In the Matter of

DEPARTMENT OF THE NAVY
NAVAL UNDERSEA WARFARE CENTER
DIVISION NEWPORT
NEWPORT, RHODE ISLAND

and

FEDERAL UNION OF SCIENTISTS AND
ENGINEERS
LOCAL R1-144, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, SEIU

Case No. 16 FSIP 84

ARBITRATOR'S OPINION AND DECISION

This case arises from a request for assistance, filed by the Federal Union of Scientists and Engineers, Local R1-144, National Association of Government Employees, SEIU (Union or FUSE), under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119. It concerns a dispute between the Union and the Department of the Navy, Naval Undersea Warfare Center—Division Newport, Newport, Rhode Island (Employer, Division, NUWCDIVNPT or Agency), over a successor agreement for the parties' continued participation in a personnel demonstration project.[1/]

1/ In 1994, Congress passed P.L. 103-337, an authorization for certain Federal agencies to participate in Personnel Demonstration Projects. "Demo projects" are alternative pay-for-performance and personnel systems which replace the General Schedule pay structure with pay bands for determining salaries. The law also provides for funding two types of incentive pay--"continuing pay" (salary increases) and bonus pay (pay-for-performance). In 1997, the Office of Personnel Management published in the Federal Register (F.R.) provisions for implementing personnel demo projects. *See* Vol. 62, No. 232, Dec. 3, 1997, p. 64049 *et seq.* Labor organizations which represent employees in

After an investigation of the request for assistance, the Federal Service Impasses Panel (Panel) directed the parties to mediation-arbitration with the undersigned. Accordingly, on September 21 and 22, 2016, a mediation-arbitration proceeding was convened at the Employer's facility in Newport, Rhode Island. On those dates, the parties engaged in extensive mediation efforts which continued, by teleconference, on September 30 and October 6, 2016.[2/] Mediation proved unsuccessful in resolving the issues and, therefore, I now am required to resolve them by issuing a final and binding award. In reaching my decision, I have considered the entire record in this case, including the parties' final offers submitted on October 14, 2016, documentary evidence, and summary post-hearing statements of position filed on October 24, 2016.

BACKGROUND

The Employer's mission is to conduct research and development on underwater weapons systems. The Union represents approximately 2,100 professional employees who hold positions such as engineer and scientist. The parties do not have a collective-bargaining agreement as such but, rather, they have negotiated a series of Memoranda of Understanding (MOU) on various topics.

In 1999, the parties entered into an agreement to participate in a demo project. When the agreement expired, it was replaced by another, in 2003 and, over the years, the 2003 agreement was extended. The most recent extension agreement was signed on November 18, 2015, for a 1-year term. In January 2016, the parties began negotiations over a demo project agreement to replace the 40-page agreement that was bargained in 2003. A significant part of those negotiations concerned issues relating to the funding and distribution of the two pay pools

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agencies eligible to participate in demo projects were given the right to voluntarily consent to employee participation.

2/ I also convened a teleconference with the parties' representatives, on December 29, 2016, to discuss documentation, belatedly submitted by the Union but relevant to two significant issues at impasse. As discussed below, I have admitted the documentation into evidence and have considered it during my deliberations.

associated with the demo project--the continuing pay pool and the bonus pay pool--for Fiscal Year (FY) 2016.

One of the apparent impediments to the parties' negotiations has been the Employer's inability to determine its budget for incentive pay (IP) until the end of a fiscal year. The Employer, which operates as a non-appropriated fund instrumentality, contends that it cannot determine its revenues for the fiscal year until it has ended and it has received the Department of the Navy's annual performance award guidance. Only after these conditions are met is the Employer able to determine its budget for IP funding. This means that, at least until the close of the fiscal year, management cannot offer the Union an assessment of the extent to which it is willing to fund the continuing pay pool and the bonus pay pool, both of which make up the IP pool fund.

As of October 14, 2016, the due date for the parties' submissions of their final offers, the Employer did not have a proposal for funding the pay pools for FY-2016. It was not until December 22, 2016, when the Commander of the NUWCDIVNPT determined, in a memorandum to the Union President, that the CP pool fund would be set at 1.1% of base salaries and the BP pool fund would be set at 1.5% of aggregate salaries for FY-2016. On December 23, 2016, the Union provided this documentation to the Panel, which I have interpreted as a request to reopen the record for its receipt. During a conference call with the parties, on December 29, 2016, the Employer objected to reopening the record to receive the document. Nevertheless, I shall allow the December 22, 2016 memorandum from the Commanding Officer, as well as the documents referenced in the Commander's memorandum, to come into the record as I believe their contents are relevant to my resolution of the issues concerning CP and BP funding for FY-2016.[3/] During the conference call, the Union representative stated that a 1.5% increase for bonus pay for FY-2016 was acceptable to the Union.

3/ The mission of the Panel is to resolve bargaining impasses. In furtherance of that objective, Panel representatives have a concomitant responsibility not to ignore information that is relevant to the resolution process. I conclude that the long-awaited management determination for CP and BP funding for FY-2016 should not be ignored as it furthers resolution of two significant area of dispute.

ISSUES AT IMPASSE

The parties have submitted for resolution nine areas of disagreement within their multi-page proposals to extend the demo project. The issues concern: (1) incentive pay funding; (2) continuing pay pool funding; (3) bonus pay funding; (4) funding for reconsideration awards; (5) the value of a pay point for bonus pay and continuing pay; (6) financial responsibility for costs associated with arbitration proceedings; (7) duration of the successor demo agreement; (8) incentive pay for Union officials; and (9) training expenses for Union officials.

A HISTORICAL PERSPECTIVE CONCERNING THE PARTIES' NEGOTIATIONS OVER INCENTIVE PAY

I believe it is useful to examine how the parties came to where they are today. The record reveals the following summary of incentive pay agreements/settlements reached by the parties for the period 1999-2015:

1999: Continuing Pay (CP) 1.4% and Bonus Pay (BP) 1.6% of base salaries

2000: CP 1.4% and BP 1.6%

2001: CP 1.4% and BP 1.6%

2002: CP 1.4% and BP 1.7%

2003: CP 1.4% and BP 1.6%

2004: CP 1.4% and BP 1.6%

2005: CP 1.4% and BP 1.6%

2006: CP 1.4% and BP 1.6%

2007: CP 1.4% and BP 1.6%

2008: CP 1.4% and BP 1.6%

2009: CP 1.4% and BP 1.6%

2010: CP 1.4% and BP 1.7%

2011: CP 1.4% and BP 1.7%

2012: CP 1.4% and BP 1.2%

2013: CP 1.3% and BP 1.7%[4/]

2014: CP 1.2% and BP 1.8%[5/]

2015: CP 1.33% and BP 0.96%[6/]

The parties' 2003 Demo Agreement, and its extensions in 2008 and 2010 which covered the period up to 2012, provided for a minimum of 1.4% of the IP budget to be allocated to the continuing pay pool. The Division Commander determined the budget for the incentive pay pool which the Union had no role in establishing.

4/ For FY 2013, the Demo Project extension agreement provided for a payout of 1.3% CP and 1.7% for BP. The Employer, however, initially payed 1.3% CP and a reduced amount of 1.2% for BP. The Union filed a grievance over the reduced BP and, following an arbitration decision which sustained the grievance, the parties ultimately reached a resolution which required a payout of 1.7% BP.

5/ The Union filed a grievance over the Employer's initial payout of 1.07% CP and 1.2% BP because the contractually agreed upon amount had been for 1.2% CP and 1.8% BP. The parties have a tentative settlement which provides for 1.2% CP and 1.8% BP but, at this point, employees have not been paid the additional 0.6% BP as the agreement remains unexecuted.

6/ The Union filed a grievance when the Employer failed to authorize CP or BP. The parties reached a settlement, on November 18, 2015, which provides 1.33% for CP. This includes: (1) the total funding for FY 2015 CP of 1.03%; (2) plus 0.17% in recognition of the 2-month extension of the 2015 performance year from the end of July 2015 to September 30, 2015; and (3) an additional 0.13% to settle an arbitration concerning the FY-2014 CP. For BP, the Employer agreed to "fund the BP pool at 0.96% of total aggregate salaries of FUSE employees as of 9/30/2015 for the FY 15 performance year per consideration of the FY16 DoN Awards guidance." This guidance, issued by the Department of the Navy on November 5, 2015, stated that lump sum cash awards/bonuses may not exceed 0.96%. Apparently, the Union acquiesced to that guidance when negotiating the settlement agreement.

The prior agreements provided for the division of the incentive pay pool budget between the continuing pay and bonus pay pools. With respect to the continuing pay pool, there was a minimum funding of 1.4% of total base salaries and a requirement that any reductions to the amount were to be negotiated with the Union. As to the bonus pay pool, which was to be based primarily on historical spending for performance awards, the fiscal condition of the Employer's operation, and employee retention rates, the typical bonus pay funding was calculated to be 1.6% of the base pay for pay pool members. Decisions to lower funding for bonus pay pools below 1.0% were to be discussed with the Union. The record reflects further that 1.4% for continuing pay and 1.6% or greater for bonus pay were maintained until 2013 when sequestration of Federal funding for Government operations was put into effect by Congress.[7/] At that point, the parties descended into the chaotic state in which they find themselves today involving grievances, arbitrations and bargaining impasses, all a continuation of the negotiating process.

The Federal Register

A. The Employer's Position

The Employer has consistently raised, throughout the mediation-arbitration proceeding and prior to it, that the Union has misinterpreted its role under a Demo project with respect to the establishment of incentive pay pool funding, including determinations for allocating funds for the continuing pay and bonus pay pools. According to the Employer's current argument, the Federal Register (F.R.), Volume 62, No. 232, p. 64049 *et seq.* (December 3, 1997), which provides instructions to parties who agree to enter into Demo projects, allows the agency to retain authority to make final determinations regarding the funding of the incentive pay pools and the percentages for continuing pay and bonus pay that are derived from the incentive

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7/ Although the Employer maintains that it has been constrained by pronouncements issued by the Department of the Navy in 2014 and 2015, which limited cash awards and bonuses to no more than 0.96% of aggregate salaries for activities operating under alternate personnel systems, it appears unusual that NUWC-Division Newport would be included in that limitation because, although it operates as an alternative personnel system, it is 100% industrially-funded and in no way relies on Congressionally appropriated funds.

pay pool. It argues that the Union's role is limited to bargaining over the *process* for determining funding; it does not extend to negotiations over allocations of funding levels for determinations of the final amounts and percentages.

In support of its position, the Employer contends that the Union's proposals are inconsistent with mandates in the F.R. In this regard, the F.R. states that "(t)he decision process for defining the size of the incentive pay pool and the two funds within that pool will be established at the Division/site level." *Id.* at 64063. Consistent with the mandate, the parties' 2003 demo agreement provides that the amount of money in the incentive pay pool is determined "by the Division's Commander and Executive Director, after discussions with Senior Management and the president of the union (FUSE) representing participating bargaining units." According to the Employer, "discussions" do not equate to collective bargaining. The F.R. may be construed to permit the Union to have input into incentive pay pool determinations, but it falls short of conferring any right upon the Union to bargain the substantive decision concerning funds to be budgeted for the continuing pay and bonus pay pools. Moreover, in determining the size of the incentive pay pool and the funds within it, the F.R. requires the Division to consider certain factors regarding the size of the continuing pay fund, including:

> a. Historical spending for within grade increases, quality step increases, and in-level career promotions (with dynamic adjustments to account for changes in law or in staffing factors *e.g.*, average starting salaries and the distribution of employees among job categories and band levels);
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> b. Labor market conditions and the need to recruit and retain a skilled workforce to meet the business needs of the organization; and
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> c. The fiscal condition of the organization.

Id. In addition, the F.R. states that:

> (g)iven the implications of base pay increases on long-term pay and benefit costs, the amount of the continuing pay fund will be derived after a cost analysis with documentation of mission-driven rationale for the amount.

Id. The same factor analysis process is undertaken to assess the size of the bonus pay fund. While the F.R. identifies that the *design of the decision process* for defining the size of the incentive pay pool, and the two funds within the pool insofar as it affects bargaining unit employees will be subject to collective bargaining, determinations of the size of the continuing pay and bonus pay funds must be based on the factors outlined in the Federal Register.

Unlike appropriated-fund agencies which know their budgetary constraints typically at the beginning of a fiscal year, the Employer, as a Defense Business Operating Fund (DBOF) activity, is totally industrially-funded and operates as a "not-for-profit" competitor within the Department of Defense. Under DBOF, a Warfare Center such as Newport is reimbursed for work by its customers through billings based on stabilized rates. The Employer must know its revenue before it can determine the allocation for the incentive pay pool. The Union is attempting to impose contractual limits on the Employer's ability to make the assessments necessary under the FR for determining incentive pay funding levels.

B. The Union's Position

The Union contends that, under a demo project, the exclusive representative is granted certain rights to engage in collective bargaining with respect to the establishment of incentive pay. The Union and the Employer negotiated an agreement, in 2003, which explains the parties' rights and obligations when setting continuing pay and bonus pay poll funding. Under that agreement, continuing pay funding is set annually by the Employer and, if it chooses to set it below 1.4% of salary, it must negotiate and reach agreement with the Union. Bonus pay funding also is determined annually by the Employer and, if it elects to set it below 1.0% of salary, the Employer must notify the Union and give it an opportunity to discuss the change.

According to the Union, the F.R. provides that all decisions left to the local Warfare Center Divisions (the Employer) that affect bargaining-unit employees will be made through collective bargaining, including setting the size of the incentive pay pools and the distribution of those pools to bargaining-unit employees. In support of its position, the Union cites specific references in the F.R. which provide:

> While much of the Demonstration Project will be applied uniformly, there are decisions which will be delegated to the divisions and activities so that the needs and cultures of those organizations may be taken into account. Decisions at the local level will be made through the collective bargaining process.

Id. at 64054-64055.

> The decision process for defining the size of the incentive pay pool and the two funds within that pool will be established at the Division/site level. The design of the decision process, insofar as it affects bargaining unit employees, will be subject to collective bargaining.
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> . . .
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> The criteria and process for incentive pay distribution for bargaining unit employees are subject to collective bargaining. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties from developing the criteria and process for incentive pay decisions.

Id. at 64063. The Union does not dispute that the Employer must consider the factors listed in the F.R. when determining incentive pay pool funding levels. When the decision affects bargaining-unit employees, however, the Union maintains that it is very clear from the above-quoted language that the F.R. requires collective bargaining over the decision process for defining the size of the incentive pay pool and the two funds within that pool. The parties negotiated and agreed upon the decision process in the 2003 Demo Agreement and extension agreements that covered the bargaining unit through FY-2015. In this regard, the agreement provides that the incentive pay pool funding decisions are to be determined annually by the Division Commander in consultation with senior management and the union president. At least 30 days prior to making any funding decision, the Employer will invite the Union to participate in a meeting with upper management "to determine funding levels for pay pools." Any funding cuts in CP and BP pools from the previous year will be discussed with the Union at a meeting at least 30 days prior to implementation. A detailed rationale for cuts will be provided by the employer at the meeting and the Union will have an opportunity to present is position and any

alternatives to the proposed cuts. The Union further contends that as part of the decision process, the parties agreed, in the 2003 Demo Agreement with respect to the continuing pay pool, that the "(m)inimum funding for each CP pool is 1.4% of total base salaries in the unit." And, furthermore, the process provides that:

> Any decision to reduce the amount of funds devoted to continuing pay increases below the minimum 1.4% level occurs only in lieu of more drastic cost cutting measures (*e.g.*, RIF or furlough) and must be negotiated and agreed upon by the union prior to implementation.

This language defines the decision process negotiated and agreed upon by the parties to determine the size of the continuing pay pool. That *process* requires the Employer to negotiate with the Union. It is disingenuous for the Employer now to claim that its prior agreement permitted the Union to have bargaining rights which it should not have, according to the Employer's new interpretation of the F.R. Bargaining is part of the process agreed upon and it should continue.

THE PARTIES' PROPOSALS

The parties' positions on the first three issues, which concern incentive pay, continuing pay and bonus pay, are set forth below and shall be resolved collectively.

1. Incentive Pay Pool Funding

A. The Union's Position

The Union proposes the following:

> The IP funding determination is made by the Division's Commander and Technical Director, after discussions with Senior Management and the FUSE President.
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> Any funding cuts in CP and BP pools from the previous year will be negotiated with the union prior to implementation. A detailed explanation of the reason(s) for the cuts will be provided by management at the meeting described above, and the union will have an opportunity to present their *(sic)* position and any alternatives to the proposed cuts at the meeting and during negotiations with management.

The Union contends that management is attempting to replace the phrase "IP funding" with "CP pay fund and BP pay fund" in this section to give it sole discretion to make funding decisions for the individual CP and BP pools without negotiating with the Union. The Employer's proposal is inconsistent with the F.R. which provides that:

> While much of the Demonstration Project will be applied uniformly, there are decisions which will be delegated to the Divisions and activities so that the needs and cultures of those organizations may be taken into account. Decisions at the local level will be made through the collective bargaining process.

Id. at 64054. Furthermore, the Union notes that the F.R. also provides that:

> The decision process for defining the size of the incentive pay pool and the two funds within that pay pool will be established at the Division/site level. The design of the decision process insofar as it affects bargaining unit employees, will be subject to collective bargaining.

Id. at 64063. According to the Union, the plain language of the F.R. gives it the right to negotiate all aspects of the demo project that are left to the local level, including the size of the two incentive pay pools.

Moreover, the Union maintains that an arbitrator, who sustained a Union grievance over the Employer's unilateral reductions of CP and BP percentages in FY 2012, held that the language of the F.R. "appears to authorize the parties' engagement in the collective bargaining process" and that the "Agency was legally required to honor" the parties' 2003 demo agreement and a 2012 extension agreement." *See* Award of Arbitrator Talmadge at p. 10 (December 31, 2015). The decision, which was never appeal by the Employer, confirms the Union's right to negotiate CP and BP pool funding.

B. The Employer's Position

The Employer proposes that "(t)he CP pay fund and BP pay fund determination is made by the division's Commander and Technical Director after discussions with Senior Management and the FUSE President." The F.R. outlines the demo budgeting and

funding process and provides that, within the incentive pay pool, there are separate funds for continuing pay increases and bonus payments. *Id.* at 64062-64063. Management's proposal clearly states that, in accordance with the F.R., there is a "CP fund" and a BP fund." The F.R. affirms that these must be "separate funds" because the two serve different purposes and, further, that the size (funding determination) of these two funds will be analyzed differently under the F.R. The Union proposal uses the term "IP funding" which is not found anywhere in the F.R. Moreover, the Union is seeking to negotiate over any funding cuts in CP and BP pools from the previous year, a right which, heretofore, it never has been granted and is inconsistent with the Union's limited role, under the F.R., which permits it to bargain only over process and criteria and not substance. Management's proposal, on the other hand, does not change any language or concept that was in the parties' 2003 demo agreement and extension agreements which have been in effect for 13 years.

2. Continuing Pay (CP) Pool

A. The Union's Position

The Union proposes that:

> All CP funds must be distributed yearly to employees within the pools at the end of the IP cycle. Minimum funding for each CP pool is 1.2 percent of total base salaries in the CP pool.
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> Any decision to reduce the amount of funds devoted to continuing pay increases below the minimum 1.2% level will occur only in response to a government-wide directive or regulation. However, the minimum guaranteed CP payments specified in this agreement must be paid to eligible employees each year.

The Union contends that its proposal for a 1.2% funding level for CP is reasonable given the continued "financial health" of the NUWC-Division Newport; moreover, it demonstrates the Union's willingness to seek a compromise by proposing a reduction from the 1.4% CP funding level for salaries which the parties had included in the 2003 demo agreement. A continuing pay pool set at 1.2% of salaries is well within the Employer's ability to pay. The Employer's operations remain financially robust as demonstrated by the hiring of 353 new employees and 77 interns during the past 12 months and the Technical Director's

assessment that FY 2016 was a successful year for the NUWC-Division Newport as evidenced not only by its hiring initiatives but also by the achievement of "bottom-line Net Operating Results" and the awarding of "all mission essential FY16 contractual requirements . . . ."

The Employer's proposal, on the other hand, would require the Union to relinquish a right, established in the F.R., to negotiate CP funding levels, and which the parties memorialized in the 2003 demo agreement. The Union is unwilling to waive this right particularly when the Employer has failed to provide any evidence of a diminished ability to retain CP funding through a negotiated process. The Union successfully refuted a claim made by Employer during the arbitration proceeding that it needed to unilaterally reduce CP funding levels because salaries had become so high at NUWC Division Newport that it was losing its ability to compete with other Warfare Centers. The Union demonstrated that Warfare Centers are established to "avoid competition and redundancy and ensure that efficiencies and synergies between the Divisions are realized." *See* NAVSEA Warfare Centers Technical Capabilities Manual, July 7, 2015, p.1.

B. The Employer's Position

The Employer proposes the following:

> The amount of money in the CP fund is determined annually by the Division's Commander and Technical Director and is subject to available funding. The size of the continuing pay fund is based on appropriate factors from the Federal Register. Each performance year, these factors will be analyzed and the amount of the continuing pay fund will be derived after a data and cost analysis.
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> The minimum CP pool funding level is the projected General Schedule equivalent spending for Within Grade Increases, Quality Step Increase and in level career promotions as calculated in the 'Data Analysis - FUSE' for that performance year. Any decision to fund the CP pool of FUSE bargaining unit employees below 1.0% of basic salary will be discussed with the union no less than 30 days prior to implementation. An explanation of the reason(s) for the decision will be provided by management at this meeting, as well as an

> opportunity for the union to present their position and any alternative(s) to the funding decision.
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> . . .
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> Continuing Pay will be allocated at the NUWCDIVNPT level and managed at the Department level.

The Employer provides a sentence-by-sentence analysis of its proposal. It contends that the first sentence, which requires the CP fund to be determined by the Division's Commander and Technical Director and is subject to "available funding," does not represent a change to the parties' 2003 Demo agreement and is not a new practice. The CP fund decision always has been subject to available funding which is a requirement set forth in the F.R. The second sentence, which requires the size of the CP fund to be based on "appropriate factors" from the F.R., also is not a new concept for the parties. Historical spending, staffing, labor market conditions, and the organization's fiscal condition are all factors referenced in the F.R. which must be taken into consideration when CP funding is determined. The third sentence of the Employer's proposal, which provides for a data and cost analysis, is yet another mandated element for determining CP funding as required by the F.R. It provides that "(g)iven the implications of base pay increases on long-term pay and benefits costs, the amount of the continuing pay fund will be derived after a cost analysis with documentation of the mission-driven rationale for the amount." F.R. at 64063. According to the Employer, its proposal allows management to make a reasoned assessment of the annual CP funding level by adhering to the criteria and processes in the F.R. for determining the CP fund.

The second paragraph of the proposal would allow the Employer to determine annually "a minimum CP funding level" with discussions to take place with the Union in the event that any final decision is made to fund the CP pool below 1.0% of base salary. The Employer contends that, when the demo began in 1999, it was able to determine a minimum 1.4% CP funding level for that "snapshot in time" based upon historical spending for GS employee's salaries, within-grade increases, and career ladder promotions. Much has changed 16 years later. At this point in time, approximately 77.20% of FUSE bargaining unit employees are above their salary mid-band and, within that group, 33.26% are either at the top of their salary band and cannot receive another CP point or are within one CP point away from the top of their pay band. The F.R. requires that this

essential staffing factor be considered when determining the size of the CP fund.

The Employer contends that the minimum for CP funding is likely to increase over the years, but a decision will have to be made each year using the analysis required by the F.R. for determining the size of the CP fund. In this regard, staffing likely will change over time as new employees are hired at the entry salary level of the pay band and bargaining unit employees, many of whom are at the top of their salary pay band start to retire. Emphasis will then shift to continuing pay because it is likely that more bargaining unit employees will be below the mid-band.

The Employer's proposal permits management to make a reasoned judgement of the size of the CP fund using the factors which the F.R. requires for such an analysis. Furthermore, it permits the Employer to control expenditures so that the Warfare Center remains economically viable and competitive with other organizations. The Union's proposal, on the other hand, is inconsistent with the F.R. requirements that the size of the continuing pay fund be based on the appropriate factors listed in the F.R. Its proposal, that management budget 1.2% of base salaries for the CP pool for salary increases is not driven by the F.R. requirements and, therefore, is inconsistent with law. The F.R limit negotiations to the "design of the decision process" that management will use to determine the size of the CP fund and the "criteria and process for incentive pay distribution" of the funding which the Employer determines is available. The Union does not have the right to negotiate over the decision concerning the amount of money budgeted for the size of the CP fund. Its 1.2% proposal is devoid of the requirement to analyze the F.R. factors and only presumes that the percentage reflects the correct amount of funding that will be budgeted for CP. To accept this percentage is to ignore the law.

3. Bonus Pay (BP) Pool

A. The Union's Position

The Union proposes that:

Based on historical factors, the typical BP funding is between 1.2 and 1.6 percent of the base pay (not including the locality adjustment) of pay pool members. Any decision to cut funding for BP pools of

> bargaining unit employees below 1.2% of base salaries will only occur in response to a government-wide directive or regulation. A detailed explanation of the reason(s) for the cuts will be provided by management, as will an opportunity for the union to present their position and any alternatives to the proposed cuts.
>
> The minimum guaranteed BP payments specified in this agreement must be paid to eligible employees each year. All BP poll funds must be distributed yearly to all BP pools and employees within the pools at the end of each IP cycle.

The Union contends that the parties negotiated agreements that determined BP funding levels for FY-2012 through FY-2015, and the Union's proposal is consistent with that practice. According to the Employer's proposal, if bonus pay funding falls below 1%, the matter would be "discussed," not negotiated, with the Union. The Employer is attempting to eliminate the Union's right to negotiate and, instead, grant management discretion to set BP funding based on certain factors. Contrary to the Employer's claim that BP funding is limited by a cap imposed by the Department of the Navy, the Union maintains that the "guidance" from the Department does not apply to the NUWCDIVNPT. Rather, the Naval Sea Systems Command, which is the parent organization of the NUWCDIVNPT and nine other Warfare Centers, four Navy shipyards and the NAVSEA Headquarters office, has the authority to determine the total amount of awards for all of its subordinate sites without specifying a cap for any particular organization. For example, award funding that is not fully utilized at one Warfare Center, could be spent by another NAVSEA component such as the NUWCDIVNPT. Management has never provided any evidence that NAVSEA has limited the Employer's operation to an awards cap.

B. The Employer's Position

The Employer proposes the following:

> The amount of money allocated to each BP pool is calculated as a percentage of the total base pay of all employees in that unit. The percentage is determined principally by historical spending for performance awards, special act awards, and awards for beneficial suggestions; the organization's fiscal

condition and financial strategies; and employee retention rates.

Based on historical factors, the typical BP funding is 1.6 percent of base pay (not including locality adjustment) of pay pool members. Since the ability to pay out BP points is related to the fiscal condition of the Division, there is no minimum BP pool funding level. However, the minimum guaranteed BP payments specified in this agreement must be paid to eligible employees each year. Any decision to cut funding for BP pools of bargaining unit employees below 1.0% will be discussed with the union no less than 30 days prior to implementation. A detailed explanation for the reason(s) for the cuts will be provided by management at this meeting, as will an opportunity for the union to present their position and any alternatives to the proposed cuts.

The Employer proposes, essentially, to continue the wording from their 1999 and 2003 Demo agreements. The Employer contends that it is unwilling to pre-determine BP funding levels because funding must be based on an annual examination of the fiscal condition of the Division. Previously, when the Employer "locked in" a percentage for BP pool funding, as it did in 2012 for a 3-year period, it resulted in extensive litigation when the Employer was unable to meet its obligations under the agreement. Annual assessments of the organization's fiscal condition must be made and guidance from the Department of Navy that may limit awards funding must be taken into consideration before a BP funding level is determined.

OPINION

Preliminarily, I take notice that the parties are seeking to make a significant number of changes to their 2003 Demo Agreement and to say that they are far apart in their positions would be an understatement. For the most part, I find that the majority of the changes proposed to that agreement either are unwarranted or deserve only slight modification. I also want to make clear that, in adopting a party's proposal, I am ruling only on the wording presented. All other aspects of a section not presented to me for resolution shall remain in place consistent with whatever voluntary agreement the parties already have reached and I see no need to substitute. Having fully considered the parties' proposals and positions and documentary

evidence, I conclude that the dispute over the above-reference three issues shall be resolved as follows:

1. IP Pay Pool Funding Decisions

The parties shall adopt that portion of the Union's proposal which states that "(t)he IP funding determination is made by the Division's Commander and Technical Director, after discussions with Senior Management and the FUSE President." The provision is a continuation of the parties' 2003 Demo Agreement and I am not persuaded that a change is needed. The underlying question concerning this issue is at what point should the Union enter into discussions over how the incentive pay fund should be split. For nearly 15 years, the Union has had the right to discuss with management how funding for incentive pay should be distributed between the CP and BP pools. The Employer's proposal would restrict the Union's involvement until management has unilaterally rendered its determinations concerning the distribution of CP and BP pools. Under the 2003 Demo Agreement, the Union's opportunities are limited solely to discussions. It does not have the right to negotiate the distribution of the IP fund. I believe the Union should retain the opportunity to have input concerning the distribution of the funds and, therefore, I am unwilling to adopt a provision that would eliminate a long-standing right for the Union.

As to the second aspect of the Union's proposal, which would require funding cuts in CP and BP pools from the previous year to be negotiated with the Union prior to implementation, consistent with my decision set forth below concerning how the parties are to come to agreement concerning CP and BP funding levels, I see no need to tackle that issue in this section and I shall order the Union to withdraw the provision.

2. Continuing Pay (CP) Pool

The parties shall adopt the Union's proposal which provides for a minimum 1.2% continuing pay pool funding level and the right of the Union to negotiate over any decision to reduce the amount of CP funds below the minimum 1.2 level. The proposal shall be modified to include wording from Section 2.3 of the 2003 Demo Agreement as set forth the below in the *Decision* section of this award. At the outset, I feel compelled to **underscore** that the purpose of a demonstration project is to

provide an alternative performance system where the emphasis is on rewarding excellent performers. The parties should not lose sight of that objective. After examining the parties' agreements, since 1999, for CP funding, I am persuaded that a 1.2% funding level for CP is warranted, even though it represents less than the historic average of their CP agreements over the past 16 years. The history of those agreements makes it clear that the parties have, in fact, negotiated CP funding levels over the years through actual bargaining or as settlements resulting from grievances and arbitrations, both of which are part of the bargaining process. From 1999 to 2012, the final CP figure was determined to be 1.4%. While it is unknown precisely how the Employer arrived at the percentage, what is known is that the agency unilaterally collected information to devise that figure which undoubtedly included historical spending, dynamic adjustments, staffing factors and labor market conditions that include wage comparisons. And, as a result, the Employer was able to predict a 1.4% CP funding level was feasible for the parties' Demo Agreements in 1999, 2003 and beyond. I believe the Employer acted in accord with standards set forth in the F.R. when it reached its 1.4% determination concerning continuing pay. Whether you want to characterize the Union's agreements to CP funding to be based upon negotiations or acquiescence, I conclude that those concurrences were derived through a bargaining process and, I see no reason why the process should not continue.[8/]

The record also reflects that, in recent years, the parties have been able to work through their various conflicting

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8/ I have given little weight to management's contention that its determinations on CP are constrained by issuances from the Department of the Navy, specifically, the Department's performance awards guidance for FY-2015 and FY-2016. Alternate personnel systems are included in the guidance which sets limitations on continuing pay increases and bonuses. The guidance for FY-2015 provides that funding limitations "apply to all awards programs in the DON, including non-appropriated fund (NAF) award programs, regardless of the source of underlying authority." As noted earlier in this decision, the Employer's operations are not dependent on Congressional appropriations but, rather, are 100-percent industrially funded. It would appear that its liberation from **appropriated** funding should give the Employer greater discretion to determine incentive pay rather than claiming to be "ham strung" by the Departmental guidance.

interpretations of what the Federal Register requires for determining continuing pay pool funding levels and that the Union had a major voice in reaching agreement on continuing pay. See, for example, the parties' settlement agreement, dated November 18, 2015, wherein they agreed to a total funding level of 1.33% for CP in FY-2015. The Union's involvement should continue in the negotiation process as I am not persuaded by the Employer's contentions that there is a need to change the methodology for determining CP.

3. Bonus Pay (BP)

In regard to bonus pay, the parties shall adopt the Employer's proposal which acknowledges a typical BP funding level of 1.6% of base pay (not including locality adjustment) of pay pool members, and an obligation to discuss with the Union any decision to cut funding for BP pools below 1.0%. This resolution, essentially, continues the provision in the parties' 2003 Demo Agreement. The evidence reveals that the Union's "voice" concerning BP is not identical to the process used for determining continuing pay. While the Union argues that BP is negotiable, and while the process for determining BP is similar to that of CP, bonus pay decisions have not involved a fully bilateral process as the parties' historical agreements concerning BP reveal. In this regard, the parties' 2003 Demo Agreement provides for discussions with the Union over decisions to cut funding for BP pools below 1.0%. The record reflects, in the past, the parties appear to have engaged in a "back and forth" concerning BP and the Union has exercised its options, just short of the ability to negotiate. It has the right to information and consultation, and to argue a contrary position concerning the Employer's BP decision but, the parties' prior agreement shows that they have used a process that was mutually satisfactory for many years and I am not persuaded that it should change.

4. Funding for Reconsideration Awards

A. The Employer's Position

The Employer proposes the following:

Within the Continuing pay (CP) Pool and the Bonus Pay (BP) pool, up to 4% of the funding from each pool will be set-aside for Incentive Pay Reconsideration. This funding is set-aside for reconsideration payments at the informal, formal and arbitration stages.

> CP Set-Aside. This funding is used for reconsideration requests that result in the awarding of additional CP point(s) during the reconsideration process. The amount of CP money awarded in excess of the set-aside will be deducted from the CP pool in the next performance pay pool cycle. In the event that any funding remains in this set aside, the remaining funds will be distributed to the FUSE bargaining pool.
>
> BP Set-Aside. This funding is used for reconsideration requests that result in the awarding of additional BP point(s) during the reconsideration process. In the event that any funding remains in this set-aside, the remaining funds will be distributed to the FUSE bargaining pool.

The Employer maintains that it is essential to have funds set aside from the CP and BP pools to compensate employees who, as a result of a reconsideration process, are deemed entitled to an increase in continuing pay or bonus pay. The parties agree that the former "Corporate Incentive Pools," established under the 2003 Demo Agreement, no longer should be used as a source of funding for reconsideration awards. Money, however, must come from somewhere and the Employer contends that the best source is from the CP and BP pools. Setting aside up to 4 percent from each pool would ensure that there is adequate funding available to pay employees who successfully appeal their incentive pay payout through reconsideration. The Union's proposal, which would require the establishment of a separate fund that does not take money from the CP or BP pools, fails to consider where the additional funding would come from to support reconsideration determinations. With respect to BP, guidance from the Department of the Navy has limited bonus pay to 0.96%. Therefore, any BP payment due to an employee because of reconsideration would need to come from money set aside when the pools were established so management would not exceed the limitations set by the Navy. Any amount remaining in the BP set-aside fund, after reconsiderations are complete, would be distributed to the FUSE bargaining pool. In regard to CP, the amount of funding allocated to the CP pool is determined based on the appropriate factors from the Federal Register. Funding for reconsideration payments for CP would need to be set-aside at the time the annual decision is made concerning the CP fund.

B. The Union's Position

The Union proposes that:

> Pay pool funding will not be held back or delayed from being distributed to the pay pools/employees for the purposes of IP Reconsideration or any other purpose.
>
> All pay points issued during reconsideration will be funded and paid from a separate fund established at the beginning of the IP cycle. This fund will not decrease or be taken from the regular CP and BP pools.

Essentially, the Union contends that its proposal retains the process the parties have had in place since executing their 2003 Demo Agreement, which established a separate "corporate incentive pool," whose funds were used, among other matters, to augment CP or BP payments to employees as a result of reconsideration of incentive pay decisions. The separate corporate pay pools were limited to 10 percent of money allocated to the CP and BP pools, but funding for them never was taken from the CP and BP pools. Management now proposes to reduce the size of the CP and BP pools, each by 4 percent, by setting aside funds from those pools to be used to pay employees for awards issued to them through a reconsideration process. The Employer's proposal is likely to result in disputes over its interpretation and application because it is vague with respect to how any unused "set aside" money would be returned to bargaining-unit members. The Union's proposal is consistent with a process that has been in place since 2003, which has worked well for the parties and does not violate the Federal Register requirement that the reconsideration process include, but not be limited to, the following characteristics:

> It should be administratively streamlined; provide expedited resolution; maintain appropriate confidentiality; be fair and impartial; address assertions of harmful error involving issues of process and procedure; and ensure that management payout decisions reflect reasonableness in judgment in evaluating applicable criteria.

See F.R. Vol. 62, No. 232, Dec. 3, 1997, 64063.

Another troubling aspect of the Employer's proposal is that it would permit the Employer, in the event the 4-percent "set aside" money from the CP and BP funds is insufficient to cover

reconsideration award determinations, to deduct from the following year's pay pools any additional funding needed. This process would be inherently unfair because management has discretion to determine how much money to award during a reconsideration process, based on the amount available to them at the time, and supervisors could use as much of the following year's pay pool funding as they deem necessary. In essence, there is potential for significantly reducing pay pool funding in the following year, if management "takes the easy way out in the current year by awarding numerous pay points during reconsideration."

OPINION

Essentially, the Employer's proposal would create a source of funding for reconsideration awards by factoring out or setting aside 4 percent each of funds from the CP and BP pools to be used, as necessary, for reconsideration awards. This is a change from the parties' 2003 Demo Agreement, which established separate "corporate incentive pools" that did not diminish the funding of the CP and BP pools but, rather, was in addition to them and capped at 10 percent of the combined CP and BP funding level. The 2003 Demo Agreement also states that money from the corporate incentive pools could be used not only to supplement IP reconsideration payments but also "to provide Senior Management with the flexibility to incentivize business and technical initiatives and recognize Division-level contributions." The Employer's proposal would limit the use of the set-aside money from CP and BP to fund only reconsideration requests that result in the awarding of additional CP or BP points. It does not permit the set-aside money to be used randomly by Senior Management to fund other matters, a change from what had been permitted under the 2003 Demo Agreement. I am persuaded that, with the limitation created in the Employer's proposal that the set-aside money is to be used solely for funding reconsideration awards, a 4-percent set aside from each fund should be sufficient to support reconsideration awards. I note that neither party expressed any concern that the 10-percent funding level for corporate incentive pools that was established in the 2003 Demo Agreement was insufficient to compensate employees for reconsideration awards. Therefore, in my view, the reduced funding level of 4-percent, set aside from each of the CP and BP pools, should be sufficient to compensate employees since the money, now limited to funding only reconsideration awards, makes is unlikely that it would be necessary to take additional funds from the subsequent year's CP

pool fund CP reconsideration awards. Accordingly, I shall order the adoption of the Employer's proposal.

5. Pay Point Values

A. The Employer's Position

The Employer proposes that:

> The dollar value of a bonus pay (BP) point varies and is dependent upon the amount allocated to the bonus pay pool. The dollar value of the BP point is calculated by multiplying the mid-band salary (without locality) by 1.5% and, then applying the locality percentage, and rounding up to the nearest whole dollar if the funding for the bonus pay pool is equal to or greater than 1.6% of basic salaries. If the funding is less than 1.6% of basic salaries, the value of the point will vary proportionally to the amount of funding allocated to the bonus pay pool.
>
> For purposes of calculating the value of the CP and BP point, the mid-band will be defined as the arithmetic mean between the lowest payable salary in the band and the highest payable salary in the band to the nearest whole dollar for all pay bands.

The Employer contends that its proposed change for determining bonus pay points is necessary and consistent with the F.R. requirement that all who make a positive performance contribution are to share in incentive pay. Approximately 77.20% of employees in the FUSE bargaining unit are above their salary midband and, of that group, 33.26% are either within one point of the top or are at the top of their salary band. The Employer contends that when demo salaries are above the midband, the emphasis should be on rewarding employees with BP points. For a nominal reduction in the pay point value for bonus pay, management is able to provide more pay points to award employees. This concept is both reasonable and makes good sense. The proposal would give management the flexibility to adjust the pay point proportionally to ensure that all eligible employees are rewarded appropriately based on their contributions.

B. The Union's Position

The Union proposes the following:

> The dollar value of the bonus pay (BP) point in each payband is calculated by multiplying the midband salary (excluding locality) by 1.5%, then applying the locality percentage, and rounding up to the nearest whole dollar. This results in a BP point having the same base value as a CP point in each payband.[9/]

In support of its position, the Union states that its proposal continues the wording in the parties' 2003 Demo Agreement, and extension agreements, concerning the value of a BP point. It allows employees to know the exact value of a bonus pay point at the beginning of a performance year so they may assess how their performance is likely to be rewarded.

The Employer is proposing to both devalue a BP point and make its worth variable each year. Neither change is warranted or supported by evidence that the parties should deviate from the current practice. Reducing the value of a BP point would create more points to be distributed. While having more points to distribute seems to be a good result, the reality is that the concept of pay for performance would become diminished in that supervisors may reward excellent performance but with a reduced payout for employees. BP points need to be worth a meaningful amount to incentivize performance; reducing pay point values to potentially miniscule levels, as the Employer proposes, allows incentive pay to become meaningless.

The Employer's proposal also would create inequity between more experienced older employees, and newer ones. In this regard, when the salaries of those in the former group reach the top of their payband, they can no longer receive continuing pay (CP) points. In that situation, employees only may receive BP points. Younger employees with salaries below the top of the payband, however, may receive both CP and BP points. When CP and BP points do not have the same value, the result is that BP points given to older employees could be worth much less than the CP points given to younger employees, notwithstanding that both groups of employees may be performing at the same level. Each employee may receive a maximum of four pay points in each

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9/ The parties have agreed that the dollar value of a continuing pay (CP) point will be calculated in the same way as the Union proposes for BP points; that is, a CP point is determined in each payband by multiplying the midband salary (without locality) by 1.5%, and rounding up to the nearest whole dollar.

of the two incentive pay categories. Thus, in the scenario described, employees who earn four CP points will receive significantly more money than those who receive four BP points should the value of the BP point be reduced as the Employer proposes.

OPINION

The Employer does not address the situation where an employee no longer is eligible to receive CP points and must rely solely on BP points for incentive pay. It is undisputed that the current FUSE bargaining unit consists of a high percentage of employees who are at or near a pay level that would make them ineligible to receive CP points. The interest for this group, therefore, is on receipt of BP points and, clearly, the higher the value of a BP point the better for them. The Employer's proposal, which would allow management to reduce the value of a BP point below 1.6% of base salaries, certainly would enable it to create more BP points to award employees and maintain a wide spread distribution. I am more concerned, however, by the apparent inequity that would be created for this large group of employees, nearing the end of their ability to receive CP points, when the value of a BP point is less than a CP point. In my view, the Employer's proposal is likely to create a disparity among employees that could adversely affect morale and result in diminished productivity and performance. All employees should be encouraged to perform at the highest level and, in doing so, reap a financial incentive which is the hallmark of a demonstration project. In my view, the Union's proposal better supports that concept and, therefore, I shall order the adoption of the Union's proposal which requires parity between CP and BP points.

6. Arbitration

A. The Employer's Position

The Employer proposes to include the following wording in the Arbitration provision:

> The cost of the FMCS list, Arbitration and any other cost(s) associated with the Arbitration is paid by the Division as long as the number of arbitration cases does not exceed 4. If there are more than 4 FUSE arbitration cases in the performance year, Management and the Union will split all costs of the arbitration and FMCS list equally.

Management contends that, if the Union does not fare well in regard to its incentive pay proposals in the instant case, employees are more likely to request reconsideration of their incentive pay and, if unsatisfied, invoke the arbitration process. While there is no requirement in the F.R. that such disputes be resolved through arbitration, the Employer has agreed to utilize the process. Management is willing to pay for up to four arbitrations each year, which represents the parties' annual historical average. Beyond that number, the parties would split the costs. Sharing the costs of arbitration is the typical arrangement in most collective-bargaining agreements and it is the agreement the parties have in place for all other types of grievances that proceed to the arbitration phase. Shifting part of the financial responsibility of an arbitration proceeding to the Union at a certain point is likely to encourage the Union to attempt resolution at a lower level which would benefit everyone involved.

B. The Union's Position

The Union proposes to continue the wording that has been in effect starting with the parties' first demo agreement, in 1999, and continuing with the 2003 Demo Project Extension agreement. It provides that "(t)he cost of the Arbitration is paid by the Division." The Union maintains that the Employer has failed to demonstrate a need to modify the parties' long-standing agreement regarding payment of expenses associated with arbitrations where employees dispute their incentive pay. Since 1999, the number of arbitration cases has remained few, ranging each year from zero to five. Other provisions which the parties will roll over from their previous agreement, place a time limit on a presentation before an arbitrator which allows the arbitrator to hear up to three cases in a single day and, thereby, keep the cost of the proceedings low. In the 17 years since the arbitration payment provision has been in effect, management has never claimed that the cost of arbitration is excessive and, rightly so, because limiting the duration of an arbitration hearing and permitting an arbitrator to hear up to three cases a day naturally means that there will be reduced costs.

OPINION

The record reveals that the parties have taken steps to contain the costs for arbitration proceedings by agreeing to ground rules that include, among other matters, narrow time

allotments for the presentation of each case before the arbitrator. In doing so, they create the possibility that three arbitration proceedings may come before an arbitrator in a single day. While there always is potential that in any given year more employees will seek to have a dispute over their incentive pay resolved through arbitration, the evidence reveals that the number of arbitration proceedings each year, since the inception of the demo project, has been relatively constant, with an average of approximately four disputes over employee bonus pay proceeding to arbitration, and not been more than five arbitrations in a single year. In my view, both parties bear a responsibility for resolving such disputes at the lowest possible level and the Union should carefully evaluate which matters merit proceeding to arbitration. To that end, I shall order a resolution that requires both sides to have a financial responsibility in the cost of arbitration proceedings. I believe a reasonable resolution is to adopt a modified version of the Employer's proposal which requires the Employer to pay full costs of five arbitrations per year which appears to be the maximum number of arbitration proceedings in any year as both parties have acknowledged. In the event that there are more disputes that proceed to arbitration, the Union shall share equally in the costs and related expenses of the designated neutral.

7. **Duration of the Demo Project Agreement**

A. The Employer's Position

The Employer proposes the following:

> This agreement is for a period of 3 years (FY 16, FY 17 and FY 18). After 3 years, the agreement may be renegotiated or terminated by request of either party, or earlier by mutual agreement. If the parties agree to terminate the agreement, employees will exit from DEMO in accordance with the procedures established by the DEMO Program Office. Personnel systems which were in place prior to DEMO will be restored, except insofar as they have been affected by legal/regulatory/procedural changes in the interim.

The Employer contends that the parties should have an agreement of several years duration because, over the past few years, it has been increasingly difficult for them to timely

conclude their negotiations over the distribution of the annual CP and BP allotments. The instant case is but one example where the parties have been attempting, for nearly 1 year, to reach agreement not only on a successor demo agreement but, also, on CB and BP funding for FY-2016, which ended on September 30, 2016. Too much time and too many resources are spent negotiating annual agreements and, therefore, the parties should be committed to a demo agreement that has a longer duration. The Union's proposal, for an agreement that covers only the FY-2016 performance year, is unrealistic because the parties already are in a new fiscal year and it is essential that they have an agreement that applies beyond the previous performance year.

B. The Union's Position

The Union proposes the following wording:

This agreement covers the FY 16 DEMO year only: Oct. 1, 2015 through Sept. 30, 2016 and the resulting reconsideration period through arbitration. After this period, the agreement may be renegotiated or terminated by request of either party, or earlier by mutual agreement. If the agreement and DEMO program are terminated, employees will exit from DEMO in accordance with the procedures established by the Federal Register (FR)/Vol. 62, No. 232/ Wednesday, December 3, 1997 and Federal Register (FR)/Vol. 64, No. 139/ Wednesday, July 21, 1999. Personnel systems which were in place prior to DEMO may be restored after negotiation with the Union, except insofar as they have been affected by changes in law or Government-wide regulations in the interim. All negotiable aspects of an exit from the DEMO and the conversion to any other personnel/pay system will be negotiated by the Agency and the Union prior to implementation for FUSE bargaining unit employees in accordance with all applicable laws, rules, regulations, instructions, policies, agreements and past practices.

If the FUSE bargaining unit exits DEMO as a whole, any/all IP payouts owed by employees from the previous IP cycle will be paid to employees in accordance with this agreement.

The Union favors a duration of 1 year because, in the event that the terms imposed for a successor agreement deny the Union the opportunity to bargain over pay pool funding levels, the Union may soon exercise its right to voluntarily discontinue participation in a DEMO Project. Moreover, the experience of another labor organization in negotiating its exit from the Employer's DEMO, reveals that the process of bargaining an exit from DEMO can take well over a year, even after the parties' agreement has expired. A demo agreement that has a shorter duration would foster the Union's ability to be released from the DEMO project sooner than later and begin the process of bargaining over the return of bargaining unit employees to the GS system. The Employer's proposal for a 3-year duration, likely would extend to 4 years while the parties negotiate the Union's exit. It is unfair to employees to require them to remain under a system for that length of time when the terms of the DEMO project no longer benefit them. An agreement with a 1-year duration would allow the Union to quickly begin the process for negotiating a return to the GS system.

OPINION

Having considered the parties' positions, I conclude that the impasse over the duration of the agreement should be resolved on the basis of the Union's proposal which provides for a 1-year duration for the successor demo agreement. The agreement shall be retroactive to October 1, 2015, the beginning of the performance year for FY-2016, and continue until September 30, 2016, the end of the performance year for 2016. I am well aware that adopting the Union's proposal for a 1-year agreement term means that as soon as the parties receive a decision in this case, they would have to begin the process of bargaining over CP and BP issues for the current FY-2017 performance year which, if history is an indication, is likely to be arduous. The parties' coexistence under the demo project, at least in recent years, has proven to be less than peaceful given the amount of time they spend in negotiations over demo matters, as well as the time and expense of related litigation. I am sympathetic to the Union's concern that the demo is not turning out to be the pay-for-performance system it had hoped for and that the Union may soon want to cease participating in the demo project. In my view, a shorter duration for the agreement preserves the Union's right to voluntarily exit from further participation in the demo project and begin the process of bargaining over a return to the GS pay system. A longer duration for the demo agreement would force the Union to remain

under the demo project, which is intended as a voluntary agreement, and I am unwilling to support such an outcome.

8. Incentive Pay for Union Officials

A. The Union's Position

The Union proposes the following:

Union officials who perform work under their activity-assigned duties or responsibilities for less than 90 hour per rating year will not be rated under the Performance Development System, and will not receive Incentive Pay. Union officials who perform 90 hours or more of activity assigned-duties or responsibilities will be evaluated and assigned pay points by management based on the employee's performance while working on management-assigned duties. Their IP and performance evaluations will not be based on, or compared to, the expectations of an employee working full-time on management-assigned duties. In no way will they be under-compensated or penalized for working less than full time on management-assigned duties.

Union officials shall not be interfered with, restrained, coerced or discriminated against in any manner, including with regard to Incentive Pay or performance ratings, for performing union-related duties and responsibilities. In assigning ratings and IP decisions, management shall not penalize union officials for time spent on union matter, or for any other reason related to their union duties/responsibilities.

IP funding for up to five (5) FUSE officials will be allocated and distributed at the NUWCDIVNPT level (up to 20 pay points yearly), and will be separate from the funding allocated to the regular pay pools. The Union shall inform management at least 3 weeks before the date that pay polls are "frozen" of the names of the officials to be covered by this agreement.

Either party may request to renegotiate the number of officials so treated, based on changing requirements or any other appropriate reason.

The Union states that its proposal would retain a separate pay pool for Union officials to receive incentive pay, a practice established in the 2003 Demo agreement and continued in subsequent agreements. A separate pay pool is necessary because, otherwise, Union officials who work only a limited number of hours performing mission-related work would be included in the pay pools for employees who perform agency work on a fulltime basis. It is unfair for Union representatives to have to compete with fulltime employees who are likely to garner greater favor with supervisors who have only a limited amount of money to reward their employees. Furthermore, requiring a limited number of hours of mission-related work for a Union official to attain eligibility for incentive pay is comparable to situations involving part-time employees, and those on extended leave. Those individuals, because of their reduced number of work hours, become eligible for incentive pay after 90 calendar days of duty and an unspecified number of hours per day. Thus, a part-time employee could receive incentive pay after 90 hours of work (1-hour each day). The Union maintains that Union officials are equivalent to part-time employees when they perform agency-related duties assigned by management on a part-time basis and, therefore, they too should be eligible for incentive pay after performing a limited amount of agency work.

B. The Employer's Position

The Employer proposes that:

> Union officials must perform work under their activity-assigned duties or responsibilities for a minimum of 520 hours per rating year or else they cannot be rated under the Performance Development System, and therefore are ineligible for Incentive Pay. In cases where the Union official works beyond 520 hours, they will be rated accordingly and IP will be issued by their respective supervisor within their organization.

The Employer contends that its proposal is in keeping with the core concept of a demo project—that it is a pay-for-performance system and, therefore, an employee's performance must be evaluated in order to determine whether it merits incentive pay. Management's proposal, which would require a Union official to perform a minimum of 520 hours of agency work per year to receive a performance rating, is consistent with the provision in the parties' 2003 Demo Project Extension agreement as well as a 2016 agreement that resolves a grievance over incentive pay

for Union officials. A requirement that 520 hours of agency work be performed per rating year would allow a supervisor sufficient time to evaluate and rate performance. The Union's proposal, on the other hand, that would require a Union official to perform only 90-hours of work per rating year would not allow supervisors "an adequate snapshot" of an employees' performance in order to rate them.

OPINION

Having considered the parties' proposals and positions, I am persuaded that the issue should be resolved on the basis of the Employer's final offer. The Union has not made a persuasive case for altering the parties' prior agreements that require a Union official to perform 520 hours of Agency work to qualify for incentive pay. In my view, a proposal that would permit eligibility for incentive pay after only 90 hours of Agency work performance over a 1-year period is too short a time to allow a supervisor to make a fair assessment of whether the work performed merits the financial incentive. Accordingly, I shall order adoption of the Employer's proposal that would require a Union official to perform Agency work for a longer period of time to qualify for incentive pay.

9. Training Expenses for Union Officials

A. The Union's Position

The Union proposes that:

> The Division will provide $3,000 each calendar year (unless less is requested by the Union) to FUSE for training (tuition; fees; books; materials; travel including transportation, mileage, meals, lodging, *etc.*; and labor) at conferences, seminars, conventions and other events or activities which provide mutual Union/Division benefit. These funds will be made available to the FUSE President and may be used at his/her discretion, subject to management determination that the funds are being expended in accordance with applicable laws and regulations. The funding level for these purposes may be renegotiated at any time by mutual agreement. Training requests will be submitted through the regular Division approval process. If requests are submitted during the last quarter of the fiscal year, management may

delay approval of the training request until the first quarter of the next fiscal year for budgetary reasons.

The Union contends that the parties' 2003 demo project extension agreement contained a similar provision, except that it permitted the Union to incur expenses up to $16,000 over the initial 4-year term of the agreement. At no time since 2003 has the Employer claimed that the Union was seeking to use the funds for inappropriate training. Nor has it ever claimed that the expenses incurred by the Union to train its representatives were excessive or burdensome and, rightly so, because for many years the Union did not utilize any training money and in other years, only a "miniscule" amount was used. There is no basis to dramatically change the provision as the Employer proposes.

B. The Employer's Position

The Employer proposes the following:

The Division will receive and consider all requests for FUSE Union Official training up to $3,000 each fiscal year. All requests will be accompanied with an agenda of topics to be covered with an explanation of the mutual, Union/Division, benefits of said training. The request will be reviewed to endure mutual benefit. With management concurrence regarding the benefits to be derived and the availability of training funds, the request will be submitted through the regular Division approval process.

OPINION

The Employer states that it is seeking to implement safeguards in the approval process to ensure that the training requested by the Union will be of mutual benefit to the parties and require management concurrence. It is apparent that the Union's proposal is in line with the Employer's objectives because it provides that the training shall be "of mutual benefit" and "subject to management determination that the funds are being expended in accordance with applicable laws and regulations." The Union's proposal is the same as the provision in the parties' 2003 agreement concerning training for Union officials, except for the funding level which the parties now agree should be up to $3,000 per fiscal year. I am reluctant to modify wording that has been in effect for many years without there being a reason for a change, and the Employer has not provided a basis for change. In this regard, the Employer has

not recounted disputes between the parties over the interpretation or enforcement of the provision in the 2003 agreement. Another drawback to the Employer's position is that its funding is not guaranteed but, rather it is conditioned "on the availability of training funds." In my view, the Employer should commit to a funding level that it deems reasonable and be ready to fulfill that commitment annually assuming that the requested training meets the test of mutual benefit to the parties.

DECISION

Having carefully considered the arguments and evidence presented in this case, I conclude that the parties shall adopt the following to resolve the impasse:

1. **Incentive Pay Funding:**

The parties shall adopt a modified version of the Union's proposal which provides that "(t)he IP funding determination is made by the Division's Commander and Technical Director, after discussions with Senior Management and the FUSE President."

2. **Continuing Pay Pool Funding:**

The parties shall adopt the following modified version of the Union's proposal:

> The amount of money allocated to each CP pool is calculated as a percentage of the total base pay (excluding locality) of all employees in that pay pool. All CP funds must be distributed yearly to employees within the pools at the end of the IP cycle. Minimum funding for each CP pool is 1.2 percent of total base salaries in the unit. Locality pay is not included in CP pool funding, but is applied later to the new base pay, which includes any CP points distributed to employees.
>
> CP funding in excess of the minimum is determined by considering such factors as historical spending for with-grade increases (WIGIs), quality step increases (WSIs), and in-level career promotions, labor market conditions and the need to recruit and retain a skilled work force to meet the business needs of the organization, and the fiscal condition of the organization.

Any decision to reduce the amount of funds devoted to continuing pay increases below the minimum 1.2% level occurs only in lieu of more drastic cost cutting measures (e.g., RIF or furlough), and must be negotiated and agreed upon by the union prior to implementation. However, the minimum guaranteed CP payments specified in this agreement must be paid to eligible employees.

3. Bonus Pay Pool Funding:

The parties shall adopt the Employer's proposal.

4. Funding for Reconsideration Awards:

The parties shall adopt the Employer's proposal.

5. Pay Point Value for Bonus Pay and Continuing Pay:

The parties shall adopt the Union's proposal.

6. Arbitration Costs:

The parties shall adopt a modified version of the Employer's proposal which requires the Employer to pay full costs of five arbitrations per year. In the event that there are more disputes that proceed to arbitration, the Union shall share equally in the costs and related expenses of the designated neutral.

7. Duration of the Demo Project Agreement:

The parties shall adopt the Union's proposal.

8. Incentive Pay for Union Officials:

The parties shall adopt the Employer's proposal.

9. Training Expenses for Union Officials:

The parties shall adopt the Union's proposal.

Donald S. Wasserman
Arbitrator

January 5, 2017
Washington, D.C.