

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF THE ARMY
FORT CAMPBELL, KENTUCKY

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2022

Case No. 22 FSIP 089

DECISION AND ORDER

BACKGROUND

The American Federation of Government Employees, Local 2022 (Union) filed this request for assistance over Ground Rules for the negotiation of a successor Collective Bargaining Agreement (CBA) with the Department of the Army, Fort Campbell, Kentucky (Agency). The Agency's mission is to provide our Nation Air Assault capability to conduct forcible entry and other worldwide unified land operations in support of Combatant Commanders. The Agency serves as a projection platform and premier training and development center for Air Assault Operations in the United States Army. The Agency is home to the 101st Airborne Division, 5th Special Forces Group, 160th Special Operations Aviation Regiment, 52nd Ordnance Group, U.S. Army Medical and Dental Activities, Tennessee Valley District Corps of Engineers, and Veterinary Command.

The Union represents civilian employees at the Agency's installation, including hospital and administrative personnel. There are approximately 2,645 employees within the bargaining unit. The parties' current CBA expired in June 2020. The terms of the existing CBA roll over until the parties reach an agreement on a new CBA.

BARGAINING & PROCEDURAL HISTORY

In July 2020, the Agency opened negotiations for a successor CBA with proposals for Ground Rules. The parties bargained the Ground Rules in person on

four occasions before seeking the assistance of the Federal Mediation and Conciliation Service (FMCS) for one day of mediation. On October 1, 2020, the Agency submitted a request for Panel assistance in Case No. 21 FSIP 001 over the one remaining provision from the parties' Ground Rules. That provision concerned whether one party could unilaterally determine when CBA negotiations would meet virtually/telephonically rather than face-to-face. The Panel asserted jurisdiction in that case and ordered the parties to a written submission procedure. On December 20, 2020, the Panel issued a Decision and Order in Case No. 21 FSIP 001, resolving the impasse.

Following the Panel's Decision and Order, the Agency denied the Ground Rules upon Agency Head Review pursuant to 5 U.S.C. § 7114(c)(1). Specifically, on January 21, 2021, the Agency found four provisions from the parties' tentatively agreed upon (TA'ed) Ground Rules to be contrary to law, rule, or regulation. The Agency's denial also proposed modifications for the four provisions at issue, but the Union declined to adopt such modifications. On March 8, 2021, the Union notified the Agency that it considered the TA'ed Ground Rules to be null and void. The Union also informed the Agency that following the issuance of Executive Order 14003, it intended to start negotiations of the Ground Rules anew and provided the Agency with a new set of proposed Ground Rules.

The parties negotiated over the Ground Rules between March 2021 and June 2022 before engaging in mediation with FMCS. On August 3, 2022, FMCS released the parties to the Panel as they were unable to reach an agreement on any of the Ground Rules. On October 14, 2022, the Panel voted to assert jurisdiction over all of the parties' Ground Rules except for the provision ordered in Case No. 21 FSIP 001.¹ The Panel ordered the parties to engage with a private Mediator/Factfinder, sharing the costs equally. In addition to providing the parties with a timeline for completing mediation and providing the Factfinder with written positions on any unsettled matters, the Panel provided procedures in the event either party did not accept the Factfinder's recommendations. Specifically, the parties were to advise the Panel and the other party, in writing, of any unresolved issues and proposed alternatives along with justifications for their objections. Thereafter, the other party would be permitted to file a response.

On February 14, 2023, the parties requested an extension of the Panel's deadline to submit positions in response to the Factfinder's recommendations. The parties requested additional time because the Factfinder was late in submitting his recommendations to the parties, as specified in the Panel's procedural order. The Panel approved a two-week extension for both providing statements of objection and

¹ Under Section 7119(c)(5)(C) of the Statute, this provision remains final and binding on the parties as they have not agreed otherwise.

any corresponding responses. With the extension, the Panel was to receive the parties' objections by 5:00 p.m. Eastern Time on March 3, 2023. Thereafter, the other party would be permitted to file a response to be received by the Panel by 5:00 p.m. Eastern Time on March 17th.

On March 3rd, the Panel received a statement of objections from the Agency at 4:52 p.m. Eastern Time and from the Union at 5:14 p.m. Eastern Time. On March 17th, the Panel received the Union's response to the Agency's March 3rd objections at 6:36 p.m. Eastern Time. The Agency did not respond to the Union's March 3rd objections.

PROCEDURAL DETERMINATIONS

The Panel's procedural order advised the parties that the Panel would accept objections and corresponding responses received by a set date and time. The Agency complied with the Panel's order in submitting its objections, but neither of the Union's submissions met the established deadlines. In response to the Panel's inquiry into the two untimely submissions, the Union provided a statement claiming to have sent the emails "in a timely manner." However, the Union did not provide any evidence to demonstrate this, even though such documentation was specifically requested. Instead, the Union claims that due to the size of the attachments and other IT issues, the emails must have been delayed in reaching the Panel. The Panel afforded the Agency the opportunity to provide a position on the Union's late filings. However, the Agency responded to the merits of the Union's March 3rd objections and March 17th response instead of addressing the timeliness of those submissions.

Based on the facts and circumstances surrounding the Union's two late filings, the Panel strikes both from the record. The Panel received the Union's objections 14 minutes after the Panel's deadline. The Panel finds that the Union's explanation for the delay is not credible and is inconsistent with the evidence. The Union was provided the opportunity to provide corroborating evidence in support of their claim that they had submitted their objections in a timely manner but failed to do so. Indeed, the Union's objections specifically reference the Agency's objections that were filed at 4:52 pm. It is highly unlikely that the Union reviewed the Agency's objections and revised its own objections to refer to the Agency's filing in only eight minutes, i.e. the amount of time remaining for the Union to file its objections in a timely manner. The Union's own document undermines the credibility of the Union's claim that the Union emailed its objections in a timely manner but delivery was delayed because of the size of the file.

The Panel received the Union's March 17th response to the Agency's objections over an hour and a half after the Panel's deadline. Of concern to the

Panel is that the Union's position states the Union President became aware, when she went to shut down her computer after the 5:00 p.m. eastern deadline had passed, that the Union's March 17th Response was still in the process of sending. However, the Union did not contact the Panel upon learning of this delay and only provided this explanation after the Panel's inquiry. The Union's explanation is not credible.

DISCUSSION

Generally, the Panel will defer to a factfinder's recommendations if they are supported by clear and convincing rationale and do not appear to be illegal. A party objecting to the Factfinder's recommendations bears a heavy burden of rebutting this presumption in demonstrating why such recommendations should not be adopted. The Panel shall therefore order the parties to adopt the Factfinder's recommendations with the modifications outlined herein.

The Agency's objections notified the Panel that while it accepted the Factfinder's recommendations, there were five unresolved matters and one point of clarification. Of note, all of the Agency's proposed language for the unresolved matters in its objections are from the parties' December 2020 TA'ed agreement (Agency Exhibit #2), which was rejected on Agency Head review in January 2021. Yet, the Agency presented a different last best offer (Agency Exhibit #1) to the Factfinder. The Agency now argues that as the Union previously agreed to the provisions of the December 2020 TA'ed agreement (Agency Exhibit #2), the Union is attempting "to revoke that agreement after the fact."

As the parties jointly agreed in March 2021 to bargain these Ground Rules anew, following the Agency Head's denial and the issuance of Executive Order 14003, the Agency's presentation of Agency Exhibit #2 as its last best offer to the Panel is inaccurate. Further, the Panel finds the Agency's main argument for the adoption of Agency Exhibit #2, which is that the Union previously agreed to the language and is trying to revoke a past agreement, is erroneous. Accordingly, the Panel rejects the Agency's argument for the adoption of provisions from Agency Exhibit #2.

Agency Objection #1 – Denied

The Agency takes the position that the Factfinder did not resolve a dispute over a provision from the Agency's Exhibit #2 proposal, which states, "(a)lternates will have the full responsibilities and authority of the primary committee member when they are substituting." The Agency requests the Panel order the applicable language from the Agency's Exhibit #2 proposal, but the Agency did not propose this language in its last best offer to the Factfinder, Agency Exhibit #1. Interestingly,

the Union proposed the exact language in its last best offer to the Factfinder, Union Exhibit #1. As the Agency has effectively agreed to the Union's proposal, no impasse remains, and thus the Panel denies the Agency's objection.

Agency Objection #2 – Denied

The Agency requests the Panel clarify that the Factfinder's reference within Factfinder Recommendation #12 is to Headnote 3, rather than Section 3. The Panel declines to address the Agency's request for clarification as it is outside the scope of review in this matter.

Agency Objection #3 – Granted – Order Items 4.b, 4.c, and 4.e from Agency Exhibit #1 as modified below

The Agency takes the position that the Factfinder did not resolve a dispute over whether breaks during bargaining will be taken by "mutual agreement." The Agency proposes that breaks only be taken by mutual agreement, whereas the Union's proposal would permit either party to unilaterally call a break. The Agency requests the Panel order the applicable language from the Agency's Exhibit #2 proposal.

The Panel finds it appropriate to order language to address negotiation procedures, including the issue raised by the Agency. First, the Panel orders the parties to add a provision before Item 4.a from Agency Exhibit #1, which sets the parties' initial negotiation session. Specifically, the Panel orders the parties to add the following, "(n)egotiations will begin within two weeks, unless the parties mutually agree otherwise, following the exchange of initial proposals." The parties are also ordered to adopt Items 4.b, 4.c, and 4.e, as modified in italics below, from the Agency's last best offer to the Factfinder (Agency Exhibit #1) because it provides a comprehensive set of provisions to guide the parties' negotiations.

4.b – The employer recognizes and agrees that union representatives functioning as union negotiating team members will be allowed official *time consistent with the Statute* during alternate weeks, if otherwise in a pay status, to prepare, research, and participate in collective bargaining to establish a term agreement. Should negotiations occur outside of a union representative's scheduled work hours, he or she cannot be compensated for any additional hours. If a supervisor believes work requirements preclude the union representative from leaving, the supervisor will explain the reason on the Official Time Request form and advise the union representative when they should be able to leave. Preparation will occur on the alternate week after the week of negotiations. This preparation time will not interfere with previously established negotiation sessions.

4.c – Each PCN, without the consent of the other, may call caucuses. There is no limit to the number of caucuses that may be held. The party calling for the caucus will vacate the negotiating room and meet in the caucus room. If more than 15 minutes is needed, the PCN will notify the other party within the original 15 minutes and provide an estimate of how much more time will be needed. If a caucus is requested with less than thirty (30) minutes remaining in the scheduled negotiation time, on any negotiating day, the negotiating session may be terminated for the day upon mutual agreement of the PCNs.

4.e – There will be no recording or verbatim transcripts of negotiation sessions, neither audio, nor video nor by court reporter. This does not preclude either party from taking notes for the use of their respective teams, either on a computer or by hand.

The Panel notes that the ordered modified language in Item 4.b may conflict with the language ordered in Factfinder Recommendation #11. Because the Factfinder gave no rationale for his recommendation, the parties shall adopt the Panel's language in Item 4.b in lieu of Factfinder Recommendation #11.

Agency Objection #4 – Granted – Order Item 4.f from Agency Exhibit #1

The Agency takes the position that the Factfinder did not resolve a dispute over information requests. The Agency proposes including that “information will be provided in a reasonable time” and either party has the option to table an issue involving an information request. The Agency takes the position that the Union's proposal has no time limits and would afford the Union the chance to create a “never ending stall” during negotiations. The Agency requests the Panel order the applicable language from the Agency's Exhibit #2.

Here, it is appropriate for the Panel to order language to address information requests, as noted in the Agency's objection. The Panel orders the parties to adopt Item 4.f from Agency Exhibit #1 as it provides reasonable guidelines for the parties to follow.

4.f – The agency will provide the union with requested information consistent with 5 U.S.C. 7114(b)(4). Information will be provided within a reasonable time in relation to the information being requested. The information request will meet the particularized need standard.

Agency Objection #5 – Granted – Order Items 8. a-b from Union Exhibit #1

The Agency takes the position that the Factfinder did not resolve a dispute over impasse procedures. The Agency proposes three impasse provisions. The first involves a shared commitment to Alternative Dispute Resolution during

negotiations. The second states that either party may request FSIP's assistance but that the parties will request binding arbitration. The third provides that the parties will "strive to complete negotiations of a term agreement within a reasonable timeframe," but if unable to do so, either party may request FMCS and/or FSIP assistance. The Agency argues that the Union did not include a provision committing the parties to complete negotiations in a timely manner. The Agency requests the Panel order the applicable language from the Agency's Exhibit #2.

It is appropriate for the Panel to resolve the outstanding matter involving provisions related to mediation and impasse procedures. As noted earlier, the Panel declines to order language from Agency Exhibit #2. Instead, the Panel orders the parties to adopt Items 8. a-b from the Union's last best offer to the Factfinder, Union Exhibit #1, as it provides clear mediation and impasse provisions for the parties' negotiations.

8.a – Either or both Parties may declare impasse and submit unresolved provisions to the Federal Service Impasses Panel (FSIP) in accordance with the Panel's regulations. Before either Party can request assistance from the FSIP, the parties must first seek mediation assistance from the Federal Mediation and Conciliation Services (FMCS).

8.b – Both parties will make a good faith effort to change their work and negotiating schedule to accommodate the mediator.

Agency Objection #6 – Granted – Order Items 9.a-9.g from Union Exhibit #1

The Agency takes the position that the Factfinder did not resolve a dispute over negotiability issues. The Agency states its interest with these proposals is to ensure negotiations progress. The Union's proposal, according to the Agency, includes ambiguous language for the parties to "meet promptly" following the resolution of a negotiability appeal. Instead, the Agency proposes the parties set a fifteen-day timeframe to resume negotiations. The Agency requests the Panel order the applicable language from the Agency's Exhibit #2 proposal.

Similar to the Panel's review of Agency Objection #5, the Panel finds the matter of negotiability provisions unresolved but declines to order language from Agency Exhibit #2. Rather, the Panel orders the parties to adopt Items 9. a-g from Union Exhibit #1 as it provides a fair and detailed set of procedures to address any negotiability matters during negotiations.

9.a – If either Party alleges that it is not obligated to negotiate on a particular proposal, the Parties will explore alternative language that will achieve the purpose of the proposal and would not render the proposal

outside the scope of bargaining. If the Parties are not able to agree on such language, the Parties will attempt to work through until a decision is reached. Each Party is free to take appropriate action if a decision is not achieved.

9.b – If the Union files a negotiability appeal with the FLRA or the Agency withdraws its allegation of non-negotiability or FLRA rules the Union's proposal or a portion of the proposal is negotiable before a final agreement has been reached, the Parties will commence negotiation on the portion of the proposal within 15 days of receipt of the FLRA decision.

9.c – A pending negotiability appeal before the FLRA will not delay the final agreement. The Parties will make every attempt to reach agreement on all other provisions in that Article and will initial/sign the Article once that agreement is reached. If the Agency withdraws its allegation of non-negotiability or FLRA rules that the Union's proposal or a portion of the proposal is negotiable after a final agreement has been reached, the Parties will reopen the entire Article related to the proposal and commence negotiations. Upon agreement, the Article will replace the previously agreed-upon Article.

9.d – The parties agree that any and all provision of the CBA that are not disapproved by the Agency Head Review will be implemented and enforced without further negotiation. The parties will re-negotiate over any disapproved provision which will later be incorporated in the agreement once they have been re-negotiated and approved unless the Union files a petition for review with the FLRA. Should the petition be dismissed, the parties will again negotiate over those provisions until language has been agreed upon and approved. If the FLRA finds that provisions were negotiable, they will immediately be incorporated in the agreement.

9.e – If the Agency files an unfair labor practice (ULP) charge over a Union allegation that it has no duty to bargain over a particular proposal, and the Union withdraws its allegation or the FLRA rules that there is a duty to bargain over the Agency proposal or a portion of the proposal before a final agreement has been reached, the parties will commence negotiations on the proposal or portion of the proposal within 15 days of receipt of the FLRA decision.

9.f – A pending ULP charge filed by the Agency over a Union declaration that it has no duty to bargain over an Agency proposal will not delay a final agreement. The Parties will make every attempt to reach agreement on all other provisions in that Article and will initial/sign the Article once the agreement is reached. If Agency withdraws its allegation or the FLRA rules

that there is a duty to bargain over the proposal after a final agreement has been reached, the Parties will reopen the entire Article related to the proposal and commence negotiations. Upon agreement, the Article will replace the previously agreed upon Article.

9.g – The parties have no intent to waive any of its statutory rights regarding negotiability.

Panel's Review

The Panel has performed its own review of the Factfinder's recommendations and finds some recommendations so deficient that the Panel cannot defer to them. First, the Factfinder, without rationale, deviated from the parties' last best offers (i.e., Union Exhibit #1 and Agency Exhibit #1). Instead, he recommended language from the parties' December 2020 TA'd agreement (Agency Exhibit #2), which failed the Agency Head review in January 2021, leading to the renegotiation in this matter. Even more puzzling, the Factfinder recommended language from the Agency Head's rejection notification (Agency Exhibit #3), which was not negotiated by the parties. While the Factfinder has the authority to recommend language other than that contained in a party's last best offer, the Factfinder here did not provide any rationale in his report as to why he found Agency Exhibits #2 and #3 to be appropriate or even applicable.

First, the Panel orders the parties to adopt Item 1.a from Agency Exhibit #1 in lieu of Factfinder Recommendation #1. Here, the Factfinder failed to explain why it is appropriate to recommend language from the Agency Head's rejection notification (Agency Exhibit #3), which was not negotiated. Therefore, the Panel orders the language from Agency Exhibit #1, which the parties negotiated, as it provides an appropriate introduction. Next, the Panel orders the parties to strike Factfinder Recommendation #4, which recommends the parties add a paragraph on management rights as drafted in Agency Exhibit #3. Because the Factfinder did not provide a rationale for adding this language, the Panel finds this addition unnecessary.

The Panel also orders the parties to adopt Items 7.a-d from Agency Exhibit #1 in lieu of the Factfinder's Recommendation #5. Again, the Factfinder ordered language from Agency Exhibit #3 without providing any rationale. The Panel orders the parties to adopt the Agency's proposed language on ratification as well as agency head review, which are otherwise not addressed, as it establishes a clear and equitable procedure for both processes to be completed following the parties' reaching an agreement.

7.a – Upon completion of the negotiations, after all proposals have been initialed or withdrawn, the PCNs for each party will sign and date the book of record to indicate agreement.

7.b – The union has thirty (30) days from signing the book of record to obtain union membership's vote for ratification. The Union will notify the agency within three (3) days of the results of the ratification vote. If the CBA is not ratified, the union shall provide the specific articles it seeks to reopen along with the new proposals for negotiations no later than fifteen (15) days from its notification date to the agency. Failure to notify the agency by the deadline of the specific articles it seeks to bargain constitutes a waiver of the right to bargain over the article upon which the agreement will be submitted for Agency Head Review (AHR).

7.c – The agency will then have thirty (30) days after execution to complete AHR pursuant to 5 U.S.C. 7114(c).

7.d – If Agency Head disapproves the agreement, the parties will then meet promptly to arrange resumption of negotiations on the disapproved provisions only, in an effort to reach agreement. Should the Agency Head timely disapprove any provision, the union, within fifteen (15) days of being notified in writing of such disapproval, will provide notice to the agency and include their proposals of these provisions if it wishes to bargain over the disapproved provision(s). Once the union provides such notice, the parties will return to the bargaining table as soon as possible, but no more than fifteen (15) days after receipt of the union's notice. If the union does not respond within the fifteen (15) day requirement to bargain, the AHR language will be adopted.

Next, the Panel orders the parties to adopt Item 2.e from Agency Exhibit #1 instead of Factfinder Recommendation #8. The Factfinder did not provide a rationale for including the provision on subject matter experts from Agency Exhibit #2. Therefore, the Panel orders the parties to adopt the provision permitting subject matter experts as outlined in the Agency Exhibit #1 as it is fair and reasonable.

2.e – By mutual agreement of the PCNs, subject matter experts (SMEs) may attend to address any particular issue in the given field of their expertise. A SME may provide information only to the extent their specialized knowledge and presence is necessary for negotiations. SMEs will not directly participate in negotiations. SMEs will not be charged leave for this time.

Last, the Factfinder Recommendation #12 ordered language pertaining to negotiation preparation sessions from Agency Exhibit #2. As already explained,

Agency Exhibit #2 is the December 2020 TA that was rejected on Agency Head review, rather than the last best offer of either party. Accordingly, the Panel orders the parties instead adopt Items 3.a-f from Agency Exhibit #1, as modified below in italics, to provide the parties with adequate preparation time.²

3.a – After the final Agency Head Review (AHR) approval of the Ground Rules is received, the parties will exchange written proposals for articles of the CBA within thirty (30) calendar days, or sooner if the parties agree. Timelines for the exchange of written proposals will be extended upon mutual agreement of the Chief Negotiators.

3.b – Additional proposals may only be added by mutual agreement of the PCNs.

3.c. – Both parties agree that the current CBA format will be used as a guide for numbering or ordering of initial proposals.

3.d – The PCNs will meet prior to the start of negotiations and determine the order in which the articles will be on the table for discussion. If the PCNs cannot reach an agreement, the next article for discussion will be the lowest numbered article of the current CBA not yet set aside or bargained to completion.

3.e – Each article will be negotiated to completion unless either PCN sets aside the article or either party declares impasse. All proposals set aside will be brought back one time from being set aside prior to the conclusion of the negotiations. By mutual agreement of the PCNs the proposal may be set aside again.

3.f – Both PCNs must initial and date each page of agreed-upon articles or sections in the book of record, as they are completed (including during virtual negotiation sessions). Once initialed, a proposal will not be subject to further discussion unless there is mutual agreement by both PCNs to reconsider or revise the agreed-upon article or section. The Labor Relations Officer will be responsible for keeping the original signed documents in the book of record which will be available at each session.

The Panel's review of the Factfinder's recommendations also revealed that some of the recommendations conflict. Factfinder Recommendation #3, without rationale, accepts language from Agency Exhibit #3 that the Agency has the authority to determine the number of members on its negotiation team, and the Union would then be permitted to have an equal number of members on its

² The Panel notes that Factfinder Recommendations #6 and 9 include provisions covering matters from Items 3.g and h of Agency Exhibit #1.

team. In Factfinder Recommendation #10, the Factfinder without rationale, accepts the Union's proposal from Union Exhibit #1 that the parties will each have six members on their negotiation teams. The two recommendations are incompatible with each other.

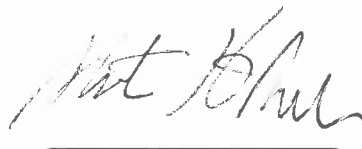
Here, the Panel finds it inappropriate to order Factfinder Recommendation #3 or #10 based on the issues outlined above. The Panel orders the parties to instead adopt Items 2.a and b, as modified below in italics, from Agency Exhibit #1 because it will provide a clear process for the parties to use in assembling their negotiation teams.

2.a – At each negotiating session, both negotiating teams will have an individual entrusted with all the authorities required in 5 U.S.C. 7114 (a)(4) and (b). While it is understood that it is management's right to assign work, for clarification purposes only, the individual that has the authority required by 5 U.S.C. 7114 (a)(4) and (b) will be identified throughout the remainder of this agreement as Primary Chief Negotiator (PCN). Each party reserves the discretion to change their PCN at negotiation sessions or to delegate an Alternate Chief Negotiator (ACN) who would also have this authority.

2.b – No later than two weeks prior to the first negotiation session, unless the parties mutually agree otherwise, the Agency shall designate the number of individuals representing the Agency, and the Union shall be entitled to an equal number of individuals on official time. Each party may utilize alternate team members who may be used in lieu of primary team members when a primary team member is unable to attend.

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

June 30, 2023