IN THE MATTER OF ARBITRATION BETWEEN

American Federation of Government Employees, AFL-CIO	§	
	§	**Re: Ground Rules**
- AND -	§	
Transportation Security Administration, U. S. Department of Homeland Security	§	

Before the Arbitration Panel of Kathy L. Eisenmenger, Esq., Harry C. Katz, Ph.D., and David Bruce Lipsky, Ph.D.

Introduction

Pursuant to the terms of § V.C.9., of the Determination and Sections A and C.3 of the Resolution System Process (RP I), the arbitrators of the Panel of Neutrals ("the Panel") conducted a two-day arbitration hearing at the offices of the Federal Mediation and Conciliation Service in Washington, D.C., on March 8 and 9, 2012. Ms. Leisha A. Self, Staff Counsel, and Mr. Chad E. Harris, Acting Supervising Attorney, of the Office of General Counsel, represented the American Federation of Government Employees, AFL-CIO, ("the AFGE" or "Union").[1] Ms. Amy Allen Ruggeri, Assistant Deputy Chief Counsel in the Office of the Chief Counsel, represented the Transportation Security Administration ("the TSA" or "Agency").[2] The parties jointly submitted seven (7) exhibits that the Panel admitted into the record.[3] See Appendix A to this Award.

The AFGE presented the sworn/affirmed testimony of Messrs. John Gage, AFGE National President, and David A. Borer, Esquire, AFGE General Counsel. The AFGE also submitted four (4) exhibits that were admitted into the record.[4] The TSA presented the sworn/affirmed testimony of Mr. Robert Ball, Jr., Federal Security Director, Detroit Metropolitan

[1] Mr. Joseph P Flynn, Vice President, and Mr. Peter Winch, Deputy Director of the AFGE attended portions of the hearing.
[2] Ms. Francine J. Kerner, Chief Counsel, Mr. Thomas McGivern, Acting Deputy Chief Counsel, Ms. Jennifer Ellison, Senior Counsel and Ms. Elisabeth J. Ambrozaitis, Staff Counsel, of the TSA Office of the Chief Counsel attended portions of the hearing.
[3] The joint exhibits are hereinafter referred to as "JX" and followed by the number designated for that particular document.
[4] The AFGE's exhibits are hereinafter referred as "UX" and followed by the number assigned to that particular document.

Airport, and Administrator John Pistole. The TSA submitted four (4) documents that the Panel admitted into the record.[5]

Both days of the arbitration hearing were transcribed by a professional court reporter. The second day of the hearing closed without specifically allowing for the AFGE to provide rebuttal to TSA witnesses' testimony. The Panel provided the AFGE with an opportunity to articulate in writing the scope of any rebuttal it would seek if the hearing was reconvened for rebuttal purposes only. After a review of the AFGE's written submission, the Panel deemed that the proffer for rebuttal had been adequately covered during the two days of hearing and denied the AFGE's request to reconvene for rebuttal purposes. Thereby, the Panel closed the evidentiary record on March 16, 2012, by issuance of the Panel's Denial of AFGE Request to Reconvene Arbitration Hearing for Rebuttal Testimony.

The parties submitted post-hearing briefs. Briefs were timely received by the members of the Panel via electronic transmission on April 26, 2012. The arbitration proceeding was thus closed for further substantive communications from the parties to the Panel. The Panel notified the parties that the Award would be rendered one week after the prescribed thirty (30) day time frame, to which the parties did not object.

Issues

The parties did not stipulate to a joint statement of the issues to be resolved by this Panel. The AFGE framed the issues in dispute as follows:

1. Is the impasse arbitration process final and binding or subject to the referendum process, including a vote by unit employees, and other requirements? If so, what shall the remedy be?

2. Whether AFGE's Ground Rules proposal on referendum as set forth in its 10/24/2011 Proposal is consistent with the Determination? If so, does it better promote the collective bargaining process than TSA's position? If so, what shall the remedy be?

3. Did TSA fail to act in a manner consistent with the Determination when it failed to agree that a ratification/referendum process and/or an impasse process may be included in the Ground Rules? If so, what shall the remedy be?

[5] The TSA's exhibits are hereinafter referred as "MX" and followed by the number assigned to that particular document.

The TSA did not offer a statement of the issues pertaining to the merits of the above-captioned dispute. However, in the TSA's post-hearing brief, the TSA argued that the AFGE attempts to bring the issues of the referendum process and the resolution system in the Determination under the rubric of ground rules and thus modify the terms of the Determination.

Additionally, the TSA raised an arbitrability issue as follows:

> Whether the Panel has the jurisdiction to modify the February 4, 2011 Determination on Transportation Security Officers and Collective Bargaining[6] by requiring TSA to engage in ground rules negotiations with AFGE on matters already established in the Determination and not subject to collective bargaining, including
>
> (1) the ratification/referendum process for voting on a collective bargaining agreement, and
>
> (2) the final and binding nature of any decisions reached by a Panel of Neutrals during collective bargaining negotiations on TSA and AFGE, as opposed to the unit employees.

Pertinent Provisions of the Determination

DECISION MEMORANDUM

Determination

Transportation Security Officers and Collective Bargaining

Introduction

> . . . The Transportation Security Administration's mission to protect transportation security systems is critical to our national interests. . . .
>
> . . . I have also considered the recent decision under the Federal Service Labor-Management Relations Statute[7] (5 U.S.C. Chapter 71) issued by the Federal Labor Relations Authority (FLRA or Authority) – an independent government agency that oversees federal labor relations – directing an election about exclusive representation for purposes other than collective bargaining (65 FLRA No. 53 (2010)). The determination that follows outlines my decision regarding collective bargaining in the context of my ongoing assessment of TSA's operations and how to best achieve our critical security mission.

[6] JX 1.

[7] Hereinafter referred to as "the Statute" or "FSLMRS."

Basis and Criteria for this Determination

* * * *

The criteria that have shaped and form the requirements of the labor management framework I commit to in this Determination pursuant to my authority under ATSA § 111(d) are:

* * * *

- Labor management relations must be results oriented, designed to solve problems and resolve issues rather than defer resolution through resorting to lengthy, multiple, adversarial avenues.

- Procedures for resolving disagreements must be efficient, fair, and transparent and include checks and balances.

* * * *

- . . . Bargaining shall be interest-based, with any disputes arising from either the bargaining process or the application of a binding collective bargaining agreement resolved expeditiously and fairly under the processes described in this Determination.

* * * *

Essential Components of this Determination

I. Legal authority for Determination:

A. I have determined that an election conducted by the FLRA under the principles and conditions set forth in this Determination, for the purposes described in this Determination, does not pose an actual conflict between my statutory authority over unit employees' terms and conditions of employment under § 111(d) of ATSA (49 U.S.C. § 44935 note). I have further determined that ATSA § 111(d) supersedes the [FSLMRS] (5 U.S.C. Chapter 71) in all other respects and therefore Chapter 71 shall not apply, or afford any rights, to management, unions, or covered employees that are not expressly provided in this Determination.

II. Covered employees: [Provides a listing of the positions included in the bargaining unit, the type of positions excluded from the bargaining unit and the strike prohibition.]

III. Scope of representation and coverage:

* * * *

B. Representation for purposes of collective bargaining:

1. General requirements:

b. Any collective bargaining agreement will be national in scope and will cover all unit employees if approved by referendum held among all unit employees under § III(B)(1)(e) below.

e. Referendum on collective bargaining agreement:

i. A collective bargaining agreement negotiated between TSA and an exclusive collective bargaining representative will be binding on the parties and unit employees after it has been presented to unit employees, voted on in a referendum among all unit employees, and affirmatively supported by a majority of unit employees voting in the referendum. . . . if the vote is not to support the collective bargaining agreement, [TSA will] . . . will provide information on which provisions were not supported and why. TSA will promptly provide the results of the referendum and any information gathered through it to the exclusive collective bargaining representative.

ii. If the collective bargaining agreement is not approved, TSA and the exclusive collective bargaining representative will recommence negotiations during the 45 calendar day period beginning on the day that the result of voting in the referendum is announced. If a revised collective bargaining agreement is agreed upon during this period, it will be submitted to all unit employees for an up or down vote. If a majority of unit employees voting support the revised collective bargaining agreement, that agreement will be binding on the parties and unit employees. If a majority of unit employees do not affirmatively support the revised collective bargaining agreement, TSA and the union will collaboratively decide on next steps in the

bargaining process. If a collective bargaining agreement approved by a majority of voting unit employees is not in place, TSA will continue to manage unit employees' terms and conditions of employment and the exclusive representative will provide representation for purposes provided under this Determination.

2. Issues subject to collective bargaining: The establishment, termination, or adjustment of the following matters shall be subject to collective bargaining:

[The provision lists eleven (11) subjects pertaining to various working conditions but are not reproduced here for sake of brevity. None of those listed subjects pertain to ground rules for collective bargaining, the ratification/referendum process or the Resolution Process].

3. Issues excluded from the collective bargaining: The establishment, determination, or adjustment of the following matters concerning covered employees shall be decided by TSA's Administrator and neither these matters nor the impact and implementation of decisions concerning them shall be subject to collective bargaining or grievable. Moreover, the matters listed below shall have the broadest possible interpretation as to scope, meaning, and interpretation:

[The provision lists ten (10) subject matter areas but are omitted herein for sake of brevity. None of those listed subjects pertain to ground rules for collective bargaining, the ratification/referendum process or the Resolution Process].

7. The parties will agree on ground rules for collective bargaining within 30 calendar days of commencing negotiations on ground rules. If agreement on ground rules is not reached within 30 calendar days, outstanding issues will be put before the rights based process established under § V below for final resolution of these issues.

10. If, at the end of the period for collective bargaining, agreement is not reached on any issues that have been subject to the collective bargaining process and are within the subjects deemed appropriate for collective bargaining under this Determination, those issues will be put before the rights based process established under § V below for

final resolution of these issues pertaining to or arising from collective bargaining.

IV. Rights, roles, and responsibilities:

A. Covered Employees:

* * * *

3. Covered employees may designate any individual, whether or not that person is employed by, a member of, or a representative of a union, to be his/her personal representative in the resolution process set forth below in § V or TSA Management Directives . . ..

5. All covered employees will have the right to vote in a referendum on whether or not to support any collective bargaining agreement negotiated by TSA with a duly elected exclusive representative before such agreement becomes binding and effective.

6. Official time: [provides excused time with pay for unit employees to participate in on the union bargaining committee].

B. Unions:

* * * *

3. If a union is certified by the FLRA as the exclusive representative for purposes consistent with the provisions of this Determination, such union shall have the right to represent covered employees in the Resolution Process set forth below in § V . . ..

4. A representative of any union certified as the exclusive representative will have the right to be to be present at formal discussions [with conditions]. Further, this paragraph does not amend or broaden the rights to personal representation afforded under TSA Management Directives addressing personal representation rights and under § IV.A.3. and 4 above or provide a right to union representatives to be present when a covered employee has not selected a union or union representative as his/her

personal representative under TSA management directives and above under § IV.A.3 and 4.

6. An exclusive representative will maintain respectful and constructive communication on work issues and concerns with TSA employees and management and act in a manner characterized by cooperative problem-solving approaches to raising, addressing, and seeking resolution of issues.

C. TSA management must:

* * * *

2. Act in a manner characterized by cooperative problem solving approaches to raising, addressing, and seeking resolution of issues.

D. TSA may:

* * * *

4. Engage with any covered employee or covered employees generally on any matter or deal with any employee group on issues affecting covered employees except that TSA will not engage in collective bargaining resulting in a binding collective bargaining agreement with any entity other than a union which has been certified as the exclusive representative of the covered employees by the FLRA provided that a union is so certified.

E. Conditions on union campaign activities:

* * * *

10. During the voting period, no party will engage in actions that interfere with, influence, or coerce covered employees at the time when covered employees are casting their ballots. Covered employees must be able to cast their ballots in an environment that preserves their freedom of choice and the integrity of the secret ballot.

V. Resolution Processes:

A. I have concluded that:

* * * *

2. TSA's employees deserve a resolution system that is fair, transparent, and efficient; and

3. TSA's mission requires that disputes, including those related to union activity and collective bargaining, be resolved quickly and collaboratively and without protracted and potentially acrimonious litigation.

B. . . . This system will not be subject to the collective bargaining process except that details of the initial local phases of the resolution process may be subject to bargaining at the discretion of the TSA.

C. Core Principles, Objectives, and Requirements for Resolution Processes under this Determination:

* * * *

7. Recognizing that the resolution of some issues will, despite the parties' best efforts, require neutral assistance, the resolution system will, in appropriate circumstances, provide neutral assistance to enable the parties to reach interest-based solutions. Such interest-based resolution assistance may include, as appropriate, coaching, facilitated interest-based discussions, mediation, and other neutral third-party approaches that assist parties to raise and resolve issues, concerns, and disputes themselves.

8. Recognizing that some disagreements will require a rights-based decision made by a neutral decision-maker, credible rights-based systems will be established.

9. The system for resolving disputes on the following issues will include a rights-based mechanism for final decisions by panels selected from a roster of neutrals, with backgrounds in both security and collective bargaining, who are mutually agreed upon by both TSA and the certified exclusive representative:

a. After certification of an exclusive representative, issues that arise during the collective bargaining process, including but not limited to:

i. Failure to agree on ground rules;

ii. Allegations of failure to bargain in good faith; and

iii. Failure to agree on terms of the collective bargaining agreement.

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I. Resolution System Processes

1. Resolution Process I: Issues Covered in Section V.C.9 of the Determination[8]

J. Process for Step 2 Rights-Based, Third Party Determination by Panel of Neutrals

5. Decision of the Panel of Neutrals

c. The panel of neutrals' decision is final and binding on both parties.[9]

Statement of Facts

The TSA is a relatively new federal agency created under the Aviation and Transportation Security Act ("the Act"), signed into law on November 19, 2001.[10] An Administrator heads the TSA under the authority of § 114 of the Act. The Act authorizes the Administrator to adopt and modify the personnel management system established by the Administrator of the Federal Aviation Administration and other personnel systems of the U.S.

[8] Hereinafter referred to as "RP I." JX 2.

[9] A review of RP I reveals the document contains no designation or definition of the term "parties." However, the RP I refers repeatedly to the "TSA" and the "Exclusive Representative" with no mention of covered or bargaining unit employees. Lastly, J.6 of the RP I, the document identifies the "parties" as the "TSA" and the "Exclusive Representative."

[10] Pub. Law 107-71, 115 STAT. 597, 49 U.S.C. 40101. The ATSA at Section 111(d) refers to 49 U.S.C. § 44935 Note, that states in pertinent part: ". . . the Under Secretary of Transportation for Security [the TSA Administrator] may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals the Under Secretary determines to be necessary to carry out the screening functions . . .. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed."

Department of Transportation.[11] Additionally, the Act prohibits Agency employees who screen passengers or property to participate in a strike or assert a right to strike.[12] Agency employees who perform screening duties hold the general position of Transportation Security Officers ("TSO"). By a memorandum, the TSA Administrator declared in 2003 that TSO employees would not be entitled to engage in collective bargaining or be represented for the purpose of engaging in bargaining by any representative or organization.[13]

On February 22, 2010, the AFGE filed a petition to order an election for exclusive recognition under § 7111(b)(1)(A) of the FSLMRS of the TSA's TSOs. A different labor organization filed the same type of petition on March 17, 2010. The FLRA Regional Director ("RD"), relying on the Authority's prior decision in TSA 2003, held he was precluded from processing either petition and dismissed them. However, by Decision and Order on Review, the Authority reversed the RD's decision and ordered the RD to take appropriate action. UX 3.[14] A few months later, on February 4, 2011, Administrator Pistole effectively rescinded the 2003 Memo and issued the Determination. JX 1.

In addition to promulgating the Determination, the TSA also issued communications on February 4, 2011, that declared Administrator's Pistole's decision to allow some limited collective bargaining. Administrator Pistole issued a "TSA Broadcast" on February 4, 2011 to articulate the features of his "Determination Regarding Collective Bargaining." MX 2. The TSA Public Affairs issued a press release on that date that outlined the Administrator's decision, included a Q & A section and gave website links for the two (2) vying labor organizations involved in the petitions for employee representative elections. MX 3.

The FLRA noted that the TSA had expressly stated it did not oppose an election for an exclusive representative on the condition that the election not be for the purpose of certifying a union that could engage in collective bargaining.[15] The Authority reassessed whether § 7111 of the FSLMRS precludes processing election petitions with respect to TSO employees. Upon review of the statutory provision, the Authority found it was obligated to process a representation

[11] Section 114(n).
[12] Section 111(i).
[13] United States Department of Homeland Security, Border and Transportation Security Directorate, Transportation Security Administration, 59 FLRA 423, 424 (2003) (TSA 2003).
[14] U.S. Department of Homeland Security, Transportation Security Administration, 65 FLRA No. 53, 65 FLRA 242 (2010).
[15] *Id.* at 245.

petition seeking an election provided the requisite percentage number of employees had indicated their "wish to be represented for the purpose of collective bargaining by an exclusive representative[.]" The Authority based its finding on the plain wording of § 7111 that focuses on the wishes of *employees*, not the wishes or intentions of *employers.*[16] The Authority also noted that the TSA was in a unique position to not allow the unit of employees' exclusive representative the opportunity to collective bargain inasmuch as "the TSOs at issue here currently lack any right . . . to engage in collective bargaining." However, the Authority cited other provisions of the FSLMRS that provided various rights to a certified exclusive representative, such as the right to act for employees, to consult with agency management, to participate in formal meetings concerning grievances, personnel policy or practices or general conditions of employment, and to be present during Weingarten discussion.[17] In conclusion, the Authority found that the FSLMRS does not preclude the Authority from processing the labor organizations' petitions merely because the TSA Administrator exercised his statutory discretion to decline to accord exclusive representatives the right to engage in collective bargaining. The FLRA Chicago RD thereafter conducted the election for covered employees to vote for either the two (2) petitioner labor organizations or for no union representation.

On June 29, 2011, the Chicago RD issued a "Certification of Representative" that certified the American Federation of Government Employees, AFL-CIO, as the representative for the included employee "for the purposes of exclusive recognition." UX 4.[18] The Certification stated that "[p]ursuant to Chapter 71 of Title 5 of the U.S.C., the named labor organization is the exclusive representative of all employees in the following unit: . . . All full and part-time non-supervisory personnel carrying out screening functions under 49 U.S.C. § 44901, as that term is used in ATSA § 111(d): Transportation Security Officers, Lead Transportation Security Officers; Master Transportation Security Officers (which includes Behavior Detection Officers, Security Training Instructors, and Equipment Maintenance Technicians); and Expert Transportation Security Officers (which includes Behavior Detection Officers, Security Training Instructors, and Equipment Maintenance Technicians) of the Transportation Security Administration, Department of Homeland Security."

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[16] *Id.* at 246. (Emphasis in original).
[17] *Referring to* § 7114(a)(1), § 7117(d)(1), § 7114(a)(2)(A) and § 7114(a)(2)(B).
[18] FLRA Case Nos. WA-RP-10-0033, WA-RP-10-0036, (2011), 65 FLRA No. 53, *sutra* note 14.

On or about October 24, 2011, the AFGE submitted its typed "Proposed Ground Rules for Collective Bargaining" to the TSA's negotiating team. The proposal contained language pertaining to matters for ratification of the collective bargaining agreement. The proposal also contained language pertaining to an impasse procedure. UX 1. On or about October 26, 2011, the TSA submitted a counterproposal that contained much of the same language as that offered in the AFGE's proposal. The TSA countered the AFGE's proposal on the ratification matter by proposing, "The Parties will hold a referendum consistent with Section III.B.e. of the Determination. The TSA also countered to the AFGE's impasse procedure proposal with, "Impasse issues will be addressed in accordance with the Determination." UX 2.

By letter dated November 21, 2011, Mr. Harris wrote to the TSA's National Resolution Center to initiate the Resolution Process 1 (RP 1) because "the parties have failed to agree on ground rules." The letter referred to § V.C.9 of the Determination. The AFGE therein invoked the review of a third party for the ground rules negotiations pertaining to the ratification/referendum process and the final-and-binding nature of impasse arbitration.[19] The AFGE letter also advised that once the arbitration process would begin the AFGE would provide a more detailed summary of the impasse issues and its statement of position. JX 6.

In preparation for the arbitration hearing, Administrator Pistole submitted a Declaration of March 1, 2012, for consideration by the Panel. He testified that the document contained his views on the matters in dispute brought to arbitration on March 8 and 9, 2012. Tr. 411; MX 1. The following pertinent provisions of the Administrator's Declaration are reproduced:[20]

> 3. The Administrator of TSA was vested by Congress with broad discretion and authority to set the terms and conditions of employment of Transportation Security Officers (TSOs). See 49 U.S.C. § 44935 note. . . . Through the Determination, I provided that . . . TSOs could decide whether to elect an exclusive representative for the purpose of collective bargaining on eleven specific, enumerated topics and other carefully defined representational activities. I expressly stated that the Determination establishes a comprehensive labor management structure

[19] Two additional issues were cited in the AFGE's letter. However, those issues are not before this Panel for review.

[20] The arbitrators in this Panel of Neutrals have reviewed and considered all of the evidence admitted into the record in their entity. However, for the sake of brevity, only those portions that provided the most relevant and material evidence have been reproduced in this Award for clarity.

for TSA that is different and distinct, separate and independent, from that provided in 5 U.S.C. Chapter 71.

5. . . . The Determination provides . . . that TSA has the responsibility to make all final decisions on the design of the [Unitary Dispute Resolution System or "UDRS"].

6. . . . The referendum is not among the eleven topics subject to collective bargaining and therefore is not an appropriate topic for either ground rules or collective bargaining negotiations. Interpreting the Determination as authorizing negotiations on the referendum is inconsistent with the plain language of the Determination, and would violate my intent and meaning in issuing the Determination.

7. During collective bargaining negotiations, it is possible that issues subject to collective bargaining will reach impasse and will be referred for resolution to a panel of neutrals provided in the UDRS. The resolution of any such issue would be final and binding on TSA and AFGE, and then would become part of the CBA that will be represented to all unit employees for a vote. I intended the Determination to provide a process that maximizes participation of all unit employees by providing them the opportunity to vote on every aspect of the CBA.

Administrator Pistole testified that he sought to craft through the issuance of the Determination a new model for the TSA, recognizing that the large and diverse agency could still benefit form the positive aspects of a collective bargaining agreement. Tr. 413.

The bargaining unit covers approximately 44,000 TSA employees who work at the nation's 450 commercial airports. At the time Administrator Pistole assumed his position as the head of the TSA, there were approximately 13,000 TSO employees who paid dues via payroll deduction to the two labor organizations vying for exclusive representation certification.

Administrator Pistole testified that the Determination set up a process for the AFGE and TSA to reach agreement for the benefit of the workforce, but the Determination also built a "unitary dispute resolution system", which should govern that whole process with the key aspect being that the TSOs should be able to vote on what that collective bargaining agreement says. Tr. 467.

Mr. Borer testified that one of the Determination's operative paragraphs pertaining to the ratification/referendum process on collective bargaining agreements was at [III.]B.1.e.i. He considered the provision to say that a collective bargaining agreement negotiated between TSA and the exclusive representative is binding on the parties and all of the bargaining unit

employees after it had been presented and voted on in a referendum and a majority of the unit voted affirmatively. Tr. 166. Mr. Gage also testified concerning the contents of § III.B.1.e.i. of the Determination. He added that this provision presupposes an agreement where both parties have agreed to a collective bargaining contract and thereafter the contract may be taken to the employees for a traditional ratification or referendum. Tr. 110.

Mr. Borer reviewed the provisions of § IV.A.5 of the Determination and stated that his understanding of the term "negotiate" is that the parties resolved issues at the bargaining table. He added that the section does not say that the referendum will include matters imposed by arbitrators. Tr. 194. Administrator Pistole testified that the term "negotiate" meant to him, "to engage in substantive discussions in an attempt to reach a common purpose . . . [a]nd something of benefit to the TSA workforce." He added that he understood that a decision issued by an arbitrator was not something that had been negotiated between any parties but was imposed. Tr. 437. Administrator Pistole reviewed § III.B.1.e.i. and confirmed that the term "imposed" was not used and the term "negotiated" was used in that section.

Mr. Gage testified that the AFGE was certified and chosen by the covered employees who elected the AFGE to be their exclusive representative. He added that the terms "exclusive representative" are ones of art and signify a role that the AFGE is obligated to fulfill. He further added that he believes the AFGE makes a huge difference in providing some due process as well as a collective voice for bargaining unit employees, and it improves the covered employees' day-to-day working life. Tr. 116.

Mr. Borer testified with regard to the Agency's concern that the AFGE would attempt to force an agreement through the Panel of Neutrals' decisions rather than through bilateral negotiations and to not have the covered employees vote for ratification of the agreement. He explained that the AFGE's business is to represent employees and that the AFGE's mission is for that purpose. He added that a motive to not let employees vote goes against everything the AFGE's believes in. Tr. 170.

Mr. Borer testified with regard to the bargaining impasse issue. He understood the system set forth in the Determination was to be considered as a whole, that if the parties "get an agreement" then the terms go to the covered employees for ratification. He added that if the parties do not reach agreement, then the dispute goes to arbitration that is to be final, as expressed in the Determination. Tr. 171-172. He added that the labor relation systems in which

he has had experience provide that alternative to give the parties finality, because if the parties cannot reach agreement they need finality. Tr. 172.

Mr. Borer testified that on a number of occasions the AFGE imparted to the TSA that AFGE believed the TSA was limiting negotiations and the TSA's actions were inconsistent with the provisions of the Determination, particularly concerning AFGE's proposals for the ratification/referendum process and the TSA's position that the Panel of Neutral's decisions were not final and binding in resolution of impasse disputes. Tr.184-185. He described what he believed TSA's interpretation was and that it would lead to an "endless loop." Mr. Borer testified that he informed more than one TSA official that TSA's interpretation was inconsistent with the provisions of the Determination as to ratification, impasse and the finality of the Panel of Neutral's decisions. Tr. 186. Mr. Gage testified that the AFGE negotiations team members questioned TSA management officials about the process after arbitrators had issued a decision on impasse but the voting employees turned in a negative vote. He stated that the Union's question was, "Okay, we go back to the people, we go back to the arbitrators, we go back to the table, how long do we do this[?]" and the answer he recalls was in words to the affect, "Well, we'll do it twice." Mr. Gage testified that he then asked, "Well, then what?" He stated that management's response was, "If we still don't have it, then we'll sit down and decide what to do next." Tr. 108. Mr. Gage then responded, "That's just not acceptable. That could gain[21] [*sic*] this process." *Id.*

Messrs. Borer and Gage provided extensive testimony pertaining the AFGE's efforts to negotiate on behalf of the covered employees, to involve through structure and communication those employees during the bargaining process and to communicate on a daily basis with the employees to receive their input and impart information. Tr. 119-120, 127, 138, 203-04, 241-242.

Administrator Pistole testified that under paragraph [III.]B.e.i. of the Determination the collective bargaining agreement negotiated between TSA and the Union would be binding on the parties and unit employees. He stated that he considered the Determination sets forth a unique construct as opposed to the traditional Title5/Chapter 71 because the Determination recognizes

[21] The Panel considers that the court reporter erred and that the word Mr. Gage used in his testimony was "game," not "gain." There were other references in the evidence to an intent to "game" the procedures.

three entities; i.e., the TSA, the union and, thirdly, the covered employees. Tr. 406. Administrator Pistole described the process about the final nature of any agreement between the parties, meaning the AFGE and TSA. He sought to have the covered employees able to vote on things that the parties had reached some type of agreement on. Tr. 407. Administrator Pistole stated that the employees would vote on anything that TSA and AFGE agreed on as part of the covered eleven (11) items allowed for collective bargaining in the Determination. He explained that if there were parts of the collective bargaining agreement the employees did not agree with then the parties would negotiate through a new agreement and take the resulting agreement back to the employees for a vote. Tr. 408. When asked about the use of the terms "final" and "binding" in the Determination, Administrator Pistole testified that he viewed the Panel of Neutral's decision to be final as to the TSA, but he stated that "the intent of this whole Determination . . . is to empower the TSOs, to give them a voice so they're not disenfranchised as a group that is not allowed to vote on something that affects their day-to-day work life." Tr. 426.

By letter dated November 9, 2011, Mr. Gage wrote to Administrator Pistole to invoke § V.C.9. of the Determination on the basis that the parties had failed to agree on ground rules and that such a failure was referable to arbitration. The letter stated that the parties had reached impasse on the ratification process and the final-and-binding nature of impasse arbitration. JX 4.

By letter dated November 17, 2011, Mr. Ball responded to the AFGE's claims that the parties had reached impasse on four issues: the collective bargaining agreement ratification process, the final-and-binding nature of impasse arbitration and two other issues [resolved prior to the instant arbitration proceedings]. The TSA's response stated, "None of these issues are within the scope of the ground rules negotiations in which TSA and AFGE have been engaged; thus, TSA will not address these issues in ground rules negotiations." The Agency's response referenced Section III.B.2 of the Determination, which lists the subjects authorized for collective bargaining, and averred its declination to negotiate on subjects the TSA views as outside the scope of collective bargaining. The TSA's response explained that the Determination does not include the ratification process among the eleven subjects for which collective bargaining is authorized. The TSA response noted that the Determination addresses the referendum required for any proposed collective bargaining agreement. The TSA's response also explained that because the AFGE's proposal on the "final-and-binding nature of impasse arbitration" pertains to

the dispute resolution process the proposal falls outside the scope of the eleven subjects for collective bargaining. The Agency's response further noted that Section V.B. of the Determination excludes the resolution process as a subject for collective bargaining, with one exception that does not apply in the instant matter. The Agency's response ended with its readiness to move forward with negotiations and an invitation to resume collective bargaining. JX 5.

Mr. Gage testified that he shared the same concerns as Mr. Borer concerning the provisions of the Determination that were in writing and the interpretations given to the AFGE negotiators by the TSA officials. He stated that he read the language of the Determination to provide that if the parties at the table make an agreement, then it goes for ratification or referendum and then that is final. He added that if the employees vote the agreement down then the parties are to go back to the table and try to cure the issues that prompted the non-ratification vote. Mr. Gage testified that a problem surfaces if the parties cannot reach agreement after the negative ratification. He stated that the TSA informed him that there would not be an agreement and the parties would need to sit down and decide what to do next. Mr. Gage stated that with that information he informed the TSA that their explanation was not acceptable, that the parties may never reach agreement on a contract and that finality was needed. Tr. 108-109. He added that he discussed this issue with Administrator Pistole and described to the latter what the AFGE foresaw as an "endless loop" created by the TSA's interpretation of the Determination. Tr. 106-107.

Administrator Pistole testified pertaining to his considerations relative to § V.C.9.iii of the Determination. He explained that after a panel had made a decision on the impasse terms of the collective bargaining agreement the parties, specifically the Union and the Agency, would take the agreement back to the workforce, identified as the third entity here, to vote on. Tr. 421-422. Administrator Pistole added that he did not want a panel to impose something on the workforce, that he wanted the workforce to vote on the issues that would affect their day-to-day work environment and that he specified these goals a number of times in the Determination. Tr. 422.

By letter dated January 20, 2012, the AFGE initiated Step 2 under the RP I. The AFGE filed the grievance on the issues pertaining to the ratification/referendum process and to the final-and-binding nature of impasses arbitration over a bargaining dispute. JX 7.

On January 11, 2012, the parties engaged in mediation on the four (4) issues which the AFGE deemed were at impasse. The mediation ended with the parties reaching agreement on one issue, the AFGE withdrawing a second issue and leaving for resolution the issues of ratification/referendum process and the final-and-binding nature of impasse arbitration over bargaining disputes. Attachment to JX 7. On January 11, 2012, the parties entered into interim "Ground Rules for Collective Bargaining." JX 3. The parties agreed to a number of ground rules, but held two (2) subjects open. The open items are reproduced below in pertinent part:

> IX. Ratification
>
> Without prejudice to the positions of either TSA or AFGE, the Parties agree that their respective positions convening their dispute over the ratification/referendum process will be submitted to a panel of neutrals pursuant to TSA's Resolution Process 1. The Parties may make any argument before the panel of neutrals concerning these issues.
>
> X. Impasse Procedure
>
> Without prejudice to the positions of either TSA or AFGE, the Parties agree that their respective positions concerning their dispute over the final-and-binding nature of impasse arbitration will be submitted to a panel of neutrals pursuant to TSA's Resolution Process 1. The Parties may make any argument before the panel of neutrals concerning these issues.
>
> JX 3.

Mr. Borer testified that he has negotiated between 100 and 200 collective bargaining agreements and that typically the parties negotiated ground rules. He described ground rules to encompass the methods, process and procedures for the parties' collective bargaining, everything "from A to Z" including how the ratification process works. Tr. 179.

Administrator Pistole testified with regard to § [III.B.] e.i. of the Determination that a collective bargaining agreement (CBA) would be negotiated between the TSA and the Union that would be binding on the parties and unit employees after the agreement had been presented to the unit employees for vote in a referendum. Tr. 440-441. He added that he made a distinction between the parties, which he regarded as being the AFGE and the TSA, and the unit employees. He recognized that this was not the traditional scheme under Title 5 [Chapter 71 of the FSLMRS] and that it was something different. Tr. 441.

The Administrator testified that he did not give initial consideration to whether the decisions issued by the Panel of Neutrals as part of the resolution process was also part of the collective bargaining process. He stated upon reflection that he considered that the decisions of the Panel of Neutrals would be a part of the overall collective bargaining process. Tr. 460-461.

Positions of the Parties

The TSA raised an arbitrability threshold issue, which generally would cause the arbitration to bifurcate the presentation of evidence with the TSA moving first with the jurisdiction matter and the AFGE moving next on the merits of the dispute. With the agreement of the parties, the Panel conducted the hearing without bifurcation. The AFGE presented evidence pertaining to the merits and addressing TSA's threshold issue. This was made possible by virtue of the parties' submission of pre-hearing statements pertaining to the arbitrability issue. After the AFGE's presentation of evidence, the TSA presented its evidence in response to the merits of the dispute as well as evidence to support its arbitrabilty claims.

Positions of the AFGE

The AFGE first addressed the Agency's arbitrability issue. The AFGE asserted that the Determination did not limit the Panel's jurisdiction pertaining to disputes arising about either the ratification/referendum process for voting on a collective bargaining agreement or the final and binding nature of decisions reached by a Panel of Neutrals during collective bargaining negotiations between the TSA and the AFGE. The AFGE argued that the Determination provides broad jurisdiction to the Panel of Neutrals per paragraph V.C.9. The AFGE observed that the Determination provision used the terms "including but not limited to" and thereafter specifically referred to "failure to agree on ground rules" as a covered issue. The AFGE further observed that the Determination authorizes the Panel of Neutrals to hear allegations that "management . . . failed to act in a manner consistent with this Determination." JX 1, Paragraph V.C.9.b.ii. The AFGE also referred to the provision in the Determination, which states outstanding issues pertaining to the parties' failure to agree on ground rules for collective bargaining are to be moved to the "rights based process" under § V for "final resolution" of those issues. The AFGE posited that by the use of the terms "outstanding issues" the Determination granted broad authority for the Panel to hear matters pertaining to the failure to agree on ground

rules. The AFGE claimed that because the parties have failed to reach agreement on their ground rules negotiations the Determination provides that it is appropriate for the Panel to resolve these two outstanding issue.

The AFGE objected to the TSA's claim that the AFGE's issue concerning the ratification/referendum process fails to be a ground rule issue rather than one of the negotiating processes. The AFGE posited that the Determination specified that ground rules are "for collective bargaining," rather than limiting ground rules to the activity of "negotiating." Reference JX 1, III.B.7. The AFGE asserted that collective bargaining also includes the ratification process and the impasse process. The AFGE contended that the TSA could have written the provisions of the Determination to exclude specific topics from the ground rules. The AFGE noted that as the drafter of the Determination's language, the document excludes a number of subjects from the scope of collective bargaining with the elected exclusive representative. Reference JX 1, III.B.3. The AFGE maintained that the TSA did not exclude in the Determination the subjects of ratification/referendum or impasse processes from the parties' bargaining over ground rules.

The AFGE maintained that the resolution process is a part of the collective bargaining process. The AFGE cited the Administrator's testimony wherein he considered that the Panel of Neutrals' action to hear a dispute through the resolution process was part of the overall collective bargaining process. The AFGE also referred to outside authority as analogous to its position that a resolution process is part of the collective bargaining process.[22] The AFGE opined that it is commonly understood that ground rules pertain to more than negotiating logistics. The AFGE contended that ground rules regularly include the ratification process and cited several outside authorities in support of its position.[23] The AFGE relied upon the testimony of Messrs. Borer

[22] ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1350 (BNA Books, 6th ed. 2003)("Elkouri & Elkouri")("Arbitration of interest disputes may be viewed more as an instrument of collective bargaining than as a process of adjudication . . ."); American Federation of Government Employees v. Federal Labor Relations Authority, 778 F.2d 850 (D.C. Cir. 1985).

[23] Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 92 FLRR 1-4024 (1992); U.S. Department of Defense, Department of the Army and Lexington-Blue Grass Army Depot, 90 FLRR 1-4067 (1990); Federal Firefighters Assoc. Local 58 and Department of the Air Force, 34 FLRA No. 142 (1990); U.S. Patent and Trademark Office v. Patent Office Professional Assoc., 31 FLRA 952 (1988); Department of the Air Force, Griffiss Air Force Base, 25 FLRA 579 (1987); Department of the Air Force, Air Force Material Command, 98 FLRR 1-4019, FLRA ALJ Dec Rep. No. 137 (1998).

and Gage wherein they described their extensive experience with collective bargaining that included ground rules. The AFGE noted that both individuals' experience included the subject of ratification in the parties' ground rules to establish what would happen at the end of joint negotiations and what to expect thereafter. The AFGE further observed that the TSA had previously entered into agreement pertaining to a ground rule regarding ratification. The AFGE asserted that the subject of ratification/referendum is proper for inclusion in the parties' ground rules.

In response to TSA's letter of November 17, 2011 (JX 5) wherein Mr. Ball stated that none of the AFGE's claimed impasse subjects were within the scope of the ground rules because those subjects were not among the eleven subject the Determination authorized for collective bargaining, the AFGE opined that TSA's position is incorrect. The AFGE argued that TSA's position is inconsistent with the Determination's stipulation that only limits ground rules to the extent they must be "for collective bargaining." Reference JX 1, III.B.7. The AFGE maintained that it is incorrect to limit the ground rules to those eleven subjects the TSA deemed appropriate for inclusion in the collective bargaining agreement. The AFGE gave some examples of where the parties had negotiated over a matter that was established in the Determination but where the parties further developed those matters, such as the location of where collective bargaining would take place (FMCS offices versus TSA Headquarters), notice requirements and travel and per diem for employee negotiators. The AFGE argued that it is not inconsistent with the Determination for the parties agree to develop upon provisions that are covered in the Determination. The AFGE urged that the Panel disregard the Agency's position that the ground rules may only consist of subject matters allowed by the Determination for collective bargaining and where the Determination establishes a particular matter the AFGE is not authorized to bargain about it. The AFGE urged that the Panel give persuasive weight to the testimony of its witnesses because the information conveyed the traditional view that ground rules include any collective bargaining process from beginning to end, including the process if negotiations fail.

The AFGE countered TSA's objection to AFGE's claim that the Determination does not require a referendum for Panel-imposed agreements because the AFGE allegedly raised the matter untimely. The AFGE referred to Mr. Borer's testimony that the AFGE raised this claim when the AFGE first became aware of TSA's position that a Panel of Neutral's decision on an impasse dispute would be taken to the employees for a vote. The AFGE cited provisions of

various documents wherein the Union had reserved the right to further define the issues and its position up and until the arbitration proceeding. JX 7, JX 6, JX 3.

Turning to the merits of the dispute placed before this Panel, the AFGE urged that the Panel use the rule of interpretation of a document that when a document is unambiguous, the plain meaning of the words of the document should control. The AFGE cited several authorities in support of this position.[24] The AFGE objected to the Agency's position that the Panel must defer to the Agency's interpretation of the language contained in the Determination. The AFGE opined that the Agency's argument ignores the maxim that any "deference to agency interpretation is not in order if the [document's] meaning is clear on its face."[25] The AFGE reiterated that inasmuch as the Determination is clear on its face, deference need not be addressed. The AFGE argued moreover that the TSA's interpretation is not entitled to deference because the Agency's interpretation amounts to a litigation position, and therefore, should be rejected.[26] The AFGE ventured that it would be difficult to defer to the Agency's interpretation inasmuch as the latter's positions had shifted during the course of this dispute and were inconsistent.[27] The AFGE asserted that the Agency's interpretation is not well considered or well reasoned and is inconsistent with the Determination.

The AFGE contended that the plain language of the determination makes clear that only negotiated collective bargaining agreements are subject to the ratification/referendum process. The AFGE asserted that the TSA has misread the Determination and that the TSA's misinterpretation does not render the Determination's positions at issue to be ambiguous.[28] The AFGE referred to the following provisions in the Determination that deal with negotiations: "A

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[24] Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911); National Treasury Employees Union (NTEU) v. Federal Labor Relations Authority, 418 F.3d 1068 (9th Cir. 2005); Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1219 (9th Cir. 2002); Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

[25] Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984), *citing* Udall v. Tallman, 380 U.S. 1, 16 1965).

[26] NATCA v. Secretary, Department of Transportation, 997 F. Supp. 874, 882 (N.D. Ohio 1998); *citing* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988).

[27] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); U.S. Department of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del., 57 FLRA 304, 307 (2001); NTEU, Chapt. 41, 57 FLRA 640 (2001).

[28] Pfizer, Inc., *supra* note 25 at 1509; Steward v. KDH Deutz of Am. Corp., 980 F.2d 142 (11th Cir. 1993); Klein Tools, 90 LA 1150, 1153 (Poindexter, 1988); Ash Grove Cement Co., 112 LA 507, 511 (Wyman, 1999).

collective bargaining agreement **negotiated between TSA and an exclusive collective bargaining representative** . . .," (referring to paragraph III.B.1.e.i of the Determination and referred to in paragraph III.B.1b); "If a revised collective bargaining agreement is **agreed upon** during this period, . . ." (referring to paragraph III.B.1.e.ii of the Determination); "All covered employees will have the right to vote in a referendum on whether or not to support any collective bargaining agreement **negotiated** by TSA with a duly elected exclusive representative before such agreement becomes binding and effective[,]" (referring to paragraph IV.A.5); and "If a union is certified . . . consistent with the provisions of this Determination, such union shall have the right to: a . . . engage in . . . collective bargaining . . . within the ambit of § III.B.2; b. Enter into a collective bargaining agreement reached as a result of good faith collective bargaining if approved by covered employees in a referendum as provided in § III.B.1.e." (Emphasis in brief). The AFGE asserted that the Determination explicitly states in three different subsections that the ratification/referendum process pertains to "negotiated" or "agreed upon" agreements; e.g., § III.B.1.e.i, § III.B.1.e.ii and § IV.A.5. The AFGE cited two additional subsections of the Determination to support its position that the document specifies that "negotiated" agreements will be subject to ratification/referendum; i.e., § III.B.1b (which incorporates § III.B.1.e.i) and IV.B.2.a. and b. The AFGE further referred to the testimony of Messrs. Borer and Gage wherein they testified their understanding that the Determination clearly envisioned that an agreement that had been negotiated between the TSA and the excusive bargaining agent would go to ratification for the employees' vote.

The AFGE reiterated its position that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.[29] The AFGE again cited § III.B.1.e.i of the Determination that provides for a referendum for "a collective bargaining agreement negotiated between TSA and [the AFGE]." The AFGE followed that § III.B.1.e.ii provides that if the parties need to "recommence negotiations" because the covered employees did not approve the agreement, the revised "agreed upon" agreement will be submitted for another vote. The AFGE

[29] ELKOURI & ELKOURI, *supra* note 22 at 434, 449 ("[I]n the absence of [internal or external evidence indicate the parties' use of a special meaning] when each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail) [citations omitted]; Department of Navy, 86 LA 92, 96 (Connors, 1985).

posited that the Determination uses the terms "agreed upon" or "negotiated" as synonymous. The AFGE referred to both various dictionary sources for the common definition of "negotiate" and the testimony of Mr. Borer and the Administrator. The AFGE claimed that the use of the terms "negotiate" or "agreed upon" do not encompass the situation where a judge or an arbitrator imposes a decision. The AFGE posited that the Determination specifies that a referendum vote will take place over a collective bargaining agreement that has been negotiated or agreed upon.

The AFGE argued in contrast that the Determination provides for the situation in which a collective bargaining is imposed via the Panel of Neutrals rather than negotiated by the parties. The AFGE opined that this option under the Determination does not provide for the ratification/referendum process. The AFGE cited § III.B.10 wherein the Determination stated in part, "[i]f . . . **agreement is not reached** on any issues that have been subject to the collective bargaining process . . . those issues will be put before the rights based process established **under** § V **below for final resolution of issues** pertaining to or arising from collective bargaining." The AFGE observed that § III.B.7 of the Determination contains similar language as that used in § III.B.10 but with regard to ground rules. The AFGE objected to the TSA's claim that "final resolution of issues" in the context of the collective bargaining agreement means something different than in the ground rules context. The AFGE asserted that the Determination be interpreted using the rule of construction that the meaning of words should remain constant throughout the document.[30] The AFGE argued that the consistency of terms include the provisions at issue under § V of the Determination.

The AFGE presented similar arguments pertaining to the common definitions and understandings of the terms "final" and "resolution." The AFGE cited the provision in the Determination that pertained to the final nature of an imposed Panel of Neutrals decision on collective bargaining terms in § V.C.9. The AFGE also referred to TSA's documents pertaining to the Resolution Processes. Reference JX 2, 1.J.5.c. The AFGE argued that the Determination envisioned two difference processes. The first process involved an agreement that had been negotiated by the parties or agreed upon by the parties and for which the negotiated document would be subject to a referendum. The second process the AFGE asserted involved an award by a Panel of Neutrals that imposed contract terms, and in that situation, the Panel's decision was not subject to ratification. The AFGE noted that this dual approach has been widely used in

[30] ELKOURI & ELKOURI, *supra* note 22 at 452.

other employment situations with organized employees.[31] The AFGE contended that in these situations the adjudicator's decision is almost universally considered as final or final and binding.[32] The AFGE observed that the Determination does not use the terms "recommended," "advisory" or "mediated" with regard to the nature of the Panel of Neutral's decisions. The AFGE reiterated that the Determination clearly provides for two different paths and different concepts – one for collective bargaining agreements that are negotiated and thus subject to a vote, and another for collective bargaining agreements that are imposed and therefore are final and not subject to a vote.

The AFGE asserted that it would be improper to rely on the Administrator's testimony as it related to the final or binding nature of the Panel of Neutral's decisions and reiterated that it is litigation-focused expression.[33] The AFGE contended that the Administrator's interpretation is unpersuasive because it conflicts with the plain meaning of the Determination's applicable provisions, and it treats the Panel of Neutral's decisions as recommendations when the Determination states they are final. The AFGE further asserted that the Administrator's interpretation ignores the difference between a complete negotiated agreement for which the employees may vote during ratification/referendum and the parts of negotiations for which the Panel of Neutrals would render the "final decision," which would not be subject to employee vote. Reference to § III.B.1.e.i and § V.C.9 of the Determination.

The AFGE argued that the RP I supports its interpretation of final decisions by the Panel of Neutrals as they relate to impasses incurred during the parties' negotiations. The AFGE cited paragraph J.5.c of the RP I, which states the "panel of neutrals' decision is final and binding on both parties." The AFGE urged that the rule of contract interpretation be followed whereby if an interpretation would render some provisions of the document meaningless an arbitrator will likely select the interpretation that gives meaning to all of the contract's provisions.[34] The AFGE referred to Mr. Gage's testimony concerning the AFGE's anticipation of an endless loop that would negate the completion of negotiations completions unless there was some finality. The AFGE also referred to the processes used by the U.S. Federal Services Impasses Panel, which is

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[31] *Id.* at 1365-68, 1371-89.
[32] In support of this position, the AFGE cited the state statutes for Delaware, Hawaii, Alaska, Iowa, Maine.
[33] AFGE, Locals 225, 1504 and 3723, AFL-CIO v. FLRA, 712 F.2d 640 (D.C. Cir. 1983).
[34] ELKOURI & ELKOURI, *supra* note 22 at 463.

empowered to issue orders that are "binding on [the] parties during the term of the agreement, unless the parties agree otherwise," and may include the use of final and binding interest arbitration.[35] The AFGE noted that a court decision that reviewed the mechanisms of the Impasses Panel's actions supported the goals of speedy resolutions of disputes with finality as meeting the FSLMRS.[36] In a separate case the AFGE found as analogous to the instant dispute, the federal sector parties submitted their bargaining proposals to an Impasses Arbitrator who then made final decisions on the terms of their agreement. After the union submitted the final agreement for ratification, which was returned with a negative vote, the union sought to renegotiated with the agency. The agency filed an unfair labor practice charge. The AFGE observed that the FLRA held "there [was] no basis for submitting terms of [the] collective bargaining agreement to a ratification vote, because those terms cannot be altered. They are final and binding." The FLRA also held that there was no statutory basis or nothing in the parties' ground rules to support the union's action to place before the covered employees the entire master labor agreement, including the Impasses Arbitrator's decision, for ratification.[37] The AFGE further asserted that it is widely recognized that labor arbitration interest decisions are to be binding on all parties, except for limited judicial review[38] and federal agency head review.

The AFGE cited similarities between the goals of the FLMRS[39] and the Determination where both prohibit covered employees from participating in a strike and to resolve collective bargaining impasses quickly and with finality. The AFGE further noted that the FLMRS provides for the Impasses Panel's action as a final action.[40] The AFGE opined that the Determination contains a similar mechanism at § III.B.10. The AFGE referred to Mr. Borer's testimony wherein he described his extensive experience pertaining to the traditional approach of bargaining parties to establish an alternative where they may fail to reach mutual agreement. The AFGE referred to, "The primary rule in construing a written instrument is to determine, not

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[35] 5 USC § 7119(C); Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984).
[36] Council of Prison Locals at 1400. *See also* AFGE, *supra* note 24.
[37] U.S. Department of the Air Force, Air Force Material Command and AFGE Council 214, 98 FLRR 1-4019 (1998). *Cf., e.g.,* Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133 (Colo., 2000).
[38] ELKOURI & ELKOURI, *supra* note 22 at 1364.
[39] 5 USC § 7116(b)(7)(A).
[40] 5 USC § 7119 (c)(5)(C) ("Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.)

alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions."[41] The AFGE urged that the reasonable person approach be taken with the interpretation; i.e., that a reasonable person interprets the Determination to provide for employees' vote on a mutually agreed upon contract vice one imposed by the Panel of Neutrals. The AFGE cited various provisions of the Determination and the TSA's February 4, 2011, Broadcast to show that its primary goals were that of efficiency and rapid problem solving.

The AFGE asserted that the TSA's interpretation could result in an "endless loop" in contraction to the Determination's goals of quick and final resolution. The AFGE noted that the Determination sets forth very short time limits for various functions, e.g., thirty (30) days in which to reach agreement on ground rules or the parties must proceed to resolution before a Panel of Neutrals, and ninety (90) to 120 days to negotiate the collective bargaining agreement, or the parties are to proceed to resolve the impasse before the Panel of Neutrals. The AFGE described that the endless loop would occur after the Panel issues its "final" decision but the TSA would place the negotiated agreement, as well as the Panel's decision on the impasse items, to the covered employees for vote. If the employees return a negative vote, the parties are to recommence negotiations (that may include the Panel's decision if that is the terms caused the employees' dissatisfaction), and if the parties cannot reach mutual agreement on all issue again, the second impasse goes to the Panel for another decision, which would then lead to another vote for ratification by the covered employees, and on and on.

The AFGE further argued that the TSA's interpretation that the AFGE described as allowing for an endless loop would violate the rule of contract construction that the interpretation should avoid "harsh, absurd, or nonsensical results."[42] The AFGE asserted that the Union's interpretation both comports with the plain language of the Determination and gives effect to the Determination's goals, including the finality of resolving bargaining impasse disputes.

The AFGE responded to the TSA's claims that covered employees have a vote on the collective bargaining agreement by denying the AFGE is attempting to silence the employees'

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[41] ELKOURI & ELKOURI, *supra* note 22 at 462, *quoting* Riley Stoker Corp., 7 LA 764767 (Platt, 1947).
[42] *Id.* at 470-471 [citations omitted].

voice. The AFGE maintained that it intends to work toward a mutual agreement so that covered employees have a vote. The AFGE's brief cited at great length and detail the testimony of Messrs. Borer and Gage concerning the activities of the Union to involve covered employees, provide the employees with information and to receive employee input.

The AFGE denied the TSA's argument that the AFGE might force the collective bargaining terms to be resolved by the Panel of Neutrals to cause an imposed rather than a negotiated agreement to be subject to ratification. The AFGE cited Mr. Borer's testimony wherein he explained the basis for the Union's denial.

The AFGE urged that the Determination be interpreted by the utilizing the rule of contract construction of *contra proferentum*; meaning that when ambiguity exists in the document's language that the language be interpreted against the party that drafted the language.[43] The AFGE posited that the TSA drafted the provisions of the Determination and did so using terms of the Agency's own choosing. The AFGE opined that the Agency offered no justification for why it drafted the Determination but later interpreted the language at issue differently than the plain meaning of the language. The AFGE reiterated in a more concise form that the Determination's terms provide for a workable system of (1) negotiation and (2) the alternative of final and binding arbitration if negotiation fails. The AFGE maintained that this system allows for the employees to have a voice and a contract.

The AFGE objected to the TSA's claim that the Determination sets up a three (3) party system in which only the AFGE and the TSA are bound by the Panel of Neutrals' decisions but the covered employees are not. The AFGE posited that the TSA's claim misunderstands the Union's role and status as the exclusive bargaining representative for the covered employees, both under the FSLMRS and the Determination. The AFGE cited the Certificate of Recognition that designated the Union as the covered employees exclusive bargaining agent. UX 4. The AFGE also cited provisions of the Determination at page 5, "This representational framework will be structured so TSA and TSOs can enjoy the benefits of union representation . . ." and § IV.B.3. The AFGE posited that these provisions acknowledge the Union's role as representative of the covered employees and not as some independent body. The AFGE argued that this language comports with the FLRA's definition of exclusive representative for purposes of final and binding Panel decisions on collective bargaining terms.

[43] *Id.* at 477 [citations omitted].

The AFGE contended that when TSA issued the Determination the Administrator did so with knowledge that the FLRA had previously determined that TSO employees were entitled to elect an exclusive representative under the FSLMRS. Reference UX 3. The AFGE observed that the FLRA conducted the election as the body authorized by statute to accord exclusive recognition status. The AFGE objected to the TSA's position that the Determination system is completely distinct from the system under the FSLMRS inasmuch as the two are linked by § IV.B.3, the November 12, 2011 FLRA decision and the FLRA Certificate of Recognition for the Union (UX 4). The AFGE asserted that the Determination and the FSLMRS clearly provide that the exclusive representative party at the resolution process does not represent the Union but represents the covered employees. The AFGE further asserted that because the Union is bound to the final decision from the Resolution Process, so are the covered employees. The AFGE referred to Mr. Gage's testimony concerning the role as the covered employees' exclusive representative. the AFGE opined that the relationship an exclusive representative has to the bargaining unit employees is that of an agent and principal. The AFGE cited legal encyclopedia, case law, arbitral decisions and the Postal Reorganization Act[44] in support of its position on this matter. In summation, the AFGE opined that it would be improper and inconsistent with the Determination to hold a referendum after the Panel of Neutrals has made a "final and binding" decision on contract terms.

The AFGE asserted that § V.B. of the Determination does not prevent the Panel of Neutrals from making a determination that the plain language of the Determination allows for a ratification/referendum only upon an agreement fully negotiated between the parties (the TSA and the AFGE), as opposed to the function that the Panel's imposed contract terms will be final and binding to all concerned. The AFGE maintained that for the Panel of Neutrals to function the Panel must interpret both the Panel Processes under Section V of the Determination and the RP I (JX 2). The AFGE denied it was attempting to bargain over the terms of the RP I.

The AFGE argued that its proposals for ratification/referendum process are appropriate for bargaining with regard to setting forth the negotiations ground rules for the parties' collective bargaining of the contract. The AFGE urged that the test established for assessing the appropriateness for ground rules issues be adopted in this dispute; i.e., whether the proposed ground rule was offered in good faith and whether the proposal(s) was designed to further the

[44] 39 USC Section 1200, *et seq.*; Section 1203.

bargaining process.[45] The AFGE asserted that its proposal on the ratification/referendum matter further develops what is already provided in the Determination. The AFGE posited that its proposals demonstrate reasonableness and good faith. The AFGE opined that the Union's proposals do not conflict with the provisions of the Determination because the proposals pertain to matters on which the Determination is silent. The AFGE moreover contended that the Union's proposals represent typical provisions relative to ratification/referendum procedures for taking the contract to the voting employees.

The AFGE provided its proffered analysis for the Panel's consideration pertaining to the Union's October 24, 2011, proposed ground rules. UX 1. With regard to the proposal that "[A]n agreement will be implemented 30 days after ratification or 30 days following a decision by an arbitrator," the AFGE claimed this provision does not conflict with the Determination because the latter document is silent as to implementation in this manner. The AFGE countered that a provision as here is better than no provision and the proposal contributes to the Determination's goals of efficiency and promptness.

With regard to the proposal that "[I]f a majority of bargaining unit members voting choose not to ratify, the parties will return to the table within 45 days of the non-ratification vote to determine the issues contributing to the non-ratification vote and resume bargaining," the AFGE opined that this provision would not conflict with the Determination inasmuch as the latter specifies for the 45-day time frame for the parties to return to the negotiations table. The AFGE denied the TSA's argument that the Union's proposal conflicts with the Determination and observed that the Determination does not say that only the TSA may determine the issues that caused non-ratification. The AFGE posited that it is normal and appropriate for the Union to communicate with the covered employees concerning their input in the ratification/referendum process. The AFGE claimed that its proposal promotes collective bargaining inasmuch as it promotes the joint duty to bargain in good faith to reach a collective bargaining agreement.

With regard to the AFGE proposal that "TSA managers and supervisors shall maintain neutrality on the question of ratification and shall not express any opinion other than neutrality on any provision . . .," the AFGE referred to witness testimony that management neutrality benefits everyone and that this proposal is not different than the neutrality management was to

[45] Assoc of Civilian Technicians v. FLRA, 353 F.3d 46 (D.C. Cir, 2004); Department of Justice, Bureau of Prisons, FCI and Local 3690, AFGE, 2011 FSIP 001 (2011, Angelo).

exhibit during the election process. The AFGE opined that the neutrality provision is consistent with the Determination inasmuch as it prohibits management coercion of employees, referring to § V.D.4.

With regard to the AFGE's proposal that stated, "procedural instructions to employees on the ratification process will be subject to mutual agreement," the AFGE contended this would contribute to the parties to work collaboratively and cooperatively. The AFGE maintained that it must ensure unbiased instructions are given to the voting employees, particularly inasmuch as the TSA is to conduct the ratification process. The AFGE opined that this proposal would promote collective bargaining and would promote the welfare and morale of the workforce, goals that are stated in the Determination. Additionally, the AFGE denied that its proposal prevent the TSA from conducting the ratification/referendum electronically.

In summation, the AFGE asserted that its proposals were offered in good faith, would further the collective bargaining process, would function better than the TSA's proposals and are consistent with the Determination. As such, the AFGE requests that the Panel adopt the Union's proposals at UX 1.

Positions of the TSA

The TSA overall asserts that the Panel dismiss the AFGE's claims for lack of jurisdiction because neither of the two (2) issues raised is appropriate for ground rules negotiation under the Determination, and therefore, a lack of agreement on these issues cannot constitute a "failure to agree on ground rules." The TSA urged the Panel to give deference to the plain wording of the Determination and to the Administrator's interpretation of that document pursuant to his broad statutory authority.

Before turning to the merits of the dispute raised by the AFGE, the TSA argued that the Panel lacks jurisdiction to resolve the substance of the aggrieved matters. The TSA acknowledged that the Determination the purpose of ground rules is to "govern the procedures for negotiating a Collective Bargaining Agreement, which include the logistics and procedural aspects of bargaining. Reference to JX 3. The TSA noted that the Determination allows for the parties to agree on "ground rules for collective bargaining," but does not permit ground rules to expand the scope of subject matters enumerated in the Determination or amend the content of the Determination in this regard. (Reference § III.B.7.) The TSA reasoned that inasmuch as the

Determination contains specific language regarding the referendum process and the UDRS (also referred to as the RP I, these two items are not appropriate topics for ground rules negotiations under the Determination. The TSA referred to the testimony of Mr. Ball and the written communications from the TSA to the AFGE that articulated TSA's objection to the negotiations of the ratification/referendum and the RP I issue as part of ground rules bargaining.

The TSA asserted that the referendum is a unit employee right established by the Determination and is not a right of the Union. The TSA argued that, therefore, the AFGE's proposal concerning referendum is not negotiatiable. The TSA added another reason by observing that the Determination (§ IV.A.5) contains details of the referendum, thereby providing additional basis for not allowing the matter an appropriate subject for ground rules negotiations. The TSA posited that its willingness to work collaboratively with the Union did not convert the referendum as an appropriate subject for ground rules.

The TSA argued similarly with regard to the AFGE's claim to bargain over the final and binding nature of the resolution process as part of ground rules negotiations. The TSA observed that the Determination contains the rights-based mechanism for the resolution of certain categories of issue to be resolved by panels selected from a Panel of Neutrals (§ V.C.9.A). The TSA summarized that the Determination does not authorize Panel review of subjects such as the referendum process or the resolution system inasmuch as grounds rules pertaining to those subjects are set forth in the Determination.

Turning to the individual ground rules at issue raised by the AFGE, the TSA reiterated that the AFGE's ground rules proposals are contrary to the plain language of the Determination. The TSA argued that Agency's interpretations of the language at issue be given deference. The TSA also described its position that the AFGE's proposals would alter the Determination and conflict with the Administrator's core principle, which is to enhance the engagement of individual employees.

The TSA relied upon the provisions of the Determination that authorizes a referendum process that is different and distinct from the ratification processes used under Title 5, and for which Messrs. Gage and Borer have experience. The TSA noted that one of the AFGE's objections was the latter's access to gathering its own information and thus the Determination's referendum process was "not acceptable." Referring to Tr. 109. The TSA argued that the

AFGE's proposal to allow the Union its own gathering of information in preparation for renegotiations would be contrary to the Determination.

The TSA contended that the AFGE's proposed Section X. Ratification, is outside the rights granted to the AFGE per the Determination to impose an implementation time frame. The TSA claimed that the AFGE's ratification further conflicts with the Determination because the appointment of a single arbitrator is not provided for in the RP 1 process, noting that the Determination requires a Panel of Neutrals to hear impasse issues. Reference § V.C.9.a.iii. The TSA also objected to the AFGE's proposal on the basis that the 30-day time frame cannot be accomplished with sufficient time to give the unit employees their vote on the agreement. The TSA observed that the results of negotiations of the collective bargaining agreement cannot be effected until approved by the covered employees in the referendum.

The TSA asserted that because the Determination provides for a 45-day period for the parties to return to the bargaining table upon a negative vote from the covered employees it is unnecessary to place in the ground rules this requirement, as proposed by AFGE proposed Section X.B. (UX 1). The TSA further observed that the Determination requires TSA to give the unite employees an opportunity inform TSA which of the agreement's provisions are rejected and why. Reference III.B.1.e.i.

The TSA claimed that AFGE's proposed ground rules in its Subsection X.C are inconsistent with the Determination inasmuch as the proposed language conflicts with the plan language that charges the TSA with conducting the referendum and collecting information about rejected sections of the agreement. The TSA argued there is no provision in the Determination that gives the AFGE the right to restrain TSA from training its employees or from collecting information. Reference § IV.D.4.

The TSA objected to the AFGE's proposed ground rules in its Subsection X.D. because the language therein conflicts with the authority provided to TSA in the Determination to conduct the referendum.

In summation, the TSA urges the Panel to reject the AFGE's proposed ground rules on the referendum because the language used therein fails to conform to the plain language of the Determination.

With regard to the second issue brought by the AFGE, the TSA responded that the Resolution Plan 1's decisions are final and binding upon the TSA and the AFGE but those

decisions are not final and binding upon the covered unit employees. The TSA reviewed the objections the AFGE raised relative to TSA's position that the unit employees stand as a separate and distinct entity from the AFGE. The TSA considered that the AFGE claims that as the unit employees' representative the AFGE subsumes the unit employees, that the unit employees thus should not be a separate entity with an individual voice. The TSA asserted that the AFGE's position in contrary to that set forth in the Determination.

The TSA referred to § V.C.9 of the Determination that requires the TSA to develop a unitary dispute resolution system that includes "final decisions by panels" on dispute arising during the collective bargaining process. The TSA posited that once a completed agreement is reached on all eleven (11) subjects allowed for bargaining, presumably including those issues decided by the Panel of Neutrals, the agreement will be "binding on the parties and unit employees after it has been presented to unit employees, voted on in a referendum among all unit employees, and affirmatively supported by a majority of unit employees voting in the referendum. Reference § III.B.1.e.i. The TSA denied that this structure would create an endless loop. The TSA relied on § III.B.1.e.ii. of the Determination that provides the parties, meaning the TSA and the AFGE, to engage in re-negotiations and to collaboratively decide on next steps in the bargaining process. The TSA opined that another version of finality contrary to the Determination cannot be imposed. The TSA contended that if there was any gaming the system under the Determination's scheme it would be for subverting the Determination's goal that covered employees have their own voice on the collective bargaining agreement.

The TSA explained its position that the Determination refers to three distinct entities; e.g., the TSA, the AFGE and the covered unit employees. In support of this position, the TSA referred to the contents of the Determination at paragraph I.A., and §§ III.B.1.B., III.B.1.e.i., III.B.1.e.ii, IV.A.6.a and IV.E.10. and Administrator Pistole's testimony wherein he described his considerations in this regard. The TSA also referred to the Determination that states employees are not obligated to received representation from the AFGE for personal issues and that the AFGE is not obligated to provide personal representation. Reference §§ IV.A.3., IV.B.4. The TSA reiterated that the plain langue of the Determination comports with the core principle that the referendum gives all covered employees the right to vote for the broadest possible participation and involvement by the entire workforce. The TSA contended that a limitation on the covered employees' right to vote on all eleven (11) subjects in the collective bargaining

agreement would be contrary to the plain wording and spirit of the Determination. The TSA further claimed that such a limitation would be contrary to the Administrator's intent that the *entire* collective bargaining agreement would be binding on the parties and the unit employees only *after* the employees had voted in a referendum.

The TSA asserted that the AFGE's ground rules proposal regarding the impasses procedure is contrary to the Determination and should not be adopted. The TSA reiterated that subsection X.A of the AFGE's proposal would implement any parts of the collective bargaining agreement that had been attained through a third party decision. The TSA also reiterated that the AFGE's proposal at section XI provided for a single arbitrator whereas the Determination clearly provides for a Panel of Neutrals. Reference § V.C.9. The TSA objected to the AFGE's proposal that contains provisions for shared costs of the arbitration, the final and binding authority of the arbitrator and to expeditiously convene the arbitration proceeding because these proposed provisions pertain to the resolution system. The TSA noted that the Determination excludes bargaining on the resolution system. Reference § V.B. The TSA posited that if a subject matter is excluded from collective bargaining it would likewise be inappropriate for bargaining in the ground rules. The TSA also objected to the AFGE's proposal on the ground that its language did not draw the distinction between the parties and the unit employees pertaining to "final and binding authority," that fails to include the referendum process described above. In sum, the TSA claimed that the subjects of authority of the Panel of Neutrals and hearing procedures set forth in the RP 1 process are not subject to ground rules negotiations inasmuch as the resolution system is within the authority of TSA to establish.

Analysis and Decision

The resolution of the issues requires that this Panel of Neutrals, appointed to this dispute initiated by the AFGE (JX 7), to interpret the relevant language of both the Determination (JX 1) and the PR I (JX 2). The starting point obviously begins with a review and analysis of the actual words Administrator Pistole chose to use to establish the goals, policies and procedures in those documents. As indicated by the TSA, the Agency urges that the Panel look no further than the plain meaning of the language in those documents, but also supplemented by the Administrator's Declaration (MX 1) and the Administrator's testimony.

The Panel recognizes that neither the Determination nor the RP I documents carry the status or enforceability of contracts, particularly the type of specialized contracts known in this country as collective bargaining agreements. However, arbitrators have long used recognized rules of contract construction to interpret collective bargaining agreements that have been adopted from such sources as Restatement (Second) of Contracts. For instance, arbitrators generally adhere to the view that, "It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probative intent, and to putative intent, always governs."[46] Arbitrators tend to adopt two different approaches to the use of the language to be interpreted at issue. "Some arbitrators follow the . . . rule that, if words 'are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators."[47] The other view followed by arbitrators analyzes the meaning of the writing in light of all the circumstances that ". . . reveal the sense in which the writer used the words."[48] Whichever approach to interpretation is utilized, the prime directive is for the arbitrator to determine the principal purpose of the writing and thus the contract interpretation that favors that meaning.[49]

To determine the meaning of the terms utilized in the Determination and the RP I, the Panel must review them under the circumstances occurring at the time those words were written; i.e., prior to or on February 4, 2011. The panel agrees with the TSA's argument that the plain meaning of the language is fundamental to determining the proper interpretation. [50] Coincidentally, the AFGE also urges the Panel to follow the plain language rule of contract interpretation. Despite the TSA's and AFGE's agreement that the plain language rule should be applied, the parties application of the rule leads to completely different results. The TSA argues that ground rules cannot include the subjects of the ratification/referendum process or the effect

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[46] HILL & SINICROPI, EVIDENCE IN ARBITRATION 348 (2d ed. 1987), *quoting* Hecla Mining Co., 81 LA 193, 194 (1983).

[47] THE COMMON LAW OF THE WORKPLACE §2.3 66-67 (St. Antoine ed., BNA Books 1998), *quoting* Volz, Marlin M. & Goggin, Edward P., eds.; Elkouri & Elkouri, How Arbitration Works, 5th ed. 1997) at 470.

[48] Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643 (Cal. 1968).

[49] THE COMMON LAW OF THE WORKPLACE, *supra* note 47 at §2.11 74.

[50] ELKOURI & ELKOURI, *supra* note 22 at 430 (Arbitrators utilize contract interpretation rules, standards, and principles to ascertain the meaning of language contained in collective bargaining agreements. Some of those standards are contained in RESTATEMENT (SECOND) OF CONTRACTS).

of a Panel of Neutrals' arbitration award on items brought under the impasse processes, specifically whether such an award is final and binding on bargaining unit employees for referendum purposes. As discussed above, the AFGE claims that the Determination does not exclude or prohibit the parties from negotiating those two subjects for ground rules.

Arbitrability

The Panel finds that the issues submitted by the Union are arbitrable. Our opinion is based, first, on the objectives served by collective bargaining, which the Director describes in the Determination and, second, on the clear and unambiguous language in the Determination regarding arbitrable issues. The Panel observes that the objectives in the Determination state, "Bargaining shall be interest-based, with any disputes arising from either the bargaining process or the application of a binding collective bargaining agreement resolved expeditiously and fairly under the processes described in this Determination. " It further states on page 6 that the resolution process shall be one that includes "both interest-based and rights-based options" and "creates solutions that are fair, transparent, and timely." Section V of the Determination establishes the "Resolution Processes," and states in Section V.A.3. that "TSA's mission requires that disputes, including those related to union activity and collective bargaining, be resolved quickly and collaboratively without protracted and potentially acrimonious litigation." This Panel must find that the issues before it are arbitrable, because any finding otherwise would require an alternative means of resolving the disputes (possibly including litigation). Those means would in all likelihood be inconsistent with the Determination's goal of resolving disputes in a "fair, transparent, and timely" fashion and would obviously be considerably more protracted and possibly more acrimonious than using this forum.

To achieve the purposes described above, the Determination also contains clear and unambiguous language regarding the procedure for resolving such disputes. It establishes a "rights-based mechanism for final decisions by panels selected from a roster of neutrals…" Further, Section 9.a. clearly describes the nature of the disputes that are included within the scope of the rights-based mechanism's authority: "After certification of an exclusive representative, issues that arise during the collective bargaining process, including but not limited to: i. Failure to agree on ground rules; ii. Allegations of failure to bargain in good faith; and iii. Failure to agree on terms of the collective bargaining agreement" shall be submitted to

the rights-based mechanism for resolution. The matters brought before this Panel clearly fall within the requirements of this provision of the Determination. The two issues that have been brought to this Panel include, first, whether the decisions of a rights-based (arbitration) panel are final and binding and, second, a dispute over the definition and nature of "ground rules" in negotiation and whether this arbitration Panel's ruling on this matter should be subject to ratification and referendum of covered employees. These are issues that, in this Panel's judgment, clearly and unambiguously fall within the language of Section 9.a. of the Determination. It is important to note that the language in Section 9.a. of the Determination states that the rights-based mechanism shall be used to resolve disputes that arise during the collective bargaining process that include *but are not limited to* failure to agree on ground rules. In this Panel's opinion, this language provides the Panel with sufficient authority to resolve the specific issues submitted to it.

In making the above interpretation, the Panel relies on the traditional understanding of the terms "final and binding" as they relate to labor arbitration and to the terms "ratification" and "referendum" pertaining to union members' acceptance or disapproval of the collective bargaining agreement presented to them by their union negotiators and officers. "Final and binding" has become known, even in the federal sector, to constitute the last word in the written decision of a properly appointed authority, such as a labor arbitrator or arbitration panel. The decision is final, except for some extremely limited and specific bases for appeal to a higher adjudicating authority. The concept that the arbitrators' decision is binding on the parties coexists with the final aspect so as to establish what the parties are expected in terms of their rights and obligations to resolve the problem and in the future, unless the parties subsequently amend their writing. Without a binding arbitration decision, a party could claim it is not bound by the decision, and therefore negate the finality of that decision. Therefore, the Panel holds that the terms "final and binding" used in the manner and under the circumstances present on or about February 4, 2011, must be interpreted to mean that the Panel of Neutrals' decisions are final as far as they relate to the disputed issues placed before the Panel and that they are binding on all parties so as to effect the goals of the Determination.

The Panel has thoroughly and carefully considered the testimony and the Declaration of the Administrator. From an evidentiary perspective, the information so imparted is considered to be extrinsic to the plain language used in both the Determination and the RP I documents.

However, this Panel adopts the view held by many arbitrators, borrowed from the jurisprudence under the *Restatement (Second) of Contracts,* § 212 cmt. b (1979), where extrinsic evidence cannot change the plain meaning of the writing. Such information may be considered when making a determination of meaning. "Any ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. . . But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." Involved in this deliberation is the effect of the substantive rule of law, known as the parol evidence rule, that bars the introduction of extrinsic evidence, whether oral, documentary, or other form, to contradict or supplement the final and complete written expression [in the document at issue]." *See Restatement (Second) of Contracts,* § 213 (1979). Regardless of which interpretation approach is taken, the "mental processes" of a party are considered irrelevant because that what a party may have privately intended the words to mean plays no role in the interpretive process if the intended meaning has not been communicated.[51] Moreover, if an ambiguity exists in the language, the general rule followed for interpretation functions is to "[c]onstrue language against the drafter (*contra proferentem*)."[52] The Latin phrase means, "Against the one who produces." "If a contractual expression has two or more plausible meanings, the maxim instructs an arbitrator to prefer the interpretation that is less favorable to the party that drafted the disputed language." The rationale behind the rule considers "[t]hat the party had an opportunity to resolve the ambiguity and failed to do so."

The Agency also contends that AFGE's petition should be dismissed for lack of jurisdiction because neither issue raised by the Union is appropriate for ground rules negotiation under the Determination. The Agency reasons, therefore, that a lack of agreement on these issues cannot constitute "a failure to agree on ground rules." In the Agency's view, the rights-based mechanism—that is, arbitration—can only be used to resolve ground rules narrowly

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[51] ELKOURI & ELKOURI, *supra* note 22 at 433.

[52] THE COMMON LAW OF THE WORKPLACE §2.6 70-71. *See also*, EVIDENCE IN ARBITRATION, *supra* note 46 at 361 ("A construction principle relied upon by courts and arbitrators holds that ambiguous language should be construed against the party responsible for its inclusion in the agreement (*contra proferentem*). The rationale for this rule is that the drafting party is in the best position to prevent mistakes and interpretation problems.")

construed, including only matters dealing with "the logistics or procedural aspects of bargaining." This Panel finds that the matters that have been brought before it are commonly considered to be aspects of ground rules in collective bargaining negotiations. Although there may not exist a definitive definition of the term "ground rules," as the term relates to labor-management bilateral negotiations, there is a general understanding that ground rules are a creature developed by the bargaining parties to govern their collective bargaining function and their effort to reach a final collective bargaining agreement. Ground rules encompass, as Mr. Borer described, matters from "A to Z," including when and how to initiate ground rules negotiations[53] and the identification of the ratification date.[54] Administrator Pistole chose to use the term "ground rules" in the Determination without providing any specific definition for that term. Thus, absent any particularized definition stated in the Determination, the Panel adopts the traditional meaning of the term "ground rules."

The interpretation proffered by the Agency that the Determination limits the scope of an arbitration panel's authority only to matters dealing with ground rules cannot be sustained in view of the language in the Determination. As cited above, the Determination clearly states that *an arbitration panel's authority is not limited to failure to agree on ground rules* [italics added]. The Agency refers to the Administrator's testimony that subjecting the disputed issues to arbitration would violate his intent and what he believes is the clear meaning of the Determination. This Panel would give greater weight to the Administrator's testimony if we believed the language in the Determination required further definition or clarification. However, the Panel finds that the language in the Determination speaks for itself: as noted above, Section V.C.9.a. plainly gives the Panel the authority to resolve the issues in dispute in the instant case.

Arbitration Awards Are Final and Binding

In the course of the Parties negotiating their first collective bargaining contract, the Agency and the Union reached impasse on the definition and nature of the ground rules that would be used to govern their negotiations. In brief, the Union maintains that impasses on ground rules must be submitted to the "interest-based mechanism" established by the

[53] Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Miami, Florida and Local 3690, AFGE, AFL-CIO, 11 FSIP 1 (2011).
[54] Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. ____ (2010), No. 08-1214.

Determination and that the decision of this "mechanism" (i.e., an arbitration panel) is final and binding. By contrast, the Agency contends that the Determination requires that an arbitration award be binding on the Union and the Agency as the principal parties, but not on the bargaining unit employees, which the TSA argues is a separate third party. Rather, the Agency argues that the Determination requires that the terms of arbitration awards be incorporated into collective bargaining contracts negotiated by the Parties and then submitted to all bargaining unit employees for ratification (or a referendum). In essence, the Agency maintains that there are three parties in the collective bargaining relationship, namely, the Agency, the Union, and the bargaining unit employees, and an arbitration award is final and binding on the Agency and the Union but must be submitted to a vote by all employees (and not just members of the Union) in the bargaining unit. In the Agency's view, an arbitration award becomes binding on bargaining unit employees only if it is incorporated in a tentative collective bargaining agreement and then approved by a majority of those employees in a referendum.

The Union argues that if this Panel accepts the Agency's interpretation of the Determination, the dispute resolution process would lack closure and would nullify the terms that authorize the Panel of Neutrals' arbitration awards as final and binding. The Union reasons that consequently the Determination's goal of efficient and timely resolution would be contradicted. The Union maintains that the Agency's interpretation would result in an "endless loop": "Specifically, if the parties reach impasse on the collective bargaining agreement, the Neutral Panel of Arbitrators will render a decision on the contract. Then, according to the TSA's (mis)interpretation of the Determination, ratification/referendum will take place by having the employees ratify the contract terms imposed by the arbitrators. If the employees vote the contract down, then TSA and AFGE must recommence negotiations on the collective bargaining agreement, including the terms determined by the Neutral Panel of Arbitrators. Since the panel of arbitrators determined the contract terms, at least one party is likely to be disposed heavily against the language. As such, the parties likely will proceed to impasse again over the same issues. Once again, the collective bargaining agreement will have to be ratified by the employees, including the issues determined by the Neutral Panel of Arbitrators. This impasse panel decision/ratification process could go on and on and on."

The Agency disagrees with the Union's characterization that "this process would be endless." The Determination, the Agency points out, provides a process in the unlikely and undesired scenario that a collective bargaining agreement is not approved by the covered employees. The Agency asserts that if a tentative collective bargaining contract that includes terms decided by an arbitration panel is rejected by the bargaining unit employees, "the parties (TSA and AFGE) would engage in re-negotiations. If the renewed negotiations failed to result in a revised contract that was supported by the bargaining unit employees, the Determination would require the parties to "collaboratively decide on next steps in the bargaining process."

This Panel acknowledges that the contract ratification/referendum process required by the Determination differs significantly from the standard ratification process used in other collective bargaining relationships. The relevant language in the Determination is in Section III.B.e.i.: "A collective bargaining agreement negotiated between TSA and [the Union] will be binding on the parties and unit employees after it has been presented to unit employees, voted on in a referendum among all unit employees, and affirmatively supported by a majority of unit employees voting in the referendum. The referendum will be conducted electronically by TSA and will provide unit employees with the opportunity to vote on the collective bargaining agreement, and, if the vote is not to support the collective bargaining agreement, to provide information on which provisions were not supported and why. TSA will promptly provide the results of the referendum and any information gathered through it to the exclusive collective bargaining representative." Section III.B.e.ii. of the Determination provides instructions on what the parties are required to do if the collective bargaining agreement is not approved by the bargaining unit employees. As the Agency has noted, this section requires the Union and the Agency to collaborate on deciding the "next steps in the bargaining process."

In their testimony before this Panel, both Union President Gage and AFGE General Counsel Borer expressed their reservations about the ratification process. Mr. Borer testified that it was "radically outside the norm" of collective bargaining practices. Although the process is uncommon and possibly unique, there can be no question about the fact that the Determination gives the Agency the authority to administer the ratification process and conduct a vote of all bargaining unit employees. The question this Panel must decide is whether awards issued by arbitration panels are in effect not final and binding, in the sense normally construed in collective bargaining, but subject to ratification by bargaining unit employees.

The Panel does not accept the Agency's position on this matter. If it did accept the Agency's position, doing so would seriously undermine the Determination's requirement that "labor management relations must be results oriented, designed to solve problems and resolve issues rather than defer resolution through resorting to lengthy, multiple, adversarial avenues." Section V of the Determination describes in some detail the establishment and operation of a dispute resolution process, including a rights-based mechanism for resolving disputes. This section reiterates the objective of resolving disputes "quickly and collaboratively and without protracted and potentially acrimonious litigation." As the Agency maintains, the section seeks to establish "a unitary dispute resolution system." But it clearly distinguishes interest-based processes, including "conversation" between the parties as well as "coaching, facilitated interest-based discussions, mediation, and other neutral third-party approaches that assist parties to raise and resolve issues, concerns, and disputes themselves" from rights-based processes. In Section V.C.8. the Determination says, "Recognizing that some disagreements will require a rights-based decision made by a neutral decision maker, credible rights-based systems will be established."

There is no dispute between the Union and the Agency that the Determination in Sections V.C.8. and V.C.9. equates a "rights-based mechanism" with arbitration. Further, there is no dispute that arbitration results in final and binding awards. The only dispute between the Agency and the Union regarding arbitration is whether the arbitration process results in an award that is incorporated in a collective bargaining agreement which is subject to ratification by the members of the bargaining unit. But there is no provision in Section V that directly or plainly states that arbitration awards must be ratified by bargaining unit employees. Rather, Section V.C.9. clearly calls for the rights-based mechanism (i.e., arbitration) to result in "final decisions by panels selected from a roster of neutrals," but makes no further reference to whether such "final decisions" should also be subject to ratification by bargaining unit members. Nor does Section III of the Determination, which deals with representation, the collective bargaining process, and ratification, mandate that arbitration awards be subject to ratification by bargaining unit employees. Section III.B.e. does describe the referendum process but is silent on the matter of whether arbitration awards are subject to that process.

There are two references to arbitration in Section III: The first is Section III.B.7., which states, "The parties will agree on ground rules for collective bargaining within 30 calendar days of commencing negotiations on ground rules. If agreement on ground rules is not reached within

30 calendar days, outstanding issues will be put before the rights based process established under §V below for final resolution of these issues." The second is Section III.B.10., which states, "If, at the end of the period for collective bargaining, agreement is not reached on any issues that have been subject to the collective bargaining process and are deemed appropriate for collective bargaining under this Determination, those issues will be put before the rights based process established under §V below for final resolution of issues pertaining to or arising from collective bargaining." Once again, both of these sections focus on the "final resolution of these issues," and do not qualify that requirement with any reference to the incorporation of such decisions into the ratification or referendum process.

"Arbitrators have held that the contract must be construed as a whole and that its provisions cannot be isolated from the rest of the agreement or construed independent of their relationship to the entire agreement and the overall intent of the parties. Likewise, a contract must be construed to give effect and meaning to all of its clauses."[55] In sum, this Panel finds that the Determination never envisioned the dispute resolution process now favored by the Agency in this proceeding. The Panel also finds that the Determination clearly intended that arbitration awards be truly final and binding.

The Negotiation of Ground Rules

The final issue this Panel must decide is whether the Union's proposal to negotiate certain ground rules for collective bargaining negotiations is consistent with the Determination. Both Parties agree that the Determination provides that the parties will agree on "ground rules for collective bargaining." Reference Determination, Section III.B.7. However, the Parties disagree on whether the Union's proposals regarding the ratification/referendum process and the dispute resolution procedures are appropriate topics for ground rules negotiations under the Determination. The Agency argues that the Determination "does not permit ground rules designed to expand the scope of the matters subject to collective bargaining or to amend in any

[55] EVIDENCE IN ARBITRATION, *supra* note 46 at 354. *See also* THE COMMON LAW OF THE WORKPLACE, *supra* note 47 at § 2.9, 72; RESTATEMENT (SECOND) OF CONTRACTS § 202(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together (1981).

way the content of the Determination." The TSA further asserts, "During ground rules negotiations, TSA's collective bargaining negotiating team consistently maintained that the referendum process and the resolution system, including the final and binding nature of panel decisions, were outside the scope of ground rules for collective bargaining and did not waiver from this position."

The Determination lists eleven substantive issues or topics that are subject to collective bargaining. Reference Determination, Section III.B.2. In his testimony before this Panel, the Administrator said, "The referendum is not among the eleven topics subject to collective bargaining and therefore is not an appropriate topic for either ground rules or collective bargaining negotiations. Interpreting the Determination as authorizing negotiations on the referendum is inconsistent with the plain language of the Determination, and would violate my intent and meaning in issuing the Determination" Reference MX 1.

The Union maintains that ground rules pertaining to the referendum/ratification process and the dispute resolution system are appropriate subjects for collective bargaining negotiations. It regards the Agency's definition of "ground rules" as unnecessarily constricted: "The Determination itself specifies that the Ground Rules are 'for collective bargaining,' not simply for 'negotiating'…While negotiation is part of collective bargaining, it is not the totality of collective bargaining. Collective bargaining also includes the ratification process and the impasse process."

The Union points out that the Determination explicitly excludes certain topics or issues from collective bargaining. Section III.B.3. of the Determination lists ten substantive matters that are excluded from collective bargaining, stating not only that these matters are not bargainable but also that "the impact and implementation" of these matters are neither bargainable nor grievable. The Union argues that the Determination might have listed the referendum and impasse process among the topics excluded from collective bargaining, but it did not. Moreover, the Union maintains that the Agency's definition of ground rules is significantly narrower than the definition of ground rules used in other collective bargaining relationships in the federal sector, and it cites several decisions by the Federal Labor Relations Authority to support its position.

Finally, the Union makes reference to several "legal and arbitrable standards" that it contends support its positions on the issues in dispute in this proceeding, including the topics

suitable for ground rules negotiations. In sum, based on its interpretation of arguably relevant case law, the Union urges that this Panel not automatically give deference to the Agency's interpretation of the Determination. Rather, it asks this Panel to resolve the issues in dispute by applying the language of the Determination where it is plain and unambiguous, and if the Determination is ambiguous or silent on a matter, to resolve disputed issues using the conventional methods of legal and arbitrable interpretation.

This Panel finds that the Determination prescribes a model of collective bargaining that in many ways differs from the standard model. The Panel also finds that the unique features contained in the Determination must be respected and applied to the parties pursuant to the terms therein. Regarding the ratification/referendum process called for by the Determination, this Panel once again acknowledges the Agency's control over this process. However, the Panel determines that the Agency's authority in respect to the referendum/ratification process should not be interpreted to mean that the Union, in its role as the exclusive representative of Agency employees, has no interest in and should be excluded from the ratification/referendum process. There are numerous matters the Determination does not specify that have been recognized in other ratification processes employed by other parties. For example, in its proposal on ground rules, the Union suggested several rules for governing the ratification process. Reference UX1.

This Panel takes no position on whether the Union's proposals on the ratification process are or are not consistent with the Determination. However, while recognizing the authority of the Agency over the ratification process, the Panel holds that negotiating procedures pertaining to the ratification process that supplement the ratification requirements contained in the Determination are within the scope and meaning of "ground rules." The proposals regarding the ratification process offered by the Union may or may not be consistent with the Determination, and may or may not otherwise have merit. In the Panel's view, if there is disagreement over those Union proposals (and also, for that matter, any Agency proposals pertaining to the ratification process), the Panel holds that negotiation is the preferred method of resolving that disagreement, as established unequivocally in the Determination. Indeed, to achieve the Determination's goal of avoiding "lengthy, multiple, adversarial avenues," and to promote "interest-based bargaining" that results in agreements "resolved expeditiously and fairly," the Panel requires that the broadest definition be given to the term "ground rules." If this Panel were to rule otherwise, disagreements over definitions of ground rules would always need to be

resolved by resorting to arbitration, as in the instant case. The Panel's ruling is rendered to serve the goals and the objectives of the Determination, which require the parties to do their utmost to resolve such disagreements through negotiation.

Award

As discussed above, the Panel has the jurisdiction to interpret the language of the Determination and to apply the provisions in the document to find that the TSA is committed to engage in ground rules negotiations and that the subject of those ground rules may include: (1) the ratification/referendum process for voting on a collective bargaining agreement, and (2) the final and binding nature of any decisions reached by the Panel of Neutrals on all parties concerned, including bargaining unit employees.

The Panel also renders the following conclusions in resolution of the above disputes:

1. The impasse arbitration process is final and binding. As such, arbitration awards rendered by a Panel of Neutrals convened to resolve impasse disputes that arose during negotiations between the TSA and the AFGE are final and binding per the Determination express language. Thus, impasse arbitration decisions from the Panel of Neutrals are not subject to bargaining unit employees' approval/disapproval.

2. The AFGE's 10/24/2011 Ground Rules proposal on referendum provisions is remanded to the TSA and the AFGE to reconvene negotiations until either the parties reach mutual agreement or reach impasse. Impasse cannot be declared at the time the parties ceased negotiations on or about November 9, 2011, because the TSA claimed the AFGE's proposals that contained provisions for the ratification/referendum process and the impasse arbitration process were non-negotiable.

3. The TSA failed to act in a manner consistent with the Determination when it declared that the ratification/referendum process and the final-and-binding authority of arbitration awards under the impasse process must be excluded from Ground Rules negotiations. The Determination does not expressly exclude the subjects of the ratification/referendum or the impasse arbitration process from topics that may be negotiated under Ground Rules.

4. The Determination needs no modification to require the TSA to engage in ground rules negotiations with AFGE on matters that supplement to or further develop the ratification/referendum process for voting on a collective bargaining agreement. The

Determination also needs no modification pertaining to the final and binding authority of the Panel of Neutrals' decisions that resolve impasse disputes because the Determination expressly and unambiguously establishes such authority, thus negating the argument that bargaining unit employees may nullify final-and-binding decisions.

It is a commonly recognized tenet in the labor jurisprudence of the Unites States that once a labor organization is certified by the proper authority that organization thereafter becomes the "exclusive" representative of the employees who hold positions in the bargaining unit. 5 U.S.C. § 7111(a). The laws that grant the authority to an organization for exclusive recognition are not intended to thwart the will of the bargaining unit employees. On the contrary, the election laws generally require an employee vote where a minimum number of employees voted to be represented by the petitioner. In other words, the employees decide, not the employer, who will be the employees' representative in matters affecting at least some subjects of their working conditions. Therefore, the TSA's argument that the bargaining unit employees should be protected in some way from the AFGE's efforts to obtain a collective bargaining agreement, in which the TSA would also have agreed, cannot be sustained.

The following members of the Panel of Neutrals fully agree to the Award:

_____ _____

Kathy L. Eisenmenger, Esq. Date

_____ _____

Harry Katz, Ph.D. Date

_____ _____

David Lipsky, Ph.D. Date