United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

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| In the Matter of<br><br>UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br>CENTER FOR DISEASE CONTROL AND PREVENTION,<br>ATLANTA, GA<br><br>And<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2883 | Case No. 19 FSIP 056 |

## DECISION AND ORDER

This case, filed by the U.S. Department of Health and Human Services, Center for Disease Control and Prevention, Atlanta, Ga. (Agency or Management) on July 2, 2019, concerns a dispute over 3 articles in the parties' successor collective-bargaining agreement (CBA) and was filed pursuant to 5 U.S.C. §7119 of the Federal Service Labor-Management Relations Statute. The American Federation of Government Employees, Local 2883 (Union) represents approximately 350 employees in medical and non-medical positions. The mission of the Agency is to protect public health and safety through the control and prevention of disease, injury, and disability in the United States and internationally. The American Federation of Government Employees, Local 2883 (Union) represents approximately 2,000 bargaining-unit employees in a variety of positions at the Agency's Atlanta and Miami facilities. The parties are signatory to a collective bargaining agreement (CBA) that expired on July 17, 2017. The agreement rolls over on an annual basis. The Federal Service Impasses Panel (Panel) asserted jurisdiction over this dispute in the manner discussed below.

## BARGAINING AND PROCEDURAL HISTORY

The parties had seven weeks of bilateral negotiations between October 2017 and November 2018. They received the assistance of the Federal Mediation and Conciliation Services (FMCS) for 3 days in January 2019. During this time, the Union alleged that five of Management's articles contained permissive topics of negotiations that the Union had no obligation to bargain over. As a result, in February 2019, the Union filed an unfair labor practice (ULP) charge against Management. As no further

progress could be made between the parties, the Mediator released them to the Panel on March 11, 2019. The Agency filed its request for Panel assistance on July 2, 2019.

On August 1, 2019, the Agency submitted an unsolicited "revised" final offer as to the five challenged articles to the Union and the Panel. The Union objected to the Agency's revisions. The Panel subsequently asserted jurisdiction over all articles in dispute, save for the five "revised" Management proposals, on September 17, 2019. The Panel asserted jurisdiction over all remaining articles in the Agency's request for assistance and directed the parties to submit all remaining disputed issues to FMCS Mediator Bobby Brown for a period of 45 days following that appointment. The Panel further informed the parties that, should any issues remain unresolved following mediation, the parties would be required to submit Written Submissions on every remaining disputed Article along with their final offers within 10 days of being released from mediation. The submissions would be limited to 1 page per remaining disputed article.

FMCS appointed Commissioner Bobby Brown to this matter on September 20, 2019. As a result of FMCS's assistance, the parties were able to resolve 35 articles.[1] On October 31, 2019, Mediator Thompson referred this matter to the Panel on 3 remaining articles. In accordance with the Panel's Order, the parties submitted their Written Submissions to the Panel on November 12, 2019.

## PROPOSALS AND POSITION OF THE PARTIES

Due to their length, the parties' proposals will not be set forth in the body of this Decision and Order. Rather, they are attached to this document and will be referenced as appropriate.

### 1. Article 8 – Union-Sponsored Training

#### I. Union Article and Position

Article 8 in the parties' existing CBA grants the Union 40 hours of official time per year to attend Union-sponsored training. The Union may obtain additional official time for these purposes, but only by mutual agreement. All training under this article must be of "mutual benefit" to the parties. The Union wishes to retain this language because it benefits the parties and "provide[s] the necessary skills, knowledge and abilities to ensure the union is providing the necessary assistance to all" Agency employees.

#### II. Agency Article and Position

The Agency proposes eliminating Article 8 altogether primarily because it creates an "undue administrative burden" upon the Agency as it requires the Agency to rely

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[1] The Panel takes this opportunity to thank Commissioner Brown for his diligent efforts and work in narrowing significantly the scope of this dispute.

upon public funding to support Union training. The Agency "estimates" that it has spent $70,000 in support of Union-sponsored training over the past decade. On an annual basis, five to six Union representatives usually petition the Agency to attend conferences/trainings. The Agency sees little return on this investment, and there is simply no need for a guarantee of 40 hours of official time per year. The Agency, however, has already agreed to provide official time "consistent" with 5 U.S.C. §7131.

III. Conclusion

The Panel will impose the Agency's language to resolve this dispute. The parties' efforts, or lack thereof, to support their positions resulted in a dearth of information for the Panel to assess their veracity. For example, although the Agency "estimates" that it has paid $70,000 over the course of a decade for training costs, it provided no evidence to support this claim, e.g., written statements, records, etc. The Union, however, did not provide much in the way of supporting evidence either. It makes a broad claim that training is beneficial to the Agency and the Union, but the Union did not offer any information to support this claim, e.g., examples of prior trainings that have assisted the parties.

The above evidence – or lack thereof – notwithstanding, the Panel believes the Agency's position is the more appropriate one. Although the Agency's $70,000 figure is unsupported, it is also the closest approximation to empirical data that is in the record on this topic. Additionally, the Agency acknowledges that is willing to provide official time for training pursuant to 5 U.S.C. §7131. While the Agency does not elaborate, it appears that the Agency is willing to provide official time in accordance with §7131(d), which permits the use of official time for numerous matters arising under the coverage of the Statute so long as that time is "reasonable, necessary, and in the public interest" and is mutually agreed upon the by the parties. Thus, the Agency's position still meets the Union's interest of receiving official time for training purposes. Rather, official time will no longer be a set amount, an amount that does not even appear to be supported by the record. Accordingly, the Panel will adopt Management's position in full.

2. Article 34 – Disciplinary and Adverse Actions

I. Union Article and Position

The Union proposes retaining Article 34 in its entirety. This article covers the topic of disciplinary and adverse actions.[2] It addresses a variety of topics including, among other things: the use of "progressive discipline" as "guid[ance]" barring severe situations; recognizing that discipline will be taken when necessary to "promote[ ] the efficiency of the service;" requiring Management to initiate discipline in a "timely manner;" the right for an employee to request a Union representative prior to that

[2] "Disciplinary actions" refer to personnel actions involving suspensions of 14 calendar days or fewer. By contrast, "adverse actions" are personnel actions concerning the imposition of suspensions of greater than 14 calendar days. *See* 5 U.S.C. §7512.

employee providing a statement; when punishment for off-duty conduct is permissible; and what information must be provided to the employee and the Union.

The Union believes that retention of all of the foregoing is necessary to support the idea that discipline is intended to correct and improve employee behavior rather than to punish employees. The existing language provides the Union with notice and representation, something that would be missing were the language removed from the contract.

II. Agency Article and Position

The Agency proposes a "simplified" version of this article. The Agency's proposal states simply that the Agency will adhere to all applicable laws, including Agency policies. Management claims that the existing article places an administrative burden upon the Agency by "expanding the statutory and regulatory requirements." Federal law protects employees during the discipline process, and a Health and Human Services (HHS) policy codifies these protections. The HHS policy also establishes timelines and notice requirements that supervisors must adhere to. All of the foregoing provides Management with the flexibility it needs to carry out the Agency's duties while balancing protections for employees who face discipline.

III. Conclusion

The Panel will impose a modified version of the Union's proposal to resolve this dispute. The parties have once again largely chosen to rely upon broad assertions rather than record evidence. Management complains of "administrative burden" but provides no evidence to establish specifics. Indeed, it failed to offer a single incident in which Management was burdened by the existing contract language. The Agency also makes much of an alleged HHS policy that provides sufficient protections to employees, but the Agency did not provide a copy of the policy or otherwise explain how this policy could be reviewed independently. Much more troublingly, the Agency did not offer any citations to the language contained therein. As such, it is difficult to gauge the Agency's intertwined claim that the CBA burdens the Agency and the HHS policy is an appropriate solution. The Union's arguments focus on protecting the rights of the Union and the employees, but does not address Management's concerns – inflated or not – that the contract hampers the Agency.

Given the paucity of the parties' arguments, it is appropriate to examine guidance from other appropriate sources. The Panel has recently issued several decisions in which it has recognized that President Trump's May 25, 2018, Executive Orders concerning Federal-sector collective bargaining serve as an authoritative voice of public policy on the topic of labor relations.[3] Of relevance to this dispute, Executive Order 13,389, "Promoting Accountability and Streamlining Removal Procedures Consistent

[3] *See, e.g., U.S. Dep't of Transp., FTA, Wash., D.C. and AFGE, Local 3313*, 19 FSIP 043 (November 15, 2019); *U.S. Dep't of Health and Human Services, Indian Health Service, Claremore Indian Hospital, Claremore, Oklahoma and AFGE, Local 3601*, 19 FSIP 031 (November 18, 2019).

with Merit System Principles" (Removal Order or the Order) addresses the topic of proposed removals due to disciplinary reasons. In this regard, the Order states that such removals should be a "straightforward process."[4] On the topic of timelines for proposed disciplinary removals, the Removal Order states that agencies should adhere to the ones set forth under Chapter 75 of Title 5, i.e., 5 U.S.C. §7501 et. seq. Thus, for example, employees should receive no more than 30 days of advance written notice of a proposed removal.[5] The Removal Order, then, establishes a ceiling for agencies to follow when they rely upon the proposed disciplinary action of a removal.

The Removal Order is silent on the topic of non-adverse action discipline, i.e., suspensions of 14 days or fewer. But, the Panel believes that the Order nevertheless provides some degree of guidance in this dispute, particularly in light of the parties' failure to adequately support their respective positions. As such, the Panel believes that the Union's proposal should be modified so that the guidelines under Title 5 apply to *all* proposed actions, whether they be non-adverse or otherwise. As is, the Union's language speaks to timeliness, but does not establish any hard parameters. The Panel's new language will address that gap. Union Proposal 34.3 will be modified to read (new language in bold):

> If the [Agency] believes that disciplinary or adverse action is necessary, such action will be initiated in a timely manner after the offense was committed or made known to the [Agency]. **An employee shall have an opportunity to submit a response to the proposed action. The timelines that apply for all proposed actions shall be those that are established by 5 U.S.C. §7513.**

Despite imposing the adoption of the above language, the Panel notes that the Removal Order is silent on several other topics discussed within the Union's proposal. For example, the Order does not address an employee's right to remain silent when faced with a potential criminal investigation as recognized under Union Proposal 34.1.[6] It also does not address the Union's language that requires a "nexus" between off-duty conduct and an employee's duties before they may be penalized for such conduct in Union Proposal 34.12.[7] And, perhaps most importantly to the Union, the Order is silent on Union language that requires the Agency to provide employees with notice of the right to have Union representation in certain situations and for the Union to receive information related to proposed discipline.

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4 E.O. 13,389, Section 2(a).

5 *Id.* at Section 2(g) (citing 5 U.S.C. §7513(b)(1)).

6 In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the United States Supreme Court held that a public employee is entitled to receive a warning regarding their constitutional right to be free from compulsory self-crimination, i.e., the right to remain silent, when they are the subject of an administrative investigation.

7 For an employee to be punished for off-duty misconduct, an agency must demonstrate a "nexus" between that misconduct and the agency's performance of its functions. *See, e.g., Doe v. Department of Justice,* 565 F.3d 1375, 1379 (Fed. Cir. 2009).

The Order is silent on the foregoing topics and, as already noted, the Agency has offered little in the way of substance as to why the foregoing items should be jettisoned from the existing contract. Management is of the contention that the HHS policy can satisfy the Union's interests. But, without having that policy in the record, it is difficult to assess the veracity of that claim. Indeed, it is possible that the HHS policy may not only undercut the Union's language, it may also be inconsistent with applicable law. It is simply difficult to say what it does and does not permit given the Agency's failure to adequately build the record. In light of the silence of the Order on the topics described above, and the Agency's inability to support its arguments, the Panel will allow the remainder of the Union's proposed language to remain as is with the exception to follow.

The Panel will strike language in Union Proposal 34.1 concerning the use of "progressive discipline." The Union has offered language stating that the "concept of progressive discipline *will* guide managers" in decisions concerning discipline. (emphasis added). In other words, the plain language of the Union's proposal establishes that Management "will" be required to rely upon the foregoing concept when assessing the appropriateness of penalties against employees who are charged with some sort of misconduct. But, the FLRA has long held that proposals establishing such a requirement are inconsistent with an agency's statutory right to discipline because they limit an agency's ability to assess an appropriate penalty.[8] Indeed, the Office of Personnel Management has recently issued guidance to Federal agencies that reiterate this principle and instruct agencies to avoid accepting such proposals as part of contract negotiations.[9] Based on all of the foregoing, the Panel will strike the following language from the second paragraph of the Union's proposed 34.1:

> The concept of progressive discipline will guide managers in making decisions regarding appropriate disciplinary or adverse actions. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal. Any of these steps may be bypassed when the severe nature of an employee's behavior makes a lesser form of discipline inappropriate.

3. Article 38 – Use of Facilities and Provisions

I. Agency Article and Position

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[8] *See, e.g., NTEU and U.S. Dep't of Treasury, Customs Service,* 46 FLRA 696, 768-69 (1992).

[9] *See* "Progressive Discipline and Table of Penalties in Penalty Determination for Federal Employees" at 3 (October 10, 2019) (available at https://www.chcoc.gov/sites/default/files/Guidance%20on%20the%20Use%20of%20Progressive%20Discipline%20and%20Tables%20of%20Penalties.pdf).

The Agency proposes modifying the existing Article 38, which grants the Union free office space and the use of other Agency equipment. Instead, the Union would be permitted to rent office space, which would put it on equal footing with other third parties that utilize Agency space. The Agency's proposed approach ensures that taxpayer-funded resources are utilized in an effective and efficient manner. Finally, Management notes that its proposal was crafted "independent from any Executive Order."

II. Union Article and Position

The Union proposes simply eliminating the existing article on this topic. Management has never provided any cost estimates or quotes for office space. Thus, it is possible that the Union could obtain better pricing from external sources. Accordingly, the Union requests that this article be dropped from the contract altogether.

III. Conclusion

The Panel will order the adoption of the Union's proposal. The Agency's proposal is intended to ensure that taxpayer funded resources are utilized properly by placing the Union on equal footing with other entities. The Union's proposal, however, accomplishes the same goal by creating a contract that is silent on the topic. That is, under the CBA, the Agency would not be required to undertake *any* action with respect to providing resources to the Union, paid or otherwise. In putting forward its position, the Union has made it clear and unambiguous that the Union is requesting to eliminate the current, existing language within the CBA altogether. The Panel's decision on this issue will do precisely that.

**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 above.

Mark A. Carter
FSIP Chairman

January 13, 2020
Washington, D.C.