for participation in arbitration hearings to be discretionary due to Executive Order 13837 Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use. The Agency would like to ensure that duty time is spent properly for purposes directly related to the arbitration hearing.
- c. Union argument:** The Union contends that, because it may periodically have to represent nonmembers, that official time for arbitration hearings is appropriate.
- d. Order:** The Agency's reliance on Executive Order 13837 is misplaced, as the order was rescinded during the Panel proceedings in this case.²⁸ During the Mediation-Arbitration, the Agency agreed that employees "will" be permitted duty time for purposes of arbitration hearings. Otherwise, the Union's arguments for its proposal were unpersuasive. **The parties shall adopt the Agency's proposal in full, modified as follows:**

"A. The parties agree that official time ~~may~~will be provided for the designated Union Representative to participate in the arbitration process as set forth in Article --.

B. The parties agree that bargaining unit employees, including the Grievant and approved witnesses ~~may~~will participate in arbitration hearings in duty status."

²⁸ Executive Order 14003: Protecting the Federal Workforce.

Section 7: Pre-hearing procedures

- a. Summary of proposals:** The Agency's proposal seeks to make prehearing conferences mandatory, while the Union proposal would make them optional. Also, the Union does not want discussion of witnesses to occur at prehearing conferences. The Agency seeks to require the exchange of prehearing statements, while the Union does not.
- b. Agency argument:** The Agency states that prehearing conferences facilitate settlement and save the time and resources that would otherwise be spent on a full hearing.
- c. Union argument:** The Union states that Agency lawyers just want to learn the Union's case ahead of time.
- d. Order:** The Union acknowledged that it cannot be required to turn over evidence at a pre-hearing conference and indicated it might be willing to consider adopting the Agency's proposal, though it subsequently declined to do so. **Nonetheless, the Agency's proposal is the more reasonable one, offers an opportunity for abbreviated proceedings, and shall be adopted by the parties.**

Section 8: Arbitration procedures and hearings

Subsection A: During the course of the Panel proceedings, the Union agreed to, and the parties shall, adopt the Agency's proposal, which allows the parties to raise issues of grievability at any time.

Subsection G: The Agency wants to require submission of post hearing briefs, while the Union would like it to be optional, pointing out that there are no post hearing briefs at least in the context of expedited arbitration hearings. **The parties shall adopt the Union's proposal.**

Subsection H: The Agency seeks to permit arbitrators to issues decisions based on written briefs alone, while the Union does not want the arbitrator to have this option. **Absent a compelling reason to not make the option available, the parties shall adopt the Agency's proposal.**

Subsection I: The Agency seeks to permit the hearings to be conducted remotely, while the Union opposes this option. **Absent a compelling reason to remove the option from consideration, the parties shall adopt the Agency's proposal.**

Subsection J: The parties proposals appear to be the same, except that the Union's proposal eliminates the possibility that the hearing would be conducted remotely. **As this issue has been settled above, the parties shall adopt the Agency's proposal here.**

Subsection K: The parties' proposals appear identical, except that the Union's proposal permits arbitrators for institutional grievances to be selected from FMCS. **The Agency provided no substantive objection to the Union's proposal, and the parties shall adopt it.**

Subsection L: The parties' proposals are quite similar and, during the Mediation-Arbitration, the Agency agreed to, and the parties shall adopt, the Union's proposal.

Section 9: Time limits

- a. Summary of proposals:** The parties' proposals are nearly identical, except that the Union's permits a pending case to continue without a hearing for over a year upon mutual agreement. The Agency's proposal would allow the non-moving party to seek dismissal of the case if "the moving party has failed to take reasonable steps to schedule a hearing within one year" of invoking arbitration.
- b. Order:** The Agency's proposal is the more reasonable one. If there is a good reason for waiting more than a year to schedule an arbitration hearing, the Agency's language would allow the process to continue so long as the moving party has made "reasonable" efforts to schedule it. **The Parties shall adopt the Agency's proposal.**

Section 10: Expedited arbitration procedure

- a. Summary of proposals:** The parties both provide a process for an expedited arbitration procedure, but differ on many of the same questions at issue in the normal

procedure, such as whether the hearing may be conducted virtually or decided on the basis of written briefs.

- b. Order:** As these issues have been resolved in the Agency's favor above, the parties should adopt the Agency's proposal here as well, except that the Agency shall strike the word "Applicability" from the beginning of its proposal, as agreed, and the Agency's (c)(1) shall be modified as follows:

"The Arbitrator will be appointed using the traditional Arbitrator Panel or FMCS described in this Article."

Section 11: Distribution of awards

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, required the director of the Hearings and Appeals Branch to quarterly provide the Union with copies of all arbitration awards.
- b. Order:** During the Mediation-Arbitration, the Union agreed to, and shall, withdraw its proposal.

32. Article: Grievances

Section 1: Purpose

- a. Summary of proposals:** The parties' proposals both allow the Union to present grievances without the employee present. The Union's proposal directs the parties to attempt to resolve grievances "at the lowest possible level," while the Agency's proposal does not. The Union's proposal seeks to secure a "reasonable" amount of official time, which shall not count against the bank of official time hours, to pursue grievances. The parties differ regarding how and to whom grievance responses will be transmitted.
- b. Agency argument:** The Agency states that the Union is engaging in representational work when it processes grievances and should be required to deduct such hours from its bank, which exists for that purpose.
- c. Union argument:** Generally, the Union states that it is the Agency violating the contract and forcing the Union to respond with grievances. It states that time

should not be taken from the Union's bank because the Agency violated the agreement.

- d. Order:** The Union failed to adequately justify why it needed official time in addition to what is provided in its bank of hours to file grievances against the Agency and did not show that unlimited official time for filing grievances is "reasonable, necessary and in the public interest."²⁹ During the Mediation-Arbitration, the Agency agreed to accept the last paragraph of the Union's proposal. **Accordingly, the parties shall adopt the Agency's proposal with the last paragraph modified to read as follows:**

"In accordance with this Article, grievance response(s) as well as the grievance and all supporting documentation, shall be sent simultaneously to the grievant and the grievant's designated representative. The Agency shall provide the Union representative with information in accordance with statutory and contractual requirements."

Section 2: Definitions

- a. Summary of proposals:** The Agency's proposal seeks to exclude nine items from the negotiated grievance procedure; the Union's proposal strikes each of these exclusions. Both proposals define a generally similar list of terms related to grievances, while the Union's proposal provides an extended definition of "grievance" itself.
- b. Order:** During the Mediation-Arbitration, the Union agreed to accept the following Agency-proposed exclusions: (1) "Any claimed violation relating to prohibited political activities"; (2) "Any complaint concerning retirement, life insurance, or health insurance"; (3) "Any suspension or removal for national security reasons"; (4) "Any examination, certification, or appointment, including the removal of a probationary employee during his/her probationary period"; (5) "The classification of any position which does not result in the reduction in grade or pay of an employee"; (6) "Notices of proposed disciplinary and adverse actions,

²⁹ 5 U.S.C. § 7131(d).

furloughs, or removals"; and (9) "Non-selection from a group of properly ranked and certified candidates, provided another grievable issue(s) is not also alleged, e.g. illegal discrimination." Each of these exclusions exists in the present agreement.

During the Mediation-Arbitration, the parties agreed to a modified version of the Agency's eighth exclusion, which originally covered both performance progress reviews and final ratings but, upon agreement of the parties, will cover only progress reviews.

The Union did not accept the Agency's seventh exclusion, however, of "Appealable adverse and performance-based actions." Federal court precedent holds that the party advocating a limited scope grievance procedure "must establish convincingly that, in the particular setting, its position is the more reasonable one."³⁰ In this case, while neither party argued convincingly for its position, the Agency fell short of the standard necessary to justify its proposed grievance exclusion, noting only generally that the Merit Systems Protection Board may be more uniquely qualified to handle appealable actions than an arbitrator.³¹

Further, during the Mediation-Arbitration, the Agency accepted with the Union's proposed definition of "grievance" and agreed to move it to the beginning of the section. Finally, the parties generally agreed on the "terminology" section, except that the Union could not explain why its definition of "remand" was necessary when the parties agreed on a definition of "return" that was nearly identical. **Accordingly, the parties shall adopt the following language for this section reflecting the various agreements reached and the judgement of the undersigned:**

"a. For the purposes of this Article, a grievance means any complaint:

1. by any unit employee concerning any matter relating to the employment of the employee;

³⁰ *AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983).

³¹ The Agency may have also commented that this proposed exclusion was related to Executive Order 13839: Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, which was rescinded during the Panel proceedings by Executive Order 14003.

2. by the Union concerning any matter relating to the employment of the employees; or

3. by any employee, the Union, or the Agency concerning:

(a) The effect of interpretation, or claim of breach of this exclusive bargaining agreement; or

(b) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

b. Grievance Procedure Coverage.

Except where established by law, rule, regulation, or excluded by the terms of this Agreement, this procedure shall be the exclusive procedure available to the parties to this Agreement, and the employees in the unit for resolving grievances subject to this procedure. Grievances excluded from consideration under this article include:

1. Any claimed violation relating to prohibited political activities;

2. Any complaint concerning retirement, life insurance, or health insurance;

3. Any suspension or removal for national security reasons;

4. Any examination, certification, or appointment, including the removal of a probationary employee during his/her probationary period;

5. The classification of any position which does not result in the reduction in grade or pay of an employee;

6. Notices of proposed disciplinary and adverse actions, furloughs, or removals;

7. Performance progress reviews; and

8. Non-selection from a group of properly ranked and certified candidates, provide another grievable issue(s) is not also alleged, e.g. illegal discrimination.

c. Terminology: The party responding will use at least one of the terms below.

1. Accept: The grievance meets all contractual requirements for filing.

2. Reject: The grievance fails in one or more respects to meet the contractual requirements for filing. The reason for the rejection will be stated in the response rejecting the grievance.

3. Deny: The decision concludes that the evidence does not support the allegations put forth in the grievance in whole or in part. The reason for the denial will be stated in the grievance response.

4. Sustain: The grievance review concludes that the evidence supports the grievance in whole or in part.

5. Return: A grievance timely filed by an employee on his/her own behalf may be returned to the employee for clarification where the responding official determines further clarification is needed to respond to the grievance. Such a grievant will be granted up to three (3) business days, as determined by the responding official, to submit the requested clarification."

Section 3: Appeal and grievance options

a. Summary of proposals: The parties' proposals discuss the means by which an employee "affected by a removal or reduction in grade, based on adverse action or unacceptable performance" may challenge the action. The Agency's proposal envisions only statutory appeals,

while the Union's proposal also acknowledges the possibility of using the negotiated grievance procedure.

- b. Order:** During the Mediation-Arbitration, the Agency agreed to, and the parties shall, adopt the Union's proposal for this section in full.

Section 4: Contents of grievances

- a. Summary of proposals:** The Agency seeks to require that certain information about the grievance is provided at every stage, while the Union wants the information provided only once.
- b. Order:** The Union did not raise a compelling argument against ensuring that relevant information about the grievance be provided at every stage of the process. During the Mediation-Arbitration, the parties agreed to strike the last sentence of their respective proposals. **Accordingly, the parties shall adopt the Agency's proposal, except for the last sentence reading, "For the purpose of this Article, grievant is defined as the aggrieved employee and not the Union."**

Section 6: Grievability/arbitrability

- a. Summary of proposals:** The Agency seeks to allow questions of grievability to be raised at any stage of the process, while the Union wants to require them to be raised at the first stage.
- b. Order:** The parties had the same debate over questions of arbitrability. As the undersigned resolved that matter by permitting arbitrability issues to be raised at any time, it will do the same here. **The parties shall adopt the Agency's proposal.**

Section 7: Back Pay, Discipline/Adverse Actions, Conflict of Interest, and Hazardous Pay

- a. Summary of proposals:** The parties' proposals address how grievances involving "back pay, discipline/adverse actions (or) disciplinary actions, and conflict of interest determinations" will be processed.
- b. Order:** During the Mediation-Arbitration, the parties reached agreement on much of the proposal. **Accordingly,**

the parties shall adopt the following language for this provision reflecting the agreement of the parties and, where agreement was not reached, the judgement of the undersigned shall be imposed:

"If a grievance involves back pay, discipline/adverse actions (or) disciplinary actions, and conflict of interest determinations, it shall be sent to the LERD Director, or designee within 30 calendar days after the date of the event or the date that the Agency or Union became aware or should have known of the action which form the basis for the grievance by emailing to LERD@usda.gov. Should the Agency email address change, the Union shall be provided timely notice.

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Mailstop 3730
Washington, DC 20250

The LERD Director or designee will either respond to the grievance or refer it to the appropriate official for response. The LERD Director or designee shall respond within twenty (20) workdays after receipt of the grievance from the Council Chairperson, or designee. If the grievant(s) remains dissatisfied, the grievance may be pursued to arbitration in accordance with the provisions identified in the Arbitration section."

Section 8: Union/Agency (Institutional) grievances

- a. Summary of proposals:** The parties offered generally similar proposals for handling institutional grievances.
- b. Order:** During the Panel proceedings, the parties agreed to, and shall adopt, the following language for this section:

"Grievances must be filed within 30 calendar days after the date of the event or the date that the Agency or Union became aware or should have known of the actions which form the basis for the grievance. The grievance shall be filed using the attached grievance form at the end of this article, or an equivalent in writing. The Director, Labor

and Employee Relations Division, or designee, shall respond within twenty (20) workdays after receipt of the grievance from the Council Chairperson, or designee. The Council Chairperson, or designee, shall respond within twenty (20) workdays after receipt of the grievance from the Director, Labor and Employee Relations Division, or designee."

Section 9: Service and time limits

- a. **Summary of proposals:** The parties' proposals address the service requirements and time limits governing the negotiated grievance procedure.
- b. **Order:** During the course of Panel proceedings, the Union agreed to, and the parties shall adopt, the Agency's proposal for this section.

Section 10: Distribution of grievances and responses

- a. **Summary of proposals:** The Union's proposal, which the Agency did not counter, requires the Agency to quarterly provide the Union with "copies of all grievances and responses to grievances that have been filed."
- b. **Agency argument:** The Agency asserts that the Union has all of this material already; there's no need for the Agency to send it to the Union again.
- c. **Union argument:** The Union did not dispute the Agency's point.
- d. **Order:** The Union shall withdraw its proposal for this section.

Section 11: Numbering system

- a. **Summary of proposals:** The Union's proposal, to which the Agency offered no counter, would obligate the "appropriate district office" to sequentially number grievances upon receipt.
- b. **Agency argument:** The Agency did not disagree with the substance of the Union's proposal, but did not necessarily want to assign the task of numbering grievances to the district offices.

- c. Order:** The parties shall adopt the Union's proposal, modified as follows to address the Agency's concern:

~~"The appropriate district office~~ The Agency will designate appropriate staff/office(s) who will apply the number and identification to the grievance upon receipt. These numbers are to be sequential and in the order the grievance is received. This will aid in the responses of the grievances. Example: FY- District-XXX eg. 20-Denver-001"

33. Article: Use of Agency Equipment and Resources

Section Unnumbered

- a. Summary of proposals:** The parties' proposals list the kinds of items considered "Agency-owned or leased equipment and resources" and agree that the "Agency has a responsibility to ensure the security and protection of designated sensitive information." However, whereas the Agency's proposal obligates employees to "follow applicable laws, rules, regulations, Departmental Regulations and FSIS policies policy pertaining to security," and lists such authorities, the Union's proposal omits this language.
- b. Order:** The Union's only objection to the Agency's proposal was a purported desire to streamline the CBA. However, it is not unreasonable for the Agency to acknowledge employees' responsibility to ensure the security of Agency equipment, and having made such an acknowledgement, to provide the list of relevant legal authorities, without restating them at length. The Agency's proposal is consistent with its general approach to the agreement, which the undersigned has favored above. **Accordingly, the parties shall adopt the Agency's proposal.**

Section Unnumbered

- a. Summary of proposals:** The Union seeks to strike the Agency's proposal which would provide that "email communications to groups of employees" be "subject to approval prior to distribution."

- b. Agency argument:** This proposal reflects current agency policy.
- c. Order:** The Union raised no compelling argument against the Agency's proposal. The Agency deserves the ability to manage its email systems and ensure they are used for appropriate purposes. **The parties shall adopt the Agency's proposal.**

Section 5: Digital signature

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, would obligate the Agency to furnish, at Agency expense, electronic signatures to any Union official who wants one.
- b. Agency argument:** The Agency already provides electronic signatures to bargaining unit employees with access to electronic devices and does not want to have to arrange for Union officials who are not Agency employees to have electronic signatures.
- c. Order:** Given that Union officials who are bargaining unit employees already have access to an electronic signature via the Agency, and without compelling justification for the Union's proposal, **the Union shall withdraw its proposal for this section.**

34. Article: Work Performed at Prison/Correctional Facilities

- a. Summary of proposals:** The Union's proposed article is not included in the prior agreement. It would require the Agency to provide an orientation for all employees who are to work "[i]n Official establishments where inmate labor is used" and prescribe the content of such orientations. The Union's proposals would also require the Agency to provide hazard pay and grade all employees working in such facilities as GS-10 because of the "inherent danger" of the work. Finally, the Union's proposal would require the Agency to distribute and post written guidance material regarding the "'do's and don'ts' of working in prisons/correctional facilities."
- b. Agency arguments:** Prisons and correctional facilities have their own security protocols, which the Agency follows and cannot change. The Agency does not object to the idea of orienting employees, but the Union's

proposal poses administrative challenges in terms of figuring out who would conduct the orientation and where would it happen.

- c. Order:** The Agency's objections to an orientation program are well-founded, given the Agency's lack of control over the facilities. Working in such facilities is part of inspectors' regular duties and should not automatically qualify them for hazard pay, which has been addressed elsewhere in the agreement. However, the Union's proposal that the Agency distribute written guidance to employees who work in correctional facilities is reasonable. **Accordingly, the Union will withdraw Sections 1 and 2 of its proposed article, and the parties shall adopt the Union's section 3, modified as follows:**

~~"Prior to being assigned to these types of establishments/prisons/correctional facilities, BUE's will be provided, in writing, the "do's and don'ts" of written guidance about working in prisons/correctional such facilities. Additionally, these same guidelines will be posted in the USDA office for all BUE's to review. In situations where BUEs have not been assigned to prisons/correctional facilities for a period of time, they will be provided reasonable time to review the guidance material referenced above. Upon request from a BUE reasonable time will be provided to review all reference material. Regardless of duration, working in prisons/correctional facilities will only be done by properly trained employees."~~

35. Article: Worker's Compensation and Employee Assistance Program

Section 1: References

- a. Summary of proposals:** Consistent with its general approach to this agreement, the Agency seeks to establish at the outset of this article the authorities that govern the workplace compensation program. The Union's proposal is similar to the Agency's, except that it acknowledges that the parties may be required to bargain over changes to Agency policies and directives.

- b. Order:** As the parties bargaining obligations remain the same whether stated in the agreement or not, the parties shall adopt the Agency's more abbreviated proposal. However, during the course of Panel proceedings, the Agency indicated that FSIS Directive 4630.2, "Leave," should be added to the list of authorities referenced in this section. **Accordingly, the Parties shall adopt the Agency's proposal, modified to include FSIS Directive 4630.2 on the list of references.**

Section 2: Policy

- a. Summary of proposals:** The parties agree that the Agency will provide employees with "the applicable forms for filing claims for compensation due to work-related injuries and illnesses and will provide guidance to claimants through the appropriate Workers' Compensation Technician." However, the Union's proposal specifies that this will be consistent with "current practices."
- b. Agency argument:** The Agency states that the parties do not even know what the past practices are in this regard.
- c. Union argument:** The Union simply states that past practices vary.
- d. Order:** **Absent a compelling reason to maintain unidentified past practices, the parties should adopt the Agency's proposal.**

Section 4: Employee Assistance Program services

- a. Summary of proposals:** The Agency's proposal simply references the applicability of DR 4430-792-1, "Employee Assistance Program." The Union's proposal does this as well, but also states that the Agency can "approve administrative leave for EAP reasons," provides that employees remain "eligible for entitlements under the Family and Medical Leave Act on the same basis as for any illness when absence from work is necessary," and directs supervisors to assist employees "in working out an appropriate schedule for taking leave" for EAP reasons.
- b. Order:** During the Mediation-Arbitration, the parties agreed to strike (a) of their respective proposals, as DR 4430-792-1 is already cited in Section 1. Regarding

(b) of the Union's proposal, the Agency expressed its belief that it was covered by the authorities cited in Section 1 and indicated it did not wish to depart from those authorities. **Absent a compelling justification from the Union for including the language, the Parties shall withdraw their respective proposals for this section.**

Section 5: Confidentiality

- a. Summary of proposals:** The Union's proposal, which the Agency seeks to strike, acknowledges the confidentiality of employee records regarding counseling and treatment.
- b. Order:** The parties acknowledge the Union's proposal is informational only, and that the Agency would be obligated to maintain the confidentiality of employee records even absent inclusion of this provision in the contract. **In the interest of a concise CBA, the Union shall withdraw its proposal.**

36. Article: Official Travel

Section 1: Policy

- a. Summary of proposals:** The parties' proposals acknowledge the Agency's statutory right "to make assignments involving travel." The Agency's proposal acknowledges that employees "are entitled to reimbursement for expenses incurred in official travel in accordance with applicable laws, rules, and regulations," lists the applicable regulations and directives, and provides that the Agency "will provide sufficient information to inform the employee of the position being assigned and duration of assignment."

The Union's proposal does not list the authorities governing travel, provides that employees "may be excused from assignments involving official travel" under certain circumstances, lays out in detail the information that must be included in employees' travel instructions, and provides that employees will not be required to travel on holidays absent an "emergency" situation.

- b. Agency argument:** The Agency states that the Union's language about being excused from travel assignments really is not a travel issue appropriate for this article. The Agency already provides employees with sufficient information on their travel instructions.
- c. Union argument:** The Union states that the Agency's travel instructions may provide for the information the Union is seeking, sometimes they leave employees in the dark about key information.
- d. Order:** During the Mediation-Arbitration, the parties agreed to strike the Union's proposal regarding holiday travel. While the Agency aptly pointed out that the travel article is not the best place to include a discussion of how employees can be excused from assignments, it did not point to another provision of the agreement that addressed the issue. Finally, the Union's desire to ensure that employees are provided with adequate information regarding their travel assignments is reasonable and, if the Agency is already providing the information, that should not place an unreasonable burden on the Agency. **Accordingly, the parties shall adopt the following language incorporating aspects of both proposals:**

"Pursuant to 5 U.S.C., Section 7106(a), the Agency has the management right to make assignments involving travel.

Employees are entitled to reimbursement for expenses incurred in official travel in accordance with applicable laws, rules, and regulations regarding travel and compensation while in travel status including, but not limited to:

Federal Travel Regulations (FTR)
 DR 2300-005, Agriculture Travel Regulation
 FSIS Directive 3800.1, Temporary Duty Travel Within CONUS
 FSIS Directive 3800.2, Reimbursement for Use of Privately-Owned Vehicles

The Agency will provide sufficient information to inform the employee of the position being assigned and duration of assignment, including, if applicable: The reason for the travel, departure

and anticipated return dates, type and mode of travel, T&A transaction codes, starting time of the assignment(s), physical address of the facilities, travel authorization code, and the name and contact information of the reporting supervisor.

Employees may be excused from assignments involving official travel when they are medically incapacitated for duty, have a personal emergency or hardship such that leave from duty is approved, or arrange for a substitute traveler who is acceptable to the supervisor at no additional cost to the Agency."

Section 2: Time Spent in a Travel Status for Travel Compensatory Time Off

- a. Summary of proposals:** The parties agree that, "Employee eligibility for compensatory time for travel is governed by the Federal Workforce Flexibility Act of 2004," but the Union proposal would require the Agency to furnish employees with a hard copy of the Act upon request.
- b. Order:** During the Mediation-Arbitration, the Union agreed to, and the parties shall, adopt the Agency's proposal.

Section 3: Per diem

- a. Summary of proposals:** The parties' proposals both recognize that "Travel and per diem entitlements will be governed by the Federal Travel Rule," but the Agency's specifically cites the rules while the Union does not.
- b. Order:** During the Mediation-Arbitration, the Union agreed to, and the parties shall, adopt the Agency's proposal.

Section 4: Travel expenses

- a. Summary of proposals:** The parties' proposals address employee completion of vouchers for travel expenses.
- b. Agency arguments:** The Agency opposed the Union's proposal to annually ensure that "[a]ll Labor Management codes utilized by Council Presidents will be placed in the favorite code portion code of Concur." The Agency

believes this is overly specific and unnecessary, as individuals can designate their own favorite codes in Concur. The Agency did not object to (b) of the Union's proposal, however, requiring employees to complete travel vouchers on "approved, compensable time." The Agency contended that (c) of the Union's proposal was covered by existing Agency regulations/policies. Finally, the parties agreed that the Agency was consistently timely in its processing of travel vouchers, rendering (d) of the Union's proposal either unnecessary or unobjectionable.

- c. Order: During the Mediation-Arbitration, the parties reached various agreements on aspects of their respective proposals and shall adopt the following language for this section reflecting these agreements and, where no agreement was reached, the judgement of the undersigned shall be imposed:**

"A. Upon request, employees shall be provided assistance to properly complete vouchers where necessary.

B. Employees shall complete all vouchers as well as all other administrative duties only during approved, compensable time. Employees shall request time from the supervisor, if needed, to complete vouchers and other administrative duties.

C. The Agency shall timely process travel vouchers to ensure that employees are promptly reimbursed for travel-related expenses."

Section 5: Telephone Calls on Official Travel

- a. Summary of proposals:** The parties' proposals permit traveling employees to make "a brief personal call each night." The only differences are that the Union's proposal strikes the Agency's reference to "hotel telephones" and calls to "minor" children.
- b. Order:** As the Agency did not articulate a reason not to accept the Union's proposal, which appears reasonable on its face, the parties shall adopt the Union's proposal for this section.

37. Article: Bargaining During the Term Agreement**Section 1: Management-initiated bargaining and Section 2: Union-initiated bargaining**

- a. Summary of proposals:** The Agency proposes to have two different sections governing mid-term bargaining: one regarding management-initiated bargaining; and one addressing union-initiated bargaining. The Union proposes combining these two sections into a single section establishing a single process that both the Agency and Union will follow to initiate mid-term bargaining. Further, the parties differ on the timelines for requesting, initiating and conducting mid-term bargaining, with the Agency preferring an expedited process and the Union preferring a lengthier one.
- b. Agency argument:** The Agency states that the Union always takes the maximum time allotted at each stage to navigate mid-term bargaining, even if less time is required. The Agency would like to make the process faster.
- c. Union argument:** The Union states that it takes time to evaluate and respond to Agency-initiated bargaining requests. The Agency has had plenty of time to prepare and the Union deserves a reasonable opportunity to respond. The Union contends that it is only fair that the process for initiating mid-term bargaining apply the same to both parties. The Union argues that the Agency should not have more time to respond to Union requests to bargain than the Union gets to respond to Agency requests.
- d. Order:** The Agency's proposal to address Agency and Union-initiated mid-term bargaining in separate sections is reasonable and less confusing than attempting to combine the procedures into a single section. The Agency's desire to streamline the mid-term bargaining process is also understandable, though the Union reasonably argued that it deserved more time to evaluate Agency-initiated changes before having to decide whether to request bargaining and that the Agency's timeline for responding to Union-initiated bargaining requests should be similar to the timeframe provided to the Union to respond to Agency-initiated changes. For consistency, references to "business days" in the Agency's proposals should be changed to "workdays," which the Agency

indicated was its intent. **Accordingly, the parties shall adopt the Agency's proposal for Section 1 in full, modified as follows:**

"If the Union elects to bargain over an Agency scheduled change, the Union shall submit a written request (via electronic submission or mail) to bargain to the Assistant Director, LERD within ~~five (5) business~~ ten (10) workdays of receipt of the Agency's notice."

"After the Union's request to bargain, the Union will then have five (5) additional ~~business~~ workdays to provide the Agency with proposals that are reasonably related to the proposed change and shall identify the adverse impact upon the employees which the proposal is intended to reduce or remedy."

"If the Union's proposals are not provided to the Agency within the five (5) ~~business~~ workdays as stated above, then the request to negotiate will be deemed waived and closed, and the Agency may proceed with implementation, unless an extension is requested and approved in advance."

"Bargaining shall commence as soon as possible, but no more than seven (7) ~~business~~ workdays after the Agency's receipt of the Union's proposals, unless the Parties mutually agree to extend the period. Parties will endeavor to reach an agreement and conclude bargaining within ten (10) ~~business~~ workdays from the start of negotiations, but that period may be extended by mutual agreement of the Parties."

Further, the parties shall adopt the Agency's proposal for Section 2 in full, modified as follows:

"If there is an obligation to bargain, the Parties' Chief Spokespersons will make appropriate arrangements for the bargaining session to occur normally within ~~forty-five (45) calendar~~ twenty-two (22) workdays from receipt of the Union's request to bargain."

Section 3: General provisions for bargaining

- a. Summary of proposals:** While the parties' submissions to the Panel indicated this section was in dispute, no proposed language was presented to the Panel.
- b. Order:** The parties informed the undersigned during the Mediation-Arbitration that they had reached agreement on this section. **Accordingly, the parties shall follow the agreed upon language.**

38. Article: Duration of Agreement

Section 2: Duration of agreement

- a. Summary of proposals:** The parties agree that the agreement shall have a duration of three years. However, the parties proposed different procedures for initiating term negotiations. The Union's original proposal provided for automatic one-year rollover periods after the initial three-year period, while the Agency's proposal would allow the contract to remain in effect until a successor is executed. The parties also differ over the number of articles that each side can reopen mid-term, with the Agency proposing a limit of three and the Union a limit of four.
- b. Order:** **During the Mediation-Arbitration, the parties reached agreement on the issues in dispute and agreed to, and shall, adopt the following compromise proposal, with a modification made to the commencement of negotiations to make it clear when that process shall begin:**

"A. This Agreement shall remain in full force and effect until three (3) years from its effective date. Following the 3rd anniversary, the parties will exchange initial written proposals on a new Agreement no later than six months prior to the 4th anniversary date.

B. If renegotiations of an agreement are in progress, but not completed upon the termination date of this Agreement, this Agreement shall be automatically extended until a new agreement is in effect.

C. Either Party may reopen three (3) articles of this contract during the thirty (30) calendar days surrounding the 18th month anniversary of this Agreement. The parties agree that a maximum of six (6) articles of this agreement may be re-opened during the 18th month anniversary of the execution of this agreement."

39. Article: Training and Career Development

Section 1: Policy

a. Summary of proposals and arguments: The parties' proposals govern how the Agency will conduct and administer training, discuss the applicable regulations and directives, and acknowledge various types of training. Though there is considerable overlap between the parties' proposals, the Union's differs from the Agency's in that it would specify that employees "receive proper training before being assigned work." The Agency believes this is the norm already, but does not want to incorporate the language into the contract.

The Union's proposal would also require the Agency to provide the Union with a "schedule of training annually," which the Agency indicates it does already, and a list of all training attendees before the start of any training, which the Agency contends would be unduly burdensome.

Also, the Union would prevent employees from having to document any completed training. The Agency counters that supervisors should not have to independently research employees' training records and that employees should be able to easily produce documentation of training completion.

Finally, the Union's proposal specifies that inspectors "are not required to train co-workers or managers." The Agency responded that it does not require inspectors to do this, yet the Union argued that some supervisors have an "expectation" that inspectors provide training to co-workers, even if it is not formally required.

b. Order: The Union did not adequately justify its proposal requiring the employees receive "proper" training, which is overly vague and remains within the Agency's right to

determine. Further, the Union did not offer a compelling reason for placing the burden on the Agency of providing the Union with a list of attendees prior to every training. Similarly, it is not unreasonable for employees to be able to document completed training if necessary. Finally, the Union's proposal preventing inspectors from training their colleagues is unnecessary, as the Agency acknowledges that it does not require this of employees and the Agency's proposal recognizes that training is management's responsibility. That some supervisors may have misplaced expectations when it comes to inspectors training their colleagues is not a problem likely to be addressed through additional contract language and is speculative.

- c. During the Mediation-Arbitration, the Agency agreed to make several modifications to its proposal. **Accordingly, the parties shall adopt the Agency's proposal in full, modified as follows:**

"The Agency agrees to comply with all laws, rules, regulations, and FSIS Directive 4338.1, regarding training.

The parties agree that the primary function of training is to assure the optimum use of human resources in attaining organizational needs and, when feasible, to provide career development opportunities to employees. The parties further recognize that development of employee's knowledge, skills, and abilities through effective training and education is an important factor in maintaining efficient operations. It is the Agency's intent to utilize multiple means and methods as appropriate to facilitate training, which include, but are not limited to, in-service, on-the-job, computerized, and cross-training.

~~The Agency agrees to comply with all laws, rules, regulations, and FSIS Directive 4338.1, regarding training.~~

The Agency shall train employees in those appropriate inspection phases of the Program to the maximum extent practicable. A concerted effort will be made to provide specialized technical training through job-related courses for eligible employees.

Pursuant to 5 U.S.C. 7106 (a)(Management Rights), the Agency shall determine employee training and education needed to meet workforce needs. The Agency shall provide training and education subject to the availability of funds and shall determine the methods and means to provide the training.

Management is responsible for determining when training will be conducted and the employees to be trained. ~~Upon request, employees will be provided access to the Agency training schedule and/or a listing of available training DVDs and CDs.~~

The Agency agrees to advise the Council Chairman (or designee) of the training activities which have taken place within FSIS during the preceding year, upon request. Such information shall enumerate training received by employees by grade level and organizational unit for those employees in the recognized unit only."

Section 2: Employee initiative

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, recognizes that "each employee is responsible for applying reasonable effort, time, and initiative in increasing his/her potential value to the Agency through self-development, training, and education." The Union's proposal also grants employees "duty time, when appropriate, to participate in approved programs or courses."
- b. Order:** During the course of the Mediation-Arbitration, the Agency agreed to, and the parties shall, adopt the Union's proposal.

Section 3: Individual development

- a. Summary of proposals:** The parties' initial submissions to the Panel indicated that this section was at impasse, but the submissions failed to include the language of the parties' proposals. The Agency subsequently submitted the following proposal to the undersigned:

"DR 4040-410

Individual Development Plans (IDPs) can be an effective tool for the development of USDA employees. As part of long-term career planning, employees, supervisors and training managers can use IDPs to outline training and more importantly, create activities that will lead to a more engaged, effective and skilled workforce. In developing IDPs employees are encouraged to seek AgLearn, outside training sources and seek counseling from the immediate supervisor regarding training needs and opportunities."

The Union also subsequently provided its proposal, which reads:

"The Agency shall provide employees with information on available training, education, and career development opportunities upon request."

- b. Order:** It is not clear to the undersigned that the parties bargained over the proposals each party provided during the Mediation-Arbitration proceeding and are, thus, at an impasse over this language. As a result, the undersigned will require the parties to withdraw their proposals.

Section 4: Announcements

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, obligates the Agency to provide employees with "information on training, educational, and career enhancement opportunities."
- b. Order:** During the Mediation-Arbitration, the parties acknowledged that the Union's proposal reflects existing contract language. **The Agency agreed to, and the parties shall, adopt the Union's proposal.**

Section 5: Record of training

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, requires the Agency to maintain a record of employees' "satisfactorily completed training."
- b. Order:** During the Mediation-Arbitration, the parties acknowledged that the Union's proposal reflects existing

contract language. The Agency expressed ambivalence towards the proposal and did not raise any substantive objections to it. **Accordingly, the parties shall adopt the Union's proposal.**

Section 6: Training costs

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, provides that the "Agency will support approved training courses that would be beneficial," but indicates that Agency funding for training will be subject to the "program benefit" and "the availability of training funds."
- b. Order:** During the Mediation-Arbitration, the parties acknowledged that the Union's proposal reflects existing contract language. The Agency suggested the proposal could be covered by existing Agency policy, but did not provide specifics or raise any substantive objections to it. **Accordingly, the parties shall adopt the Union's proposal.**

Section 8: Training as a condition of employment

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, governs how training will be conducted for employees for whom training is required.
- b. Order:** During the Mediation-Arbitration, the parties acknowledged the Union's proposal was covered by existing Agency policies and directives. The Union agreed that its inclusion in the CBA would be for informational, rather than substantive, purposes. **In the interest of a concise agreement, the Union shall withdraw its proposal.**

Section 9: Training materials

- a. Summary of proposals:** The Union's proposal, to which the Agency offered no counter, requires the Agency to annually provide employees with a listing of available training materials.
- b. Order:** During the Mediation-Arbitration, the Agency agreed to accept, and the parties shall adopt, the following abbreviated version of the Union's proposal:

"The Agency, on an annual basis, will provide a listing of available training."

40. Article: Union Representative, Rights, and Responsibilities

Section 1: Policy

a. Summary of proposals: The parties' proposals each recognize the Union's status as exclusive bargaining representative and the application of the Statute to the parties' conduct and dealings. The only difference between the two proposals is that the Union specifically references the Union's ability to file ULP charges under the Statute, a right also reserved to the Agency and which both parties agree exists whether it is specifically mentioned in the agreement or not.

b. Order: The parties shall adopt the Agency's proposal.

Section 2: Employee representation

a. Summary of proposals: The Union's proposal, to which the Agency offers no counter, requires Union officials to contact an employee's supervisor before meeting with an employee.

b. Order: During the course of Panel proceedings, the parties informed the undersigned they had reached agreement on this section. **Accordingly, parties shall follow the agreed upon language.**

Section 3: Designation of Union Officials

a. Summary of proposals: The parties' proposals govern how the Union will provide the Agency with information regarding Union officers and representatives.

c. Order: During the course of Panel proceedings, the parties informed the undersigned that they had reached agreement on this section. **Accordingly, parties shall follow the agreed upon language.**

Section 4: Communications with Bargaining Unit Employees and Other

a. Summary of proposals: The parties' proposals both recognize that the Agency will not deal directly with

Union represented employees in a way that violates the Statute. They also both recognize the Union's statutory right to be present at any formal discussions between employees and management. The Union's proposal goes further than the Agency's, though, in that it specifies between whom communications at the level of recognition will occur and requires the Agency to notify the Union in writing of "Agency initiated changes to conditions of employment."

- b. Order:** The Union acknowledges that the additional provisions in its proposal are there for informational purposes only and do not materially affect the parties' conduct, which is governed by the Statute. **In the interests of a compact agreement, the parties shall adopt the Agencies more truncated proposal.**

Section 5: Information

- a. Summary of proposals:** The parties' dueling proposals address the process by which the Union may request information from the Agency under section 7114(b)(4) of the Statute. The only difference between the proposals is that the Agency provides that the Union must demonstrate a "particularized need" for the information requested, while the Union omits such language.
- b. Order:** There is no substantive difference between the parties' proposals. Though the Union's language omits reference to "particularized need" and simply states it may request information under the Statute, the FLRA has recognized the "particularized need" standard as required by the Statute.³² **For clarity, the parties shall adopt the Agency's proposal.**

Section 6: Statutory appeals

- a. Summary of proposals:** The Union's proposal, which the Agency wishes to strike, states that the Union "has the right to refuse to represent non-dues paying members only in matters outside this Agreement."
- b. Agency argument:** This is a matter between the Union and the employees, not the Union and Agency, and is not appropriate for inclusion in the CBA.

³² See *IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 50 FLRA 661, 669 (1995).

- c. **Union argument:** The Union acknowledges that this proposal is informational in nature and not substantive.
- d. **Order:** The Agency's point is well-taken. The Union shall withdraw its proposal.

Section 7: Surveys and questionnaires

- a. **Summary of proposals:** The parties' proposals address the process by which the "Agency may solicit feedback from bargaining unit employees through verbal or written surveys and questionnaires."
- d. **Order:** During the course of Panel proceedings, the parties informed the undersigned they had reached agreement on this section. **Accordingly, parties shall follow the agreed upon language.**

Section 8: New Employee Orientation/Meeting

- a. **Summary of proposals:** Both parties' proposals allow the Union to conduct a 30-minute presentation to newly-hired employees about "the Union's role in the workplace and membership benefits." However, the Union's proposal would allow Union representatives to be reimbursed for up to 100 miles of travel costs to make Union presentations. The Agency's proposal would permit reimbursement for travel within the "local commuting area," or about 50 miles. Finally, the Union proposes new language that would allow a Union representative to meet with new hires "when they report to their headquarter plant" in the event the Union was not able to meet with the employee during orientation and would reimburse the Union representative for up to 100 miles of travel.
- b. **Agency argument:** The Agency opposes the expense associated with travel reimbursements of up to 100 miles. The Agency also believes the secondary opportunity for the Union to meet with employees may prove disruptive to its mission.
- c. **Union argument:** The Agency commonly permits Union representatives to meet with new employees at the headquarter plant.

- d. Order:** The Union offered no compelling argument for doubling the amount of travel for which Union representatives may be reimbursed to conduct new employee presentations, or for requiring a second opportunity to meet with new hires, a privilege the Union acknowledges it is frequently afforded already. **The Parties shall adopt the Agency's proposal.**

Section 9: Freedom from interference

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, recognizes the statutory prohibition against Agency interference in Union affairs.
- b. Order:** The parties acknowledge that this matter is covered by the Statute and that the Union's proposal is informational in nature, not substantive. **In the interests of a compact agreement, the Union shall withdraw its proposal.**

Section 11: Right to communicate with other organizations

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, provides that, "[t]he Union shall not be precluded from consulting with religious, social, fraternal, professional, or any other groups/associations with respect to matters or policies which involve individual members of the association or are of specific applicability to it or its members."
- b. Order:** As the Union could not explain the rationale for its proposal and, in any event, would not be prohibited from communicating with whomever it wishes, the Union shall withdraw its proposal for this section.

Section 13: Devices and supplies for Union officials

- a. Summary of proposals:** The Union's proposal, to which the Agency offers no counter, obligates the Agency to furnish Union local and council presidents with at least a computer, email account, printer, scanner, fax machine, paper, ink, internet, and, upon request, GSA vehicles.

b. Order: The Union provided no explanation as to how furnishing Agency supplies – up to and including vehicles – is reasonable, necessary, in the interest of the public,³³ or advances the goals of an “effective and efficient government.”³⁴ **The Union shall withdraw its proposal.**

ORDER

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



Maxford Nelsen
FSIP Member

January 27, 2021
Washington, D.C.

ATTACHMENT

³³ While the “reasonable, necessary, and in the public interest” standard appears in § 7131(d) of the Statute governing official time, which is statutorily authorized, it is nonetheless a useful and appropriate reference point when evaluating the appropriateness of Union uses of Agency facilities and resources to which the Union has no statutory right.

³⁴ 5 U.S.C. § 7101(b).