

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF DEFENSE,
US ARMY DENTAL ACTIVITY, FORT SAM
HOUSTON, HOUSTON, TX

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1004

Case No. 21 FSIP 013

DECISION AND ORDER

BACKGROUND

This case, filed by the Department of Defense, Army Dental Health Activity, Joint Base San Antonio (JBSA), Fort Sam Houston, Texas (Agency or Management) on November 20, 2020, concerns the Ground Rules for the successor Collective Bargaining Agreement (CBA) and was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). The U.S. Army Dental Health Activity is a subordinate command of the U.S. Army Medical Command that provides command and control of the Army's fixed-facility dental treatment facilities, preventive care, dental research, development and training institutions, dental treatment to ensure the oral health and readiness of the force, a trained dental force for worldwide deployment, and structures for evolving missions of the Army. The American Federation of Government Employees, Local 1004 (Union) represents approximately 83 bargaining unit employees at JBSA. The parties are governed by a national collective bargaining agreement (CBA), effective date October 10, 2003, and expired as of October 10, 2020, but remains in effect until the parties negotiate a successor CBA.

BARGAINING HISTORY

The Agency requested to reopen the CBA. The parties negotiated over the ground rules for bargaining the successor CBA. The parties mediated with the assistance of an FMCS Mediator and on November 20, 2020, the Agency filed a request for Panel assistance. On November 23, 2020, the Union filed five (5) Unfair Labor Practice (ULP) charges alleging that the Agency violated sections 7116 (a)(1) and (5) of the Statute by insisting to impasse on proposals that the Union asserts are permissive; requiring the Union waive its statutory rights. On January 14, 2021, the Panel asserted jurisdiction over 11 of the remaining provisions. The Panel ordered the parties to a Written Submissions procedure. Both parties timely provided their submissions.

On January 25, 2021, the Union provided a written request to the Panel seeking: 1) the Panel consider the Union's more extensive jurisdictional argument that goes to proposals and topics that are inextricably intertwined to the Agency permissive proposals; 2) cancel the January 17, 2021-Panel Procedural Determination letter; and 3) reissue a new jurisdictional letter after the Panel has had an opportunity to consider the Union's additional jurisdictional arguments. The Panel formally responded to the Union's January 25, 2021-email, noting that the Union had previously provided a jurisdictional statement on November 23, 2020, which had been considered by the Panel and resulted in the Panel declining (as requested by the Union) to assert jurisdiction over 4 out of 15 remaining provisions. The Panel determined that it would consider the Union's additional jurisdictional submission when it considered the complete record after the submissions were received. The Union's request to extend the due date for the submissions was denied.

On February 2, 2021, the parties were notified that President Biden solicited the resignation of the Trump Administration's Panel membership. As a result of the notification, the Union requested that the new Panel consider the January 25, 2021-additional jurisdictional submission by the Union. That request was considered by the Panel in its November 5, 2021-Panel Meeting. In its review of the case, it was determined that the Panel had appropriately asserted jurisdiction over 11 provisions. Additionally, in July 2021, with the assistance of the FLRA Atlanta Regional Office, the parties reached resolution over the ULP filings, ending the impasse over a number of the outstanding articles.

ISSUES AT IMPASSE

The following 10 issues remain for the Panel to address:

1. Conflict with DOD regs – Union A. Section 3
 2. Reopening with a new Executive Order - Union A. Section 4.a.
 3. Reopening with a new Executive Order - Union A. Section 4.b.
 4. Copies of MOUs intended to be reopened in bargaining - Union A. Section 6
 5. Obligation to bargain in good faith (definition) - Union D. Sections 1-11
 6. Bargaining Schedule – E. Sections 1, 2, 5. Matters regarding mediation have been resolved through the ULP settlement
 - ~~7. Failure to follow FSIP procedures – Agency F. 2 – *settled through ULP*~~
 - ~~8. Procedures for seeking FSIP assistance - Union F. 1 – 5 *settled through ULP*~~
 7. Official time to prepare for negotiations – Union G.6 and 7
 - ~~10. Negotiability of a proposal/severability – Agency H.1 – ULP filed – *settled through ULP*~~
 - ~~11. Negotiability appeals/finality of the CBA – Union H 1-7 – *settled through ULP*~~
 8. Ratification – Agency I, Sections 1-3 and Union I, Sections 1-17
 - ~~13. Agency Head Review/severability – Agency J, Sections 1 and 2, Union J, Sections 1-9 – 3 ULPs filed over Agency J1, J2a, and J2b – *settled through ULP*~~
 9. Effective date of the ground rules MOU – L, Section 1
 10. Termination of the ground rules – L, Section 3
- Conflict with DOD Regulations – Para A., Section 3

Agency Proposal:

This Ground Rules MOU shall be interpreted in accordance with all applicable Federal laws and Government-wide regulations.

Union Proposal:

This Ground Rules MOU shall be interpreted in accordance with all applicable Federal laws and Government-wide regulations. This Ground Rules MOU takes precedence over any conflicting Department of Defense, U.S. Army, and Agency regulations, manuals, policies, directives, bulletins, or other issuances for which there is no compelling need under 5 CFR 2424.50.

The parties agree that the Ground Rules agreement must be interpreted in accordance with Federal Law and with government-wide regulations. The Union proposal goes on to reference conflicting DoD US Army, Agency regulations, manuals, policies, directives, bulletins, or other issuances for which there is no compelling need determination under 5 CFR 2424.50¹. The Agency rejects this language because the Union did not name or cite any specific regulation, manual, et. al. that they assert would be impacted by the Parties Ground Rules. The Union argues that they could not at this time name any specific regulation or manual because they do not know when the Ground Rules will be in effect.

The Panel orders the following amended language that adopts principles of collective bargaining:

This Ground Rules MOU shall be interpreted in accordance with all applicable Federal laws, Government-wide regulations in existence prior to the effective date of the Ground Rules MOU, and any non-Government-wide regulations and issuances that came into effective prior to the effective date of the Ground Rules MOU, where there is a "compelling need" determination under 5 CFR 2424.50.

¹ § 2424.50 - A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

- Reopening with a new Executive Order – Para. A., Sections 4.a. and 4.b.

Agency Proposal:

4.a. If during the negotiations of these Ground Rules or during the negotiation of the successor Labor Agreement, Executive Orders are issued for which there is a direct impact on the bargaining process of the successor Labor Agreement, the Parties shall meet any bargaining obligations during negotiations.

4.b. If during the negotiations of these Ground Rules or during the negotiation of the successor Labor Agreement, Executive Orders are issued for which there is a direct impact on the bargaining process of the successor Labor Agreement, the Parties shall meet any bargaining obligations during negotiations.

Union Proposal:

4.a. If during ground rules negotiations, or during term negotiations, the new Administration issues an Executive Order concerning the relationship between labor organizations and management in the Federal government, the Parties shall reopen the ground rules, or if during term negotiations, the Agency shall afford the Union the right to make new proposals regarding negotiable matters that are encompassed by the new Administration's Executive Order. If the Executive Order is issued during the term of the new collective bargaining agreement, the Parties shall reopen the collective bargaining agreement to bargain over negotiable matters that are encompassed by the new Administration's Executive Order.

4.b. If during ground rules negotiations, or during term negotiations, the new Administration rescinds Executive Orders 13836, 13837 and 13839 the Parties shall reopen the ground rules, or if during term negotiations, the Agency shall afford the Union the right to make new proposals regarding matters that had been encompassed in those three Executive Orders. If Executive Orders 13836, 13837 and 13839 are rescinded during the term of the new collective bargaining agreement, the Parties shall reopen the collective bargaining agreement to bargain over negotiable matters regarding matters that had been encompassed in those three Executive Orders.

The Union proposals for Para. A Sections 4.a. and 4.b. involve the Union's concern that if the Trump Administration's Executive Orders 13836, 13837 and

13839 were revoked during the negotiation of the Ground Rules or during the negotiations of the successor CBA, the parties would agree to reopen the agreements reached and would have the opportunity to present new proposals encompassing the new Administration's Executive Order. On January 24, 2021, President Biden did in fact revoke the Trump Administration's Executive Orders and issued a new Executive Order (E.O. 14003) regarding labor management in the federal sector. The Agency offers that if the provisions of E.O. 14003 creates a bargaining obligation, the parties will meet their bargaining obligations during negotiation. The Union's proposal provides that if there is a new E.O. issued, the Parties shall reopen the Ground Rules agreement and the successor CBA to bargain over negotiable matters that are encompassed by E.O. 14003. Once E.O. 14003 was issued, the Union asked to withdraw its proposals. The Union also offers two new proposals. Since the Agency's proposal simply reflects the obligation, it would have under the law to meet any bargaining obligations, and the Union has asked to withdraw its proposal, the Panel orders both parties to withdraw their proposals for both Section 4.a. and 4.b.

The Union offered new proposals for Section 4.a. and 4.b. however, those new proposals would create a *POPA*² problem for the Panel to adopt. The *POPA* case arose from a dispute between the Patent and Trademark Office (PTO) and the Patent Office Professions Associations (*POPA*) over the negotiability of proposed contract provisions. At issue in the *POPA* case was Union's presentation of revised proposals that had not been previously presented by the Union to the Agency during negotiations. The Agency refused to bargain over the new proposals, declaring the proposals untimely. The Union moved their proposals before an interest arbitrator. The Agency refused to participate in the arbitration hearing, insisting that the existence of a bargaining impasse was a pre-condition to the exercise of the arbitrator's authority; on this point, PTO asserted that the arbitrator lacked jurisdiction over the new proposals because the parties had never bargained over those proposals. Over the Agency's objections, the interest arbitrator issued an award that included several of the newly presented proposals. The Agency disapproved the ordered language on Agency Head Review, and the Union in turn filed a negotiability appeal with the Authority. In the negotiability appeal, the Authority ruled in favor of the Union, ordering, in relevant part, that the interest arbitrator has jurisdiction over the newly offered proposals. The Agency petitioned the federal court for review. The federal court held that the Authority erred in finding that the interest arbitrator had jurisdiction over proposals in which the parties never bargained. The court determined that neither the interest arbitrator nor the Authority could require the Agency to accept any such proposals as a part of the parties' collective bargaining agreement.

² Patent Office Professional Association vs. Department of Commerce, Patent and Trademark Office, 26 F3d 1148 (1994). (*POPA*)

The Union offered a new proposal to reflect their understanding of a requirement of the Biden Executive Order, E.O. 14003. The Union offered:

The Parties agree that they will negotiate in good faith all proposals that are encompassed within section 7106(b)(1) of the Statute.

This new proposal was not merely a continuation of the old provisions in the Union's Sections 4.a. or 4.b., which provided that if a new E.O. is issued, the parties will reopen the Ground Rules agreement or the Successor CBA. Instead, the new proposal addressed the commitment to bargaining over the subjects set forth in 5 U.S.C. 7106(b)(1). Adopting a proposal where the Panel had not asserted jurisdiction of that subject matter would create a *POPA* concern. Therefore, the Panel will not order the adoption of that newly offered Union proposal.

The Union offered another proposal to reflect their understanding of a requirement of the Biden Executive Order, E.O. 14003. The Union offered:

a. The Agency shall fully comply with the January 24, 2021, Executive Order by: 1) identifying agency actions, as soon as practicable, that relate to or arose from the Executive Orders 13836, 13837 and 13839; 2) suspend those Agency actions as soon as practicable; and 3) revise those Agency actions as soon as practicable by reestablishing the conditions of employment and collective bargaining agreement terms that had been terminated under the auspices of the three Executive Orders.

b. Term negotiations shall immediately commence after the Agency has complied with the new Executive Order.

While the original proposals provided that the Parties would essentially, restart negotiations the new set of proposals provided that conditions must be fulfilled (i.e., compliance with the Biden Executive Order) before the parties engage in negotiations of the successor CBA. As for agreements reached over the Ground Rules provisions, the parties can address the obligation to review those agreements under the E.O. As for provisions under the Panel's jurisdiction in this impasse, the Panel will determine the appropriate outcome of those matters. As for proposals offered in the negotiations of the successor CBA, the parties have not yet offered proposals, and can address compliance with E.O. 14003 when they do so. And finally, to the extent the E.O. 14003 has the force and effect of law, the Agency will be obligated to ensure compliance with E.O. 14003 of both the Ground Rules and ultimately the successor CBA (i.e., Agency Head Review). The Panel will not order the adoption of the Union's revised proposals.

- Copies of MOUs intended to be reopened in bargaining – Para. A., Section 6

Agency Proposal:

All Memorandum of Understanding (MOUs) or Memorandum of Agreement (MOAs), or other side agreements (written or unwritten to include any past practices) between the union and the agency, which are not exchanged by the Parties for bargaining in accordance with Para E.1 of these Ground Rules, are hereby rescinded with the effective date of the successor agreement.

Union Proposal:

To enable the Union to understand the scope of the negotiations and to properly prepare for these negotiations, the Agency shall provide to the Union within seven (7) calendar days after this Ground Rules MOU is effective with copies of all MOU's/MOA's that the Agency intends to renegotiate as stated in the Agency's August 7, 2020, notice to reopen the current CBA. Any MOU not timely served shall remain in full force and effect during the term of the next CBA.

The Parties were negotiating over language that addressed the exchange of full written proposals after the approval of the Ground Rules (at Para. E1; below). The Agency stated that the Successor CBA proposals it intends on submitting with the opening of bargaining would include the new language it intended to bargain. The Agency argued that this should be more than sufficient to provide the Union full disclosure as to what MOUs, MOAs, and other agreements the Agency intends on negotiation³. However, the Agency also proposed that those MOUs/MOAs that are not exchanged for negotiations in the Ground Rules process shall be considered rescinded.

The Union asked the Agency to provide the MOUs that it intended to modify, amend, cancel, or rescind through the Successor CBA process. The Union's proposal provided that any MOU that is not provided, is assumed to remain in effect during the term of the next CBA. In its submission, the Union requested that the Panel decline jurisdiction over this issue because of the unfair labor practice they have filed, which has now been resolve through settlement of the parties.

To the extent that either party seeks to modify or cancel an MOU, MOA, or past practice, it is not unreasonable to expect that party to provide not only their proposals, but the MOU, MOA or agreement that it proposes to be changed (if such agreement is available in writing). To help facilitate bargaining, the Panel orders

³ The Union has filed an unfair labor practice charge alleging that the Agency violated section 7116(a)(1), (5) and (8) of the Statute by failing to provide the MOU's and MOAs that the Agency intends to renegotiate as stated in the Agency's initial notice to reopen the current contract.

the parties to adopt language that provides for an exchange of written agreements a party seeks to modify:

The party seeking to make changes to a written MOU, MOA, or past practice, will provide any written MOU, MOA or past practice, along with the exchange of modifying proposals provided in accordance with Para E.1 of these Ground Rules.

More significantly, the parties disagree over the effect of MOUs, MOAs or past practices that are not impacted by proposed changes in the negotiations of the Successor CBA. To facilitate efficiency in the bargaining process, the Panel orders the parties to adopt the following language:

Where there is no conflict with the new CBA, written MOUs, written MOAs and written past practices in effect upon the execution of the new CBA will remain binding on the parties, consistent with their terms.

As for agreements and practices that have not been formalized in writing, the Authority would be a better forum to determine the effect of those agreements and practices (i.e., the binding nature of those practices).

- **Obligation to bargain in good faith (definition) – Para. D., Sections 1-11**

Agency: STRIKE LANGUAGE ENTIRELY

Union:

D. Good Faith Bargaining

The parties agree that good faith bargaining includes (as necessary) an opportunity and a responsibility for both parties to:

1. Present and explain its proposals.
2. Ask questions about the other party's proposals.
3. To provide responses to the other party's questions about its proposals.
4. To raise any concerns about how a party's proposals would operate and be implemented.
5. To provide responses to the other party's concerns about how proposals would operate and be implemented.
6. To raise any party interests that may not be adequately satisfied by the other party's proposals.
7. To provide responses to the other party's interests that may not be adequately satisfied by the other party's proposals.
8. To explain to the other party why the party may disagree with a partial section, subsection, or sentence in the other party's proposals.
9. To respond to the other party's reasons for disagreement.

10. To offer counter proposals or different approaches to resolve areas of disagreement with the other party's proposals and to engage in good faith collective bargaining over those options.

11. To only declare an impasse when the parties have exhausted the bargaining schedule in Section E of this Ground Rules MOU and when the FMCS has concluded mediation.

The Agency rejected the Union's proposed language as nothing more than an attempt to define what is "Good Faith Bargaining," creating a possible grievance claim for a violation of the Ground Rules or a possibly ULP claim. The Agency argued that parties have already agreed upon sufficient parameters for bargaining under Para E.3 (not before the Panel):

"The parties will fully discuss all Articles twice. Proposals may be amended, revised, and/or modified during bargaining. The Parties are encouraged to present and explain their proposals/counter proposals, to include questions related to how language would function upon implementation, and other discussions towards reaching an agreement."

The Union argued that their proposal contains standards for ensuring that the parties bargain in good faith and do not seek FSIP assistance prematurely. The Union offered this proposal in an attempt to help regulate the parties' behavior in the bargaining process. The Statute (i.e., § 7117) provides a duty for each party to bargain in good faith. The interpretation of that obligation, including a review of the behaviors proposed by the Union, has been addressed through numerous FLRA cases. Those matters are best addressed under the guides of the Authority case law. The Panel orders the Union to withdraw its proposal as these matters are already covered by the Statute.

- Bargaining Schedule when parties are at impasse. – Para. E., Sections 1, 2, and 5

Agency Proposal:

Bargaining Schedule

1. The Parties shall exchange full written proposals within fifteen (15) calendar days after the approval of these Ground Rules by the Agency Head, pursuant of 5 U.S.C. Section 7114(c)(1)(2)(3)(4).

Union Proposal:

Bargaining and Mediation Schedule

1. The Parties shall exchange full written proposals within thirty (30) calendar days after the approval of these Ground Rules by the Agency Head, pursuant of 5 U.S.C. Section 7114(c)(1)(2)(3)(4).

The first area of disagreement involves the title of the section. Agency sought to label Para E. as Bargaining Schedule with “Mediation” stricken from the Para. The Agency argued that mediation is addressed in a separate Paragraph and is not referenced in this Paragraph of the Ground Rules. The Union does not address the titling. The Panel orders the parties to adopt the Agency’s titling for this section – “Bargaining Schedule.”

Para. E. Section 1 addresses the length of time the Parties have to exchange written proposals. The Union proposed 30 calendar days between approval of the Ground Rules and submission of the proposals. The Agency proposed a 15-day time period to exchange proposal. In its statement of position to the Panel, the Union agreed with the Agency’s proposal of 15 calendar days to submit proposals after Agency Head Review of the Ground Rules. The Panel orders the parties to adopt the Agency’s proposal, requiring proposals be exchanged within 15 calendar days after approval of the ground rules.

Agency Proposal:

2. The Parties shall meet within fifteen (15) calendar days after the exchange of written initial proposals to commence negotiation and bargaining with the following schedule:

Union Proposal:

2. The Parties shall meet within thirty (30) calendar days after the exchange of written initial proposals to commence negotiation and bargaining with the following schedule:

Para. E. Section 1 addresses the length of time the Parties have to start to bargain after the exchange of proposals. The Agency proposed a 15-day frame, the Union proposed a 30-day timeframe. The Agency argued that it did not want a delay in getting to the bargaining table. The Agency argued that the Union's 30-day time frame is an unreasonable delay. The Union, on the other hand, provided a substantive assessment of the actions that would need to occur in order for either party to be prepared to bargain in good faith over the exchanged proposals: examine, analyze the impact and develop interests or positions responding to all of the other party's proposals covering the entire collective bargaining agreement (and any MOA, MOUs and past practices the other party would want to amend or cancel). The Union argued that fifteen (15) calendar days, which is basically eleven (11) workdays, is simply not enough time for a complete review of proposed changes to the entire contract and opportunity to prepare response.

The Panel agrees with the Union that effective bargaining requires preparation on both sides. The Panel disagrees that 30 calendars is not an unreasonable amount of time to dedicate to preparation. The Panel orders the parties to adopt the Unions' proposal, allowing the parties thirty (30) calendars days after the exchange of initial proposals to commence negotiations.

2. The Parties shall meet within thirty (30) calendar days after the exchange of written initial proposals to commence negotiation and bargaining with the following schedule:

Agency Proposal:

5. The Parties will not be considered to be at impasse until, as required by 5 C.F.R. 2470.2(e), the Parties have reached "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement."

Union Proposal:

5. The Parties will not be considered to be at impasse until, as required by 5 C.F.R. 2470.2(e), the Parties have reached "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." The parties shall not be considered to be at impasse just because of the expiration of a bargaining time limit or goal. The Parties shall not be considered at impasse until the parties have fulfilled the duty to bargain in good faith over all of both Parties' proposals.

In Para. E. Section 5, both parties recognize that under the Statute, the Panel determines when impasse has been reached, guided by the Panel regulation 5 C.F.R. 2470.2(e)⁴. However, the Union's proposal would establish two factors that would be considered by both parties **prior to seeking** Panel assistance: 1) that neither party should consider negotiations at an impasse just because of the expiration of a bargaining time limit; and 2) the Parties should not consider themselves at impasse until the duty to bargain in good faith has been fulfilled. The first qualifier seems to be an attempt to overturn any limitation the parties may have agreed to in the bargaining schedule, and the second qualifier once again addresses good faith bargaining.

Without qualification, under 5 U.S.C. 7119, Congress provided:

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter

Once a request is made, the Congress determined:

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section.

The Panel will not order additional requirements to the process, but instead, orders language that follows the Statutory process as intended by Congress. The Panel should order the parties to adopt the following amended language for Section 5:

5. The Panel will determine when an impasse exists, as guided by 5 C.F.R. 2470.2(e) – “that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.”

- **Procedures for seeking FSIP assistance – Para. F., Sections 1 – 5**

In its January 17, 2021 Procedural Determination letter, the Panel advised the parties that it was declining jurisdiction over a number of sections because the Union filed a colorable ULP charge. Both parties offered argument in their

⁴ 5 C.F.R. 2470.2(e) - that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

statements to the Panel, however, in its Rebuttal, the Agency stated – the Agency adopts the Union’s Final Best Offer at Para F. The Panel will not address this section due to the Panel’s determination to decline jurisdiction over this matter. Additionally, on July 14, 2021, the parties reached settlement of the ULPs filed by the Union, including resolution of this provision.

- **Official time to prepare for negotiations – Para. G., Sections 6 and 7**

Agency Proposal: STRIKE LANGUAGE

Union Proposal:

6. To enable the Union team to be able to draft proposals covering 41 articles and an indeterminate number of MOU’s/MOA’s, and to be prepared to negotiate a 41 article, 125-page CBA and an indeterminate number of MOU’s/MOA’s, each Union team member shall be provided 120 hours of official time to prepare the Union’s proposals during the thirty (30) calendar day time period (4 hours per day x 30 calendar days = 120 hours or 3 weeks of official time).

7. To enable the Union team to consider all of the Agency proposals, to perform necessary research, and to prepare counter proposals, each Union team member shall be provided eighty (80) hours of official time during the twenty (20) calendar daytime period (4 hours per day x 20 days = 80 hours or 2 weeks of official time).

The Agency’s proposed to strike this language from Para G. The Parties have already agreed, at Para G.5.:

“The Union Negotiation Team members that fall under the bargaining unit identified by BUS Code AR3251 at US ARMY DENTAL HEALTH ACTIVITY JBSA (DENTAC), as defined under Article 1 of the Labor Agreement shall be granted Union Time to prepare for negotiation sessions in accordance with the Parties’ negotiated agreement on Official Time; to include, but not limited to, Article 6, Article 39, and pursuant to 5 U.S.C. Section 7131(d). No premium pay or any form of compensatory time is authorized for Union Negotiation Team members pursuant to any phase of the negotiation process.”

The Agency argued that the Union failed to provide any argument on why the agreed upon language and the 2003-CBA do not sufficiently address the use of Official Time for any preparation the Union requires for negotiations. Any further

request for official time would be in accordance with the negotiated agreement on Official Time.

The Union acknowledged that the Parties agreed that Union negotiators are entitled to official time for all phases of bargaining, including preparation, negotiations, and current bargaining related activities between negotiation sessions. However, the Union is also concerned over the Agency's refusal to agree on any specific allocation of official time. The Union argued that without specific language otherwise, it would be up to the Agency's discretion to determine how much official time it will grant.

The parties are free to negotiate the entitlement to Official Time under Section 7131(d) of the Statute for negotiation preparation and related activities away from the bargaining table to support the term negotiations. Both parties acknowledged that the parties have reached agreement providing for that entitlement. While both agreed that the bargaining preparation time is reasonable and necessary, what remained at issue was the amount of time that will be granted. The Panel disagrees with the Agency in their assertion that the Union did not justify the activities they would be engaged in preparing for the successor CBA negotiations. To support those activities, the Union proposed a specific bank of time:

Section 6 - 4 hours x 30 calendar days (based upon their proposal in Para A, Section 1 above) = 120 hours per Union representative.

This proposed calculation will be amended to reflect the changes ordered above. The Panel determined above that it will order the parties to adopt a 15-calendar day schedule, instead of a proposed 30-day schedule, to prepare their initial proposals. Using the Union's proposed calculation, which would amount to a bank of 60 hours per Union representative. The Panel orders the parties to adopt the following:

6. In support of Para E, Section 1, the Union shall be provided a bank of official time to prepare for the start of negotiations. That bank shall be up to sixty (60) hours per Union representative, limited to the number of union officials participating in negotiations on official time.

In support of the activities needed to consider the Agency proposals, to perform research, and to prepare counter proposals, the Union proposed a bank of time amounting to eighty (80) hours of official time, basing that time on 4 hours per day x 20 days (i.e., 80 hours or 2 weeks of official time). The Panel believes that proposed bank of time is reasonable, especially given the decision above to grant the Union's request for 30 calendar days to review and provide counters. The Panel orders the parties to adopt the following:

7. In support of Para E, Section 5, the Union shall be provided a bank of official time to review the Agency's proposal's research and provide counter proposals. That bank shall be up to eighty (80) hours per Union representative, limited to the number of union officials participating in negotiations on official time.

- **Negotiability appeals/finality of the CBA – Para. H, Sections 1-7**

In its January 17, 2021-Procedural Determination letter, the Panel advised the parties that it was declining jurisdiction over a number of sections because the Union filed a colorable ULP charge. Both parties offered argument over Para. H in their statements to the Panel. The parties even each offered concessions and agreement over some of the proposed language. However, the parties were on notice of the Panel's determination to decline jurisdiction over this matter. Additionally, on July 14, 2021, the parties reached settlement of the ULPs filed by the Union, including resolution of this provision.

- **Effective date of the ground rules MOU – Para. L, Sections 1 and 3**

Agency Proposal:

1. These Ground Rules shall become effective upon the date approval by the Agency Head Review (AHR), pursuant to the provisions of 5 U.S.C. Section 7114(c) is received.
3. This Memorandum shall terminate on the date that it is replaced by a successor Agreement.

Union Proposal:

1. These Ground Rules shall become effective after union ratification and then upon the date of approval by the Agency Head Review (AHR), pursuant to the provisions of 5 U.S.C. Section 7114(c).
3. This MOU shall terminate when there is a fully negotiated, ratified, and approved CBA, and when there are no pending negotiability appeals, FSIP cases, or unfair labor practice charges or grievances that could result in further term bargaining.

Both parties offered that the Ground Rules would be effective upon the Agency's approval pursuant to 5 U.S.C. Section 7114(c), Agency Head Review. The only difference between the proposals is that the Union's proposal provided for

Union ratification of the Ground Rules MOU. The Union has the right to ratify negotiated agreements, as long as they have provided notice to the Agency that they intend to subject the agreement to ratification, and they have not waived that right to ratify. In its Rebuttal, the Agency stated that it is now willing to adopt the Union's proposals for Para L, Section 1 and 3. The Panel orders the parties to adopt the Union's proposals:

1. These Ground Rules shall become effective after union ratification and then upon the date of approval by the Agency Head Review (AHR), pursuant to the provisions of 5 U.S.C. Section 7114(c).

3. This MOU shall terminate when there is a fully negotiated, ratified, and approved CBA, and when there are no pending negotiability appeals, FSIP cases, or unfair labor practice charges or grievances that could result in further term bargaining.

ORDER

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



Martin H. Malin
FSIP Chairman

November 9, 2021
Washington, D.C.