

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF HOMELAND SECURITY,  
FEDERAL LAW ENFORCEMENT TRAINING  
CENTER

And

NATIONAL TREASURY EMPLOYEES UNION

Case No. 20 FSIP 056

**DECISION AND ORDER**

The U.S. Department of Homeland Security, Federal Law Enforcement Training Center (Agency or FLETC) in Glynco, Georgia filed the instant request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, concerning a dispute from negotiations over two articles related to the grievance procedure and merit promotions in a new collective bargaining agreement (CBA). The mission of the FLETC is to provide training on firearms, driving, tactics, and investigations to law enforcement professionals to help them fulfill their responsibilities safely and proficiently.

The National Treasury Employees Union (NTEU or Union) represents a bargaining unit consisting of approximately 723 non-professional employees located at FLETC facilities in Glynco, Georgia; Artesia, New Mexico; Cheltenham, Maryland; and Charleston, South Carolina. The employees mostly encumber law enforcement specialists that provide law enforcement training in the aforesaid locations. The parties are covered by a 2014-CBA between the FLETC and the American Federation of Government Employees, who represented the bargaining unit until 2017 at the FLETC. In December 2017, NTEU was certified by the Federal Labor Relations Authority (FLRA) as the exclusive representative of the FLETC's bargaining unit. As a result, the parties began negotiating over a new contract. The parties are abiding by the terms of the FLETC-AFGE contract until they reach agreement over a new CBA.

**BACKGROUND AND PROCEDURAL HISTORY**

The parties initiated negotiations over a new CBA on May 14, 2018, at the FLETC's Headquarters in Glynco, Georgia. The parties opened up 45 articles in the FLETC-AFGE contract for negotiation. The parties met in 2018, from May 14 to 18; June 4 to 8; July 23 to 27; August 6 to 10 and 20 to 24; September 10 to 14; October 15 to 19 and 22 to 26; November 26 to 30; and December 17 to 20. In 2019, the parties bargained from March 11 to 15; May 13 to 17; July 30 to August 2; and September 23 to 27. As a result of those negotiations, the parties

agreed to withdraw two articles from the CBA and reached tentative agreements on 33 articles, leaving 10 articles in dispute.

From November 4 to 8, 2019, the parties participated in mediation with the Federal Mediation and Conciliation Service (FMCS) Mediator, Barry Brown over the 10 remaining articles. During mediation, the parties reached agreement on four articles. On November 22, 2019, Mediator Brown released the parties from mediation. On December 19, 2019, the Agency filed a request for Panel assistance in Case No. 20 FSIP 023 over the six articles in dispute: Article 13 Alternate Work Schedule; Article 20 Investigations; Article 25 Negotiated Grievance Procedure; Article 27 Access to Facilities and Services; Article 28 Union Representation and Official Time; and Article 38 Merit Promotion.

On April 3, 2020, the Panel found that the parties were not at impasse with respect to Articles 20 and 27. Specifically, the Panel concluded that the parties did not complete bargaining over those articles. As a result, the Panel declined jurisdiction for good cause under its regulations over the case.<sup>1</sup>

As a result of the Panel's determination, the parties resumed mediation with the assistance of FMCS from May 6 to May 8, 2020. During mediation with FMCS Mediator G. Kent McVay, the parties reached agreement over Articles 13; 20; 27; and 28. The parties, however, could not fully reach agreement over Article 25 Negotiated Grievance Procedure and Article 38 Merit Promotion. On May 8, 2020, Mediator McVay released the parties from mediation. On June 2, 2020, the Agency filed its second request for Panel assistance in the instant case.

On July 22, 2020, the Panel sent the parties its procedural determination, asserting jurisdiction over Articles 25 and 38. The Panel ordered the parties to a Written Submissions procedure, with their statements of position due on August 3, 2020, and their rebuttal statements due on August 10. The Union timely provided its statement of position, but the Agency did not. On August 4, Counsel for the Agency responded that she never received notification of the Panel's July 22, 2020, procedural determination.

On July 22, the Panel sent its procedural determination letter via email to the Agency's Chief of Workforce Relations, the individual who filed the case on behalf of the Agency, and was the Agency's point of contact throughout the investigation. A few moments after the Agency's Counsel notified the Panel that the Agency did not receive the procedural determination, she sent a subsequent email indicating that the letter was located and that the Chief of Workforce Relations had inadvertently overlooked the email. She requested an extension of time to submit the Agency's statement of position.

That same day, August 4, the Union responded that it objected to any extension and would be prejudiced if one was granted because the Agency would have the Union's statement of position in hand as it drafted its own position statement. The Agency's request for an extension to submit its statement was granted and it was permitted to submit the statement by August 6. The parties were advised that the Panel would take each party's argument into

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<sup>1</sup> 5 C.F.R. § 2471.6(a)(1).

consideration. The Panel also permitted the parties an extension to submit their rebuttal statements by August 17. The Agency provided its position statement on August 5. The parties timely provided their rebuttal statements.

The Panel will consider the Agency's statement of position. Although the Chief of Workforce Relations had indicated that she would be the Agency representative, in the Agency's request for assistance, it lists Agency Counsel as the Agency representative. Therefore, she should have been included on the Panel's correspondence to the parties. Further, a review of the Agency's statement of position does not indicate that it used the Union's position statement to formulate its statement. As such, the Panel will consider the Agency's position statement.

## **POSITIONS OF THE PARTIES**

### **I. Article 25 Negotiated Grievance Procedure**

#### **a. Agency's Position**

##### **i. Section 3.D**

The Agency states that the parties have agreed on the exclusion of 11 matters from the grievance procedure. The Agency proposes to add an additional exclusion, identified in its section 3(D): "Any removal from Federal Service, which is appealable to the Merit Systems Protection Board." The Agency contends that the Panel is bound to follow the framework established in *AFGE v. FLRA (AFGE)*.<sup>2</sup> In this respect, the Agency states that it satisfied its burden under *AFGE*, and puts forth its rationale for excluding this matter from the parties' grievance procedure.

The Agency asserts that it is proposing to exclude removals from the negotiated grievance procedure because of flawed arbitration decisions negatively impacting the Agency; the Merit Systems Protection Board (MSPB) process is more timely, efficient, and consistent; and the Agency has no meaningful right of appeal. Additionally, the Agency states that while it is not relying on Executive Order (EO) 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, the EO directs agencies to exclude removals from the negotiated grievance procedure.

With respect to the Agency's first argument for excluding this matter from the grievance procedure, the Agency states that the FLETC is a small component of the Department of Homeland Security. It employs approximately 1500 employees spread over four locations to conduct its mission to train Federal law enforcement officers. The Agency contends that because of its size and the specialized nature of its work, the delays and uncertainty of arbitration decisions related to removal actions have caused significant disruption. The Agency states that this was evident in the case of J.H.<sup>3</sup>

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<sup>2</sup> 712 F. 2d 640 (D.C. Cir. 1983).

<sup>3</sup> Agency Ex. 1.

The Agency states that it removed J.H. from his position as a contract specialist for altering contract documents. The Arbitrator ordered the Agency to reinstate the employee to his position as a contract specialist. However, because the employee already lost his contracting warrant, the Agency states that he is no longer qualified for his position and is unable to perform the full scope of his duties, taxing a department with limited personnel resources.

To its second argument, the Agency contends that arbitrations have typically lasted three to four months; however, hearings are often delayed. In the J.H. case, the Arbitrator rendered his decision more than two years after the employee's removal. The Agency states that the MSPB's standard to adjudicate appeals is 120 days, which benefits both parties. The Agency also states that the utilization of MSPB is less expensive, since the parties do not have to pay for an arbitrator or court reporter. Finally, the Agency states that there has been only one removal action processed through the parties' negotiated grievance procedure since NTEU was certified as the employees' exclusive representative in December 2017, and it is still not resolved.

To the last argument, the Agency states that it has limited options to appeal grievance removals. In this respect, the Agency states that the MSPB has held that agencies lack an independent right to seek review of arbitration decisions.<sup>4</sup> To seek such review, the Director of OPM must exercise his or her discretion when appealing a final arbitration decision over MSPB related matters such as removals.<sup>5</sup> The Agency argues that it was impacted by this lack of review in the case of J.H. Further, the Agency contends that processing removals through the grievance-arbitration process creates procedural issues that the FLRA will not hear when the underlying matter relates to a removal.

## ii. Section 13

The next area of disagreement in Article 25 is section 13, which concerns the length of time for each step under the negotiated grievance procedure. The Agency asserts that 5 U.S.C. § 7121(b)(1) requires the grievance procedure to be fair and simple, provide for expeditious processing, and include procedures for representation and binding arbitration of grievances that are not resolved. The Agency states that its proposals fulfill these requirements.

The Agency has proposed a 14-calendar day period for individual steps to occur throughout most of the grievance procedure. The Agency states that its proposed timeframe is closer to the status quo than the Union's. Further, the Agency states that the Union has not provided any evidence to suggest that the current time period of 15 calendar days has been ineffective for the parties. Despite that, the Agency argues that the Union seeks to expand the initial time period for filing a grievance (from 15 calendar days to 30 work days); however, the Agency argues that the Union has not alleged a single case that was time barred because the Union did not have enough time to present a grievance. Moreover, the Agency states that it has routinely provided extensions to the Union for additional time.

The Agency contends that its proposed timeframes are consistent and easy to remember, resulting in less procedural errors. The Agency asserts that the managers and employees would

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<sup>4</sup> *U.S. Army Corps of Engineers*, 51 MSPR 517, 518 (1991).

<sup>5</sup> 5 U.S.C. § 7703(d).

only need to remember a single time period for grievances. The Agency states that its proposal to use calendar days instead of work days will also simplify contract administration. In this respect, the Agency states that even though its administrative functions operate Monday to Friday, its operations continue 24 hours per day, 365 days per year. The Agency asserts that the Union's proposal refers to "days" as work days unless otherwise provided, and does not specify whether "work days" refers to the normal administrative schedule, or the days that an employee is required to be at work. The Agency states that Article 26, Section 2.B. defines "days" as calendar days. For this reason, the Agency states that the Union's proposal that the parties abide by work days instead of calendar days is problematic.

The Agency does state that it determined that one of its proposals (Article 25, Section 13(B)(4)) was inconsistent with a provision that the parties agreed to in Article 26, Arbitration. Article 26, Section 3A states, "[w]ithin thirty (30) days from the employee's receipt of a final grievance decision, requests for arbitration must be submitted in writing..." The Agency states that the two provisions should be consistent. As a result, the Agency has amended its last best offer to reflect this change, which will now permit the Union 30 days to request arbitration.

### **iii. Section 18**

The final area of disagreement in Article 25 is contained in section 18. The Agency's proposal allows employees suspended for more than 14 days to proceed directly to Step 3 of the grievance process. The Agency states that there have only been eight disciplinary and adverse action grievances filed since the Union was established as the employees' exclusive representative in December 2017. The Agency contends that four of the actions were mitigated during the grievance process. Of the remaining four cases, the Agency states that only one, the J.H. case, actually proceeded to arbitration.

The Agency argues that the Union's proposal allows any employee affected by a disciplinary action, even one as minimal as a letter of reprimand to proceed directly to arbitration. The Agency contends that this would lead to additional unnecessary expenses and delays. The Agency states that employees would be permitted to unfairly threaten the Agency with thousands of dollars in expenses and lost hours over what may be minor disciplinary actions, such as letters of caution.

Finally, the Agency states that the cost and inefficiency of grievance actions must be considered. Typically, the Agency states that the cost for a hearing ranges from \$1150 to \$2800 per day. The Agency concedes that this cost is small compared to its budget of approximately \$330 million in fiscal year 2021; however, the Agency believes that the cost represents an unnecessary expense to taxpayers. The Agency states that arbitration fees are not the only expense associated with litigating a grievance; a significant number of man-hours are required to respond to discovery requests and prepare for and engage in litigation.

## **b. Union's Position**

### **i. Section 3.D**

The Union's proposal maintains the status quo, which does not contain an exclusion for removal actions appealable to the MSPB. The Union states that if the parties reach an impasse over the scope of the negotiated grievance procedure, the Panel is to impose a broad scope grievance procedure unless the limited scope proponent can persuade it to do otherwise.<sup>6</sup> The Union argues that in a recent decision,<sup>7</sup> the Panel reiterated this standard by stating "that a proponent of a grievance exclusion bears the burden of justifying that exclusion. A party proposing a grievance exclusion must 'establish convincingly that in [its] particular setting, its position is the more reasonable one'." The Union contends that in this case, the Agency has failed to satisfy its burden to convincingly establish any basis for excluding removals from the grievance procedure, as the Agency has presented no support for the exclusion.

The Union argues that the Agency submitted evidence, which shows that since the Union became the exclusive representative of the bargaining unit in December 2017, the parties have had only one removal action processed through the grievance procedure. Thus, the Union states that the Agency has not demonstrated how the continued availability of the grievance procedure to employees for removal actions has been and would be burdensome on the FLETC. The Union contends that the Agency's reference to the J.H. case as an example of one arbitration that the Agency believes was wrongly decided by the Arbitrator does not constitute persuasive evidence for overturning the presumption in favor of a broad scope grievance procedure.

The Union states that in *Social Security Administration*,<sup>8</sup> the Panel rejected the agency's argument to exclude removals because the MSPB has the ability to timely process appeals. The Union asserts that the Panel noted that the agency in that case failed to provide any empirical data to buttress its claim regarding the time-processing contrasts between MSPB's policy to adjudicate all cases within 120 days and the arbitration process taking up to two years for a final resolution. Given the lack of data, the Union states that the Panel found that the agency did not satisfy its burden under *AFGE*. The Union argues that the same is true here. The Union further states that MSPB has been without a quorum since 2017, and as a result, has had no authority to resolve appeals.

The Union also states that the parties have reached a tentative agreement in Article 26, section 3.C. That section requires the parties to schedule arbitrations within six months of the selection of the arbitration unless the parties mutually agree otherwise. The Union asserts that the Agency has not provided any argument or evidence to support its position that the agreed upon timeframe does not adequately resolve its concerns over timely processing cases.

Finally, the Agency notes that it has no meaningful right of appeal of arbitration decisions. The Union contends that under 5 U.S.C. 7703(d), the Agency has the ability to

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<sup>6</sup> See, e.g., *National Association of Government Employees, Local R3-77*, 59 FLRA 937 (2004).

<sup>7</sup> *USDA, OGC*, 2020 FSIP 012 (2020).

<sup>8</sup> 2019 FSIP 019 (2019).

petition the Director of OPM to request a review of an arbitration decision over a removal. Therefore, the Union argues that the Agency has the ability to appeal these decisions.

## **ii. Section 13**

In the next disputed section of Article 25, section 13 over timeframes, the Union proposes 30 days as the deadline for filing a grievance, while the Agency proposes only 14 calendar days. The status quo indicates that a grievance must be filed within 15 calendar days. The Union states that its proposal to change the status quo to 30 days is consistent with other federal sector contracts and reflects an understanding that this is the first contract for the parties, and is in recognition of the fact that the parties will be training stewards and supervisors on the new contract. The Agency proposes 14 calendar days for its grievance responses, but the Union states it will then only have 14 calendar days to 1) discover a grievable issue; 2) designate a steward to handle the grievance; 3) meet with the grievant(s) and other relevant witnesses to prepare the grievance; 4) draft the grievance; and 5) submit it for processing.

Finally, the Union contends that the Agency's proposal contradicts the tentative agreement the parties already reached in Article 26, Section 3.A. The Union states that the parties agreed that arbitration must be invoked no later than 30 calendar days after receipt of the Agency's grievance decision. The Union states that its proposal is consistent with the parties' agreed upon provisions, and should be adopted to avoid confusion and litigation over which deadline applies.

## **iii. Section 18**

The last disputed section of this Article involves the Agency's proposal in Art. 25, 18.A, which would allow employees to present a grievance at the final step (step 3) for suspensions of more than 14 days, but would require employees to proceed through the three steps of the grievance process for all other disciplinary actions before the Union may invoke arbitration. The Union's proposal for this section is that final Agency decisions on disciplinary and adverse actions may be invoked by the Union directly to arbitration, within 30 days of receipt of the final decision. Unlike other types of grievances, the Union contends that disciplinary actions entitle employees to present oral and/or written replies, which Agency deciding officials must issue a final decision. The Union explains that the employee grieving a disciplinary action will proceed through the grievance process often asking lower level management officials at each grievance step to overturn the final decision already made by the Agency's designated deciding official. The Union states that this means that under the Agency's proposal, the parties would be forced to proceed through the grievance process for three steps for most of disciplinary actions even though the Agency has issued a final decision explaining the basis for the action. In doing so, the Union states that the Agency's proposal serves to increase the Union's need for additional official time in order to conduct the representational activity necessary to prosecute grievances. By eliminating these unnecessary grievance steps following a disciplinary action, the Union argues that its proposal provides for more expeditious processing of disciplinary action grievances and reduces the amount of official time necessary for the Union to conduct representational activities.

## c. Conclusion

### i. Section 3.D

**The Panel will impose the Union's proposal and require the Agency to withdraw its proposal.** The first disagreement under Article 25 is over removal actions that are appealable to the MSPB. This matter involves the exclusion of a topic from the parties' negotiated grievance procedure. As such, the Panel is guided by the framework established by the U.S. Court of Appeals for the District of Columbia in *AFGE*.<sup>9</sup> In *AFGE*, the court held that if impasse is reached over the scope of a negotiated grievance procedure, the expectation of the Court would be that the Panel would impose a broad scope grievance procedure unless the limited-scope proponent can persuade it to do otherwise.<sup>10</sup> The FLRA has recognized that the Panel has the inherent authority to impose a limited scope grievance procedure where the Panel determines that the limited-scope proponent establishes convincingly, in the particular setting, that its position is the more reasonable one.<sup>11</sup>

Removal actions can be a result of employee misconduct or performance under 5 U.S.C. §4303(a) and 5 U.S.C. §7513(a). The Agency proposes to exclude all such actions appealable to the MSPB, while the Union proposes to allow employees to continue to grieve such actions. The Agency's rationale for excluding removals is due to flawed arbitration decisions, delays in the arbitration process, and because there is no meaningful right of appeal.

The Agency cites to one arbitration decision to support its claim, i.e., the J.H. case. In that decision, the Arbitrator found that the Agency did not have just cause to remove the grievant and as a result, he was reinstated with back pay. The Agency, however, claims that the employee can no longer perform the full scope of his duties because he does not hold a contracting warrant and is no longer qualified for his position. While the Agency's claim may be true, one Arbitrator's decision does not satisfy the Agency's burden to demonstrate convincingly in this particular setting that removal actions should be excluded from the parties' grievance procedure.

The Agency also argues it has no meaningful right of appeal; however, as the Union points out, under 5 U.S.C. § 7703(d) the Agency can request that OPM seek to obtain review in the U.S. Court of Appeals for the Federal Circuit of a removal action if the Director of OPM determines that the arbitrator erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the arbitrator's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.<sup>12</sup> The Agency contends that it was impacted by this limited avenue of review in the J.H. case. However, the result from one decision does not establish that future decisions will be precluded from an appeal.

The Agency argues that the arbitration process has resulted in delays for removal actions compared to the MSPB's 120-day timeframe to adjudicate appeals. The fact that the Agency

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<sup>9</sup> *AFGE*, 712 F. 2d 640 (1983).

<sup>10</sup> *Id.*

<sup>11</sup> *National Association of Government Employees, Local R3-77*, 59 FLRA 937 (2004).

<sup>12</sup> *HHS*, 41 FLRA 755 (1991).



has only litigated one removal action since the Union was certified as the exclusive representative in 2017, in a bargaining unit of 723 employees does not establish the Agency's claim that continuing to process these actions under the parties' grievance procedure would lead to onerous delays. Further, as the Union notes, the MSPB is without a Board and has been without a Board since January 2017. Appealing a removal to the MSPB is currently not an effective or efficient way for the parties to resolve these disputes.

Finally, the Agency notes that it is not relying on EO 13939, yet it references the EO and states that the EO directs agencies to exclude removals from the negotiated grievance procedure. The EO, however, does not mandate that agencies exclude removals. Instead, it states that agencies "shall endeavor to exclude" removal actions from the grievance procedure.<sup>13</sup> The Panel has consistently treated this section of the EO as important public policy and has required the proponent of the exclusion to demonstrate convincingly that these actions should be excluded from the grievance procedure. As the Agency has not demonstrated support for excluding these actions and established convincingly that its position is the more reasonable one, the Panel will adopt the Union's proposal for section 3.D and not permit the Agency to exclude removals from the parties' negotiated grievance procedure.

## ii. Section 13

**The Panel will adopt the Agency's proposal.** Next, the parties disagree over the timeframes during each step of the grievance procedure. First, the Union argues that the Agency's proposal is not consistent with agreed upon language that permits the Union to invoke arbitration within 30 days from the step 3 grievance decision. However, the Agency amended its proposal to reflect the 30-day timeframe. Therefore, the Union's argument is now moot.

Second, the Agency proposes a 14-calendar day timeframe throughout most of the steps in the grievance procedure. Conversely, the Union proposes various timeframes throughout the grievance process, such as 30 calendar days to initiate the grievance, 10 days to hold a grievance meeting, 14 days to file the step 2 grievance, 7 days to meet with the step 2 grievance official, 14 days to provide a grievance response, and 14 days to file a step 3 grievance. The Union has not sufficiently articulated the need to increase the timeframe to file a grievance or to vary the timeframes throughout the grievance process. Further, the Agency has pointed out that the Union has not been barred from filing a grievance due to lack of time and that it would be more efficient for the parties to follow one timeframe in the grievance procedure. The Union did not provide any evidence rebutting this argument.

The Agency's proposal offers the parties consistency throughout many of the steps of the grievance procedure. Consistency and stability are important since this contract will be the first agreement for the parties, as the Union points out; the easier it is to remember timeframes throughout the grievance procedure, the less likely it is that parties will have processing issues that may lead to litigation. Therefore, the Panel will adopt the Agency's proposed timeframes under section 13.

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<sup>13</sup> EO 13939, section 3.

### **iii. Section 18**

**The Panel will adopt the Agency's proposal with modification.** The final section in dispute in Article 25 is section 18. The dispute is whether the Union can proceed directly to arbitration when grieving a final Agency decision over disciplinary and adverse actions. The Agency proposes to allow employees who are suspended for more than 14 days to proceed to the final step of the grievance procedure. Conversely, the Union proposes that it have the ability to proceed straight to arbitration on all final Agency decisions over all disciplinary and adverse actions.

The Panel will permit the Union or the employee the ability to proceed directly to the final step only over adverse actions because it will preserve resources by preventing the duplication of meetings at the first and second step of the grievance procedure over these actions. Adverse actions are the most serious personnel actions, and involve suspensions, removals, reductions in grade and pay, and furloughs of 30 days or less. For other types of disciplinary actions, such as written letters of reprimand or oral counselings, the need is not pressing to secure a final decision on the matter because, for example the employee is not losing pay due to a suspension from work.

The Agency contends that it costs money to arbitrate disciplinary and adverse actions; however, it also requires time and resources to hold several meetings over a matter that has already been decided. Minimizing the number of unnecessary meetings and proceeding to the last step in the grievance procedure will reduce the costs associated with holding numerous meetings, while also allowing the parties an opportunity to address the matter with the hope of reaching a resolution before determining whether arbitration is necessary to resolve the issue. Therefore, the Panel will modify the Agency's proposal, as ordered below to allow all adverse actions to proceed to the final step, not just suspensions of more than 14 days, since the Agency did not provide an argument against including the other actions, i.e., removals, reductions in grade and pay, and furloughs of 30 days or less in its proposal.

“Suspensions, removals, reductions in grade and pay, and furloughs of 30 days or less may be presented at the final step of the grievance procedure.”

## **II. Article 38 Merit Promotion**

### **a. Agency's Position**

The Agency states that its proposals are consistent with the FLETC's existing merit promotion plan.<sup>14</sup> The Agency also states that its proposals are designed to adhere to merit system principles set forth in 5 U.S.C. § 2301, as well as 5 C.F.R. § 335.103(b)(4). The Agency asserts that those principles require that opportunities for selection and advancement be determined solely on the basis of relative ability, knowledge, and skills of candidates after fair and open competition, and seek to ensure that all qualified candidates receive an equal opportunity. The Agency contends that its proposals are not only fair and efficient, but have been successfully implemented for the past 14 years.

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<sup>14</sup> Agency Ex. 6.

## **i. Section 6**

The Agency asserts that in section 6.B., the Union proposes that internal candidates who are absent from duty for a legitimate reason should be permitted to submit a “late” application up to 10 work days after his or her return to work. The Agency has proposed to allow the applicant five work days, which it states is consistent with the current policy.<sup>15</sup> The Agency argues that the Union has not substantiated the need for the additional time because candidates have missed out from being considered due to lack of time to apply to a position.

The Agency states that the Union also proposes in section 6.C. that the Agency permits employees to use duty time and government resources to apply for internal positions and for the Agency to provide for electronic storage of resumes and applications. The Agency again states that the Union has not demonstrated a need for its proposal. The Agency asserts that it currently allows employees to ask for permission to perform these tasks on duty time, but the Union’s proposal creates an affirmative right to duty time, which could result in grievances and allegations that an employee was not properly considered for a position if the Agency did not permit the employee time to work on his or her application. Lastly, the Agency states that the systems currently utilized by the FLETC are USAjobs.gov and Monster.com, which allow the employees to store their resumes and applications on its websites. The Agency asserts, however that it cannot speculate as to whether these sites will continue to do so indefinitely.

## **ii. Section 7**

The Agency states that the biggest difference between its proposal and the Union’s is found in section 7, Evaluating Procedures for Minimally Qualified and Eligible Applicants. The Agency asserts that its proposal provides a description of each stage of the merit staffing process from developing the area of consideration, eligibility requirements, calculating applicant ratings, the resumes, the interview criteria and process, and finally selection referral. The Agency states that its proposals are designed to assess a candidate’s qualifications for a particular position and adhere to the Office of Personnel Management’s (OPMs) regulations and merit system principles.

The Agency explains that the method it uses to determine applicant ratings in section 7(C) is based on answers that applicants provide during the self-assessment portion of the application. Each question has a numerical weight attached to it and depending on how the employee responds to the questions, dictates how many points the applicant receives for that question. Applicants are required to provide a detailed narrative, along with any applicable documentation necessary to support their answers. At the conclusion of the assessment, an automated system totals the applicant’s score. If the applicant exceeds the pre-established cut-off score, the application is reviewed by the Human Capital Office.

The Agency asserts that its proposals correctly place the responsibility on the applicant for providing documentation to support the information that he or she includes in their resume and self-assessment. Conversely, the Agency states that the Union’s proposals place that burden on the Agency by saying, “FLETC will verify the following of the BQ candidates: last

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<sup>15</sup> Agency Ex. 6, Page 9.

rating of record and award points.” For some vacancies, the Agency states that it receives 50 to 100 applications for consideration. The Agency argues that requiring it to verify this type of documentation for internal candidates would create a significant administrative burden. The Agency states that the additional time required to carry out this task would negatively impact FLETC’s ability to quickly hire qualified candidates.

The Agency argues that its proposal continues to allow hiring officials to use interviews as a discretionary tool to determine the best qualified candidate for a given position. The Agency asserts that this discretion will allow FLETC to maintain maximum flexibility and to avoid a costly and time-consuming interview process when superior candidates are clear. The Agency contends that the Union’s proposal requires FLETC to interview everyone on the list of qualified candidates if it interviews even a single individual. The Agency asserts that there is no statutory requirement or OPM regulation that requires an agency to interview all candidates for consideration.

Finally, the Agency argues that the Union’s proposal, which requires it to consider performance ratings and awards as a basis for awarding points would create a system where it is almost impossible for external candidates to achieve scores as high as internal candidates. The Agency states that many candidates may work for agencies that do not rate employees on the same scale, may come from an organization that did not have a budget to provide employees performance awards, or even from the private sector where the company may not engage in any of these practices. The Agency contends that the Union’s proposal would leave the Agency open to a claim that it was intentionally disfavoring bargaining unit employees if a selection is made from the external list, particularly since the internal candidate will have likely scored higher under the Union’s proposal based upon his or her performance rating and awards. The Agency asserts that such actions could be interpreted as providing an unfair advantage to internal candidates and considered a prohibited personnel practice under 5 U.S.C. §2302(b)(6).

### **iii. Section 8**

The Agency states that the Union’s proposal to limit the validity of a certificate of eligible employees to be considered for a vacancy to 120 days is not practical. The Agency asserts that the amount of time that it requested, 240 days is based on current practices and past experiences. The Agency states that holding a certificate open for a period of 240 days allows FLETC to avoid advertising a new position and duplicating previous efforts where a pool of vetted candidates already exists, and is consistent with OPM regulations.

### **iv. Section 11**

The final area of disagreement between the parties that the Agency addresses relates to affording candidates who have been referred but not selected, the right to meet with the hiring official. The Agency argues that this obligation could result in dozens of meetings with employees, preventing managers and employees from performing their Agency work. The Agency also states that these meetings have the potential to result in grievances, particularly if the applicant disagrees with the hiring official about his or her relative merits.

## **b. Union's Position**

### **i. Section 6**

In section 6.B, the Union proposes that employees returning to work due to being out on leave receive appropriate consideration for vacancy announcements so long as they submit an application within ten (10) business days after returning to duty, provided a selection has not been made. The Union states that the additional five days to submit an application in the Union's proposal is reasonable from the standpoint of providing returning employees the chance to get back to work and draft their application. The Union states that these employees will not be coming back to work simply to apply for jobs, but will also need the time to get situated with their day-to-day duties.

For Section 6.C., the Union states that its proposal makes clear that the proposed amount of duty time that an employee will be permitted to apply for a position must be "reasonable" and that the time is only to be used "to perform all requirements...associated with applying for the position announced under this Article." The Union argues that this limitation prohibits any "misuse" of time by the employee that the Agency may be concerned about if the Union's proposal were adopted.

### **ii. Section 7**

The Union states that the most determinative section of this Article involves the parties' proposals over the rating and ranking process contained in section 7. The Union's section 7 proposal begins with a description of the evaluation process. Notably, the Union contends that its proposal makes clear that, regardless of which applicants end up making the Agency's best qualified list, the Agency maintains the right to select from any pool of applicants, including external candidates.

The Union states that its proposal provides for much more transparency and objectivity by requiring the Agency to rate, rank, and assess employees based on their potential to perform in the announced position, and based on the applicant's relevant awards, performance appraisal scores, and performance in relevant work. In this respect, the Union states that in order to determine the employees that are qualified for a position, the Union's scoring system requires management to assign scores based on the applicant's answers to questions; performance ratings and awards received; add those scores, multiply by 30 percent, then add 70 points to that total for each applicant in order to create a score between 0 and 100. From there, the Union proposes that the Agency will select the top four applicants plus one additional name to refer to the selecting official. Conversely, the Union states that the Agency's scoring system is not clear and lacks specificity. In this respect, the Union contends that the Agency's system does not elaborate on its selection process, i.e., how management will formulate its scores for each employee.

The Union states that the Agency's proposal provides no limit on the number of candidates that might be submitted to the selecting official for promotion. The Union contends that the Panel resolved an impasse that included a dispute over the appropriate number of

candidates to be referred to the selecting official in *Department of Homeland Security, Bureau of Customs and Border Protection (CBP)*.<sup>16</sup> More specifically, the union in that case proposed that the top four candidates be referred to the selecting official, whereas the agency proposed to refer candidates who were within 12 points of the top candidate as long as there were at least five and no more than 15. The Panel stated that “the Employer’s proposal would allow too many candidates to be referred and, therefore, too much discretion for the selecting official.” The Union argues that the same logic should apply here.

The Union states that 5 C.F.R. § 300.103 requires “a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used.” The Union argues that the Agency is unable to establish any rational relationship between the employment practices proposed in its proposal and the position to be filled. Conversely, the Union argues that its proposal demonstrates such a connection.

The Union asserts that the reason it proposes in section 7.F.5 that the Agency interview all of the best qualified employees if it interviews one employee is to ensure fairness in the interview process. The Union argues that the Agency’s proposal increases its liability if it selectively interviews employees competing for promotion. The Agency claims that its “applicant assessment and hiring procedures are consistent with merit principles and do not introduce factors (such as the receipt of a performance or cash awards) that are beyond the control of the applicant in the hiring process.” However, the Union argues that it strains credulity to think that the Agency should not consider performance or cash awards received by bargaining unit employees in the performance of work related to the position being filled. The Union states that its proposal only requires the Agency to give credit to employees for performing work related to the position being filled. The Union argues its approach will ensure that the most highly qualified employee is selected for the position.

### **iii. Section 8**

In Section 8.C.3, the Agency proposes that certificates of eligible employees remain valid for 240 days after its issuance date, whereas the Union proposes only 120 days. The Union believes that the Agency’s proposal is inconsistent with merit system principles because it denies the Agency the chance to select from among the best qualified candidates. The Union argues that with an additional 120 days, the potential applicants for a position may become significantly more qualified for the vacancy rendering the certificate inapplicable if, for example, they become certified in a new skill or receive an award that makes them much more qualified than they were at the time they originally applied for the position.

### **iv. Section 11**

Finally, in section 11, the Union proposes that employees who are referred but not selected for a promotion under Article 38 be given a chance to meet with the selecting official to find out how the employee may improve their standing for future merit promotions. The Union argues that this proposal serves the parties mutual interests in developing the skills and careers

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<sup>16</sup> 10 FSIP 10 (2011).

of employees. In this respect, the Union states that the purpose of its proposal is only to provide applicants the chance to request a meeting with their immediate supervisor to discuss how the employee may improve his or her standing in the event another position is filled in the future.

### **c. Conclusion**

#### **i. Section 6**

**The Panel will adopt the Agency's proposal.** The parties disagree over the processes and procedures for merit promotions contained in Article 38 of the parties' new CBA. The first area of disagreement is section 6, over the number of days that an employee may submit a late application. The current policy, addressed in the Agency's Merit Staffing Plan, FLETC Directive 63-35A indicates that candidates who are on approved leave or official travel for at least half of the open period of an announcement may submit an application within five business days after returning to duty. The Agency's proposal is consistent with the FLETC's current policy, while the Union proposes that employees receive 10 business days to submit a late application. The Union also proposes that the Agency afford employees a reasonable amount of duty time when applying for a position, the ability to use the Agency's computers, and the ability to store resumes in an automated application system.

The Union has not supported the need for its proposal. As the Agency notes, the Union has not demonstrated that the current policy does not adequately provide employees with a sufficient amount of time to submit an application when returning to work due to an approved reason, such as being away on military leave. The Union did not provide evidence that employees have been unable to apply to open positions because they have not had enough time to submit their application upon returning to duty. The Union also did not demonstrate the need for employees to use Agency resources and duty time to apply for positions. The employees may request, and supervisors are free to grant the use of duty time and Agency resources to prepare an application for a position. Further, the Agency demonstrated that it does not use an internal application process which would allow employees to store their application materials as the Union proposes. Instead, it uses such external systems as USAjobs and Monster, which employees may use to store these documents. As a result of the Union not providing support for its proposal, the Panel will impose the Agency's section 6 language.

#### **ii. Section 7**

**The Panel will impose the Agency's proposal with modification.** The next area of disagreement is section 7 of Article 38, which addresses the evaluation procedures of applicants. The Agency proposes an evaluation system that scores applicants on a 100-point scale, with minimally qualified applicants scoring at least 70 points. The Agency's proposal also permits it the discretion to determine whether to interview applicants, the number of applicants to interview, the criteria it will use to rate applicants, and to determine the number of employees that will be referred to the selecting official.

The Union proposes an intricate scoring system for candidates that requires management to assign scores based on the applicant's answers to questions; performance ratings and awards received; add those scores, then multiply by 30 percent, and add 70 points to that total for each

applicant in order to create a score between 0 and 100. The Union did not provide rationale for this complicated system, nor did it explain its purposes. The Union similarly does not provide sufficient justification for requiring management to refer the top four candidates plus an additional applicant to the selecting official other than to state that the arrangement is similar to another Federal agency's contract.

The Union points to the *CBP* Opinion to reinforce its position.<sup>17</sup> In that Opinion, a Panel Member limited the number of candidates referred to the selecting official to the top four candidates because the Agency's proposal to refer no more than 15 candidates to the selecting official would allow "too many candidates to be referred and, therefore, too much discretion to the selecting official." While a Panel Member did issue this Opinion, the Panel is not bound by *stare decisis* and issues decisions on a case-by-case basis, weighing the parties' positions based on the strengths of their arguments in each dispute. The Union has not demonstrated support for its proposal in this case.

The Union's scoring system also requires management to interview all of the applicants that are referred to the selecting official if management determines to interview just one applicant. This proposal could have the effect of requiring management to interview dozens of candidates, which may impede the Agency's ability to timely select a candidate to fill a position. Conversely, the Agency's proposal allows it the discretion to determine whether to conduct interviews. This discretion is important since some advertised positions will draw a large number of applicants. Permitting the Agency the ability to determine whether to interview candidates on a position-by-position basis will allow it to assess the potential interest for a position and whether it is feasible to conduct interviews.

Finally, the Union argues that the Agency's proposal does not draw a connection between the competitive employment practices to select a candidate and the position as required by C.F.R. § 300.103. The Union's argument has merit. The Agency's proposal does not consider employee performance ratings and awards when evaluating candidates. Under 5 CFR § 335.103, it describes the promotion procedures that agencies must employ to ensure a systematic means of selection according to merit. Specifically, section (b)(3) states that "[d]ue weight shall be given to performance appraisals and incentive awards." Thus, the Agency's argument that consideration of such information may result in a prohibited personnel action is not justified. As such, the Panel will require the Agency to comply with the aforesaid regulation under section 7 (B) of its proposal by imposing the following language:

"The Agency shall afford due weight to performance appraisals and incentive awards consistent with applicable law, rule, and regulation."

### iii. Section 8

**The Panel will adopt the Agency's proposal with modification.** The penultimate section of disagreement between the parties is over the length of time that a certificate of eligible employees for a position will remain valid. The Agency's proposal permits it to use a certificate for up to 240 days after issuance and potentially longer under "usual circumstances." The Union's proposal permits the Agency to use a certificate for up to 120 days after issuance.

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<sup>17</sup> 10 FSIP 10 (2011).



The Union argues that the Agency's proposal is inconsistent with merit system principles; however, the Union does not identify the merit system hiring principle which it is relying upon to make its argument.

Under the OPM's Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices,<sup>18</sup> it specifically states "OPM does not dictate a specific period of time for which the Certificate of Eligibles is valid. The expiration of the Certificate of Eligibles is governed by your internal agency policies and you have the discretion to extend the expiration date consistent with your policies." Consistent with the Handbook, the Agency's proposal will allow certificates to remain valid for 240 days.

If the Agency has the ability to use a certificate that is in existence for a longer period of time, it will save time and resources to fill that position. In this respect, it will allow the Agency to use the certificate if it seeks to fill a second position that is the same or similar to one that was previously advertised. Alternatively, the Agency may review the certificate and conclude that the employees are not suitable for the position advertised and determine to create a new certificate. Thus, the Agency's proposal is more effective and efficient than the Union's because it permits the Agency the discretion to determine whether to use an already created certificate of eligible employees to fill another position rather than recreate a certificate that already exists. The Panel will, however, modify the proposal to remove "[e]xcept for unusual circumstances" to ensure that the timeframe does not exceed 240 days.

#### iv. Section 11

**The Panel will adopt the Agency's position to not include this language in the CBA and require the Union to withdraw its proposal.** The final area of disagreement is over whether the contract will contain a clause that enables an employee who is not selected for a position to meet with the selecting official and discuss how the employee may improve his or her standing for a future a position. The Union did not demonstrate the need for including this language in the parties' agreement. It did not indicate that there have been a significant number of employees who have expressed interest in meeting with the selecting official over a position that they applied for, but were not selected, and their request was denied. Employees may always request a meeting with the selecting official and the selecting official may choose to hold that meeting, but the Union did not establish that this language should be in the parties' new agreement.

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<sup>18</sup> OPM, Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices (June 2019), [https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo\\_handbook.pdf](https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo_handbook.pdf).

**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

November 17, 2020  
Washington, D.C.

**ATTACHMENTS**

- Parties' Proposals

Summary of Articles at impasse as of June 2020

Article & Section(s)	Agency Final Offer Language	Union Language
<p><b>Article 25: Negotiated Grievance Procedure, Section 3.D.</b></p>	<p><b>Section 3.D.:</b> The following matters are excluded from the grievance procedure:</p> <p>Any removal from Federal Service, which is appealable to the Merit Systems Protection Board.</p>	<p>The Union proposes to strikethrough this exclusion.</p>
<p><b>Article 25: Negotiated Grievance Procedure, Section 13.</b></p>	<p><u>Step 1: Informal Resolution Stage</u></p> <p>(1) To increase the ability to resolve problems expeditiously, a grievance should initially be raised as soon as practical, but no later than <b>fourteen (14) calendar days</b> of the incident giving rise to the complaint or the date upon which the employee became or should have become aware of the incident. The Step 1 grievance shall be presented in writing by submitting to the immediate supervisor within the grievant’s chain of command a written request for a meeting with the lowest level management official available with the authority to resolve the complaint. The request must include a brief-description of each allegation of the complaint. If the first-line supervisor is not the lowest level management official with the authority to resolve the complaint, the first line supervisor will forward the request as soon as practicable to the appropriate official to resolve the grievance, and notify the employee and the Union representative of the name and location of the appropriate official where the grievance was forwarded.</p>	<p><u>Step 1: Informal Resolution Stage</u></p> <p>(1) To increase the ability to resolve problems expeditiously, a grievance should initially be raised as soon as practical, but no later than <b>thirty (30) days</b> of the incident giving rise to the complaint or the date upon which the employee became or should have become aware of the incident. The Step 1 grievance shall be presented in writing by submitting to the immediate supervisor within the grievant’s chain of command a written request for a meeting with the lowest level management official available with the authority to resolve the complaint. The request must include a brief description of each allegation of the complaint. If the first-line supervisor is not the lowest level management official with the authority to resolve the complaint, the first line supervisor will forward the request as soon as practicable to the appropriate official to resolve the grievance, and notify the employee and the Union representative of the name and location of the appropriate official where the grievance was forwarded.</p> <p>(2) The lowest level management official available with the authority to resolve the complaint will, in collaboration with NTEU Chapter 338, schedule and hold the requested meeting within <b>ten (10) days</b> of the date of receipt of the</p>

## Summary of Articles at impasse as of June 2020

(2) The lowest level management official available with the authority to resolve the complaint will, in collaboration with NTEU Chapter 338, schedule and hold the requested meeting within **fourteen (14) calendar days** of the date of receipt of the request. If the complaint is not resolved at the meeting, the management official shall provide a written response that addresses each allegation in the grievance to the grievant and Union representative within **fourteen (14) calendar days** of the conclusion of the meeting.

(3) Unless an extension is requested and agreed to by the parties, the failure of the responding party to timely respond or hold the Step 1 meeting will entitle, but not require, the moving party to advance the grievance to Step 2.

### A. Step 2: Formal Stage

(1) If the grievance problem-solving meeting in Step 1 does not resolve the grievance, the party raising the issue shall submit the grievance form (Appendix D), as described in this Article, to the second-level supervisor and WRB within **fourteen (14) calendar days** of receipt of the Step 1 denial of the grievance. If the second-line supervisor is not the management official with the authority to resolve the complaint, the second-line supervisor will forward the request as soon as practicable to the appropriate official to resolve the grievance, and notify the employee and the Union representative of the name and location of the appropriate official where the grievance was forwarded. **At this step, the Union reserves the right to supplement or revise the grievance.**

request. If the complaint is not resolved at the meeting, the management official shall provide a written response that addresses each allegation in the grievance to the grievant and Union representative within **ten (10) days** of the conclusion of the meeting.

(3) Unless an extension is requested and agreed to by the parties, the failure of the responding party to timely respond or hold the Step 1 meeting will entitle, but not require, the moving party to advance the grievance to Step 2.

### C. Step 2: Formal Stage

(1) If the grievance problem-solving meeting in Step 1 does not resolve the grievance, the party raising the issue shall submit the grievance form (Appendix D), as described in this Article to the second-level supervisor and WRB within **fourteen (14) days** of receipt of the Step 1 denial of the grievance. If the second-line supervisor is not the management official with the authority to resolve the complaint, the second-line supervisor will forward the request as soon as practicable to the appropriate official to resolve the grievance, and notify the employee and the Union representative of the name and location of the appropriate official where the grievance was forwarded. **At this step, the Union reserves the right to supplement or revise the grievance.**

(2) Within **seven (7) days** of receipt, the second-level supervisor or designee will meet with the affected employee to discuss and attempt to resolve the grievance.

(3) The Agency's written response will address each allegation in the grievance and shall be provided to the grievant and Union representative within **fourteen (14) days** of the close of the

## Summary of Articles at impasse as of June 2020

- (2) Within **fourteen (14) calendar** days of receipt, the second-level supervisor or designee will meet with the affected employee to discuss and attempt to resolve the grievance.
- (3) The Agency's written response will address each allegation in the grievance and shall be provided to the grievant and Union representative within **fourteen (14) calendar days** of the close of the meeting, unless the parties mutually agree to an extension.
- (4) Unless an extension is requested and agreed to by the parties, the failure of the responding party to timely respond or hold the Step 2 meeting will entitle, but not require, the moving party to advance the grievance to Step 3.

### **B. Step 3: Final Stage**

- (1) If the employee is not satisfied with the resolution of the grievance after Step 2, a Step 3 grievance may be filed by submitting the Step 2 denial and the Step 2 grievance form (Appendix D) to the FLETC Director (or designee) within **fourteen (14) calendar days** following receipt of the Step 2 decision.
- (2) Prior to holding the third step grievance meeting, the FLETC Director (or designee) will review, investigate, and obtain such information, advice and assistance as desired. Absent mutual agreement, all meetings at Step 3 will be held within **fourteen (14) calendar days** of the receipt of the grievance at the Step 3 level. During the

meeting, unless the parties mutually agree to an extension.

- (4) Unless an extension is requested and agreed to by the parties, the failure of the responding party to timely respond or hold the Step 2 meeting will entitle, but not require, the moving party to advance the grievance to Step 3.

### **D. Step 3: Final Stage**

- (1) If the employee is not satisfied with the resolution of the grievance after Step 2, a Step 3 grievance may be filed by submitting the Step 2 denial and the Step 2 grievance form (Appendix D) to the FLETC Director (or designee) **fourteen (14) days** following receipt of the Step 2 decision.
- (2) Prior to holding the third step grievance meeting, the FLETC Director (or designee) will review, investigate, and obtain such information, advice and assistance as desired. Absent mutual agreement, all meetings at Step 3 will be held **within seven (7) days** of the receipt of the grievance at the Step 3 level. During the grievance meeting, the FLETC Director (or designee) shall meet with the grievant(s) and designated Union representative in an effort to reach satisfactory settlement.
- (3) The FLETC Director (or designee) will issue a final decision to the grievant and Union representative within **ten (10) days**.
- (4) If the employee is not satisfied with the final decision, the Union may invoke arbitration within **thirty (30) days** of receipt of the decision by following the process in Article

Summary of Articles at impasse as of June 2020

	<p>grievance meeting, the FLETC Director (or designee) shall meet with the grievant(s) and designated Union representative in an effort to reach satisfactory settlement.</p> <p>(3) The FLETC Director (or designee) will issue a final decision to the grievant and Union representative within <b>fourteen (14) calendar</b> days.</p> <p>(4) If the employee is not satisfied with the final decision, the Union may invoke arbitration within <b>thirty (30) calendar</b> days of receipt of the decision by following the process in Article 26: Arbitration. If no Step 3 decision is provided and no extension is granted, the Union may, in accordance with Subsection (2) above, invoke arbitration within <b>thirty (30) calendar days</b> of the date the decision was due.</p>	<p>26: Arbitration. If no Step 3 decision is provided and no extension is granted, the Union may, in accordance with Subsection (2) above, invoke arbitration within <b>thirty (30) days</b> of the date the decision was due.</p>
<p><b>Article 25: Negotiated Grievance Procedure, Section 18.</b></p>	<p><b>Section 18.A. For suspensions of more than fourteen (14) days, unless otherwise excluded from the grievance process, may be presented at the final step of the grievance procedure as outlined in this Article.</b></p>	<p><b>Section 18. Final Agency decisions on disciplinary and/or adverse actions may be invoked by the Union directly to arbitration pursuant to Article 26: Arbitration, i.e. within thirty (30) days of receipt of the final decision.</b></p>

Summary of Articles at impasse as of June 2020

<p><b>Article 38, Section 6.</b></p>	<p><b>Section 6. Application Procedures.</b></p> <p><b>A.</b> To be considered for announced positions, employees must apply in accordance with the application procedures contained in the announcement. All employee application materials must be received by the closing date of the announcement.</p> <p><b>B.</b> Employees within the area of consideration who are absent for legitimate reasons (e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments) will receive appropriate consideration for those positions to which they apply. Late applications must be <b>submitted within five (5) business days after returning to duty, provided a selection has not been made.</b> Proof of the employee’s legitimate reason must be provided. The rating, certification, and selection process will not be delayed to allow for receipt of late applications.</p>	<p><b>Section 6. Application Procedures.</b></p> <p><b>A.</b> To be considered for announced positions, employees must apply in accordance with the application procedures contained in the announcement. All employee application materials must be received by the closing date of the announcement.</p> <p><b>B.</b> Employees within the area of consideration who are absent for legitimate reasons (e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments) will receive appropriate consideration for those positions to which they apply. Late applications must be submitted <b>within ten (10) business days after returning to duty, provided a selection has not been made.</b> Proof of the employee’s legitimate reason must be provided. The rating, certification, and selection process will not be delayed to allow for receipt of late applications.</p> <p><b>C. Upon request to the immediate supervisor, and subject to workload requirements, employees will be permitted a reasonable amount of duty time, and to use the Employer’s equipment (i.e., computers), to perform all requirements (including developing resumes) associated with applying for positions announced under this Article. To reduce the amount of time required, employees will store electronic resumes in the automated application system so that they may be used in applying to subsequent announcements.</b></p>
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Summary of Articles at impasse as of June 2020

<p><b>Article 38, Section 7</b></p>	<p><b>Section 7. Evaluation Procedures for Minimally Qualified and Eligible Applicants.</b></p> <p><b>A.</b> Applicants meeting basic qualification and eligibility requirements will be evaluated for positions and receive a rating, based on how well they meet the job-related competencies contained in the announcement.</p> <p><b>B.</b> For applicants who are evaluated based on answers to job-related questions, scores will be assigned to each answer.</p> <p><b>C.</b> Applicant ratings will be transmuted based on a total possible score of one hundred (100) points. Those who receive a minimum qualifying score will be considered minimally eligible. Those who receive an eligibility score of seventy (70), will be considered minimally qualified.</p> <p><b>D.</b> Certificates will consist of a list of the names of the qualified candidates eligible for consideration to fill the vacancy. The list will contain both competitive and non-competitive applicants.</p> <p><b>E.</b> Any selection technique used by the hiring official will be uniformly applied to all applicants referred to the hiring official and will include the following steps:</p> <p>Step 1. HCO Candidate Evaluation</p> <p>When the Merit Promotion announcement closes, HCO will perform the following actions:</p> <p>1) If applicable, consult with the manager on the use of a cut-off score;</p>	<p><b>Section 7. Rating, Ranking and Assessing Internal Applicants. [Submitted to Agency on 11-7-19]</b></p> <p><b>A. General</b></p> <ol style="list-style-type: none"><li>1. The Agency may simultaneously post vacancy announcements for, and separately rate, rank, and assess, as applicable, both internal and external candidates for such vacancies.</li><li>2. Under section 7106(a)(2)(C) of the Statute, management has the discretion to select candidates for positions from any appropriate source.</li><li>3. Internal Applicants will be rated and ranked on their potential to perform in the announced position. The applicant's education, training, experience, awards and performance appraisal that are related to the vacancy to be filled will be considered. The rating and ranking process the Employer uses will be in accordance with law, rule and regulation.</li><li>4. Employees (including Wage Grade employees) who applied for and met the eligibility requirements for a vacancy (including any selective placement factors previously established and announced by the Employer) shall be ranked as described below. An employee should review, and is encouraged to print, his/her application before submission.</li></ol> <p><b>B. Validation</b></p> <p>The ranking of applicants will be based on the Competencies for the position to be filled using responses to job related questions completed during the application</p>
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## Summary of Articles at impasse as of June 2020

- 2) Confirm that the applicant meets the area of consideration;
- 3) Determine if the applicant meets the specialized experience and time in grade requirements;
- 4) Upon request from the hiring manager, validate the self-assessments of competitive candidates;
- 5) Prepare the certificate of eligibles.

### Step 2: Managerial Resume and Interview Criteria Development

Prior to the receipt of the certificate of eligibles, the manager will prepare resume and interview rating criteria. The resume and interview rating criteria will be reviewed and approved by the selecting official.

### Step 3: Candidate Resume Evaluation

All resumes of applicants on the certificate of eligibles (see Step 1) will be evaluated using the approved resume rating criteria. Interviews may be conducted based on the results of the resume scoring.

### Step 4: Interview Process

If interviews are conducted, the approved interview rating criteria will be utilized to evaluate the interviews.

### Step 5: Selection Referral

The combined resume review and interview results, and supervisory reference checks, will be used to determine the top candidate(s) for selection. The manager or approving official may choose to conduct a second round

process. The applicant's responses to the questions will determine their potential to perform in the vacant position. Competency questions will be developed in accordance with 5 C.F.R. § 300, Subpart A. Consistent with subsections 7C and 7D, below, points will also be added for related awards and the employee's rating of record.

### C. Awards

1. Using the effective date of the award, points for awards will be credited as follows: one (1) point for each related award, up to a maximum of three (3) points for related performance awards (includes time off awards in lieu of monetary awards), or related Quality Step Increases (QSI), effected in the last three (3) years.
2. If the Employer decides that an award listed in subsection 7C1, above, is not related to the position being filled, the Employer will notify the employee in writing of the reasons for the determination.

**D. Ranking.** In processing competitive actions covered by subsection 7A of this Article, the following provisions will be used to rank applicants for all bargaining unit positions:

1. The applicant's potential to perform in the position being filled will be scored using the applicant's responses to questions related to the Competencies of the position, which will include evaluating experience directly related to the position being filled, and the applicable crediting plan. Up to eight (8) points will be assigned for each Competency (maximum of forty (40) points) and will be based on the answers to questions and/or groups of questions.

## Summary of Articles at impasse as of June 2020

of interviews, and if that occurs, established criteria will be used for candidate evaluation.

A recommendation for selection must be reviewed and approved by the selecting official and then submitted to the approving official.

**F.** In an effort to provide both a manageable and adequate list of referrals to management, HCO staff, at the hiring official's discretion and request, may adjust the number of referrals on a certificate and only refer highly qualified applicants with sustained assessment scores that exceed a specific cutoff (e.g., only refer applicants that score 95 or higher based on a large number of applicants).

**G.** If the hiring official chooses to conduct interviews, they may interview one or more of the candidates on the certificate. A standard set of questions will be used for all candidates who are interviewed; however, this does not limit the interviewer from asking clarifying questions. Questions used in the interview process and any notes will be kept by the hiring official. Interviews may be conducted in person or by telephone or videoconference (or equivalent method).

**H.** An employee's accumulation or balance of annual or sick leave may not be considered by the selecting official, or manager as a basis for selection or promotion.

2. Assign points to the overall rating achieved on the applicant's last rating of record as follows:

57 points: Achieved Excellence  
 51 points: Exceeded Expectations  
 17 points: Meets Expectations  
 7 points: Minimally Successful  
 0 points: Unacceptable

3. Assign points for related awards consistent with subsection 7C above.

4. Add the scores obtained in subsections 7D1, 7D2, and 7D3 above.

5. Multiply the result by thirty percent (30%) and round-off to two (2) decimal places.

6. Add seventy (70) points to obtain the final score.

**E. Verification.**

Before a BQ certificate is issued and referred to the selecting official, FLETC will verify the following of the BQ candidates: last rating of record and award points.

**F. Referral of Candidates**

1. All applicants will be treated uniformly to the greatest extent possible.

2. If, at any time during the verification or interview process, the Employer properly determines that a BQ applicant provided inaccurate information on his/her resume and/or in responses to ranking questions, the BQ applicant will be removed from

## Summary of Articles at impasse as of June 2020

		<p>further consideration and replaced with the next best qualified applicant(s).</p> <ol style="list-style-type: none"><li>3. Any selection technique utilized by the selecting official will be uniformly applied to all BQ applicants referred to the selecting official.</li><li>4. An employee's accumulation or balance of annual or sick leave may not be considered by the selecting official, or manager as a basis for selection or promotion.</li><li>5. If the selecting official interviews any one (1) applicant referred for selection then all applicants referred for selection on that certificate will also be interviewed subject to the following:<ol style="list-style-type: none"><li>a. The selecting official may conduct the interview by her/himself or as a member of an interview panel.</li><li>b. Questions used in the interview process and the Employer's notes will be recorded and kept in the file. This shall not be construed to require that identical questions be asked of each applicant.</li></ol></li><li>6. When interviewing applicants for placement, the Employer will comply with OPM regulations.</li><li>7. The selecting official will receive a list of BQ applicants in rank order along with the appropriate supporting documentation such as the resume, performance appraisal, or transcript.</li><li>8. The BQ applicants will be the top four (4) applicants plus one (1) additional name for each additional vacancy. All tied candidates will be referred.</li></ol>
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Summary of Articles at impasse as of June 2020

		<p>9. In accordance with applicable laws, rules and regulations, any applicant on the BQ list who declines in writing a selection offer will be replaced by the next higher ranking qualified applicant.</p> <p><b>G. Selection and Documentation.</b> Upon conclusion of the ranking process, a selection certificate shall be prepared by the Agency and contain the following information:</p> <ul style="list-style-type: none"> <li>a. names of all applicants found BQ in rank order, including total BQ score;</li> <li>b. the name of the selecting official; and</li> <li>c. the names of selected applicants.</li> </ul> <p><b>H.</b> The Employer will maintain a copy of all selection certificates for a period of at least two (2) years. The Employer will maintain promotion or competitive selection files in accordance with regulatory requirements.</p>
<p><b>Article 38, Section 8</b></p>	<p><b>Section 8. Selection Procedures.</b></p> <ul style="list-style-type: none"> <li><b>A.</b> Employees are not to be charged leave to attend interviews for positions with FLETC; however, if the Agency provides an alternate method for participating in the interview at their duty station and the employee declines to utilize that method, the employee's accrued leave will be utilized for travel time between FLETC sites.</li> <li><b>B. Management may make selections for appointments from among properly ranked and</b></li> </ul>	<p><b>Section 8. Selection Procedures.</b></p> <ul style="list-style-type: none"> <li><b>A.</b> Employees are not to be charged leave to attend interviews for positions with FLETC; however, if the Agency provides an alternate method for participating in the interview at their duty station and the employee declines to utilize that method, the employee's accrued leave will be utilized for travel time between FLETC sites.</li> <li><b>B. Hiring officials may choose any applicant referred among those on the best-qualified list.</b> Nothing will prevent the employer from making a greater number of selections from a</li> </ul>

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	<p><b>certified candidates for promotion; or any other appropriate source.</b> Hiring officials may choose any applicant referred among those on the best-qualified list. Nothing will prevent the employer from making a greater number of selections from a certificate than the number of vacancies initially identified in the announcement, provided doing so is consistent with government-wide rules and regulations.</p> <p>C. Hiring officials will make selections in a timely manner. Except for unusual circumstances a certificate will not be <b>valid for more than two hundred and forty (240) days</b> after its issuance date.</p>	<p>certificate than the number of vacancies initially identified in the announcement, provided doing so is consistent with government-wide rules and regulations.</p> <p>C. Hiring officials will make selections in a timely manner. Except for unusual circumstances, certificates <b>will not be valid for more than one hundred twenty days (120)</b> after its issuance date.</p>
<p><b>Union’s Article 38, Section 11</b></p>	<p>N/A</p>	<p><b>Section 11. Post-Selection Actions.</b> Upon request by an employee referred but not selected under his procedure, the selecting official will meet with the employee for the purpose of discussing how the employee may improve his/her standing in the event another position is filled using this procedure in the future.</p>