

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF HEALTH  
AND HUMAN SERVICES

And

NATIONAL TREASURY EMPLOYEES UNION

Case No. 18 FSIP 077

**DECISION AND ORDER**

This case, filed by the United States Department of Health and Human Services (Management or Agency) on August 8, 2018, concerns a dispute over a successor collective-bargaining agreement (successor CBA) between it and the National Treasury Employees Union (Union). The dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). On November 15, 2018, the Federal Service Impasses Panel (FSIP or Panel) asserted jurisdiction over most issues in dispute and directed that those issues be resolved in the manner described below.

**BARGAINING AND PROCEDURAL HISTORY**

The Agency's mission is to enhance and protect the health and well-being of all Americans. It fulfills that mission by providing for effective health and human services and fostering advances in medicine, public health, and social services. The Union represents around 14,000 bargaining unit employees located throughout the United States in various Agency components. The parties are covered by a CBA that expired on September 30, 2016, but continues to roll over until the parties enter into a new agreement.

On May 10, 2018, the Agency informed the Union that it had decided to "commence negotiations" over the parties' successor CBA notwithstanding ongoing litigation over the parties' ground rules agreement to negotiate the same. Accordingly, the parties exchanged proposals on June 11, although the Union maintained it was doing so under protest. The Agency revised 7 existing Articles, offered 2 new ones, and proposed striking 13. The Union offered proposals on 20 Articles and provided 2 new Articles.

After exchanging proposals, the parties met to negotiate on July 9 and 10, 2018. After caucusing for several hours on the morning of the 10th, the Agency provided notice that it had contacted the Federal Mediation and Conciliation Services (FMCS) for mediation assistance. The Agency explained that it felt that this action was necessary because unassisted bargaining efforts were not productive. The Union objected to the idea that such assistance was necessary. After this meeting, the Union submitted a revised proposal for one article.

The parties met with an FMCS Mediator on July 30 (and once again, the Union participated under protest), to resume negotiations. The parties did not make significant progress during this meeting, so they met again with the Mediator on July 31. At the beginning of this session, the Agency provided its final offer for all remaining articles in dispute. The Agency made 15 concessions throughout all the Articles and advised the Mediator and the Union that it “was not going to modify its proposals” further. Accordingly, the Agency requested to be released from mediation. The Mediator informed the parties he would give them 1 week to make any additional revisions. Neither party did. The Mediator subsequently released the parties and the Agency filed this request for Panel assistance.

On November 15, 2018, the Panel asserted jurisdiction over the Agency’s request for assistance and directed the parties to submit all remaining disputed issues to FMCS, with a Mediator to be appointed by FMCS, for a period of 30 days. The Panel further informed the parties that, should any issues remain unresolved following mediation, the parties would be required to submit Written Submissions on every remaining disputed Article along with their final offers within 5 days of being released from mediation. The submissions would be limited to 1 page per remaining disputed article. In addition to the foregoing, the Panel declined jurisdiction over 6 Articles presented in the Agency’s request for assistance.<sup>1</sup> In doing so, the Panel concluded that the Union raised colorable questions about whether the articles concerned permissive topics of bargaining. Accordingly, the Panel informed the parties that it would not assert jurisdiction over these proposals so that they could “resolve the . . . bargaining obligation disputes in the appropriate forum.”

FMCS appointed Mediator Scott Blake to this matter on November 16, 2018. He scheduled 2 full weeks of face-to-face mediation during the weeks of November 26, 2018, and December 10, 2018. Additionally, on December 3-7, and again on December 14 and 15, Mediator Blake facilitated additional discussions between the parties’ Chief Negotiators. As a result of these efforts, the parties were able to reach agreement on 5 Articles. On December 16, 2018, Mediator Blake referred this matter back to the Panel. In accordance with the Panel’s November 15-Order, the parties submitted their Written Submissions to the Panel on December 21, 2018.

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<sup>1</sup> The six articles that the Panel declined jurisdiction over were: Article 2 – “Contract Duration and Termination;” Article 3 – “Mid-Term Bargaining;” Article 8 – “Dues Withholding;” Article 25 – “Hours of Work;” Article 45 – “Grievance Procedures;” and Article 46 – “Arbitration.”

## PRELIMINARY ISSUES

### 1. Agency Supplemental Submission

As noted above, on December 21, the parties submitted their last best offers on all remaining articles that the parties were unable to resolve at Panel-ordered mediation. However, the Agency also submitted six "revised" articles in response to the Panel's November 15-Order declining jurisdiction over six articles. The Agency had not sought leave to file these revisions or otherwise informed the Panel of its intent to submit them. In subsequent communications to the Panel and Union, the Agency clarified that it viewed this new submission as a request that the Panel "reconsider" its prior decision to refuse jurisdiction over the six articles in question.

The Union objected to the Agency's submission. It notes that, without any prior notice, the Agency submitted these revisions "shortly before midnight" prior to the last day of Panel-ordered mediation. The Mediator indicated the six articles and accompanying revisions were not a part of the Panel's order. Thus, the parties did not discuss or bargain these revisions. These revisions are new proposals that the parties have never negotiated. Accordingly, the parties have not reached a legal impasse over the revisions, and the Panel should not accept jurisdiction over them. Additionally, the Union believes that several provisions in the Agency's revisions still waive the Union's statutory rights (although the Union did not go into specifics).

In response to the Union's objection, the Agency maintains that its submission is appropriate and should be considered by the Panel. "Very early" in the Panel-ordered mediation process, the Mediator indicated that "all portions" of the contract could be discussed. Additionally, during the original mediation session in July 2018, the Mediator concluded that the parties were at impasse over the articles the Panel ultimately declined jurisdiction over. The Panel concurred with this conclusion by asserting jurisdiction over the "majority" of the issues involved. Thus, in the Agency's view, it would be "inconsistent" for the Panel to decline jurisdiction over the Agency's revisions given that the Agency has now cured the aforementioned bargaining questions. The Agency requests that the Panel, thus, assert jurisdiction over the revised articles and direct the parties to 2 weeks of concentrated mediation to commence "immediately."

To the extent that the Agency's submission may be considered a motion for reconsideration, the Panel denies it because: (1) it is inconsistent with the Panel's November 15-Order; and (2) the parties are not at impasse over the new proposals submitted by Management.

As to the first topic, the Panel's November 15-Order concluded that the Union raised colorable questions about its obligation to bargain over six articles in the Agency's final offer. As a result, in the Order, the Panel stated its intention to decline jurisdiction over the articles "so that the parties may resolve the foregoing bargaining obligation disputes in the appropriate forum." That is, the Panel concluded that the appropriate way to resolve these bargaining issues was for the parties to resolve them

in other forums. Indeed, the Union has filed several grievances. Rather than comply with these instructions, the Agency submitted unsolicited revisions and styled them as a “motion for reconsideration.” Contrary to Management’s claims, however, the Agency is not requesting that the Panel reconsider an aspect of its decision. Rather, the Agency is asking the Panel to consider new issues that were not considered as a part of the Panel’s Order. The Agency had ample opportunity to revise its proposals before the Panel issued its Order, but Management chose not to do so.<sup>2</sup> Further, the Agency has not claimed that the aforementioned grievances have been resolved. As the Agency’s actions are inconsistent with the direction provided by the Panel’s Order, this inconsistency is a sufficient basis for declining jurisdiction over the Agency’s revised articles.

In addition to the foregoing, the parties are not at an impasse over Management’s revisions. It is undisputed that the Agency did not provide its revisions until shortly before the conclusion of Panel-ordered mediation, and that there was no discussion involving the Union, the Mediator, or the Panel prior to this submission. The Agency argues that the Mediator “opened the door” because he stated early on that the entire CBA was open for discussion. To begin with, the scope of mediation was defined by the Panel’s Order, not the Mediator. And, as discussed above, that scope did not include these articles. Had the parties independently reached agreement regarding all, or some, of the six articles, that would be encouraged. However, having denied to assert jurisdiction over the proposals provided to the Panel with the Agency’s request for assistance, the Panel did not and does not desire to create expectations for any party to believe that it will subsequently choose to assert jurisdiction over the proposal, particularly when the parties never negotiated over the “new” proposal. As to the Mediator’s statement, the Agency does not dispute that, *after the Agency’s submission*, the Mediator commented that they were likely not before him due to the aforementioned limited scope. The Mediator confirmed that this comment was an accurate summary of the discussion he had with the parties on this topic. Further, the Agency does not dispute the Union’s claims that there were no discussions or negotiations over the revisions. Based upon all the foregoing, the Panel also concludes that the parties are not at impasse over Management’s revisions.

## 2. Union Supplemental Submission

On January 31, 2019, the Union submitted an unsolicited argument in response to some of the Agency’s claims in its December 21<sup>st</sup> submission concerning Article 10 – “Official Time.” The Union claimed that, as this was the first time these arguments had been presented, it was necessary for the Union to provide existing authority on the topic of official time in order to clarify the record. The Agency objected on the grounds that the Union’s submission went above the limitations established by the Panel’s November

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<sup>2</sup> In this regard, on August 31, 2018, the Union first raised its permissive bargaining arguments. The Agency responded to these claims on September 27, 2018, contending that the arguments were misplaced. But, Management did not offer to alter or revise its proposals in response to the Union’s arguments.

15-Order and claimed it would be prejudiced if the Panel were to consider the Union's submission. In this regard, there were a number of arguments made in the Union's original submission that raised issues for the first time to which Management has not had an opportunity to rebut. Thus, if the Union's argument were followed through to its logical conclusion, either party should be permitted to respond to any argument they first saw in the opposing parties' filing. But, the Panel's Order did not permit this scheme.

The Panel will not consider the Union's January 31- supplemental submission. The Panel's Order limited submissions to 1-page submissions addressing each remaining article, without exception. The only rationale the Union offered for its additional submission was a need to "clarify" case law concerning Management's position on official time. But, as the Agency accurately suggests, this line of thought could apply equally to arguments that either side wished to rebut. The Union offered no explanation for why the parties' article on official time should be exempt from the framework established by the Order. Accordingly, there is no basis for considering the Union's additional submission.

## **PROPOSALS AND POSITION OF THE PARTIES**

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

### 1. Article 5 – Employee Rights and Responsibilities

#### I. Agency Article and Position

The Agency proposes altering the existing Article 5 to recognize an employee's right to join a labor organization while balancing the Agency's need for efficiency. So, although it acknowledges various statutory rights such as *Weingarten* representation,<sup>3</sup> the proposal notes that such rights do *not* extend to areas like counseling and investigations. It also notes that Union representation will be limited when a representative is being disruptive.<sup>4</sup> The Agency's language is meant to discourage inefficient and ineffective grievances by reducing nuance and providing clarity.

#### II. Union Article and Position

The Union largely proposes retaining the status quo language of the existing CBA that spells out various employee rights within the workplace omitted in

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<sup>3</sup> This right permits an employee to request Union representation when facing an investigation that could reasonably lead to disciplinary action. See 5 U.S.C. §7114(a)(2)(B).

<sup>4</sup> Citing *U.S. Dep't of Justice, INS, U.S. Border Patrol*, 38 FLRA 701, 715 (1990).

Management's language. So, for example, the proposal discusses *Miranda* rights, *Kalkine* rights,<sup>5</sup> and *Beckwith* rights.<sup>6</sup> Further, although the Union agrees that a *Weingarten* representative will not be disruptive, Section 3.1 of the proposal lists six different actions he or she may engage in during an interview. The Union's proposal also provides more general information about the type of items that should be discussed between the Agency and employees, such as whether an investigation is administrative or criminal in nature. The Union is also particularly concerned that Management is seeking to strike Section 12 of its proposal that "generally" prohibits administration of polygraph examinations and prohibits discipline for refusing the same. Finally, the Union wishes to maintain Section 15, as it grants employees 3 hours of duty time to review the new CBA once it becomes effective. This time will help ensure that employees and managers are equally familiar with the requirements of the CBA.

### III. Conclusion

The Panel will order a modified version of the Union's proposal. Management complains that its managers cannot familiarize themselves with the various requirements of the contract. However, many of these rights exist independent of the CBA; thus, managers would seemingly need to familiarize themselves with them regardless of their presence in the CBA. Moreover, although the Agency raises concerns of inefficient grievances, it provided no evidence to support its claim that such grievances have been a problem for the Agency. Thus, overall, the Panel believes the Union's proposal is the more appropriate one.

Despite the foregoing, the Panel imposes several modifications. As to the Union's language concerning polygraph examinations, the Union does not offer legal support for its proposition that they should be prohibited in most circumstances. Indeed, such a request arguably runs afoul of management's statutory right to determine its internal security practices.<sup>7</sup> Given this potential risk, it is appropriate to delete this language.

Additionally, the Panel will delete language from the Union's proposal concerning a grant of duty time to review the new CBA. Although the Union identifies a goal, i.e., familiarity with the parties' contract, it does not explain why a review during duty time is

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<sup>5</sup> See *Kalkines v. United States*, 473 F.2d 1391 (U.S. Court of Claims 1973). In this decision, the court held that Federal employees under criminal investigation must be informed that their refusal to comply with an investigation can warrant work discipline but that the employee will also receive criminal immunity.

<sup>6</sup> See *Beckwith v. United States*, 425 U.S. 341 (1976). The Supreme Court held that a potential criminal investigation did not warrant *Miranda* warnings when an interviewee is not in a custodial interrogation. In a Federal employee context, an employee may also be told that a refusal to participate could lead to discipline.

<sup>7</sup> See 5 U.S.C. §7106(a)(1).

the only way to accomplish this goal. That is, there is nothing to suggest that employee cannot review the document on their own time. Accordingly, the Union's requested language is unnecessary.

## 2. Article 7 – Union Rights

### I. Agency Article and Position

This article also clarifies when a Union representative may represent employees in investigative settings, but it additionally covers “formal discussions.”<sup>8</sup> The article further discusses when an employee may forward an individual settlement to the Union, and sets a timeframe for when the Union must take actions thereafter (if any). The Agency believes that FLRA case law clearly spells out when notice is appropriate and when situations arise to the level of a formal meeting thereby necessitating the need for a representative. Both parties are “familiar” with this law. Thus, it is unnecessary to include additional language on notice requirements as the Union proposes. The proposal also requires Union representatives to follow all general procedures for accessing Agency facilities. Such a requirement does not violate any law, rule, or regulation.

### II. Union Article and Position

The Union proposal largely retains the status quo of the CBA. However, it has agreed to strike Section 5, which allows the Union to submit a brochure about “membership benefits” to local Union chapters, and Section 8, which concerns internal union business. A number of the Union's remaining proposals cover “significant” topics that touch upon the Union's representational prowess. Key among the Union's requested proposals are:

- Inclusion of a list of factors that the FLRA considers when it assesses whether a discussion arises to the level of “formal,” and, therefore, requires the presence of Union representation;<sup>9</sup>

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<sup>8</sup> Under 5 U.S.C. §7114(a)(2)(A), a Union shall be granted the opportunity to be represented “at any formal discussion between one or more representatives of the agency and one or more employees” within the bargaining unit “concerning any grievance or any personnel policy or practices or other general conditions of employment.” The FLRA has developed a wide body of authority on this statutory provision. See, e.g., Guidance on Meetings, Office of [FLRA] General Counsel (2015) (available at <https://www.flra.gov/system/files/webfm/OGC/Guidances/MEETINGS%20GUIDANCE%208-28-15%20final.pdf>).

<sup>9</sup> These factors include, among other things, attendance by management representatives, the manner in which the meeting was announced, and whether an agenda was established. These factors are meant to be “illustrative.” See,

- Although Management is willing to provide 2 workdays notice of any meeting, the Union requests that this notice be provided only if a meeting is within 5 workdays; if the meeting will be in 5 workdays or greater, the Union requests notice within 1 workday of that meeting;
- Language stating that the Union be permitted to postpone deadlines for any filings if the Agency does not provide requested information within 14 work days pursuant to a statutory information request under 5 U.S.C. §7114(b)(4);
- A requirement that NTEU representatives who have not undergone background investigations should nevertheless be permitted access to Agency buildings just as any other member of the public; and
- Continuation of a practice wherein, at the local level, local Union chapters may utilize Agency facilities as part of a "Labor Recognition Week" to discuss the contributions of public labor; employees may receive up to 1 hour of administrative time to participate.

### III. Conclusion

The Panel will impose the Agency's proposal. The parties' proposals strive for the same goal: to reference and reinforce various rights and principals associated with the topic of "Union Rights." However, they accomplish the foregoing in different ways. The Agency offers general language that references the foregoing rights but does not offer specific recitations of existing legal authorities. By contrast, the Union provides a litany of references to various authorities in a presumed effort to provide resources for individuals who would review or rely upon the CBA. Despite the differing approach, both sets of proposals accomplish the same goal because they act as a source of reference to individuals. That is, there is no substantive distinction between the objectives of the proposals. Although there is no significant difference, there is a danger that authorities discussed in the Union's proposal could change in the future. This change could then make the language of the CBA obsolete and, potentially, confuse the aforementioned parties upon future review of the document. In order to address this potential confusion, and because the Agency's language still captures the Union's rights and interests, the Panel believes imposition of Management's language is warranted to resolve the parties' dispute on this topic.

### 3. Article 9 - Union Access to Employer Services

#### I. Agency Article and Position

The Agency agrees to provide limited office space to the Union for rental. However, this space will be provided *only* if the Department of Justice concludes such

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*e.g., U.S. Dep't of Veterans Affairs, Richmond, Va. and AFGE, Local 2145, 63 FLRA 440, 443 (2009).*

an arrangement is permissible. The Union will provide its own equipment, however, but it may request the use of Agency conference rooms, email lists, telephone lines, and the like. The Union may not record meetings between the parties absent mutual consent, and Agency documents must remain internal. This arrangement limits costs to taxpayers by treating the Union equitably to other groups that would utilize Agency space. The Union's proposal for telework (discussed below) is based on its claim of limited office space, yet the Union also requests "valuable and scarce" office space for its own purposes. These positions are incongruous. The Agency's proposal provides effective and efficient government service independent from any Executive Order.

## II. Union Article and Position

With the exception of a few modifications, the Union requests to largely keep existing contract language on this topic. Thus, the Union will keep all existing office space "at no charge." Additionally, per Section 6.C, local chapters may bargain for additional office space. Further, the Union will have unfettered access to various pieces of Agency equipment for representational purposes. The Union argues that the Agency's proposal is inconsistent with the decision in *Trump v. AFGE*, 318 F. Supp. 3d 370 (D.D.C. 2018) (*Trump*). In *Trump*, the District Court issued a decision enjoining several portions of three Executive Orders issued by President Trump on May 26, 2018, concerning Federal collective bargaining. In particular, the decision enjoined several provisions that directed Federal agencies to limit access of its resources to public sector Unions. The Union argues that the decision prohibited agencies from "giving effect" to these provisions, so the Agency's proposals are illegal even if they are not explicitly based upon the enjoined portions of the Executive Orders.

In addition to the above, the Union objects to several other portions of the Agency's proposal. Agency Section 3.A waives the Union's bargaining rights because it grants Management "sole discretion" in deciding whether to permit employees to use equipment. Section 3.C inappropriately grants Management discretion in deciding what the Union may or may not post on bulletin boards. Section 4, which places limitations on information that the Union may publicly disseminate, is permissive. Finally, Section 5 goes into articles that the parties did not open for renegotiations because it states that, in conflicts with Article 9 and other portions of the CBA, Article 9 controls.

## III. Conclusion

The Panel will order a modified version of Management's proposal. On balance, we agree with Management that it is appropriate to treat the Union similar to other entities that may utilize Agency space. The same is true of Agency resources, such as telephones, computers, etc. The Agency's approach, then, is the more sensible one. However, we believe it is appropriate to strike language in Management's Section 1.G in which the Agency states its proposal is dependent upon obtaining legal guidance from the Department of Justice that its proposed arrangement is appropriate. Under the Statute, the legality of proposals turns upon conflicts with law, rule, or regulation.<sup>10</sup>

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<sup>10</sup> See 5 U.S.C. §7117(a).

Nowhere in this language does it state that memoranda from other entities govern the legality of proposals. Thus, the language should be dropped. However, in doing so, we do not take a position on the legality of the arrangement or otherwise infringe upon Management's ability to raise appropriate legal challenges as necessary, e.g., Agency head review.

Aside from its practical concerns, the Union also objects to the above approach on the grounds that it is inconsistent with the court's decision in *Trump*. It argues, essentially, that even proposing language that is similar to the enjoined Executive Orders impermissibly gives effect to those Orders. However, nothing in the *Trump* decision supports this contention or otherwise prohibits agencies from taking such actions. This argument, then, is rejected.

Despite the foregoing conclusion, the Panel does agree with other arguments raised by the Union. Management's Section 3.C requires the Union to obtain approval of all its contents that it will post on Agency bulletin boards. Agency Section 4 places limitations on what information the Union can disseminate publicly. Both of these proposals arguably place limitations, then, on what the Union may or may not speak about publicly. The Panel has rejected similar proposals in the past, and does so here.<sup>11</sup> Thus, Management's proposal 4 should be stricken, and the following sentence should be dropped from its Section 3.C:

Prior to posting, all such union materials must be approved by the Assistant Secretary for Administration (ASA), or designee, and will be limited to the designated space and shall be properly identified as official Union issuances.

#### 4. Article 10 – Union Representatives/Official Time

##### I. Agency Article and Position

The key feature of the Agency's proposal is to permit official time *only* for time granted under 5 U.S.C. §7131(a) and (c). The proposal does not authorize *any* official time in accordance with §7131(d), however. The Statute states that official time pursuant to §7131(d) "shall be granted . . . in any amount the [parties] involved *agree* to be reasonable, necessary, and in the public interest." (emphasis added). In the Agency's view, this language means that official time under §7131(d) cannot be unilaterally imposed upon the Agency; it must be bilaterally negotiated. Imposing language upon Management is essentially granting the Union a "blank check" that could interfere with management's right to assign work and schedule. Per OPM reports, the Union's use of official time increased over 200% between FY 2014 to FY 2016 (from

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<sup>11</sup> See *OPM and AFGE, Local 32, 18 FSIP 032 at p.3 (2018)*.

21,853 hours to 67,722).<sup>12</sup> However, the Agency's proposal permits Union officials the ability to utilize other forms of paid and non-paid leave for Union activities.

In addition to the foregoing, the Agency proposes requirements for employees to request official time and clear its use with supervisors. Failure to follow the foregoing will result in various penalties, including barring the use of official time altogether. Union representatives must also stagger its use throughout the year. Finally, the Union must provide a weekly report on its use of official time.

## II. Union Article and Position

The Union is willing to modify existing CBA language. In particular, there are currently 6 Union officials who are on full official time. As a compromise, the Union offers 80% official time for 4 stewards in 2 of the Union's busiest local chapters that represent around 9,300 bargaining unit employees. Other stewards would be eligible for "reasonable and necessary" official time consistent with §7131(d) of the Statute and existing language of the CBA.

The Agency's proposal of no official time under §7131(d) is inconsistent with this section's language that official time "*shall be granted . . . in any amount*" the parties agree to be "reasonable, necessary, and in the public interest." (emphasis added). Similarly, 5 U.S.C. §7101 expresses Congress' intent that collective bargaining is in the public interest. Official time will further that interest. The Statute does not contemplate that union representatives would be required to use paid or non-paid leave to perform union activities. Further, because the Agency does not track or report its use of official time to OPM, it is in no position to assert that additional official time is not reasonable and necessary.

## III. Conclusion

The Panel will impose a modified version of the Agency's proposal. The Agency's proposal provides a balance between meeting the needs of the Agency's mission while satisfying the Union's statutory rights. Management's proposal establishes an orderly system for requesting official time that emphasizes the importance of ensuring a sufficiently staffed workforce. Further, the proposal creates a system for tracking the use of official time that will provide the parties and other interested stakeholders a more accurate picture on the amount of official time that is utilized by the Union. Therefore, adoption of the majority of the Agency's proposal is warranted.

Notwithstanding the foregoing, the Panel rejects the Agency's arguments concerning 5 U.S.C. §7131(d). Management's argument that language cannot be

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<sup>12</sup> Official Time Usage in the Federal Government, Fiscal Year 2016 at 8 (available at <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2016-official-time-usage-in-the-federal-government.pdf>).

imposed upon it in the absence of its consent is inconsistent with existing legal authority governing Federal sector bargaining. The FLRA has long held that an agency *must* negotiate when a statute does not grant that agency sole discretion to act.<sup>13</sup> The Federal Service Impasses Panel is part of that negotiation process. It has the statutory authority “take whatever action is necessary” to resolve a failure to reach agreements during negotiations, i.e., an impasse, as long as that action is not inconsistent with the Statute.<sup>14</sup> Stated differently, the Panel has broad authority to impose language upon parties that fail to reach agreement when they are legally required to bargain. Section 7131(d) states as follows:

Except as provided in the preceding subsections of this section—

- (1) any employee representing an exclusive representative, or
- (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Nothing in the above language indicates that agencies have sole authority to act pursuant to this section. Accordingly, to the extent the Agency suggests it cannot have language that differs from its proposal imposed upon it, that suggestion is misplaced. Indeed, carried through to its logical conclusion, the Agency’s argument would mean that the *Union* could not have language imposed upon it that it could not agree to.

The Agency’s other arguments in support of its position on §7131(d) are equally unpersuasive. It argues that granting the Union any degree of official time pursuant to this section could run afoul of management rights. Yet, the FLRA has long held that official time is an exception to statutory management rights.<sup>15</sup> The Agency has not challenged the validity of this precedent. The Agency also points to OPM data to note an increase in official time usage from FY 2014 to FY 2016. Although these numbers are troubling, they provide little in the way of explanation or analysis. Critically, they do not explain how much, if any, tabulated official time fell under §7131(d). Further, there is no breakdown as to whether the figure captures official time used solely by NTEU or other unions within the Agency. The Agency offered no other support or figures.

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<sup>13</sup> See, e.g., *NFFE and U.S. Dep’t of Agriculture*, 35 FLRA 1008, 1014 (1990).

<sup>14</sup> 5 U.S.C. §7119(c)(5)(B)(iii).

<sup>15</sup> See, e.g., *NTEU and Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339, 346-48 (1992).

Based upon the foregoing, the Panel will remove Management Article 10, Section 2.B, which states that the parties “agree that beyond the reasonable official time required under 5 U.S.C. §7131(a) and (c), no additional official time is reasonable, necessary, and in the public interest; therefore the parties agree that no official time shall be granted under 5 U.S.C. §7131(d).” The Panel will not adopt the Union's proposal on official time, however. In this regard, despite its claim of a necessity for 4 individuals on some regular degree of official time, the Union provided little supporting empirical data to support that need. Thus, it would be inappropriate to impose a per se requirement for official time. Rather, the Panel will include language that simply references the Union's ability to request reasonable official time in accordance with §7131(d) and applicable law. Upon making such requests, it will then be up to the Union to justify its need. Based on the foregoing, the Panel will impose this language in lieu of Management Article 10, Section 2.B: **The Union shall be permitted to request official time in accordance with 5 U.S.C. §7131(d) and applicable law.**

5. Article 13-New Employee Orientation

I. Agency Article and Position

The Agency proposes that it will provide employee orientation (or “New Employee Orientations,” “NEOs”) to new employees. As part of this orientation, it will “to the best of its ability” provide a package of Union materials to the employees. This material must not violate the law or contain “libelous” material. The Agency wants to ensure new employees receive sufficient information but does not want to also overwhelm them. Thus, this proposal is meant to strike a balance. Management does not believe it is necessary for the Union to provide a separate training.

II. Union Article and Position

Because Management did not offer evidence of any issues with the existing contract language, the Union proposes largely retaining it. The Union has the right to attend “formal discussions” under 5 U.S.C. §7114(a)(2)(A), and FLRA precedent has clarified that employee orientations qualify.<sup>16</sup> And, the Union will need sufficient notice in order to request official time and release from work. To facilitate the Union's role, Management should provide the Union with pertinent information about the new employee(s), and the Union should receive an opportunity to make a presentation to new hires during non-duty times.

III. Conclusion

The Panel will order a modified version of the Agency's proposal. The parties agree that Management will conduct an employee orientation for new employees and that it will provide information from the Union to those employees. But, the parties differ primarily over how much involvement the Union should have as a part of this orientation process. The Union's proposal envisions an elaborate process by which it would,

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<sup>16</sup> Citing *SSA and AFGE, Local 1395*, 16 FLRA 232 (1984).

among other things, receive contractual notice, several pieces of information for every bargaining unit employee, and the ability to have Management distribute hard copies of the parties' CBA to all new bargaining unit employees. The foregoing process appears labor intensive given that the purpose of an orientation is to orient an employee to the Agency itself rather than the Union. Moreover, the Agency still agrees to distribute certain material to the impacted employees. Further, although the Union proposes that it meet with bargaining unit employees during non-duty time, nothing prevents the Union from initiating this action of its own accord. Thus, on balance, the Agency's proposal is more appropriate.

Despite the above conclusion, the Panel will add two modifications. The first modification is to include language recognizing the Union's right to attend employee orientations. As noted by the Union, the FLRA has interpreted the Statute as granting unions the ability to at least attend meetings involving employee orientations. Management's language does not account for this line of authority. Thus, the following language will be included as a new Section 2.C:

**Management will afford the Union the opportunity and right to participate in NEO's consistent with 5 U.S.C. 7114(a)(2)(A), applicable law, and Article 7 of this CBA.**

The other modification will be to remove Management's proposed Section 2.C. This language places restrictions on the type of information the Union may share with new employees as part of the orientation process, including a prohibition on "libelous" material. While the Panel does not condone nor should the Agency or the Union be the subject of "libelous" speech, the Panel has rejected language in other contexts that attempted to place limitations on what one party may say. Thus, it is appropriate to remove the Agency's proposed language here as well.

## 6. Article 15-Annual Leave

### I. Agency Article and Position

The main change from the current CBA is that the Agency is looking to alter annual leave request increments from 15 minutes to 30. This time period remains more generous than what is set as the floor by Federal regulation.<sup>17</sup> Additionally, leave requests of 5 days or more must be made at least 60 days in advance. Leave requests for November through January must also be submitted by September 15, and there can be no more than 5 consecutive days of leave used during this time period. The Agency's primary concern with these proposals is ensuring sufficient coverage. The Union has established "unnecessary procedures" that often lead to "frivolous grievances." Currently, Managers must either grant lengthy "use or lose" leave requests or face a grievance. The Agency's proposal is meant to remedy this scenario.

### II. Union Article and Position

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<sup>17</sup> Per 5 C.F.R. §630.206(a), Agencies should grant leave in 1 hour blocks *unless* they negotiate a different number.

The Union proposes retaining the status quo of the parties' existing CBA. Aside from the 15-minute increment issue described above, the most significant difference is the consideration process behind granting or denying leave requests. The Union acknowledges that Management and its supervisors ultimately have the right to deny such requests, but under Section 2.B of the existing CBA, supervisors "may, consistent with operational demands, workload, and with consideration of optimal staffing levels, determine when leave may be taken." By contrast, Management's proposed Section 2.B states that a supervisor or designee "may take into consideration work load requirements, operational needs, staffing levels, and other considerations in approving, denying, or revoking annual leave." In other words, under the Agency's proposal, the Agency "may" consider various factors but is not required to do so. In the Union's view, such a standard will lead to arbitrary and capricious denials of leave requests. Other CBAs have a leave standard in place, so the parties should continue to have one as well.

### III. Conclusion

The Panel will order the adoption of Management's proposal. Although there are several differences between the parties' proposals, the most significant one from the Union's point of view is what, if any, factors a supervisor should consider when granting or denying annual leave requests. The Union's proposal states a supervisor "may" deny such requests after taking into consideration several factors; the Agency's proposal, by contrast, states a supervisor "may" consider those factors, but imposes no obligation to do so. Thus, the crux of this dispute revolves around non-binding factors and whether a supervisor must consider them. However, as it must, the Union concedes that the ultimate authority to make a decision on leave requests resides entirely with Management. Indeed, even the Union's proposal requires a supervisor to do no more than *consider* certain factors. A supervisor could consider and ultimately reject a request after considering all factors. Thus, an employee's leave request could meet the same fate under either proposal. Accordingly, there does not appear to be a significant need to retain the Union's requested language.

## 7. Article 16 – Sick Leave

### I. Agency Article and Position

Once again, the Agency is looking to ensure a proper work force. Currently, employees have 2 hours after the start of the duty day to inform supervisors that they need sick leave; Management proposes changing this number to 30 minutes. Supervisors should not have to spend hours wondering when, or even if, an employee will report out due to illness. The Agency's proposal also reiterates that Management has the authority to request medical certification and may take disciplinary action against employees who abuse sick leave.

### II. Union Article and Position

The Union has made minor changes to the CBA, but the parties are largely in agreement. A "major difference," however, is that the Union wishes to keep language in Section 4.B that states the employee will not be required to provide medical certification to support absences of 3 days or less unless sick leave abuse is suspected. Dropping this requirement could force employees to go to the doctor even if they are taking 1 day to do nothing more than "drink fluids and rest." This requirement would place a significant burden upon employees. Thus, the existing language should continue without alteration.

### III. Conclusion

The Panel will order the adoption of Management's proposal. Management put forward its proposal to ensure that it can properly provide adequate coverage and, the requirement to potentially provide medical documentation upon request may help do so. The Agency does not suggest, however, that it intends to impose any sort of automatic requirement that all employees who request sick leave must provide documentation as a matter of course. Thus, the Agency's proposal strikes a greater balance of meeting the parties' interests.

#### 8. Article 22 – Overtime, Compensatory Time, and Holidays

##### I. Agency Article and Position

The Agency proposes following applicable law for granting and using overtime, compensatory time, and holiday time. In particular, the Agency is concerned with ensuring coverage if work is necessary on a Federal holiday. Thus, Management proposes language covering this topic, but it also includes language permitting an employee to locate a "qualified and willing" replacement employee to cover that shift. The "qualified" language is important to Management because it does not want to see supervisors' options limited to utilizing the service of an unqualified employee during a time sensitive project.

##### II. Union Article and Position

In an effort to compromise, the Union has agreed to strike numerous provisions in the existing contract. But, it also wishes to keep a significant portion of existing language. The Agency has not identified any problems arising from enforcement of the CBA, so it should largely remain as is. Additionally, the Union has cited numerous portions of the Agency's proposal that are allegedly legally problematic. Specifically, the Union maintains:

- Management Section 1, which defines "overtime," "conflates flexible schedules and regular schedules" and omits language about hours of work that employees

are “suffered and permitted” to work, which will waive Fair Labor Standards Act (FLSA) compensation for employees that fall under the coverage of the FLSA.<sup>18</sup>

- The Agency struck existing language that calls for FLSA overtime compensation in increments of 15 minutes. This is the unit of measurement utilized by OPM regulations.<sup>19</sup>
- The Agency struck numerous negotiable sections in the CBA that permit a fair and equitable distribution of overtime assignments.<sup>20</sup>
- Management Section 5.B refers to the definition of “hours of employment” under 5 U.S.C. §5542, which addresses eligibility for, among other things, travel compensatory time. However, this statute does not actually define “hours of employment.” Moreover, Management’s language ignores applicable regulatory authority that permits compensation for such travel time.<sup>21</sup>
- The Agency’s Section 5.D call for a forfeiture of compensatory travel time after 26 weeks but does not address regulatory exceptions to this rule.<sup>22</sup>

### III. Conclusion

The Panel will impose the Agency’s language to resolve this dispute. Similar to Article 7 discussed above, much of this dispute turns on the Union’s contention that inclusion of governing authority on overtime and other forms of premium pay compensation is necessary for instructional purposes. However, as also discussed above, this path carries a risk of confusion in the event the aforementioned guidance

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<sup>18</sup> The FLSA provides overtime compensation for employees that fall under its coverage (non exempt) if certain conditions are satisfied. “Employ[ment] under this law is defined as “to suffer or to permit to work.” 29 U.S.C. §203(g). Applicable regulations further clarify that “suffer and permit” is “any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.” 5 C.F.R. §551.104. Under this framework, an Agency may be liable for overtime compensation, even if it does not order overtime, where supervisors knew or should have known employees were working overtime. *See, e.g., AFGE, Local 4044 and Fed. Bureau of Prisons*, 65 FLRA 264, 266 (2010).

<sup>19</sup> Citing 5 C.F.R. §551.521.

<sup>20</sup> Citing *AFGE, Local 4044 and DoD*, 65 FLRA 264, 266 (2010).

<sup>21</sup> Citing 5 C.F.R. §550.1404(a).

<sup>22</sup> Citing 5 C.F.R. §550.1407(a)(1).

becomes obsolete. Thus, the Panel believes it is appropriate to rely upon Management's language in order to bring this dispute to an appropriate conclusion.

9. Article 26 - Flexible Workplace Program/Telework

I. Agency Position and Article

This article covers primarily telework and is a significant source of contention between the parties. The Agency's proposal states that telework is a privilege, rather than a right, and grants division heads the authority to unilaterally change or revoke telework agreements. Management's proposal also sets forth various work requirements as a condition precedent for being on a telework agreement, such as requiring an employee to have had at least a rating of "fully successful" on their last performance rating.

Perhaps the most contentious aspect of the Management's proposal is language establishing an "expectation" that employees report to their work site 4 days per week (although supervisors have discretion to alter this in certain situations). Management may also require employees to return to the worksite, and commute time in such situations will not count as duty time. Relatedly, employees with a telework agreement must telework if their normal duty station is closed due to inclement weather or other emergencies. Finally, the Union has no authority to grieve any Management decisions made pursuant to the telework article.

Management contends that its proposed framework is necessary because it returns discretion to managers in order to maintain an effective and efficient workplace. An employee's interest in flexible workplace arrangements does not override Management's various workplace needs. Although telework has provided "positive impacts" in some circumstances, it has had "the opposite effect" in "other cases." Thus, on balance, Management's proposal should be adopted.

II. Union Position and Article

The Union is requesting retention of the existing CBA language. The Union requested data from Management concerning telework participation but the Agency never provided it. The Telework Enhancement Act of 2010 (Telework Act) encourages telework participation to the extent such participation does not diminish employee performance. The Telework Act does not, however, grant managers or supervisors sole authority to determine whether employees should be permitted to telework. When an agency lacks sole discretion to take personnel actions, FLRA precedent requires the agency to negotiate.<sup>23</sup> The Agency's proposal granting individual supervisors sole authority to terminate agreements runs afoul of this precedent. Thousands of employees work 3-5 days of telework per week. Management has not demonstrated why this scheme is problematic, and its proposal will invariably lead to charges of "unfairness, favoritism, and discrimination."

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<sup>23</sup> Citing *NFFE* at 1014 (1990).

### III. Conclusion

The Panel will impose a modified version of Management's proposal. The parties agree that telework provides a benefit to employees and the workplace. The Agency also raises concerns about workplace flexibility and efficiency. In response, the Union challenges the Agency's supporting evidence, or lack thereof. However, it is axiomatic that Management should have a degree of flexibility in conducting the business of its workplace. Management's proposal will provide this control. Moreover, it still permits employees to telework as long as certain conditions are satisfied. Thus, overall, the Agency's proposal provides a greater balance between the needs of Management and the needs of employees. The Union's argument that the Agency is attempting to exercise discretion not to negotiate over telework is inaccurate; the Agency's proposal grants supervisors authority to make telework changes, but its proposal/position is *not* that Management has no duty to bargain.

The other key point of disagreement between the parties is the number of days per week an employee may telework. Although not specifically raised, the Union appears to take umbrage with language in Management's proposal that it believes imposes a limitation on the foregoing days. In this regard, Management Section 6.D states as follows:

Employees should expect to report to the official worksite and duty station a minimum of four (4) days per week (for employees on a compressed work schedule, the employee's regular day(s) off will count as a day away from the official worksite for the purpose of this requirement).

This language states that there is an "expect[ation]" for employees to report to their physical worksite 4 days per week. However, in the Panel's view, an *expectation* is not tantamount to a *requirement*. That is, while supervisors may fairly "expect" employees to report to the Agency's facilities for a set number of days, the Panel does not believe that the Agency's proposal establishes a requirement that they do so. However, in order to avoid confusion, the Panel will impose the following modification to the above language (modification in bold):

**The Agency will not establish a minimum number of days per week for employees with a telework agreement to report to their official worksite. However,** employees should expect to report to the official worksite and duty station a minimum of four (4) days per week (for employees on a compressed work schedule, the employee's regular day(s) off will count as a day away from the official worksite for the purpose of this **language**).

In addition to the above language, the Panel will strike language in other sections to the extent it restricts the Union's ability to pursue grievances. As the United States Court of Appeals for the District of Columbia has held, the Panel *must* impose a broad negotiated grievance procedure unless a proponent for a limited procedure

“establish[es] convincingly” the need for it.<sup>24</sup> As noted above, the Agency raises the specter of overwhelming grievances, but it offers no support. Given the aforementioned burden, the Panel does not believe it appropriate to impose language that directly or indirectly deprives the Union of its ability to pursue grievances concerning telework disputes. Thus, the following language will be removed from the Agency’s proposal:

Section 4

...

This determination is made by the Employer and within the Employer’s sole discretion, in accordance with applicable laws, government-wide rules, regulations, and policies.

Section 6.I

Decisions made by the Employer regarding telework are at the sole discretion of the Employer and shall not be subject to the grievance procedure of this Agreement.

Section 8.A (remove bolded language only)

The Employer may terminate, suspend, or modify an employee’s participation in the telework program **for any reason**, without notification to the union . . .

10. Article 27- Awards

I. Agency Position and Article

Management opposes award committees and mandatory pay pool parity between non bargaining unit employees and bargaining unit employees. Management needs discretion to reward high performers. Putting employees through a rigorous awards process demoralizes them and often leaves them confused as to why they did not receive certain awards. Worse still, Management believes that employees may abuse the process to simply reward their friends or, worse still, award themselves. Allowing Management the full discretion to analyze all facts and circumstances before issuing awards is the best solution to all the foregoing problems.

II. Union Position and Article

The Union wishes to retain the status quo of the CBA but with numerous modifications. Currently, the article establishes award committees at every Operational Division, Staff Division, and Regional Office level, all of which results in “dozens” of committees. The Union now proposes that there be only one committee at each Operational level, or 9 total (although the FDA would maintain its existing committees).

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<sup>24</sup> See *AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983) (*AFGE*).

Additionally, the Union's proposal eliminates incentive awards at the Operational level (save for FDA). The proposal also retains pay pool parity between bargaining unit employees and non-bargaining unit employees (although Management will determine the funding levels). The Union's proposals are consistent with other existing CBA's and Management has never demonstrated a need to support any alterations.

The Union also offers various objections to Management's proposal. It argues that Management Sections 2 and 3.B confuse "performance awards" based on annual ratings of records with "special act/incentive" awards. Moreover, this language fails to list criteria that employees could rely upon in assessing whether they should receive awards. Additionally, Management 2.B lists a statute that does not exist – "5 U.S.C. §430." Agency Section 3.C, which states Management "will establish its awards distribution as it deems necessary," impermissibly waives the Union's right to bargain. Finally, Section 4 improperly waives the Union's right to grieve awards related decisions.

### III. Conclusion

The Panel will order the adoption of a modified version of the Agency's proposal. The two key components of the Union's proposals are the continuation of pay parity pools and award committees (albeit at a reduced level). The Union argues that the Agency has not demonstrated why either of these practices should be discontinued. However, in its statement of position, the Agency contends that requiring automatic parity in pay pools sends a message to employees that the awards are *not* based on performance, which in turn leads to decreased morale. Additionally, requiring the continuation of awards committees chills Management from engaging in "open and free" deliberations over the types and amounts of awards that should be provided to employees. Contrary to the Union's claim, Management has identified reasonable concerns. Thus, overall, the Agency's proposal represents the better option.

Although the Agency's proposal should be largely adopted, there are a few topics that should be altered. To begin with, the Union does accurately note some confusion in Management Section 2.A, that states "Performance Awards are a method of promoting employee productivity and efficiencies." The statute that establishes performance awards states that an "employee whose most recent *performance rating* was at the fully successful level or higher (or the equivalent thereof) may be paid a cash award under this section."<sup>25</sup> (emphasis added). In other words, this statute clarifies that performance awards should be tied to performance ratings rather than other factors. Accordingly, the Panel will delete Management's Section 2.A.

Additionally, Management Section 2.B cites "5 U.S.C. §430," a statutory provision that does not exist. Accordingly, the Panel modifies this language to reference the statutory and regulatory framework that governs awards. The language will be altered as follows: "The Employer shall follow the guidelines of 5 U.S.C. §4505a, 5 C.F.R.

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<sup>25</sup>

See 5 U.S.C. §4505a(a)(1).

§451.104, and all other applicable law for all General Schedule Employees represented by this bargaining unit.”

Finally, the Union accurately notes that Management’s proposal includes some language which places potentially impermissible limits on the Union’s rights. Section 3.C states Management “will establish its awards distribution as it deems necessary.” This language calls into question whether the Union may bargain over future award matters, and thus, should be stricken. Similarly, Management Section 4 states that all awards are to be provided “solely” at Management’s discretion. This language could potentially prohibit grievances on awards. As noted above, the Panel should impose a broad negotiated grievance procedure unless a proponent for a limited procedure “establish[es] convincingly” the need for it.<sup>26</sup> Given this burden, and Management’s arguments, the Panel does not believe that the Agency has demonstrated a need for potentially removing awards grievances from the scope of the negotiated grievance procedure. Accordingly, Management Section 4 should be withdrawn.

11. Article 30 – Performance Management Appraisal Program

I. Agency Position and Article

The Agency proposes it will have sole authority to establish and create critical elements and performance plans. When the Agency seeks to create a new performance plan, it will provide the Union with notice and an opportunity to make recommendations. These areas fall within Management’s right to assign work, and the Agency’s proposal recognizes that fact. The current CBA establishes various “uniform standards” and timelines that Management must follow under threat of grievance. These requirements have hamstrung Management’s ability to govern its workforce and have increased costs for taxpayers. Indeed, Management has had to dedicate a group of employees solely to the task of ensuring compliance with the CBA. Management’s proposal is much more streamlined and efficient. As such, it should be adopted.

II. Union Position and Article

The Union once again seeks to retain the status quo because it is comparable to other existing CBAs and Management has not demonstrated a need for a change. However, in an effort to compromise, the Union has agreed to strike numerous sections throughout this existing article. The Union recognizes that Management has the sole right to “determine the number of rating levels and critical performance elements and standards applicable to each employee’s position.” Unlike Management’s proposal, however, the Union’s proposal recognizes its statutory right to bargain appropriate arrangements and procedures should Management chose to exercise its right to alter any of the foregoing.<sup>27</sup> Relatedly, the Union’s language establishes aspirational goals for the creation of elements and performance standards. The proposal also specifically

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<sup>26</sup> See *AFGE*, 712 F.2d at 649.

<sup>27</sup> See 5 U.S.C. §7106(b)(2) and (3).

defines what element ratings are currently in place. Additionally, the Union defines how the performance system will progress through the performance year. Finally, under its Section 7, the Union reduced the number of days – from 90 to 60 – that an employee must operate under a performance plan before he or she may be rated pursuant to that plan.<sup>28</sup> In relation to this 60 day period, the Union objects to Management Section 5.B, which permits an employee to be placed on a performance improvement plan (PIP) even if they have been on a performance plan for fewer than 60 days. In this regard, the Union notes that the Agency's proposed Article 31, Section 1.B actually prohibits that action. Thus, Management's PIP proposal creates an internal inconsistency.

### III. Conclusion

The Panel will impose a modified version of the Agency's proposal. The parties agree – as they should – that Management has the right to establish the particulars of its performance rating system pursuant to its statutory right to assign work.<sup>29</sup> Despite this agreement, the Union insists on inclusion of language that would set forth an elaborate process for performance management. A process so elaborate that, as Management notes, a staff is tasked with ensuring compliance with it. The Panel does not believe this arrangement constitutes an efficient use of Agency resources. Establishing a more straightforward process will allow the Agency to efficiently identify individual employee performances without fear of confusing and elaborate procedures.

Notwithstanding the foregoing, the Panel believes three modifications are necessary to Management's proposal. First, the Panel will replace the Agency's proposed Section 2 with the Union's proposed Section 2. The latter proposal appropriately recognizes the Union's right to bargain over "changes consistent with law." Management's language, by contrast, does not recognize this right.

The second change the Panel will make is in regards to Management's proposed Section 3. To ensure consistency with the above change, the Panel will impose the Union's proposed Section 3.

Finally, the Panel will impose the addition of Union proposed Section 5.B.1 to Management proposed Section 5. This language will not replace any of Management's language, rather, the Union's language will supplement it. The Union's language will promote workplace effectiveness and efficiency, and also potentially reduce disputes, because it encourages discussions between employees and supervisors on the topic of performance management. Engaging in such discussions may help identify areas that employees need to address, thereby increasing the likelihood that they will successfully contribute to the Agency's mission and reduce potential sources of future controversy.

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<sup>28</sup> 5 C.F.R. §430.207(a) states that all appraisal programs shall establish a "minimum performance period." But, it does not define the length of the period that should be established.

<sup>29</sup> See 5 U.S.C. §7106(a)(2)(A); *NTEU and U.S. Nuclear Regulatory Commission*, 13 FLRA 325 (1983).

## 12. Article 31 - Actions Based on Unacceptable Performance

### I. Agency Position and Article

This article addresses actions taken against poor performers pursuant to 5 U.S.C. Chapter 43 and 5 C.F.R. §432. Among other things, it provides employees with a 30-day PIP period if they are experiencing a deficient performance in one or more critical elements, but it does not permit any grievances until the period ends. The proposal also sets forth various timelines for actions an employee and his or her representative may take when Management proposes a performance-based action, e.g., grade reduction, removal. The proposal also clarifies that an employee may pursue an action with the Merit Systems Protection Board, a grievance, or an equal employment opportunity claim. But, once the employee has elected an option, they may pursue no other types of action. Management believes all of the foregoing is necessary to ensure a timely and orderly adverse action process. The proposal eliminates “convoluted contract language and unreasonable burdens” that divert resources from Management’s mission. Finally, Management claims this proposal is not related to any Executive Order; indeed, this proposal was first present in August 2017 for all non-bargaining unit employees.

### II. Union Position and Article

The Union proposes mostly rollover language from the existing CBA. Chief amongst its concerns with Management’s proposal is the Agency’s proffered 30-day PIP period except for “rare circumstances.” Existing language calls for a 90-day period. Management has not defined “rare circumstances,” nor has it explained why the existing period must be shortened. Existing Federal regulations require a “reasonable” opportunity to improve performance.<sup>30</sup> Management’s proposal seemingly ignores this mandate. In addition, the Union disagrees with the following proposed Management changes: reducing the time to reply to a proposed action from 15 days to 10; requiring an employee to notify Management within 5 days if they plan to submit a response; providing certain items of information in a notice of proposed action; providing a written summary of any employee oral reply; being able to rely upon action(s) that Management did not inform the employee about; requiring certain information in the notice of final action to the employee; providing certain information and copies of information to an employee pertinent to a proposed action; and omitting language concerning an employee’s ability to raise certain defenses. All of these proposed changes hamper significantly an employee’s due process rights.

### III. Conclusion

The Panel will order the adoption of the Agency’s proposal. The major point of contention between the parties in this article is the amount of time that should be devoted to granting an employee time to perform during a PIP. The Union claims that 30 days is not “reasonable,” but existing legal framework provides no specified

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<sup>30</sup> See 5 C.F.R. §432.104.

timeframe. Indeed, if 30 days was not permissible, the law would say so. Management's stated desire to "swiftly" take action against poor performers is a laudable one. The Agency's proposed timeframe establishes a process that timely resolves potential workplace deficiencies and, therefore, is more appropriate.

The Union raises valid concerns about its ability to obtain certain pieces of information from Management in connection with a proposed performance-based action. However, the Union may always rely upon §7114(b)(4) to request information from the Agency. Doing so would balance the Union's need with information and the Agency's need to streamline the process in a timely and effective manner. Accordingly, we reject the Union's proffered rationale.

### 13. Article 34 – Details and Temporary Promotions

#### I. Agency Position and Article

The Agency defines "details" and "temporary promotion" actions, and clarifies that both will be done as determined by Management needs and in accordance with established law. Moreover, decisions to assign such duties or end them will not be considered grievable. Supervisors will determine what, if any, training is necessary for the new duties. Management believes that overly complex language will hinder the assignment process, thereby discouraging supervisors from utilizing these tools. This, in turn, would deprive employees of the opportunity to enhance and broaden their skillsets. Anything beyond what the Agency proposes would limit Management's ability to assign work and manage its workforce.

#### II. Union Position and Article

The Union maintains that the Agency has not demonstrated any need to alter existing CBA language and, as such, the status quo should be retained. One of the Union's primary concerns is retaining language from the CBA that states details are to be made in a "fair and equitable basis." The FLRA has held that this type of language is negotiable, so any Management argument to the contrary is misplaced.<sup>31</sup> It provides a fair basis for selection purposes and reduces the chance that a detail or temporary promotion may be offered on the basis of favoritism or other illegal criteria. Management's Sections 2.A and B remove these personnel actions from the grievance process, but Management has not demonstrated why they should be. Additionally, the grievance article is not a part of this dispute because the Panel did not accept jurisdiction over it in its November 15-Order. Thus, accepting Management's proposals could impact the grievance article when it eventually is resolved.

#### III. Conclusion

The Panel will impose the Agency's language to resolve this dispute. Management's proposal is motivated significantly by a desire to ensure that a straightforward selection process is in place that will allow it to efficiently select

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<sup>31</sup> Citing *NFFE, Local 797 and Dep't of the Navy*, 29 FLRA 333 (1987).

employees for the personnel actions covered by this article. This process will also allow the Agency to reward employees with new occupational opportunities. The Panel believes that these are laudable goals that should be cemented within the parties' contractual framework. Accordingly, we will do so.

#### 14. Article 35 – Reassignments

##### I. Agency Position and Article

Management proposes that it will have sole discretion to make reassignments, which it defines as permanent assignments from one bargaining unit position to another without promotion, demotion, or break in service. The Agency will follow all applicable laws when it undertakes such actions. If a reassignment is involuntary, Management will “strive to take efforts” to minimize the impact. Management claims that any language that goes beyond its proposal would interfere with management’s right to assign work. Additionally, being unable to quickly fill vacancies can drain resources and overburden employees who lack the manpower necessary to accomplish their duties.

##### II. Union Position and Article

The Union wishes to keep the unaltered status quo because it provides managers and employees with structure and guidance. Under the Union’s proposal, there are various factors that Management should consider when making reassignments. However, the Union recognizes that the right to reassign rests solely with Management. Despite this right, the Union notes that Management’s definition of “reassignment” is inconsistent with OPM guidance. In this regard, OPM defines “reassignments” as:

[T]he change of an employee from one position to another without promotion or change to lower grade, level or band. Reassignment includes: (1) movement to a position in a new occupational series, or to another position in the same series; (2) assignment to a position that has been redescribed due to the introduction of a new or revised classification or job grading standard; (3) assignment to a position that has been redescribed as a result of position review; and (4) movement to a different position at the same grade but with a change in salary that is the result of different local prevailing wage rates or a different locality payment.<sup>32</sup>

Management’s proposal is insufficiently narrow because it does not consider the four categories mentioned above. Additionally, with respect to “voluntary reassignments,” Management proposes that the Agency will adhere to all applicable laws, rules, and regulations. However, according to the Union, there is no such legal

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<sup>32</sup> See OPM Guide to Processing Personnel Actions, Ch. 14 at 14-4 (available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/processing-personnel-actions/gppa14.pdf>).

framework for voluntary reassignments. Thus, the Agency's language on this topic is "meaningless." Finally, the Union believes that the Agency's broad language will open the door for more grievances and other disputes.

### III. Conclusion

The Panel will impose the Agency's proposal. Management's proposal achieves the same goal as the Union's proposal because it establishes a contractual requirement that the Agency will adhere to governing authorities on the topic of reassignments. But, similar to other articles discussed above, the Agency's language avoids the potential pitfall of specific legal frameworks changing in the future. The Agency's more general language, therefore, is appropriate to include in the CBA.

#### 15. Article 36 – Merit Promotions

##### I. Agency Position and Article

This article covers six actions that roughly classify as promotions, such as temporary promotions over 120 days, transfers to a higher graded position, and certain reinstatements. However, it specifically excludes eight actions, such as temporary promotions of 120 days or less, promotions resulting from upgrading positions without significant change in duties, and considerations of candidates who were not given proper consideration in a competitive promotion action. The article sets forth various steps Management must take when it undertakes promotion actions, such as posting notice on USAJOBS.gov and leaving the announcement open for at least 5 business days. The article further outlines an automated process for ranking candidates to ensure they can meet minimum qualifications to make a best qualified list. It then establishes that selection will be made based on merit, without consideration of discriminatory or non-merit factors. And, Management must release an employee fairly quickly from their position if they are selected for a promotion. Finally, the Agency's proposal states that "career ladder" promotions are not to be considered automatic.

According to Management, all of the above is necessary in order to provide all applicants with a fair and equitable process. The language furthers the goals of establishing a merit based selection process. The Union has the ability to pursue any contractual grievances if it believes Management has not complied with the agreement.

##### II. Union Position and Article

The Union proposes keeping the existing contract language as is because Management has not provided evidence or information to demonstrate the existence of any problems. Management's proposal also does not address the specifics for ranking and rating processes, priority considerations, or career ladder promotions. As to this last category, the FLRA has held that an agency is not required to promote an

employee through a career ladder action in the absence of contract language.<sup>33</sup> Thus, employees could be unfairly denied career ladder promotions. These denials will lead to morale problems.

The Union is also particularly concerned by the absence of guidance on the topic of priority consideration. Under existing Section 9A1 (as set forth in the Union's proposal), an employee who was erroneously excluded from a best qualified list will receive a "priority consideration" for the next vacancy. But, the existing language on this topic also covers displaced employees (such as employees who have been involuntarily separated by a reduction in force) and preference eligible employees/veterans. These omissions are inconsistent with OPM requirements for Career Transition Assistance Plans (CTAP) and Interagency Career Transition Assistance Plans (ICTAP). In this regard, if certain conditions are met, employees who fall under these plans *must* be selected for vacancies.

### III. Conclusion

The Panel imposes a modified version of the Agency's proposal. The Agency's proposal offers a more streamlined approach to the filling of vacancies that may arise during the course of the Agency's mission. Quickly and efficiently filling those vacancies will best ensure that the Agency can continue its important mission. One of the Union's primary concerns is that, in the absence of contract language, Management may fail to timely advance employees via career ladder promotion. However, the Union offers nothing more than speculation for this point. Moreover, nothing prohibits the Union from filing a grievance pursuant to applicable laws and regulations if it believes an employee has been unfairly denied such an advancement.

Despite the foregoing, the Panel notes the Union's arguments concerning a lack of guidance about CTAPs and ICTAPs. The Agency's language is indeed silent on this topic. However, consistent with discussions elsewhere in this decision, we do not believe it appropriate to include language that recites specific existing regulatory authorities, as the Union requests. Accordingly, the Panel shall add a Section 9.D to Management's proposal that states "All actions covered by this article shall be taken in accordance with applicable law."

## 17. Article 43-Adverse Actions

### I. Agency Position and Article

This section applies to "adverse actions," which includes punishments of 14 calendar days or more, such as lengthy suspensions or removals.<sup>34</sup> The Agency will

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<sup>33</sup> Citing *AFGE, Local 3810 and Economic Development Admin.*, 61 FLRA 631, 632-33 (2006).

<sup>34</sup> See 5 U.S.C. §7512, et seq.

consider only “relevant” *Douglas* factors<sup>35</sup> in assessing a punishment, but will do so only as long as they are required by law to do so. Management will provide an employee with 30 days written notice of a proposed action, and the employee will have 10 days to provide a written or oral reply upon receiving notice. They may have representation. Any final decision may be pursued through a grievance, MSPB appeal, or through the EEO process. However, the employee may elect only one of these options. Management’s proposal should be adopted because it balances an employee’s statutory rights with Management’s needs for a timely disciplinary process.

## II. Union Position and Article

The Union asserts that the parties do not have “many disputes” in this article. The Agency includes a *Douglas* factor that does not exist in Agency Section 3.B.7 – consistency of a proposed penalty with Agency table of penalties – and it should be stricken. In addition to wanting to clarify language in the CBA, the Union also wishes to continue language in its proposed Section 7 for off-duty misconduct. MSPB precedent requires a nexus between such misconduct and discipline. The Union’s language recognizes that fact.

## III. Conclusion

The Panel will impose a modified version of the Agency’s proposal. The only two key differences are the Union’s claims concerning an additional *Douglas* factor and the lack of discussion concerning off-duty misconduct. As to the first point, the *Douglas* decision actually does reference consideration of penalties in the context of Agency table of penalties.<sup>36</sup> So, the Union’s argument is misplaced. However, the Union accurately notes that there is existing authority concerning off-duty misconduct and a nexus requirement.<sup>37</sup> Thus, it would be appropriate to retain language on this aspect. Management’s proposal will be adopted with the following addition:

In any case where the charges are premised upon off-duty misconduct, the proposal and decision will describe the relationship (often referred to as the “nexus”) between the misconduct and the employee’s position.

## 18. Article 44- Disciplinary Actions

### I. Agency Position and Article

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<sup>35</sup> The *Douglas* factors are factors developed by the MSPB that a supervisor must use when assessing an appropriate penalty within the context of adverse actions. The factors may either be mitigating or aggravating. See *Douglas v. Veterans Admin.*, 5 MSPB 313 (1981).

<sup>36</sup> See *Douglas*, 5 MSPR at 305.

<sup>37</sup> See, e.g., *Winner v. Air Force*, 10 MSPR 177, 178 (1982).

This article covers *only* actions of suspensions of fewer than 14 days. It specifically excludes counseling, warnings, admonishments, “and other similar actions” from the definition of “disciplinary actions.” And, reprimands will continue to be considered discipline for purposes of progressive discipline even though such actions may not be challenged. Further, letters of reprimand will stay in an employee’s file for up to 2 years. In considering the proper discipline action, Management will consider all mitigating and adverse factors. The Agency will provide notice (that the Union can grieve), and the employee will have 24 hours to reply, although the supervisor may extend this time. Once a final decision is issued, an employee may file either a grievance or an EEO complaint. Management’s proposal should be adopted because it balances an employee’s statutory rights with Management’s needs for a timely disciplinary process.

## II. Union Position and Article

The Union wishes to retain the status quo because Management’s proposal “excludes meaningful due process, a fair hearing, and is impractical.” Because the Agency proposes allowing the consideration of Letters of Reprimand for discipline purposes, the Union disagrees that employees should be prohibited from challenging them. The Union’s proposal also references the standard for discipline as “such cause as will promote the efficiency of the service.”<sup>38</sup> Relatedly, the Union proposes retaining language discussing various factors Management must consider when assessing a penalty.<sup>39</sup> Additionally, the proposal discussed the nexus requirement for off duty misconduct.

The Union also argues that the Agency’s proposed timeframes and other procedures for challenging proposed discipline fail to establish meaningful due process. In this regard, Management’s proposed 24-hour turnaround for review and an opportunity to respond does not provide an employee with sufficient time to obtain representation or provide a useful substantive response. Thus, the Union wishes to leave existing procedures in place, which include:

- Receipt of the proposed action no fewer than 15 days prior to the proposed date;
- 14 calendar days for the employee to provide an oral or written reply;
- Acknowledgement that an employee and his or her representative will receive reasonable time to prepare any response; and

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<sup>38</sup> The Union maintains that, in Section 3 of its proposal, the Agency erroneously states this standard as the “Employer shall affect the adverse action necessary to maintain an effective and efficient workplace.”

<sup>39</sup> These factors are similar to the *Douglas* factors described above. However, as these disciplinary actions are not “adverse actions,” the *Douglas* factors do not apply as a matter of law.

- An obligation by Management to provide information it relied upon in reaching its decision.

### III. Conclusion

The Panel will adopt a modified version of the Agency's proposal. The proposal provides a better balance of the Agency's need for processing disciplinary actions in a timely manner with an employee's need for various protections. By contrast, the Union's proposal establishes a protracted process for disciplinary actions that do not even rise to the level of an adverse action. The Agency's proposal still provides a process for notice and response, and it allows for the consideration of various mitigating factors. Thus, it is appropriate to accept Management's proposal.

Despite the foregoing, there are three modifications that should be made. First, in order to be remain consistent with the conclusion for the adverse action article above, the Panel will include language concerning off-duty misconduct and a nexus establishment. Thus, this language should be added:

In any case where the charges are premised upon off-duty misconduct, the proposal and decision will describe the relationship (often referred to as the "nexus") between the misconduct and the employee's position.

Second, the Agency's proposed language in Section 2.B prohibiting challenges to Letters of Reprimand should be dropped. The Union accurately notes a disparity in allowing Management to rely upon these letters for future disciplinary proposes while simultaneously prohibiting the Union from challenging them. The Agency offered no rationale for this inconsistency, and none is apparent. Thus, the following language should be stricken: "Reprimands are not subject to the procedures of this article."

Third and last, the Agency's language concerning the standard for discipline in Section 3 should be replaced. Management offers no authority for its proposed language that, when considering discipline, the Agency "shall affect the adverse action necessary to maintain an effective and efficient workplace."<sup>40</sup> Traditionally, discipline is framed as whether such discipline will promote the efficiency of the service. Thus, the final sentence of Management's proposed Section 3 should be stricken and replaced with the following: "No employee will be disciplined except for such cause as will promote the efficiency of the service."

## 19. Article 50 – Health & Safety

### I. Agency Position and Article

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<sup>40</sup> Moreover, as the Union accurately notes, there is a legal distinction between "adverse actions" and disciplinary actions. Thus, referencing the former in an article that covers solely the latter is confusing.

The Agency's proposal recognizes the importance of employee safety but also takes the position that many safety issues arise due to factors outside of the Agency's control. Thus, its proposal limits Management's safety obligations to only those matters that fall under its direct purview. But, the Agency will provide employees with information and training as necessary. Moreover, Management will emphasize that employees should feel encouraged to bring safety issues to the attention of the Agency. The Agency, however, disagrees with the Union's contention that safety committees – which would contain bargaining unit employees – are necessary. Unlike Agency officials and employees hired for the specific purpose of safety, employees on such committees would not have the expertise necessary to make judgements concerning health and safety. Thus, their input would not be beneficial.

Management also rejects a portion of the Union's proposal that would require supervisors to provide certain furniture and equipment whenever requested. These requests would place a significant drain on Management resources. However, the Agency's proposal would still permit employees to make reasonable accommodation requests as necessary.

## II. Union Position and Article

The Union proposes retaining the status quo of the CBA that the parties enacted in 2010. During negotiations, the Union agreed to strike several sections of the CBA. These sections include establishment of health and safety committees at the regional levels, receipt of various health and safety reports, site inspection participation, an obligation to secure transportation for employees when they are incapacitated, and the production of reports involving employees who are in workplace accidents. The Union's proposal still, however, requires Management to undertake certain duties and provide employees with certain information, such as the location of nearby facilities. Management must also provide certain equipment to all employees if they perform certain duties regardless of whether those employees raise health and safety issues. Management has not demonstrated a need to change the CBA, so the Union's proposal should be adopted.

## III. Conclusion

The Agency will impose the Agency's proposal. The Union claims that Management has not demonstrated a need for its proposed changes. However, as discussed above, the Agency has raised concerns about addressing external matters that do not fall under its control and providing equipment to all employees, regardless of the circumstances. The Union did not rebut these points of contention, and Management's concerns are common sense ones. It is not clear what actions the Agency should take when confronted with a circumstance outside of its control, e.g., a building owned by a different entity, nor is it clear why all employees should automatically receive certain equipment when they have reasonable accommodation procedures in place. Thus, on balance, Management's proposal should be adopted.

## 20. Article 59 – Peer Review

## I. Agency Position and Article

This issue covers an existing article within the CBA, and Management proposes removing it altogether. The purpose of the article is to establish a peer review system wherein Food and Drug Administration (FDA) employees – who are part of the DHHS – provide review and feedback on whether to promote scientists, engineers, and doctors to the GS-14 or -15 levels. The Agency would eliminate this altogether and allow FDA to implement its own policy and process. Management has the right and authority to make promotion and internal placement actions. It is in a better position than employees to assess factors such as fully successful performance, time-in-grade requirements, and other qualifications. Thus, allowing FDA to establish its own system is simply common sense.

## II. Union Position and Article

The Union proposes maintaining the status quo, which has been in place since the CBA's initial enactment in 2010. Supervisors within the FDA often lack the technical expertise necessary to evaluate whether a specialized employee is performing at the level necessary for advancement. Thus, peer review is an invaluable tool; indeed, it is often in the position descriptions for these employees. The article also allows employees the right to initiate the process and to nominate other employees to serve on peer review committees. The Union also objects to the extent that the Agency's proposal grants the Agency the right to establish its own peer review process unilaterally. Such an action would deprive the Union of its statutory right to bargain over appropriate matters.

## III. Conclusion

The Panel will impose the Agency's proposal. The Panel agrees with the Agency's rationale that it, and not the Union or bargaining-unit employees who are part of that Union, are in a better position to analyze the unique qualifications and requirements of employees of the FDA. Given that promotion procedures are primarily the creation of the Agency, it should be axiomatic that Management is in a better position to assess whether individuals satisfy those requirements. However, in agreeing with the Agency's position that this language should be removed from the CBA, the Panel does *not* accept the Agency's tacit position that the FDA may simply and unilaterally "implement its own internal policy and procedures" in the future. The Panel fully expects that the Agency will recognize and adhere to all applicable laws that govern the bargaining process in the establishment of a new peer review process.

## 21. New Article – Employee Space & Facilities/Space Moves

### I. Agency Position and Article

This article represents a new article put forward to address the important – and often contentious – issue of space relocation. Due to various operational needs and limited resources, Management must often move quickly and efficiently to relocate

employees. Moreover, it is often constrained by space allocations given to the Agency by the General Services Administration (GSA). Indeed, Management takes the position that the Union has no right to bargain over the assignment or alteration of office space itself (Management does not provide any authority to support this position).

The Agency's proposals are consistent with the foregoing rationale. Thus, for example, it contains six definitions that define various office sharing scenarios that could be utilized to address reduced space scenarios. Management will have *sole* discretion to decide how to utilize these procedures. Further, Management would be required to provide employees with no more than 7 calendar days' notice prior to a move date, and employees would receive no more than 4 hours of duty time for packing and unpacking.

## II. Union Position and Article

The Union proposes striking Management's proposal in its entirety and offers no counter proposal in response. The Agency's proposal grants it sole authority to decide how it will handle office space relocations and similar actions. As such, the proposal would require the Union to waive its rights to bargain over procedures and appropriate arrangements involving management's decision to relocate employees.<sup>41</sup> Requiring the Union to waive statutory rights is a permissive topic of bargaining, and the Union does not chose to bargain over it. Moreover, the parties are still engaged in discussions and litigation over Article 3, which covers mid-term bargaining. Space relocations mostly occur within the context of mid-term situations. As such, adopting Management's proposal could interfere with efforts to resolve Article 3.

On the merits, the Union notes that Management is seeking to curtail telework. The lack of telework could impact how the Union approaches a relocation. Moreover, the Agency's language lacks specificity and does not account for the fact that each relocation is usually different and turns on facts that do not apply to every situation. The proposal, therefore, is not an appropriate solution.

## III. Conclusion

The Panel will order the Agency to withdraw its proposal. The Union accurately notes that the Agency is attempting to retain sole discretion to control how office relocations will occur during the life of the CBA. But, as the Union correctly argues, the Union cannot be forced into waiving its statutory right to bargain over those matters that fall under the purview of the Statute. Indeed, the Panel declined jurisdiction over several matters entirely on that basis. Thus, to remain consistent, the Agency's proposal will be withdrawn.

## 22. New Agency Article - Interpretation

### I. Agency Position and Article

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<sup>41</sup> Citing 5 U.S.C. §7106(b)(2) and (3).

The Agency proposes including language stating that the CBA will be interpreted to not grant the Union rights greater than law or to deprive them of statutory rights. This Article is meant to dispel any ambiguity that may arise concerning articles that were not opened during negotiations due to a limitation on the number of opened articles. Additionally, the proposal addresses the Union's concern that Management was seeking to get the Union to waive various rights.

## II. Union Position and Article

The Union proposes striking the Agency's article in its entirety and has no counter offer. It argues that Management offered this article in an attempt to limit the new CBA and, as such, it is contrary to the Statute's mandate that collective bargaining is in the public interest.<sup>42</sup> The new proposal is also inconsistent with other portions of the CBA that reference other existing or new articles in the event of a conflict. This arrangement would create confusing for the parties and employees alike. The Union believes that Management's attempt to limit bargaining to those matters "expressly provided in law and regulation is clearly illegal."

## III. Conclusion

The Panel will order the Agency to withdraw its proposal. As admitted by the Agency, this proposal was offered in an attempt to address other articles within the new CBA that could not be opened due to the limitations on opened articles in the parties' ground rules agreement. That is, the proposal is an attempt to get around this limitation. Adopting the Agency's proposal, therefore, would serve as a runaround to the ground rules agreement. Moreover, the Agency has not cited a specific need for this language. Finally, adopting this language will potentially lead to confusion, and litigation, as the parties will invariably disagree over what is and is not covered under the CBA. Thus, this proposal's adoption is not warranted.

## 23. New Union Article – Student Loan Repayment

### I. Agency Position and Article

The Agency proposes that it will have sole discretion to establish a Student Loan Repayment Program (SLRP) subject to the availability of funding. No employee will have an entitlement to participate in such a program. Management's limited financial resources necessitates the discretionary nature of this proposal. A program could not be applied equitably to all employees in all offices due to differences in office budgets.

### II. Union Position and Article

The Union proposes that the Agency establish a SLRP that is in alignment with a SLRP that the Union negotiated with the United States Securities and Exchange Commission. The proposal would create a joint committee to review the program and

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<sup>42</sup> See 5 U.S.C. §7101(a).

establish several criteria that would be used in assessing whether employees would be eligible to participate in the SLRP. Management, however, would have discretion to act within budgetary constraints. The Agency has an existing SLRP that employees avails itself of; indeed, data shows that 673 Agency employees utilized the program during calendar year 2016. The Union merely seeks to establish negotiated procedures for how the program will operate.

The Union also rejects the idea that Management should have sole discretion to decide how the program should operate. The legal framework that permits an agency to establish a SLRP does not grant agencies sole discretion to do so.<sup>43</sup> In the lack of sole discretion, the FLRA has held that an agency *must* negotiate with an exclusive representative.<sup>44</sup>

### III. Conclusion

The Panel concludes that the parties should withdraw their proposals. The Union is correct to note that, under existing precedent, an agency must negotiate when it is not granted exclusive authority to act unilaterally. However, that precedent does not require an agency to accept an exclusive representative's proposal. Adoption turns on the parties' positions, as with any other impasse.

In this case, the Panel does not believe that either party has provided sufficient argument to warrant justification of their respective positions. The Union acknowledges that: (1) the Agency already has an existing SLRP; and (2) employees are already utilizing it. Given these facts, it is not clear why the Union needs additional safeguards in place. And, as a program has seemingly existed for several years, it is not clear why the Agency needs language in place to govern that program. The Agency cited no issues within its filing necessitating the creation of its proposed language. Based on the foregoing, then, the proposals should be withdrawn.

### 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

April 1, 2019  
Washington, D.C.

<sup>43</sup> See 5 U.S.C. §5379 et seq.; 5 C.F.R. Part 537.

<sup>44</sup> Citing *NTEU and Dep't of Agriculture*, 68 FLRA 334, 340 (2015).