

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF HOMELAND SECURITY,
FEDERAL PROTECTIVE SERVICE

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 918, AFL-CIO

Case No. 20 FSIP 066

DECISION AND ORDER

The U.S. Department of Homeland Security, Federal Protective Service (Agency) filed a 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 over ground rules to the parties' successor collective agreement (CBA). The Agency's mission is to prevent, protect, and respond to terrorism and criminal acts, and other hazards threatening the U.S. government's infrastructure and services. The American Federation of Government Employees, Local 918, AFL-CIO (Union) represents a nationwide bargaining unit consisting of approximately 850 employees, which predominantly consists of law enforcement officers. The parties are covered by a three-year CBA that took effect on July 20, 2011, and expired on July 20, 2014. It has renewed automatically each year and remains in effect until the parties reach a new agreement.

BARGAINING AND PROCEDURAL HISTORY

On January 16, 2020, the Agency notified the Union that it wanted to reopen the parties' CBA, consisting of 42 articles.¹ The parties initiated ground rules negotiations for a new CBA on March 14 and continued to bargain remotely on March 16 and April 9, 2020. The parties then received virtual mediation assistance from the Federal Mediation and Conciliation Service (FMCS) on June 22 to June 25, 2020. The parties agreed to several proposals within their ground rules agreement during their negotiations, but were unable to reach a full agreement over six proposals. On June 25, 2020, the FMCS Mediator released the parties from mediation. As a result, on July 13, 2020, the Agency filed the instant request for Panel assistance.

¹ The Agency also notified the Union that it intended to terminate the permissive subjects contained in the parties' CBA. The Agency has not yet terminated those subjects.

On August 25, 2020, the Panel asserted jurisdiction over five of the six proposals in the parties' ground rules agreement.² The Panel ordered the parties to a Written Submissions procedure, with their position statements due September 4, 2020, and their rebuttal statements due September 11, 2020. Both parties timely provided their responses.

I. PROPOSALS AND POSITIONS OF THE PARTIES

a. Agency's Proposals and Position

The Agency proposes in section 4.1 of its ground rules agreement to commence successor CBA negotiations on November 1, 2020. In section 4.2, the Agency proposes that the parties will attempt to complete CBA negotiations within six months from the first negotiation session. In section 4.3, the Agency proposes that the parties negotiations will be conducted during the six-month timeframe from November 1, 2020 to May 31, 2021 either by VTC, Skype, teleconference, email, or in the locations and on the dates and times mutually agreed to by the parties. In section 4.4, the Agency proposes that if the parties have not reached agreement after six months, either party may make a request for assistance to FMCS and the Panel, and that both procedures will be conducted in Washington, D.C. Finally, in section 7.3.1, the Agency proposes that in the event the Agency head disapproves one or more articles on Agency head review, that each party shall pay for its own travel if those negotiations are conducted in person.

The Agency asserts that the Union acted in bad faith during the parties' negotiations in order to delay bargaining. The Agency states when it first notified the Union that it wished to renegotiate the parties existing CBA in January 2020, the Union responded that it had no desire to renegotiate the CBA. The Union finally agreed to meet and bargain, but would not do so until April 2020.

The Agency states that the Union's initial proposal limited the length of the parties negotiations by the number of sessions (12) rather than the number of months. In response, the Agency proposed that the parties negotiate for four months. The Union submitted a counter-proposal in June 2020, which limited the parties' negotiations to six months. The Agency states that the Union sought to tie the length of the parties' negotiations to the Agency's agreement on proposal 2.3.³ However, the Agency declined to accept that offer, as it viewed proposal 2.3 as non-negotiable. Thereafter, the Agency states that on June 23, the parties agreed to limit the length of the negotiations to six months. However, the Agency asserts that the Union modified this proposal in its last best offer sent to the Agency on June 25 to a 12-month negotiations period. In a last attempt to reach an agreement, the Agency states that it offered to agree to the Union's proposal in 7.3.1, that would provide the Union travel costs for any bargaining that

² The Panel declined to assert jurisdiction over proposal 2.3 for good cause under 5 C.F.R. § 2471.6(a)(1) to allow the pending negotiability appeal over that proposal to resolve the parties' duty to bargain question.

³ As previously noted above, the Panel declined jurisdiction over this proposal. The Union proposed, "[i]n accordance with Article 43(A) of the 2011 CBA between NPPD and AFGE Local 918, the automatic renewal of the CBA will not occur in 2020 because FPS Management furnished written notice to the Union on January 16, 2020 citing its desire to renegotiate the CBA. However, the 2011 CBA will remain in full force and effect until the new CBA is effective. The parties recognize this provides for continuity of operations and continues known expectations of the bargaining unit until the new CBA becomes effective."

occurred as a result of the Agency head review process in exchange for the Union's commitment to a six-month timeline for negotiations. The Union declined to agree.

The Agency asserts that if the Union had not withdrawn its agreement over the parties' six-month bargaining schedule, the sole outstanding issue for the parties to resolve would have been the negotiability of section 2.3, which is currently pending before the Federal Labor Relations Authority (Authority). However, the Agency contends that because the Union did in fact withdraw its agreement, the parties are now before the Panel, ten months after the Agency sought to begin negotiations with no ground rules in place.

To address the Union's concern over the proposed six-month bargaining schedule, the Agency argues that its section 4 proposals do not limit the parties' negotiations to only six months. Instead, it requires the parties to negotiate for a minimum of six months, then if the parties are at impasse, either party may request FMCS assistance, followed by Panel assistance. The Agency asserts that its proposals provide the parties the option to seek third-party assistance after six months, whereas the Union seeks to require a minimum of 12 months of negotiations before either party can request assistance.

The Agency argues that six months is an adequate time for the parties to reach an agreement. The Agency asserts that if the Union tries to delay the parties' negotiations, then the Agency should not be bound to a 12-month negotiation schedule before it can request third-party assistance. The Agency states that if the Union does indeed come to the table with the intent to negotiate in good faith, then six months is an appropriate period of time to bargain a successor agreement.

Finally, the Agency states that as of March 30, 2020, the Union indicated in its annual financial report that it had a total of \$103,021 available in its budget. The Agency argues that based on this report, the Union can afford to pay for its own travel to renegotiate, if necessary and feasible after Agency head review.

b. Union's Proposals and Position

In section 4.1, the Union proposes that the parties will start successor CBA negotiations on November 1, 2020, or 30 days after the Panel and the Authority issue their respective decisions in this matter, whichever occurs later. In section 4.2, the Union proposes that the parties will attempt to complete CBA negotiations within 12 months from the first CBA negotiation session. In section 4.3, the Union proposes that the parties will conduct bargaining by either VTC, Skype, teleconference, email, or in the locations and on the dates and times mutually agreed to by the parties. In section 4.4, the Union proposes that in the event the parties do not reach agreement after 12 months, either party may make a request for assistance to FMCS, and FMCS along with Panel procedures will be conducted in Washington, D.C. Finally, in section 7.3.1, the Union proposes that in the event the Agency head disapproves one or more articles on Agency head review, the Agency shall pay for the Union's travel to negotiate in person.

The Union argues that negotiations should not begin until the ground rules have been finalized in their entirety. The Union contends that this will allow the Panel and the negotiability appeal pending with the Authority to conclude. The Union also states that it believes contract negotiations will take approximately 12 months for the parties to complete. In support of this assertion, the Union states that the parties CBA negotiations in 2011 lasted over 18 months.

The Union states that the Panel should not impose the Agency's offer for six months of negotiations. The Union asserts that the Agency is facing unprecedented times due to civil unrest and COVID-19 throughout the country. As a result, the Union argues that its negotiators are needed to support the Agency's mission and are currently deployed all around the country to assist with security and protecting federal facilities. For example, the Union states that a law enforcement inspector on its negotiation's team is preparing to deploy to Portland, Oregon to assist with security concerns. The Union contends that given the current circumstances of the country, there is an increased likelihood that some sort of operational emergency may require the parties to suspend contract negotiations. Therefore, the Union states that having a shortened time period to negotiate, as the Agency proposes will not be beneficial to the parties.

Finally, the Union contends that it negotiated over the ground rules in good faith by agreeing to conduct the CBA negotiations using various types of technology, such as VTC or Skype and to pay for its own travel unless the Agency head disapproved articles on review. The Union asserts that if the parties reach an agreement, but portions of it fail Agency head review, then the Agency should pay for the Union's travel because the Agency will be the party responsible for requiring the parties to renegotiate.

II. ANALYSIS AND CONCLUSION

The Panel will impose the Agency's proposals with modification. The parties' main disagreement is over the length of time that they will engage in negotiations over their successor CBA. First, the parties each address and defend whether they engaged in good faith negotiations during their ground rules bargaining. The Panel's role is not to assess whether the parties bargained in good faith. Instead, it is to help the parties reach a resolution over the proposals that they could not resolve during bargaining, despite their efforts to engage in negotiations and mediation assistance.⁴ The Panel concluded when it asserted jurisdiction that the parties bargained to impasse. Therefore, the matter is appropriately before the Panel.

The Panel has consistently written that it is in favor of effective and efficient bargaining that will bring about a resolution to the parties' negotiations in a timely manner. The Agency's proposals best effectuate this goal. The Agency's proposals require the parties to negotiate over the course of six months starting on November 1, 2020 and continuing through May 31, 2021, which will be followed by mediation assistance from FMCS and the Panel, if necessary. The Agency's proposals will ensure that the parties' negotiation efforts are focused on implementing a new CBA.

Conversely, the Union's proposals require the parties to bargain for 12 months before either party is permitted to request the assistance of FMCS. The Union contends that due to the

⁴ 5 C.F.R. § 2470.2 (e).

current state of affairs with COVID-19 and other demands around the country, that the parties should have more time at the bargaining table to allow for interruptions that may occur during their negotiation schedule. The Panel concludes that a six-month period to negotiate should permit the parties a sufficient amount of time to complete their bargaining efforts. Nevertheless, to address the Union's concerns that if such interruptions occur due to, for example, its bargaining unit team members being needed to fulfill the Agency's mission, the Panel will order the following modifying language to the Agency's section 4.2 language, which will permit the parties flexibility during their negotiations:

"The parties will complete CBA negotiations within six (6) months of the first CBA negotiation session unless the parties mutually agree to extend the timeline."

The Agency's proposals do not permit the parties to request mediation assistance prior to the parties negotiating for six months. This language could have the effect of preventing either or both parties from seeking third-party assistance prior to the end of the six-month negotiation period even if the parties reach an impasse in those negotiations. It would not be effective or efficient for either party to continue to negotiate if those negotiations are not fruitful. Therefore, the Panel will permit either party the option of requesting FMCS assistance prior to the six-month mark by modifying the Agency's section 4.4 proposal to following:

"Either party may make a request for assistance from the Federal Mediation and Conciliation Service, followed by FSIP assistance. If circumstances permit, FMCS and FSIP procedures will be conducted in Washington, DC."

Next, the Agency's section 4.1 proposal requires the parties to commence negotiations on November 1, 2020. However, the proposal does not take into account the period of time that may be necessary for the Agency head to review the ground rules agreement after the Panel issues its Decision and Order. Thus, the Panel will order the following modifying language:

"CBA negotiations will commence within thirty (30) days from the Agency's notification that the Agency head has approved the agreement. If the agreement fails Agency head review, the parties shall recommence ground rules negotiations within thirty (30) days from disapproval."

The parties essentially agree on section 4.3, which permits the parties to negotiate using various methods and means such as by VTC, teleconference, email, etc. The Panel, however will modify this section of the Agency's proposal by removing the timeframe in the proposal to make it consistent with the ordered language for section 4.1 above, which requires bargaining to begin after the Agency head review process. The Panel imposes the following modifying language:

"Bargaining will be conducted either by VTC, Skype, teleconference, email, or in the locations and on the dates and times mutually agreed to by the parties."

Finally, the Panel has repeatedly written that it is in favor of each party bearing the responsibility for its own travel and per diem as part of negotiations to keep the parties incentivized toward reaching an agreement. As such, the Panel will impose the Agency's section

7.3.1 proposal, which will require the parties to pay for their own travel if face-to-face negotiations are appropriate and necessary as a result of Agency head review.

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

October 19, 2020
Washington, D.C.