

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

SOCIAL SECURITY ADMINISTRATION

And

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES

Case No. 19 FSIP 019

**DECISION AND ORDER**

This case, filed by the Social Security Administration (Management or Agency) on January 10, 2019, concerns a dispute over parts of 12 articles in the parties' successor collective-bargaining agreement (CBA) between it and the American Federation of Government Employees (Union). This dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). On March 26, 2019, the 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 mission of the Agency is to promote the economic security of the nation's people through compassionate and vigilant leadership in shaping and managing America's Social Security programs. The American Federation of Government Employees (AFGE) represents 45,000 bargaining unit employees in a variety of positions located throughout the United States. The parties are represented by a collective bargaining agreement (CBA) that expired on March 31, 2018.

In December 2017, Management provided the Union with notice that it wished to bargain a successor CBA. The parties entered into a ground rules agreement in March 2018 and began term negotiations in June 2018. Between June and December 2018, the parties participated in around 40 bargaining sessions, including multiple meetings with a Mediator from the Federal Mediation and Conciliation Services. As a result of the parties' efforts, they were able to resolve over 50 articles. However, parts of 12 articles remained disputed. Accordingly, on December 20, 2018, the Mediator released the parties from mediation in Case No. 201811460056.

On January 10, 2019, the Agency filed this request for Panel assistance, and the Union opposed jurisdiction over a number of issues in that request. The Panel, on March 26, 2019, asserted jurisdiction over all but two issues and directed the parties to

provide Written Submissions on the remaining issues in the 12 articles. The Panel also gave the parties an opportunity to provide rebuttal arguments. The Panel has now received the parties' written positions.

## **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 1 – Governing Laws, Regulations, and Existing Conditions of Employment

#### I. Agency Article and Position

The Agency proposes language within its Section 3 that would terminate all 1,046 (approximate) existing memorandums of understanding (MOUs) and other supplemental agreements. Terminating these agreements would allow the parties to start from a clean slate when a new CBA is executed and would ensure that all interested parties are operating under the same "rule book." Moreover, as a practical matter, the Union had the opportunity during the course of these CBA negotiations to bargain over conditions of employment contained in those other agreements. Finally, as a clerical matter, the Agency proposes striking existing language in the Article that references the "2012" CBA, since that document will no longer be in effect.

#### II. Union Article and Position

The Union proposes retaining the existing language. Management has not justified a need to alter the status quo. In response to the Agency's claim that the Union could bargain conditions of employment during these negotiations, the Union notes that time constraints did not permit the parties to delve into every individual agreement. Moreover, eliminating over 1,000 agreements simultaneously will leave numerous individuals "in the dark" about their rights. The parties engaged in "truncated" bargaining over this CBA and, as such, they did not have sufficient time or opportunities to address the numerous existing side agreements. Tossing them all out, therefore, is not appropriate.

#### III. Conclusion

The Panel adopts Management's proposal. There is much sense in the Agency's proposition that there should be one guide for all interested parties to abide by. Although the Union's concern that employees will be in "the dark" as a result of the termination of existing agreements is understandable, having a single agreement they can turn to for light will offset that confusion. Indeed, given the existence of over 1,000 MOUs it is likely that maintenance of the supplemental agreements would result in more confusion than it would alleviate. Accordingly, on balance, the Agency's proposal presents the better solution.

## 2. Article 7 – Duration of Agreement

### I. Agency Article and Position

The Agency proposes that the CBA remain in effect for 7 years. The Agency estimates that bargaining the current contract will result in an Agency expenditure of millions of dollars. The Agency's breakdown is as follows:

- \$1.1 million in salary, benefits, and overhead for bargaining-team members who negotiated this contract;
- \$500,000 in travel and per diem for those negotiators; and
- Training for over 6,000 Agency managers once the new CBA goes into effect, roughly totaling \$3.6 million.

The Agency's proposal means that the above breakdown of \$4.7 million would accrue every 7 years only. By contrast, the Union's proposal would amount to roughly \$14 million every 14 years. The Agency also opposes the Union's proposal on ground rules discussed below because it would cost \$6,500 in travel and per diem per week. But, in any event, the parties have agreed, elsewhere in the CBA, to conduct bargaining via technology.<sup>1</sup>

### II. Union Article and Position

The Union proposes a 2-year duration because the Union has not received a "fair opportunity" to bargain this CBA due to a "lack of time traditionally given for bargaining" a new contract. The Union's proposed timeframe meets the Agency's interest of establishing a new contract but also provides the Union with ample time to begin preparations for bargaining the next CBA. The Union rejects the Agency's proposed 7-year period as "excessive" by industry standards. Congress also appropriates money from the Agency's trust fund for Agency operations, and the Agency has already set aside \$11 million from that fund for Union operations. But, the Treasury Department reimburses this fund "as soon as possible," and the foregoing figure represents a minuscule portion of the Agency's overall budget. For example, in FY 2018, the Agency requested nearly \$13 *billion* in funding. To say that Union resources places a drain on the Agency's budget is a stretch.

As part of its proposed Article 7, the Union also proposes including language on ground rules for bargaining the next CBA. The Union requests that bargaining occur in Baltimore and that the Union be entitled to seven bargaining-team members. Five of those seven members will receive travel and per diem.

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<sup>1</sup> The Agency also opposes a Union proposed "sidebar" that would require the Agency to withdraw its notice to re-negotiate the CBA. In its submission to the Panel, however, the Union does not raise this sidebar agreement. Thus, the Panel considers this issue withdrawn.



### III. Conclusion

The Panel will order the adoption of Management's proposal. As discussed above, the Agency estimates that implementation of a new CBA will amount to an expenditure of \$4.7 million in taxpayer funds. Management did not simply invent this figure. Rather, it originated from sworn statement evidence provided by Agency officials. The Union did not dispute these figures, choosing instead to essentially argue that funding is available due to Congressional appropriations. The Panel believes it is appropriate to minimize the reoccurrence of the Agency's cited figures. Thus, it is proper to impose a contract duration of 7 years.

#### 3. Article 11 - Union Use of Official Facilities and Communications

##### I. 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, albeit with various limitations depending upon certain factors. Additionally, the Union should be permitted unlimited access to other pieces of equipment because other entities continue to receive such access. Stripping the Union of all of the foregoing would hinder the Union's ability to efficiently and effectively represent its constituents.

The Agency's proposed limitations would cripple the Union's ability to engage in various representational functions. Moreover, at least three other entities receive dedicated office space: (1) minority advisory groups in the Agency's Northeastern Payment Service Center in New York; (2) an alumni association in Baltimore; and (3) American Legion Post 829 in the Agency's Mid-Atlantic Payment Service Center in Philadelphia. The Union should receive the same treatment as these groups. And, the financial figures cited by the Agency are misplaced because they go to space that is already part of the Agency's footprint.

##### II. Agency Article and Position

The Agency proposes eliminating office space for the Union, but it will make available space for Union meetings upon reasonable requests. Per a sworn statement from the Agency's Office of Finance Director, the Agency paid \$930,462 in Union office space for Fiscal Year 2018 alone. By contrast, during that same period, the Union received \$10,345,834 in dues. It is only fair, therefore, that the Union be expected to share some costs for Agency resources. Thus, the Agency also proposes eliminating mail and postage services, dedicated copy and fax machines, printing contracts, and providing office supplies. All of these cost savings can be allocated to other uses, such as 500 additional disability hearing officers. Additionally, Management proposes various limitations on use of its email system for representational purposes. Limitations include the number of individuals who may be emailed at once, when email may be used, and a prohibition on insulting or demeaning language.

Despite the foregoing reductions, the Agency is still willing to provide meeting space to the Union for representational purposes when it is "available." Such space will still allow the Union to engage in its statutory duties. There is no legal requirement, however, that the Agency *must* provide dedicated space to the Union solely for its use. The Agency disputes the Union's claim that it provides free office space to the three entities identified by the Union. The alumni association and minority advisory groups do not receive any such space. And, American Legion Post 829 receives a "small storage closet" to store flags for Agency events.

### III. Conclusion

The Panel will adopt a modified version of Management's proposal. The Agency proposes eliminating cost-free office space to the Union, and the Union wishes to retain it. A key disagreement is how much the Agency could save by eliminating this space. The Union does not dispute the Agency's cited figure, rather, it maintains that this figure accounts for space that is already present regardless. However, this space is present *because* the Union is currently utilizing it. The Agency's argument is that freeing up that space would free up those funds. Additionally, the Agency is willing to provide the Union with space for meeting usage. The Union cites no legal authority that requires Management to provide it with a dedicated office space. Finally, the parties dispute how much space is allotted to other entities. The Union did not provide evidence to support its claims that its other cited entities receive space, however. On balance, then, the Agency's proposal is most appropriate.

Notwithstanding the foregoing conclusion, the Panel will impose two minor modifications. In Agency Article 11, Section 4.C, Management proposes a ban on Union bulletin postings that contain language which would "malign, demean, or insult" individual Federal employees. Similarly, in Agency Article 11, Section 6.A.6, the Agency proposes a similar ban with respect to Union emails. The Panel takes this opportunity to clarify that it does not condone communications involving demeaning, insulting, or inflammatory comments. Effective and efficient labor relations *must* turn on respectful and clear dialogue between Federal agencies and exclusive representatives. However, the Panel is cognizant of the fact that policing the content of speech potentially runs contrary to principles established by the First Amendment to the United States Constitution. As a result, the Panel has repeatedly declined to impose language calling for speech limitations such as the ones requested by the Agency in this dispute.<sup>2</sup> **Accordingly, consistent with other Panel decisions that have stricken language that places limitations on statements that may be made to others, the Panel strikes Section 4.C and Section 6.A.6.**

#### 4. Article 13 – Parking and Transportation

##### I. Union Article and Position

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<sup>2</sup> See, e.g., *DHHS and NTEU*, 2018 FSIP 077 at p.10 (2019) (citing *OPM and AFGE, Local 32*, 2018 FSIP 032 at p.3 (2018)).

The Union proposes retaining the status quo. It is concerned about two key aspects of this article: (1) the availability of parking; and (2) transit subsidies.

Concerning the first issue, the parties agree the Agency must bargain over proposed changes in parking arrangements. But, the Union wishes to keep language clarifying that bargaining will occur within the specific context of office relocations or creations. Additionally, the Union wishes to retain language requiring the Agency to continue to provide parking "where currently provided" in accordance with GSA regulations.<sup>3</sup> And, when free parking is "not available" for employees, those spots that are "available" will be distributed in a fair and equitable rotation utilizing several factors for those employee who do not satisfy GSA criteria. The Union's proposals present a "cost saving" measure to the Agency and also protect the health and safety of employees. As to the latter point, many employees have to share parking lots with the general public, and the Union has received complaints about "angry" individuals in those lots. The Union's proposal will help ensure the safety of employees by providing them with clearly defined parking areas. The Agency cites to Executive branch guidance that calls for agencies to reduce their carbon footprint, but none of these authorities discuss parking. Further, the Agency misapplies GSA parking guidance; the Union simply wants Management to make a "best effort in accordance with law."

The second key issue in this article concerns the continuation of existing transit subsidies. Existing language states that the Agency "will" pay them if funding is available; the Agency wishes to alter this language to state "may." Additionally, the parties have a sidebar agreement in which the Agency agreed that it "will" reimburse employees a monthly subsidy in the Washington, D.C. region and non-Washington, D.C. regions. The Agency proposes removing any reference of this sidebar agreement from Article 13, and the Union opposes this move. The Union believes this language should remain.

## II. Agency Article and Position

The Agency has over 1,600 offices across the United States, and most of these locations do not have free parking. Like all Federal agencies, the Agency is under an obligation to reduce its space footprint and otherwise utilize its space efficiently. The Union's language binds the Agency to provide parking when it is "currently provided" and calls for a rotation of spaces when parking is unavailable. These proposals may place a burden on costs during office relocations because the Agency might have to make significant investments in order to provide spaces to those who "currently" receive one. Therefore, the Union's requested language is burdensome and potentially logistically difficult to implement. Management, however, recognizes that it may have a

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<sup>3</sup> Citing 41 C.F.R. §102-74.305. This regulation identifies which groups of employees should receive priority for "available parking spaces," e.g., severely disabled employees take precedence over supervisors with "unusual" working hours. But the regulation does not define when a space is considered "available."



statutory duty to bargain and must also abide by GSA guidance. So, its proposal recognizes these two facts.

As to the transit subsidy issue, the Agency is concerned with employee eligibility and fund availability. The Agency must provide funds *only* for employees within the Washington, D.C. region, but it has nevertheless agreed to the sidebar language for employees in other regions. However, funds for the latter group is not an entitlement, and the Agency must have the flexibility to discontinue it if it is no longer sustainable.

### III. Conclusion

The Panel imposes a modified version of the Agency's proposal. On the issue of parking space, the Agency's proposal, as set forth in Section 1, provides a better balance between the Agency's space-allocation needs and the Union's ability to enforce the rights of it and its bargaining-unit members. In this regard, Management agrees that it will bargain over proposed parking changes and states that parking "will be handled in accordance" with GSA regulations. This language provides a clear and concise expectation for all individuals without delving into hypothetical future scenarios. It is also not clear what cost savings accrue from the Union's proposals, and the Union's claim of threatening members of the public is not supported by the record.

Although the above language should be accepted, the Panel accepts the Union's language concerning the parties' sidebar agreement found in its proposed Article 13, Section 6. The Agency's point that funding may become an issue is a valid concern. Despite this concern, however, the Agency freely admits that it entered into the sidebar agreement stating that it "will" provide subsidies for non-Washington, D.C. employees. Moreover, the Union's language in Section 6 states the Agency will provide subsidies to employees "subject to the availability of funds." In other words, if funds are lacking, the Agency is not required to offer the transit subsidy. The Union's language in Section 6, therefore, adequately balances the parties' interests.

## 5. Article 21 -- Performance

### I. Agency Article and Position

This article generally covers performance appraisals and adverse actions stemming therefrom. The Agency offers language that is intended to streamline the article and make it more effective and efficient. So, it proposes removing language that references 5 C.F.R. §752 et seq., which covers actions based upon discipline. The Agency feels inclusion of these references will confuse those reviewing this article. Management also proposes removing language that references concepts that the parties have already agreed will no longer continue under the new contract. Additionally, the Agency is opposed to Union language that would "clarify and codify" the Agency's performance management standards. Approximately 99% of Agency employees receive an annual rating of "successful" or higher. Thus, it is apparent that employees are currently receiving the information they need to be successful. The Union's requested language, therefore, is unnecessary. That the Union has chosen to

file grievances in the past does not alter this conclusion, particularly since none of them has resulted in an adverse finding against the Agency.

One significant change the Agency wishes to make is that it proposes altering Section 8.B to prohibit grievances/arbitrations for performance-based actions. Instead, employees/the Union will be limited to pursuing such claims before "other appropriate forums." This proposal is consistent with grievance exclusions it is seeking elsewhere in the contract. Moreover, the Agency does not believe that it is appropriate for the Agency to pay arbitration fees when employees have other options available that do not result in such costs.

The Agency is also opposed to Union language that would create a new section concerning notice and the opportunity to bargain over performance measurement systems. The parties have already agreed to language in Article 4 that covers the Agency's bargaining obligations. This language, therefore, is unnecessary. Management also believes it unnecessary to accept Union Section 12 that incorporates three existing MOUs. Management needs "latitude" to make changes in its performance system during the life of the master contract, and these CBAs could hamper that latitude.

## II. Union Article and Position

The focus of the Union's proposal is to "clearly define, clarify and codify what is measured and accurately assessed including spelling out both the supervisor and employee responsibilities throughout the appraisal year." So, supervisors will be required to keep employees informed of their accomplishments and/or deteriorations. Since 2015, the Union has filed five class-action grievances against the Agency because the current performance rating system has allegedly had discriminatory impacts upon certain employees. The Union's belief is that its proposals will address these concerns.

The Union is opposed to the Agency's attempts to limit the scope of the parties' negotiated grievance procedure. Management's proposal arbitrarily denies employees of a forum provided through the Statute and also violates concepts of due process under the Fifth Amendment to the United States Constitution because it deprives them of their choice of forum. The Union filed four-class action grievances between 2014 and 2017, and the Agency settled one of them. These actions are proof of the necessity of the Union's language.

## III. Conclusion

The Panel will impose a modified version of Management's proposal. The dispute over this article essentially turns on two issues: (1) information related to performance appraisals; and (2) the ability to challenge these appraisals in other forums.



As to the first issue, the Union is primarily concerned that employees do not receive sufficient information during their performance rating period, which in turn leads to communication breakdowns and litigation over performance ratings. So, the Union's Section 6.I.4 offers language stating that certain work metrics "will be reliable," whereas the Agency proposes that it will "take steps" to ensure reliability. The difference in language is negligible as ensuring reliability necessarily involves taking steps to do precisely that. The Union's language, therefore, is unnecessary.

The remainder of the Union's performance-related language does not clearly address the Union's stated interests. For example, with respect to performance improvement plans (or opportunity to perform successfully, as referred to in the parties' agreement), the parties agree that supervisors must provide employees with the performance requirement or standard that an employee did not successfully accomplish. But, the Union proposes language indicating that the foregoing "should be consistent" with the information communicated to employees in their performance plan. Given that this scenario unfolds *after* a performance rating has been delivered, it is not clear how this proposal furthers communication efforts. Another example of a tenuous connection to the Union's interests is its proposal in Section 10 that would require the Agency to turn over certain EEO-related data. The Agency is willing to do so in accordance with "applicable law." The Union wishes to strike this phrase for unknown reasons. Complying with the law should not impact the Union's concerns about fully informed employees. Accordingly, the Union's language for this article should mostly be rejected.

The Panel will reject the Agency's proposed limitation on grievances, however. The Agency proposes eliminating grievances for performance-based actions. As this issue involves the exclusion of topics from the parties' negotiated grievance procedure, the Panel is bound to follow the framework established on this topic by the United States Court of Appeals for the District of Columbia in *AFGE v. FLRA*, 712 F.2d 640 (D.C. Cir. 1983) (*AFGE*).

In *AFGE*, the parties before the D.C. Circuit contested whether they were required to negotiate over the scope of a negotiated grievance procedure contained in a collective bargaining agreement, i.e., whether it was a mandatory topic of bargaining. The court answered this question in the affirmative. The court further clarified that parties could bargain to the point of impasse on this topic. The court then held that parties who reach this point, and the Panel, must adhere to the following framework:

[I]f impasse is reached on this subject the Federal Service Impasses Panel is to impose a broad scope grievance procedure unless the limited-scope proponent can persuade it to do otherwise. We would expect the Panel, in view of the FLRA's decision and the foregoing analysis, to rule against a proponent of a limited procedure who fails to establish

convincingly that, *in the particular setting*, its position is the more reasonable one.<sup>4</sup>

The above language is clear: the Panel is to impose a “broad scope” grievance procedure unless the party moving to limit that scope -- be it Agency or Union -- is able to “establish convincingly” the need for a limited scope. That is, the burden for exclusion rests entirely upon the moving party. However, the foregoing language also establishes that the burden for exclusion turns on “the particular setting” of the dispute. As such, the question of exclusion is a fact-specific one that turns on the particular facts and evidence contained in the record before the Panel in each individual matter before it.

With the foregoing framework in mind, we turn to examining the Agency's proposed exclusions. As noted, the Agency seeks to exclude grievances involving performance-based actions. Under Section 8.A of the CBA (in both parties' offers), if an employee does not satisfy the conditions of a performance-improvement plan, the Agency will initiate a performance-based action and reassign them to another position, demote them, or terminate them. Pursuant to Federal law, an agency may demote or remove an employee for performance-based reasons under two different statutes.<sup>5</sup> Depending on language contained within a contract, that employee has the option of challenging the personnel action through an appeal to the MSPB<sup>6</sup> or by filing a grievance pursuant to an existing negotiated grievance procedure.<sup>7</sup> If the employee chooses the former option, they will undergo a hearing with an MSPB Administrative Judge, and the Judge's decision may be appealed to the MSPB. Absent an appeal, the Judge's decision becomes final and binding. If the employee elects to file a grievance, they forego the MSPB process. Regardless of which path the employee chooses, an adverse final decision may generally be appealed to the United States Court of Appeals for the Federal Circuit.<sup>8</sup> With respect to reassignments, the MSPB has jurisdiction over such disputes *only* if that action results in a reduction of grade or pay.<sup>9</sup>

The Agency claims it should not have to devote financial resources to arbitration when “other appropriate forums” are available to employees. Although the Agency does not specify what forums it is referring to, it appears that the Agency is referencing the

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<sup>4</sup> *AFGE*, 712 F.2d at 649. (emphasis added).

<sup>5</sup> 5 U.S.C. §4303(a); 5 U.S.C. §7513(a).

<sup>6</sup> 5 U.S.C. §4303(e); 5 U.S.C. §7513(d).

<sup>7</sup> 5 U.S.C. §7121(e)(1).

<sup>8</sup> 5 U.S.C. §7703; 5 U.S.C. §7121(f).

<sup>9</sup> *See, e.g., Walker v. Dep't of the Navy*, 106 F.3d 1582, 1584 (D.C. Cir. 1997).

MSPB framework discussed above. Although the Agency cites financial concerns for its proposal, it does not actually offer supporting data on this point in its arguments. The closest the Agency approaches to doing so is raising data in a *different* article – Article 24, “Grievances,” – that the Agency has received under 1,300 grievances since Fiscal Year 2015 involving “employee performance, awards, and matters appealable to the MSPB.” But, the Agency offers no specific breakdown of this claim in general, and more specifically, there is no breakdown as it pertains to performance-based actions. Additionally, as noted above, challenges to reassignments can be heard by the MSPB only if certain criteria are met. In the absence of those criteria, it is unclear what third-party forum an employee would use to challenge that action.

In light of the “convincing[ ]” burden facing a proponent of exclusion, the Panel cannot say that the Agency’s arguments demonstrate that, in this “particular setting” exclusion is warranted. **Accordingly, the Panel will impose the Union’s Article 21, Section 8.**

## 6. Article 23-Disciplinary and Adverse Actions

### I. Agency Article and Position

The Agency proposes eliminating the ability to grieve removals, suspensions for more than 14 days, reduction-in-grades, reductions in pay, and furloughs of 30 days. All of these disputes can and should be adjudicated before the MSPB, which has jurisdiction to resolve these disputes. The MSPB has skill and expertise in resolving these controversies, which will ultimately save the parties money and time. As to the former point, since FY 2015, the Agency has devoted at least \$76,607 to grievances and arbitrations for 59 removals and long-term or indefinite suspensions. This figure translates to 630 retirement/survivor claims or 40 disability hearings. As to the latter point, MSPB’s policy is to “generally adjudicate all appeals within 120 days of receipt.” By contrast, arbitration can take years to complete. Thus, the Agency asserts that an “expedited MSPB process, and immediate adjudication” benefits the Agency and employees. A quicker resolution also minimizes backpay and attorney fees. The MSPB’s current lack of a quorum should not serve as an obstacle to the Agency’s proposal because it is merely a “temporary status.” And, in any event, on April 29, 2019, the President nominated a third member to the MSPB. Moreover, even with a lack of a quorum, Administrative Judges continue to issue timely decisions.

### II. Union Article and Position

The Union opposes the Agency’s requested language. In order to have meaningful due process, employees need meaningful venues to challenge actions proposed against them. The MSPB has lacked a quorum since January 2017, and, as such, it has had no authority to resolve any appeals continuing on until the present. Thus, the MSPB cannot be considered a reliable forum for purposes of vindicating an employee’s due process rights as guaranteed by the United States Constitution. The Agency cannot state with certainty that its financial figures, if true, actually translate to the other items discussed above. Nor is it clear that those grievances/arbitrations did



not result in savings to the Agency. And, even if the figures are accurate, they do not satisfy the heavy burden for grievance exclusion under existing Federal court precedent. Indeed, the Agency's proposal would remove the Union from the business of processing these disputes for employees which, in turn, could impose a financial burden upon them.

### III. Conclusion

The Panel will impose the Union's proposal because the Agency has not satisfied its burden under *AFGE*. As already noted, an exclusion proponent must "establish convincingly" that, in a "particular" setting, exclusion is the appropriate course. Management's arguments do not meet this threshold. The Agency's primary argument is a financial one in that the Agency estimates that arbitration costs have amounted to roughly \$76,607 since October 2014 for 59 grievances/arbitrations. These figures amount to approximately \$1,300 per arbitration, or just under \$17,000 per Fiscal Year. These figures should certainly not be discounted. However, in light of the aforementioned burden, the Panel does not believe these figures justify exclusion, particularly since the Agency did not provide any data on its overall budget. Additionally, although the Agency maintains that this financial figure translates to other Agency-related actions, Management does not allege that those other actions failed to occur as a result of the grievance/arbitration process.

The Agency's other argument concerns the ability of the MSPB to timely process appeals. It notes that the MSPB has a general policy to adjudicate all appeals within 120 days whereas "the arbitration process may take up to two years before final resolution." However, the Agency provided no empirical data to buttress its claim regarding the time-processing contrasts of the two forums. Given this lack of data, the Panel does not believe that Management's claim satisfies the burden established by *AFGE* and its progeny. Accordingly, for all the reasons already stated, the Union's proposal shall be adopted.

## 7. Article 24 – Grievance Procedures

### I. Agency Article and Position

The parties agree to exclude eight matters from the parties' negotiated grievance procedure. The Agency, however, proposes an additional 12 exclusions:

- Letters of counseling;
- Placement of an employee on an OPS in accordance with Article 21;
- Any matter that is appealable to the MSPB;
- Written notice of proposed action;
- Performance discussions;

- Non-adoption of a suggestion;
- Adjudication of claims, the jurisdiction over which is reserved by statute and/or regulation to another Federal agency, such as, but not limited to, Department of Labor determinations on workers compensation;
- Claims alleging violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et. seq.
- Actions taken by the Employer required by lawful court orders (e.g., garnishment of wages for indebtedness or child support), or actions that can be adjudicated in an employer alternate venue, (e.g. overpayment actions);
- The award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments;
- Proper termination of an allotment of union dues under the terms of the CBA; and
- Assignment of performance ratings of record.

The Agency argues that the above proposed exclusions are necessary to simplify dispute resolution procedures and minimize the impact of grievances upon the Agency's ability to conduct its mission. Management estimates that it has received roughly 1,300 grievances involving employee performance, awards, and matters appealable to the MSPB since Fiscal Year 2015.

The Agency does not believe that allowing grievances for matters that can be adjudicated through other legal means contributes to the efficiency of Federal service. In this regard, tools such as evaluations of performance, performance rewards, and the ability to issue counseling or oral warnings help facilitate an efficient workplace by allowing managers to take these actions without fear of extensive grievance litigation. Permitting grievances "discourage necessary open and honest communication." Managers are thus discouraged from using these tools. Allowing an arbitrator to substitute their judgement for that of a manager is unacceptable, particularly when employees "still retain the ability to seek redress via appropriate administrative and legal forums." Performance and awards grievances should also be excluded because managers "need the overall latitude to provide performance feedback to employees in a timely and non-adversarial environment."

The Agency is also opposed to language in Union Article 24, Section 7.B that addresses the service date for grievances filed involving individual employees. In this regard, Management disagrees with Union language that would state the transmission date of an email or fax grievance acts as the service date. Management finds this language "overly broad."

## II. Union Article and Position

The Union is opposed to the Agency's "numerous, unprecedented exclusions." Federal precedent favors broad grievance procedures, and the Agency cannot establish that its "draconian limitations" are more reasonable. In this regard, a broad grievance procedure has been the contractual norm for years, and the Agency's proposed exclusions would eliminate employees' ability to file grievances over numerous "bread-and-butter" issues that impact their daily work lives. Indeed, the Union has previously filed several successful grievances challenging the impact of discriminatory practices in the workplace. Eliminating grievance options would eliminate these types of tools and is inconsistent with the concept of due process.

The Union also proposes the language discussed above concerning electronic and facsimile filing of grievances. This language is "consistent with the parties' agreement to implement an electronic grievance filing process." The Union's proposal, therefore, should be adopted.

## III. Conclusion

The Panel will impose a modified version of the Union's proposal. The Agency proposes removing eight performance-related matters from the grievance process: letters of counseling, placement on a PIP, written notices of proposed actions, performance discussions, non-adoption of suggestions, awards of various forms of incentive pay, and assignments of ratings of records. The thrust of one of the Agency's arguments is that grievances *could* discourage managers from utilizing the foregoing performance tools. Despite offering this claim, however, Management did not offer a single instance in which a manager was discouraged from turning to them notwithstanding the presence of over 1,600 offices throughout the United States.

In addition to the aforementioned lack of evidence, the Agency does not clarify what, if any, forums are available to employees to challenge the foregoing challenges. As mentioned above, the MSPB's jurisdiction is limited to performance-related actions involving suspensions of 14 days or greater. So, for example, an employee could not go to the MSPB to challenge a letter of counseling as a matter of course. An employee may be able to avail themselves of an independent forum if, for example, they believed the personnel action involved discrimination or whistleblowing retaliation, but those options would not always be available. As discussed previously, the onus is upon a proponent of exclusion to demonstrate in a "particular" setting that said exclusion is justified. The Panel concludes that the Agency has not satisfied this burden. Thus, the foregoing eight matters should not be excluded.



The Agency's other proposed exclusions meet a similar fate. Management notes that, including the personnel matters discussed above, there have been nearly 1,300 grievances filed since Fiscal Year 2015. Those that could have been pursued through other forums, e.g., FLSA claims, should have been. The only financial figures offered by Management, however, are the \$76,607 figure presented in the discussion on Article 23 and a figure in the Article 25 discussion below claiming that the Agency has spent \$634,114 on arbitration costs between Fiscal Year 2014 and 2018. While not clear, it appears the latter financial figure includes the former figure. In any event, the second figure breaks down to \$126,822 a year. Again, the Panel not wish to discount the significance of this number. But, for similar rationale discussed above, the Panel does not believe this figure is sufficient to satisfy the burden for exclusion in this "particular" set of circumstances. Indeed, a review of data shows that, for Fiscal Year 2020, the Agency requested a budget of \$12.733 *billion* dollars.<sup>10</sup> In other words, the Agency's yearly average for arbitration counts amounts to roughly under .0009 percent of its annual budget. Accordingly, the Agency's other proposed exclusions should be dropped.

Despite rejecting the Agency's proposed exclusions, the Panel does believe it appropriate to deny the Union's requested electronic and fax language. The Union's sole argument in support is that its proposal is "consistent" with agreed-to language elsewhere. However, the Union does not cite to or provide this language. Moreover, if such language does exist, it is unclear why the Union needs additional references elsewhere. **Accordingly, it is appropriate to strike this language from the Union's proposed Article 24, Section 7.B: "or the transmission date when filed by email or fax."**

## 8. Article 25 – Arbitration

### I. Agency Article and Position

The Agency's main goals in this article are to reduce arbitration costs, provide arbitration litigators the flexibility they need to present their case, and align this article with other articles on the topic of grievance exclusions. On the topic of costs, the Agency paid \$199,382 for all arbitrations nationwide for FY 2018. And, in that same year, it paid \$15,225 for Union witness travel expenses. Moreover, between 2014 and 2018, the Agency paid \$634,114 in arbitration costs. According to the Agency's payroll records, the Union received \$10,345,834 in dues for FY 2018. The Union, therefore, has more than sufficient funds to pay for its witness expenses.

As to litigation flexibility, the Agency opposes Union language that would limit the parties' ability to engage in pre-arbitration discovery and motions. It similarly is against Union language that would place a blanket ban on ex-parte communications. Individual arbitrators should have authority to best assess the rules and procedures that will apply to an individual matter. To hold otherwise could deprive litigation teams of the ability to fluidly engage in the arbitration process. Indeed, in Article 24, Section 5.B, the parties

<sup>10</sup> See [https://www.ssa.gov/budget/FY20Files/2020BO\\_1.pdf](https://www.ssa.gov/budget/FY20Files/2020BO_1.pdf) at 7.

have already agreed that an arbitrator has the authority to determine the procedures that will be used to conduct a hearing.

Finally, the Agency strives for consistency. Thus, it proposes prohibiting expedited arbitrations over formal performance appraisals (unless they involve demotions or removals for unacceptable performance), counseling and oral warnings, and matters that could be appealed to the MSPB. This language is consistent with other grievance exclusions it has proposed in different articles.

## II. Union Article and Position

The Union wishes to retain language that would require Management to pay the travel and per diem of at least 2 Union witnesses who also happen to be Agency employees. This language will continue to ensure that the Union and bargaining-unit employees have fair and open access to the arbitration process. The Union must represent all employees regardless of whether they pay dues, so the Agency's reliance on dues is misleading. Relatedly, the Union proposes that the parties' jointly select a location for an arbitration hearing.

The Union believes its language on ex parte communications and discovery limitations is necessary due to the Agency's conduct in prior arbitrations. The Agency has engaged in, or attempted to engage in, ex parte communications with the arbitrator in past arbitrations. The Union's proposals attempt to regulate the parties' conduct in order to ensure that no party is unfairly prejudiced due to improper influence.

Finally, the Union is opposed to Management's proposed exclusions. The Union does not believe that the Agency can convincingly establish the need to support those exclusions. So, they should be rejected.

## III. Conclusion

The Panel imposes a modified version of the Agency's proposal. One of the Union's primary concerns is the Agency's request that the Union should be responsible for the travel costs of its own witnesses, which amounted to \$15,225 for Fiscal Year 2018 alone. The Union does not dispute the Agency's claim that, for this same period, the Union received over \$10 million in Union dues. Given how much the Union accumulated in comparison to the relatively smaller travel figure, it is appropriate for the Union to pay for its own costs in this category, regardless of whether they have to represent non-dues paying members.

The Panel further rejects the Union's language concerning prohibiting motions, discovery, and other related matters before and during arbitration. As an initial matter, the parties have indeed agreed to language permitting the arbitrator to determine the "procedures" that will be used to conduct arbitration hearings. Such procedures could easily include pre-arbitration matters like discovery. Additionally, much of the Union's rationale is anchored on its belief that the Agency has engaged in prior instances of

arbitrary misconduct. However, the Union did not actually offer any examples. Thus, it is difficult to justify accepting the Union's position.

The final remaining key issue is Management proposed exclusions from arbitration, albeit in the expedited arbitration context. To support its proposed exclusions, the Agency relies upon arguments that the Panel has already discussed in Article 23 and Article 24. In those articles, the Panel concluded that the particular circumstances of this dispute did not lend themselves to a conclusion that the Agency has satisfied its burden for exclusion. As the Agency's arguments for Article 25 recycle the previously disposed of arguments, the Panel reaches a similar conclusion for Article 25. **Accordingly, the Panel will replace Management's Article 25, Section 7 with that of the Union's corresponding section. However, consistent with the above discussion about the Union's proposals on pre-arbitration motions, the Panel strikes the following language from the Union's Section 7: "No written submissions of the case will be presented prior to or during the arbitration. This includes no written opening and closing statements."**

## 9. Article 26 – Merit Promotions

### I. Agency Position and Article

The Agency's primary concern for this article is ensuring that merit promotions are based solely on job-related criteria that apply equally to all employees. So, it opposes Union proposals to incorporate MOUs on two career development programs, SkillsConnect and the Job Experience Learning Program (JELP), as these programs are unrelated to merits promotion. Similarly, it opposes Union language that would reference a separate article – Article 27 – on details. This topic also has no applicability to merit promotions.

Another theme surrounding the Agency's proposal is flexibility. Thus, it wants maximum room to determine "areas of consideration" for vacancies.<sup>11</sup> The Agency will retain language about Philadelphia region employees being eligible for areas of consideration within the Washington, D.C. area, but it wishes to remove similar language for other areas of consideration. Management is also opposed to Union language that would prohibit selecting officials from relying upon tests, questionnaires, or similar instruments in the selection process. These tools assist Management with assessing whether an applicant is the "right fit" for a position. Finally, the Agency is opposed to Union language that would require the Agency to give "serious consideration" to an applicant for a vacant position where there is underrepresentation, or if there is no underrepresentation, Management will seriously consider the possibility of upward mobility for applicants who have suffered grade stagnation. The foregoing

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<sup>11</sup> "Area of consideration" refers to the geographical region an agency will turn to when considering and establishing an applicant pool for a vacancy.



criteria are not a part of merit factors that need be considered pursuant to OPM merit-promotion regulations.<sup>12</sup>

## II. Union Position and Article

The Union wishes to largely retain the status quo. Unlike the Agency, it believes that it is appropriate for this article to retain language about the JELP and SkillsConnect program. It also very much wishes to retain language about the appropriate areas of consideration. In addition to the Philadelphia region discussed above, it also wants to keep language defining three other areas (the Northeastern area, the Mid-America area, and the Western area). Retaining this language will "maximize" advancement opportunities for employees within these areas. Relatedly, the Union wishes to include new language clarifying that certain temporary promotions and details are subject to Article 27 of the CBA (not in dispute) concerning details.

Finally, a point of concern for the Union is maximizing fairness in the selection process. Thus, in its Section 13.C, it proposes that employees on a best qualified list will be listed by rank rather than alphabetical order. Additionally, its Section 13.A requires selection officials to request additional information in writing from an applicant if he or she decides they require more information. The official is also prohibited from utilizing tests, questionnaires, or other similar devices when selecting an individual.

## III. Conclusion

The Panel adopts a slightly modified version of the Agency's proposal. We agree that this article should emphasize the related dual goals of merit promotion and flexibility. It is unclear how the Union's proposed inclusion of language referencing career development furthers these goals as the Union offers little to no explanation for their inclusion. Similarly, the Union's proposed references to Article 27 on "Details" do not, on their face, clearly tie to the broader concept of merit promotions. Moreover, it is unclear why language for Article 27 should also be included within this article when Article 27 seemingly stands on its own. That is, the Union has not explained why Article 26 must reference details in order to ensure that Article 27 works as intended. The Agency's limitation on areas of consideration is also appropriate because it does not force the Agency to focus on certain areas when filling vacancies. Instead, Management will have greater flexibility to examine whatever areas may be appropriate for particular positions.

It is also appropriate to reject the Union's language on "underrepresentation" and grade "stagnation." In this regard, Management Article 26, Section 13.F states that the topic of "competitive selections to address any under-representational issues" is an appropriate topic of discussion for future meetings with the parties. Additionally, Section 13.A states a selection official may use "all available information" when selecting a

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<sup>12</sup> Citing 5 C.F.R. §335.103(b). This regulations lists five "requirements" that must be a part of the merit-promotion process.

candidate for merit promotion. Thus, tools are in place to address the Union's concerns.

Despite the foregoing, the Panel does believe a minor adjustment is warranted. Union Proposal Section 13.C requests that employees on a best qualified list will be listed by rank rather than by alphabetical order. The Agency requests the latter, although it is not apparent why. Given that the Agency emphasizes the importance of merit selection, it would seem obvious that supervisors would want highlighted to them individuals who are highly ranked as a part of the selection process. The Union's proposal still permits for flexibility, however, because it does nothing more than require supervisors to consider that information, it does not bind them into accepting an applicant for a position. Accordingly, **the Panel replaces Management Section 13.C with the Union's language for Section 13.C.**

10. Article 30- Union Time/Official Time

I. Agency Position and Article

In order to supports its resources on activities that further the Agency's mission, the Agency proposes a "bank" of 50,000 hours of official time per year for the entire unit. Additionally, users will be capped at 650 hours or 250 hours per year depending on the number of Union representative who avail themselves of official time. Even with these limitations, the Union will be able to request statutory grants of official time under 5 U.S.C. §7131(a) and (c) if they run out of official time. Management also proposes that Union representatives may request up to 80 hour of leave without pay (LWOP) per year to engage in representational activities. This is in contrast to the Union's request that representatives are eligible for up to 1 year of LWOP.

The Agency's proposals are necessary because the Union has gone above and beyond in its use of official time. For Fiscal Year 2018, the Union used roughly 181, 181 hours of official time, totaling \$10,463,014. These figures amount to time and resources that could be devoted to other Agency functions. Because the Agency is proposing limitations on grievances and arbitration, there will be less of a need for official time. In addition, the Agency is seeking to eliminate official time "loopholes." For example, under the existing CBA, the Union may use official time for EEO matters separate from any official time cap. The Agency proposes including this, and other time, within its proposed cap and bank.

II. Union Position and Article

Current CBA language grants the Union a bank of 250,000 hours per year. In an effort to compromise, the Union proposes a reduction to 230,000 hours. However, the Union proposes rolling over language that would allow 12 representatives to use 2,080 hours per year, 15 officials 1,400 hours per year, 135 officials 1,040 hours per year, and all other officials to use up to 520 hours a year. The Union's figures represent "historical data" on official time usage and should be adopted. Management has provided little to no business justification for the sudden decrease in official time hours.

In addition to the above, the Union proposes a leave without pay (LWOP) provision that would allow employees to request LWOP to work on Union programs, and Management will "normally" approve such requests. This leave may be granted for up to a period of 1 year, but the employee would continue to "accrue benefits" in accordance with applicable law, and they would be returned to their prior position afterwards. This language currently appears in the existing Article 31, and should simply rollover into Article 30.

Finally, the Union is opposed to the Agency's attempt to limit the Union's use of official time for EEO matters. 29 C.F.R. §1614.605(b)<sup>13</sup> grants official time as a "separate and distinct concept" from official time under the Statute. The Agency's attempt to intermingle these two concepts is illegal and also fails to account for the fact that the Union has had file numerous EEO actions within the past several years.

### III. Conclusion

There are several topics within this article that remain unresolved. But, the key disagreement involves dueling amounts of annual of official time. The Agency offers an annual bank of 50,000 annual hours, whereas the Union counters with 230,000 hours. We will accept Management's proposal for the reasons that follow.

Under the Statute, official time is governed by 5 U.S.C. §7131. An agency *must* provide official time for any of its employees representing an exclusive representative during "the negotiation of a collective bargaining agreement . . . including attendance at impasse proceedings."<sup>14</sup> It may not, however, authorize such time for internal union

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<sup>13</sup> This section states in full:

If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

<sup>14</sup> 5 U.S.C. §7131(a).



business.<sup>15</sup> And, the FLRA has authority to determine whether an employee shall receive official time for "any phase of proceedings before the" FLRA.<sup>16</sup>

In addition to these categories, 5 U.S.C. §7131(d) creates a "catch-all" provision for official time, albeit with qualifications. In this regard, save for the aforementioned categories, §7131(d) provides that an employee representing an exclusive representative or an employee represented by an exclusive representative in a proceeding under the Statute "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.*"<sup>17</sup> Thus, the plain language of this statutory provision authorizes official time when it is "reasonable, necessary, and in the public interest." If the parties are unable to agree to such time, the Panel has authority to impose language resolving that disagreement.<sup>18</sup>

Given the above statutory scheme, the Panel must examine the record in this case to assess whether either of the parties' proffered amounts of official time is "reasonable, necessary, and in the public interest." The Union's proposal calls for 230,000 hours as a "compromise" from its original position of 250,000 hours. According to the Union, this figure represents "historical data" and is necessary in order to sufficiently represent a unit of its size. However, the Union did not actually offer this "data," nor did it provide qualitative evidence that could be used to gauge its claim that its requested amount of time is necessary for representational purposes. By contrast, the Agency put forward considerable data that official time requires a significant devotion of time, resources, and taxpayer funding to activities that are not a part of the Agency's core mission. The Union has not rebutted this data.

The Union's opposition to the Agency's proposal is also strongly fueled by its view that the Agency is attempting to circumvent Federal EEO regulations. This argument is misplaced. The FLRA has long held that parties are authorized under 5 U.S.C. §7131(d) to negotiate all matters concerning official time, including the use of official time to assist unit employees in EEO proceedings.<sup>19</sup> The Agency is not prohibiting the Union from utilizing official time under applicable EEO regulations. It is simply proposing that official time for EEO representation will derive from the bank hours for official time under the CBA. But, if the Union were to run out of bank time, it could turn to the EEO regulation just as it could for other mandated grants of official

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<sup>15</sup> See 5 U.S.C. §7131(b).

<sup>16</sup> 5 U.S.C. §7131(c).

<sup>17</sup> 5 U.S.C. §7131(d). (emphasis added).

<sup>18</sup> See, e.g., *DHHS*, 18 FSIP 077 at 11-12 (citation omitted).

<sup>19</sup> See, e.g., *U.S. Dep't of Veterans Affairs and AFGE, Local 2145*, 45 FLRA 391, 400 (1992).

time, e.g., 5 U.S.C. §7131(a). The Union offers no legal authority that outlaws this arrangement.

Based on the foregoing, the Panel cannot conclude that the Union's proffered amount of official time is reasonable, necessary, and in the public interest. But, the same can also be said of the Agency's offer of official time. Much of the Agency's argument is devoted to explaining why it believes Management needs to reduce existing amounts of official time and rebutting the Union's arguments. The Agency offers little justification, however, to buttress its proposed amount of official time. Nevertheless, in light of the record that is before the Panel, we will adopt the Agency's amount as the most appropriate amount under the circumstances of this dispute. However, it is the expectation of that Panel that *any* party offering a quantitative amount of official time pursuant to §7131(d) should demonstrate to the Panel why its proposal is "reasonable, necessary, and in the public interest."

Having addressed the topic of official time, we turn to the parties' competing proposals on LWOP. The Union claims that its language is simply rollover language from Article 31 of the CBA, which is not a part of this dispute. The Agency's language clarifies that its proposal is "moved" from Article 31 and, is therefore, a replacement for existing language from Article 31. Management's language further places a cap of 80 hours per year that requires authorization. The Panel believes it is appropriate to accept Management's position because it provides a greater balance of ensuring that its workforce is available to conduct duties that will further the goals of the Agency's mission with the Union's desire to provide representational services. Additionally, the proposal offers greater managerial oversight as it rejects the Union's request that employees "normally" should receive LWOP.

## 11. Article 32 – Veterans

### I. Union Position and Article

In addition to proposing that Management will ensure that "sufficient information" concerning veteran benefits is provided to veteran employees, the Union lists specific categories of information Management must provide. The Union also requests that, if Employee Assistance Program (EAP) counselors cannot provide work related assistance to these employees, the Agency will reach out to the Department of Veterans Affairs to acquire assistance. Relatedly, the Union proposes the establishment of a Veterans Mentoring program that will focus on achieving parity retention rates between veteran and non-veteran employees.

Continuing with the theme of information, the Union proposes that the Agency provide information to veteran employees that is available on the Agency's internal website, i.e., the intranet. And, the Union requests that Management create an online human resources "portal" so that unemployed or deployed veterans can access information about benefits and related material. External access to internal systems does not create a safety issue, and asking veteran employees to wait until they have access to an Agency laptop is not efficient.

## II. Agency Position and Article

The Agency values the service of its veteran employees, but it prefers more general informational language than that which is proposed by the Union. Management's language will provide managers with flexibility while also ensuring that they can meet the needs of managers and veterans. Requiring managers to take certain steps is not an appropriate subject of negotiations. In response to the Union's request for a mentoring program, the Agency notes that a national mentorship program is already available to all employees. This program can provide assistance to veteran employees.

The Agency has "cyber security and feasibility" concerns with respect to the Union's request to grant external access to internal systems. Employees have the ability to access these systems via Agency-issued devices that have been secured. Allowing unsecure access may expose Agency systems to threats. And, in any event, the Department of Veterans Affairs offers a wealth of information to the public.

## III. Conclusion

The Panel imposes Management's proposal. Management's assertion that general language will provide greater flexibility for its supervisors is well taken. Although the Union believes that providing specific information in the contract will provide assistance to veteran employees, the Union offers no reason why these employees need that information within the CBA in order to access it. Additionally, there is the possibility that the information may change, thereby making references within the CBA obsolete. We also agree with the Agency's rationale that providing external access to the Agency's intranet through unsecured connections may provide too much of a security risk. Thus, it would be inappropriate to adopt the Union's suggestion that employees be granted such access.

## 12. Article 41 - Telework

### I. Agency Position and Article

Although the Agency has devoted significant time and resources into broadening telework, it has impacted Agency operations "in some instances." For example, some field offices saw increased wait times even after they adjusted workloads to account for telework. The Agency also had to adjust coverage in some hearing offices due to a lack of employee availability. Consequently, the Agency's proposals grant Agency Deputy Commissioners discretion to ensure that the Agency's mission can be satisfied with appropriate staffing levels and other resources. Among other things, Management Article 41, Section 3 grants these individuals authority to determine the number of days employees will telework (if any), the percentage of employees who will telework, and whether teleworking employees are eligible to work various types of flexible work schedules. Making immediate changes "without negotiation" is critical to the success of the Agency's operations.



In addition to the foregoing, the Agency's proposals incorporate Federal regulations that govern the Administrative Leave Act in order to allow for the continuation of services in inclement weather.<sup>20</sup> And, the Agency also requests language requiring employees to use certain communications technology while off site. It also proposes language requiring all teleworking employees to be open for the option of sharing office space at the primary duty site with other teleworking employees.

## II. Union Position and Article

The Union proposes mostly rollover language from the existing CBA. Telework and flexiplace has been in place at some locations for over 20 years with great success. So, the Union's primary interest is retaining existing telework agreements in the form of a sidebar agreement "by component and covered positions." This agreement also covers future telework expansion. Many employees report that they are more productive when they telework. If teleworking is creating problems within individual offices, supervisors have tools available to track telework use and abuse. Thus, the Union wishes to retain current practices. However, the Union is willing to "adopt[ ]" Management's language on inclement weather and off-site communication. The Union is also willing to allow office sharing if an employee were to telework 2 or more days per week.

## III. Conclusion

The Panel will impose a modified version of Management's proposal. As an initial matter, the Panel notes that, in its submission to the Panel, the Union stated its willingness to "adopt[ ]" Management's language on weather/safety leave and email usage while teleworking. Therefore, it is unnecessary to address those issues as Management's proposals on those issues should be considered adopted in full.

The Agency does take umbrage, however, to Union proposed language in its Article 41, Section 5.C.3, lines 166-192, that would allow employees to request to telework or ask for unscheduled leave if the main duty station is open but travelling conditions are hazardous. Management equates such a request with "employee-initiated" telework, and further claims that such requests would create "scheduling chaos." However, the Union's language is clear that supervisors retain full discretion to grant or deny such requests. Nothing in the language states or suggests that employees would have sole discretion to decide what their work status will be for that day. **Thus, the Panel believes it would be appropriate to add the Union's language to the end of Management's Article 41, Section 6.**

The major point of contention between the parties is the appropriate level of discretion that should be afforded to supervisors to make changes in the workplace with respect to employees on a telework agreement. To support its claim that managers should be provided broad authority, the Agency provided sworn declarations from six

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<sup>20</sup> Citing 5 C.F.R. §630.1601, et. seq.

Management officials who have experience with telework. Some of the items discussed included:

- A program manager with the Agency's information technology operations acknowledged issues with 12 field offices that arose after telework began to roll out in 2012.
- Three field office Management officials attested to challenges within their respective areas following the implementation of telework. In this regard, there were several field offices that saw increased wait times for in-person customers due to a lack of in-person employee availability.
- Two hearing office officials offered their personal knowledge about the impact of telework on their operations. One official stated that at least 18 hearing offices had to reduce the number of days of telework per week because in-person duties were not being accomplished. The other official, a Chief Administrative Law Judge, stated that his office saw an increase in the number of in-person employees available to address such duties once his office decreased the number of telework days.

Many of the officials above referenced that, although they were able to address issues arising due to telework, they had to follow a request process that did not result in immediate action. We agree that Management needs maximum flexibility to ensure that its functions can be performed in a timely and efficient manner. Therefore, the Agency's proposal represents the best balance of interests for all involved stakeholders.

Despite the foregoing, the Panel does suggest some slight alteration to the foregoing. Management Article 41, Section 3 states that each "Deputy Commissioner will also determine whether teleworkers are eligible to work" various types of schedules. However, this language may present a problem in that, for at least some of these schedules, agencies must follow applicable legal guidelines when making schedule changes. For example, certain criteria must be satisfied prior to changes in flexible schedules<sup>21</sup> and compressed work schedules.<sup>22</sup> Accordingly, the Panel alters the above quoted language as follows: "**In accordance with applicable law**, each Deputy Commissioner will also determine whether teleworkers are eligible to work" etc.

### 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.

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<sup>21</sup> See 5 U.S.C. §6122(b).

<sup>22</sup> See 5 U.S.C. §6131.



Mark A. Carter  
FSIP Chairman

May 29, 2019  
Washington, D.C.

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