United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of SOCIAL SECURITY ADMINISTRATION OFFICE OF DISABILITY ADJUDICATION AND REVIEW BALTIMORE, MARYLAND and ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, IFPTE, AFL-CIO	Case No. 12 FSIP 54

DECISION AND ORDER

The Association of Administrative Law Judges, IFPTE, AFL-CIO (AALJ or Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Social Security Administration (SSA), Office of Disability Adjudication and Review, Baltimore, Maryland (ODAR or Employer).

Following investigation of the request for assistance, which arises from negotiations over a successor collective bargaining agreement (CBA) initially involving parts or all of 12 articles, the Panel directed the parties to resume negotiations with the assistance of a private factfinder of their choice. If any issues remained unresolved at the conclusion of facilitated bargaining, the factfinder would submit a written report with recommendations for settling the issues, with clear and convincing rationale, to the parties and the Panel. In the event that a party did not accept the factfinder's recommendations it would notify the Panel and the other party, in writing, and identify the unresolved provisions. Thereafter, the Panel would take whatever action it deemed appropriate to resolve the issues.

Pursuant to the Panel's directive, the parties selected Factfinder Ira F. Jaffe, who conducted 20 days of face-to-face

mediation and factfinding and 4 additional days by telephone. Mediation resulted in complete agreements on four articles, the elimination of one article and partial agreement on most of the other articles. On October 15, 2012, the Factfinder issued a *Factfinding Report and Recommendations* (*FR&R*) addressing the remaining issues in dispute. In its response to the Factfinder's recommendations, the Employer indicated that it was "willing to accept the recommendations contained in the [*FR&R*]." The Union, on the other hand, accepted approximately one-third of the recommendations[1/] and provided alternative wording or approaches on the sections of articles it found unacceptable. Subsequently, the Panel directed the Union to show cause why the Panel should not impose the Factfinder's recommendations to resolve the issues it identified as unacceptable, including why the wording or alternative approaches it proposed should be adopted instead. The Employer was given the opportunity to submit a rebuttal statement of position. After considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*. The parties submitted statements in accordance with the *Order to Show Cause* (*OSC*) and, in reaching its decision, the Panel has now considered the entire record.[2/]

1/ More specifically, the Union accepted the Factfinder's recommendations on Article 5, § 2.A. (where it agreed to withdraw its proposed footnote but not its proposed sentence); Article 9, § 7; Article 9, § 6.C.; Article 9, § 8.C.; Article 15, § 7.G.; Article 15, § 7.I.4.; and a Side Letter essentially stating that "the withdrawal of proposals during the mediation portions of the Mediation-Fact-Finding . . . shall not be evidence of the intent of the Parties as to the interpretation or application of the Agreement, will not be cited in support of any assertion that the obligation to bargain that may otherwise arise under the Statute has been waived, and may not be referenced in support of any 'covered by' claim in any subsequent dispute."

2/ In the email message where the Union attached its response to the *OSC*, it requests "the opportunity to make an oral presentation" to the Panel. In its rebuttal, the Employer states that "it is opposed to expending any further resources to pursue oral argument on this matter and respectfully requests that the Panel deny the Union's request for oral argument." After considering this matter, the Union's request to make an oral presentation to the Panel is hereby denied.

BACKGROUND

ODAR's mission is to resolve appeals from individuals whose claims for Medicare or disability benefits have been denied. The Employer, a component of SSA, has approximately 140 hearing offices of varying sizes throughout 10 Regions in the United States and Puerto Rico. The Union represents a bargaining unit consisting of approximately 1,266 administrative law judges (ALJs) whose salaries are determined under the ALJ pay scale in accordance with 5 U.S.C. § 5372.[3/] The parties' CBA was to have expired on January 31, 2010, but its terms will continue until a successor is effectuated.

Overall, the Factfinder recommended that the Panel impose a successor CBA consisting of the following: (1) the agreed upon articles appended to his *FR&R*; (2) the partially agreed upon articles appended to his *FR&R*; and (3) the recommendations set forth in his *FR&R*, including the Side Letter regarding the mediation-factfinding process.[4/] On pages 5-6 of the *FR&R*, the Factfinder makes the following observations:

> It must be noted that the Recommendations in this Factfinding Report are inter-related and integrally connected with many of the items as to which agreement was reached, both prior to and during the Mediation process. While the Recommendations stand on their own as independently appropriate, they are part of an integrated series of provisions that, in the aggregate, form what I believe is a fair and appropriate successor Agreement . . . It may not be possible to reject or modify certain of the Recommendations in this case without affecting other agreed to provisions that were specifically linked in the bargaining. The agreed upon provisions and many

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3/ Within ODAR, there are two other bargaining units; attorneys are represented by the National Treasury Employees Union, and administrative staff and paralegals are represented by the American Federation of Government Employees (AFGE), AFL-CIO.

4/ According to the Factfinder, imposition of the Side Letter is "necessary to ensure that the express conditions upon which the Mediator-Factfinder induced the Parties to abandon positions remain enforceable. Were it otherwise, then both the Agency and the Union would have been induced to abandon bargaining positions under false pretenses."

> of the Recommendations are the product of give and take and it would be inappropriate to change one part of the bargain without making concomitant changes to the other part of that bargain.

Overview of the Union's Position

In its response to the *OSC*, among other things, the Union points out that a clear understanding of the role of ALJs at SSA is necessary to grasp fully the positions it is taking with respect to the issues that remain before the Panel. In this regard, it states that:

> The Federal administrative judiciary at SSA is unique in contrast not only to other Federal employees, but also to other Federal Administrative Law Judges serving in other agencies. ALJs in all other Federal agencies operate in an "adversarial" system. This means that all parties are represented, and the ALJ does not have any duty to develop the record. But at SSA, the Judges operate in an "inquisitorial" system, where the claimants do not have to be represented (although they usually are) and where the Agency is not represented. This "inquisitorial" system places an affirmative duty on the SSA Judges to "wear three hats" and, among other responsibilities, to develop the record. Under this "three hats" concept, SSA Judges have to represent the interests of both the claimant and the U.S. government/taxpayers, while also being independent Judges.

The Union also indicates that there are three "underlying tensions" for ALJs in SSA: (1) The duty to wear the three hats referenced above; (2) The "relentless and undue pressure from Agency managers on [ALJs] to issue more and more decisions each workday" because of the backlog of disability adjudication cases that has built up over the years; and (3) The "fundamentally undeniable tension between the Agency and all four of its labor unions" due to the current SSA leadership's "pervasive anti-union attitude which has resulted in antagonistic relationships with all of its unions."

In its overview of the negotiations and factfinding process, the Union also states that its "first and only CBA with the Agency, which became effective August 31, 2001 . . . is already a concession contract" because it:

> [E]ither yielded to the Agency's position or moderated its own position on 28 of the existing Articles because the [Panel] was, in 2001, composed entirely of conservative and pro-management appointees of President Bush who, in almost [] every case, ruled in favor of the management position on impasses brought to them.

According to the Union, ALJ productivity has increased every year since the implementation of the initial CBA, "particularly in the last few years." Rather than "reward such a group of employees when negotiating a contract," however, "the Agency's proposals during these negotiations have been regressive in the extreme." In fact, there were "no net gains made during negotiations or the mediation-factfinding process." The Agency took the "curious position" during the negotiations that "the AALJ must bargain back almost all of" its benefits. In the Union's view, when "productivity has never been higher" and "the country's economic woes have adversely affected Federal sector employees," the Agency should not be seeking to impose concessions in ALJs' working conditions. Moreover, the Union "agreed to language that eroded [] benefits, sometimes without any attendant benefit to other parts of the contract, in the mistaken impression that the Factfinder would resolve other disputes in the AALJ's favor." In addition, it accepted a number of the Factfinder's recommendations, none of which improved "in any way" current working conditions and several of which "are a regression from the current contract." The fact that the "AALJ has lost contractual ground" and that there were no net gains during the negotiations that preceded the process:

> [M]akes the rest of the Factfinder's recommendations - which completely benefit the Agency - particularly onerous and undercuts his rationale for his actions. There is simply no justification for curtailing [the AALJs] contractual benefits in light of the Federal pay freeze and the enormous increase in productivity by the members of the bargaining unit.

Overview of the Employer's Position

In its rebuttal to the Union's response to the *OSC*, the Employer essentially urges the Panel to adopt the Factfinder's recommendations in their entirety because "the Union has not shown cause as to why the [*FRR*] . . . should not be imposed to resolve the parties' dispute." Its position is consistent with the Panel's statements in previous decisions involving

recommendations of private factfinders, *i.e.*, "the Panel will normally defer to the factfinder's recommendations, particularly if they are supported by clear and convincing rationale and do not appear to be illegal."[5/] Specifically, the Employer argues that: (1) Altering the Factfinder's recommendations at this point "would undermine the entire factfinding process," which "was structured, thorough and fair"; (2) The recommendations "are supported by clear and convincing rationale"; and (3) None of the recommendations are illegal. In particular, the claim that his recommendations should be rejected because the Union failed to make any "net gains" during the negotiations or mediation-factfinding process is outside "the legal framework demanded by the *OSC* [and] prior rulings from the Panel." Contrary to the Union's position, "in the final analysis . . . [the *FRR*] reflects a balanced outcome for the parties." Quoting the Panel's statement in another recent decision involving private factfinding, overturning the recommendations at this point merely because one side wants more net gains out of the process "would undercut the effectiveness of the procedure the parties have mutually agreed to adopt by encouraging them to view the factfinding process merely as a stepping stone on their way to the Panel."[6/]

ISSUES AT IMPASSE

The parties disagree on the following issues: (1) Article 5 - Employee Rights - § 2.A. (fair and equitable treatment of ALJs); (2) Article 5 - Employee Rights - § 12 and Article 19 - Travel and Transportation - § 2.E (setting the time and place of hearings)[7/]; (3) Article 9 - Official Time - § 2.A. (locations where duties involving official time may be performed); (4) Article 9 - Official Time - § 7 (statutorily entitled official time and the Union's bank of hours); (5) Article 9 - Official Time - § 8.C. & D. (caps on an individual Union official's use of official time); (6) Article 15 - Telework - § 2.E. (definition of "portable work"); (7) Article 15 - Telework - § 3

5/ The Employer cites the Panel's decision in *Federal Election Commission, Washington, DC and NTEU*, Case No. 12 FSIP 140 (January 16, 2013).

6/ *Department of Labor, Washington, DC and Local 12, AFGE, AFL-CIO*, Case No. 12 FSIP 104 (January 8, 2013).

7/ The Factfinder's recommendations concerning Article 5, § 12 and Article 19, § 2.E., are identical so they are presented together in what follows.

(determining eligibility to telework); (8) Article 15 - Telework - § 7.L.3. & 4. (relationship between the scheduling of hearings and telework); (9) Article 15 - Telework - § 8 (entitlement to replacement telework days); (10) Article 21 - Records - § 4.C. (disclosure of written complaints against ALJs); (11) Article 27 - Judicial Training and Education - § 2.D., E. & F. (administrative leave/duty time to prepare for and attend the AALJ Annual Education Conference); and (12) Article 30 - Facilities and Services - § 2.B.8. (AALJ role in site surveys in connection with acquisition of office space).[8/]

THE POSITIONS OF THE PARTIES

1. Article 5 - Employee Rights - § 2.A.

a. The Union's Position

The Union proposes that "all Judges shall be treated fairly and equitably in all aspects of employment." It disagrees with the Factfinder's recommendation that its proposal be withdrawn and disputes his contention that, since there is no definition of "fair and equitable," such language would open up all Agency acts to challenge by grievance and confuse the parties and arbitrators as to what standard to use. It also disputes his view that Union's proposal is unnecessary because other statutes exist which the AALJ could separately enforce, claiming instead that "there are occasions where a statute does not cover the offending conduct and a remedy is needed." According to the Union, the most important reason to adopt its proposal is that SSA and AFGE recently entered into a new CBA that includes similar wording.

b. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the Union's proposal should be withdraw. In this regard,

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8/ As explained more fully below, the Union urges the Panel to impose the wording the parties' agreed upon during the factfinding proceeding concerning Article 20, Reassignments and Hardships, § 1.A. & B. As the Employer also accepts the agreed-upon wording, Article 20, § 1.A. & B. is not included as an issue at impasse in this decision. Moreover, on page 4 of its response to the *OSC*, the Union indicates its acceptance of the Factfinder's recommendation that it withdraw its proposal regarding Article 27, § 3. Consequently, that issue is no longer before the Panel.

the parties have agreed to continue a provision in the current CBA which states that:

> All Judges shall be treated fairly and equitably in all aspects of employment without regard to political affiliation, race, color, religion, national origin, sex, sexual orientation, marital status, age, handicapping condition, and with proper regard and protection of their privacy and constitutional rights.

As the Factfinder stated:

> No reason exists to add contested new language to Article 5 to allow enforcement of the Agency's obligation to follow applicable law in its treatment of bargaining unit Judges. Other contractual language already exists with respect to that obligation and, even absent contractual language, the provisions of applicable law itself would proscribe that treatment by the Agency.

2. Article 5 - Employee Rights - § 12 and Article 19 - Travel and Transportation - § 2.E

a. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the following wording should be included in the parties' successor CBA: "To the maximum extent permitted by law, an [ALJ] will set the time and place for the hearing." His recommendation essentially would continue the *status quo*, whereby ALJs have set the time and place for hearings since at least 1980, and with the practices of many, if not most, other agencies that employ ALJs. As noted by the Factfinder, "compelling practical reasons exist to continue to allow the Judges to set the time and place of hearings" and "there has been no showing of abuse in the exercise of the scheduling function." The recommendation is also consistent with the recommended language of Article 15, Section 7.L.3., which the Employer has accepted, that "Judges will schedule hearing days prior to selecting the days on which they telework." According to the Factfinder, however, "ordering that Judges set the time and place for hearings, without any qualification, may well be legally inappropriate" because "the law is somewhat murky as to a number of items." Thus, "in light of this uncertainty" it may be prudent to recognize that if some other valid legal authority trumps the exercise of authority of ALJs to continue to set the

time and place of hearings, then compliance with that legal authority would be appropriate and would not be deemed a violation of the CBA.

b. The Union's Position

The Panel should reject the Factfinder's recommendation and impose the following wording instead: "An Administrative Law Judge sets the time and place for a hearing." In its view, the Factfinder provides no rationale for changing the past practice, other than a concern about the uncertain and murky state of the law. In this regard, the Factfinder concluded that a number of factors indicate that responsibility for setting the time and place of hearings should continue to be in hands of ALJs, including that there are no significant problems with the current system. The Union also contends that, when the current Agency regulations governing this matter expire in August 2013, the Employer will take the position that ALJs no longer set the time and place for hearings. The adoption of the Union's proposal, therefore, would ensure that "there will be no uncertainty."

3. Article 9 - Official Time - § 2.A.

a. The Union's Position

The Union identified the Factfinder's recommendation on this section of Article 9 as unacceptable in its October 30, 2012, initial response to his recommendations. At that time, it proposed that the following wording be adopted: "Duties involving official time shall be conducted at any location chosen by the AALJ representative or official." The Union, however, fails to mention the issue in its response to the *OSC*.

b. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the Union's last best offer on this issue should be withdrawn. He essentially concluded that the Union failed to establish the need for adding new wording to Article 9 "that may well create new problems and conflicts, particularly where none has been shown to exist in the past." In this regard, Article 15 - Telework - permits ALJs on official time to utilize telework, enabling certain official time duties to be performed at an Alternate Duty Station (ADS). According to the Factfinder, the Union did not show that the Employer has challenged reasonable uses of official time at locations other than an ALJ's Primary

Duty Station or ADS, or inappropriately attempted to limit or interfere with the conduct of official time activities by Union officials.

4. Article 9 - Official Time - § 7

a. The Employer's Position

The Employer would have the Panel impose the following wording recommended by the Factfinder to resolve the parties' impasse over Article 9, § 7:

> The Union will be allowed to use up to 22,000 hours per fiscal year for the official time activities identified in Section 1. Absent agreement otherwise by the Parties, the provisions of Article 9 shall take effect as of the first day of the first quarter of the fiscal year that is on or after the date on which the new Agreement becomes effective. **Official time authorized pursuant to 5 U.S.C. § 7131 (a) and (c) is not counted towards the bank (term negotiations, mid-term bargaining and FSIP and FLRA time) only if the 22,000 hours in the bank is exceeded.** [Only the highlighted wording is in dispute.]

According to the Factfinder, the "primary reason" for including § 7131(a) and (c) official time in the bank of hours "is that the overall structure of the revised Article 9 is predicated upon a significant increase in the bank hours, the elimination of exclusions, and greater responsibility shifted to the AALJ President or designee(s) for the 'budgeting' of those hours to cover all appropriate official time activities." Moreover, if the bank of hours is exhausted, the fact that the Employer will still provide the Union with official time, pursuant to § 7131(a) and (c), ensures that Article 9 complies with the requirements of the Statute.

b. The Union's Position

In lieu of the Factfinder's recommendation on this issue, the Union proposes that the Panel impose the following wording: "Any official time used by AALJ officials pursuant to 5 U.S.C. § 7131(a) and (c) shall not be counted against the negotiated bank of 22,000 hours." In the Union's view, the adoption of its proposal would ensure that the total amount of official time it receives under the new CBA is not "drastically reduced," permitting more effective representation of the AALJ bargaining

unit. Its adoption also would make it easier for the Union to manage its bank of 22,000 official time hours so it does not exhaust them before the end of each year, thereby adversely affecting its ability to discuss problems with bargaining unit members and handle grievances and arbitrations, *i.e.*, "ongoing matters that cannot be deferred to the next fiscal year." Finally, the Factfinder's recommendation "cannot be imposed" because the Statute mandates two separate and distinct categories of official time.[9/]

5. Article 9 - Official Time - § 8.C. & D.

a. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the following wording should be included in the successor CBA as Article 9, § 8.C.:

> **Notwithstanding the above, and with the exception of the President, Vice President, and National Grievance Chair, in no event will the aggregate of official time hours for any individual exceed 1,400 hours in any fiscal year.** Each Regional Vice President shall be assigned a pool of official time hours that can be assigned to the LARs in his/her region. The Regional Vice President shall control the allocation of official time to the LARs in their respective regions, subject to approval of the President of the AALJ. [Only the highlighted wording is in dispute.]

It also agrees with the Factfinder that the Union should withdraw its additional proposed wording in § 8.D.

With respect to § 8.C., the adoption of individual caps on the use of official time would ensure that virtually all ALJs perform appropriate amounts of case work during the year and is consistent with law because it leaves to the Union the selection of its representatives. According to the Factfinder, absent such a provision, a significant number of Union officials could be transformed into de facto 100-percent, or near 100-percent,

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9/ The Union cites *U.S. Department of the Army, Headquarters, 10th Mountain Division and AFGE*, 64 FLRA 337, 339 (2009); *Veterans Administration Central Office and AFGE, Local 2031*, 23 FLRA 512 (1986); and *162nd Tactical Fighter Group, Arizona Air National Guard and AFGE, Local 2924*, 21 FLRA 715 (1986), to support its position in this regard.

official time ALJs. For the same reason, the Union's proposed wording in sec8D should be withdrawn as it would have the same effect.

b. The Union's Position

The Union rejects the Factfinder's recommended wording on § 8.C. and would like the Panel to delete any reference to a cap of 1,400 hours in relation to statutory official time under 5 U.S.C. § 7131 (a) and (c). With respect to § 8.D., the Union proposes that the Panel adopt the following wording:

> The AALJ President shall have the authority to make a redistribution of official time within the National Pool, from the National Pool to a Regional Pool, from any Regional Pool to the National Pool or among the Regional Pools. **This may be done without regard to the limitation of hours referenced above for individual AALJ officers; it is recognized that this may cause an increase in the individual hours listed above.** [Only the highlighted wording is in dispute.]

Deleting any reference to official time caps in relation to statutory official time from the Factfinder's recommendation in § 8.C., and the adoption of the highlighted wording in § 8.D., would allow the official time caps to be exceeded if the AALJ President decides to redistribute official time pools. This is justified on the basis of past history, where "during various periods of the past 11 years under the extant CBA, several AALJ Regional Vice Presidents have been required to use more than their allotted 60 percent of official time in order to meet their contractual and statutory obligations to represent all [ALJs] in the 8 to 25 hearing offices within their respective regions." Moreover, the agreed-upon cap of 1,400 hours "already represents a concession" on the part of the Union. Because all of the time spent on contractual committee work also would be included in the cap if the Factfinder's recommendation is adopted, the elimination of a "hard cap" would ensure the ability of Union officers to utilize official time for negotiations. According to the Union, "official time provisions of the new CBA should not be inferior to the terms of the current CBA, particularly where our ability to meet our statutory responsibilities is diminished and perhaps even eliminated."

6. Article 15 - Telework - § 2.E.

a. The Union's Position

The Panel should not adopt the Factfinder's recommendation on this issue. Rather, it should include, as part of the definition of "Portable Work," that an ALJ's ADS work "is work which may be performed in the hearing office." In this regard, the adoption of its proposal would ensure that ALJs can complete Federal Financial Disclosure Forms while teleworking, something an arbitrator previously found to be appropriate. Permitting them to do so makes sense because ALJs do not keep their financial records in the office. In addition, the current CBA allows them to perform any work on telework that may be performed in the office, other than hearings and conferences. The Union also disputes the Factfinder's statement that there may be work that may be performed in the hearing office, but cannot for various reasons be performed outside the hearing office, because the "Agency never identified any work, other than hearings and face-to-face conferences (which are specifically excluded), that could not be performed outside of the hearing office."

b. The Employer's Position

The Panel should impose the Factfinder's recommendation and order the Union to withdraw its proposal. He concluded that the additional wording proposed by the Union is not "appropriate or needed" because § 2.E. already includes within its definition of "portable work" all work that can be performed at the Judge's permanent duty station and "it need not be repeated again later in the more detailed description of duties (which are stated to be illustrative and not exhaustive in nature)." Also, to the extent that the Union's proposed wording focuses upon the ability to perform official time duties while on telework, the parties have already agreed to the Factfinder's recommendation on § 7.G.,[10/] which adequately addresses that matter.

10/ The Factfinder's recommendation on § 7.G.states that: "With the exception of teleworking judges performing official time, teleworking judges are considered to be in duty status."

7. Article 15 - Telework - § 3.

a. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the following introductory phrase regarding eligibility to participate in telework, which it proposed, should be included in § 3: "[The] Employer will determine which [ALJs] (including part-time [ALJs]) will be eligible to participate in Telework. In general, to be eligible to participate in telework, the [ALJ] must meet all of the following conditions[.]" In its view, the Factfinder's recommendation appropriately tasks the Employer with determining eligibility to telework based upon the application of 14 enumerated conditions, all of which must be met. If there are no disqualifying events, which are specifically set forth elsewhere in Article 15, requiring the suspension or removal of an ALJ from the Telework Program, Article 15, Section 5.C. provides: "If all other conditions for eligibility are met, judges may elect to work telework." His recommendation also recognizes that the Employer's determination on eligibility is subject to challenge through the grievance procedure. Contrary to the Union's position, the Factfinder concluded that "the provision does not allow the Agency to unilaterally establish new non-bargained for eligibility conditions for a [ALJ] to qualify to be eligible to participate in telework." If the Employer does so, the decision is subject to challenge by the Union in an appropriate forum. Finally, also contrary to the Union's position, the Factfinder concluded that the Employer's proposal is consistent with Office of Personnel Management (OPM) guidance because Article 15 includes appropriately detailed statements of the eligibility criteria and terms for participating in telework.

b. The Union's Position

The Union proposes the following introductory wording to § 3, rather than what the Factfinder recommended: "[ALJs] (including part-time [ALJs]) will be eligible to participate in telework. To be eligible to participate in telework, the [ALJ] must meet all of the following conditions[.]" The adoption of its proposal would ensure that all eligibility criteria are specifically set forth in § 3, and that the Agency cannot add new, non-bargained-for criteria. This is warranted given recent attempts by the Agency to target ALJs who it considers "outliers" (*i.e.*, those who have pay rates higher than, or lower than, the average) and to enforce a "quota" requiring ALJs to issue 500 to 700 decisions annually that has not been

statistically validated. The Factfinder's recommendation, on the other hand, "implies that the Employer can add other, undefined factors to its determination as to whether a Judge will be permitted to telework," and the addition of the words "in general" gives the impression that other criteria exist or may be applied beyond the 14 agreed-upon conditions. Thus, "if, in fact, these words are meaningless, adding them simply creates confusion." Telework is the "single most important benefit to our bargaining unit," which is why the Union strenuously objects to the Factfinder's recommendation to give the Agency the right to determine which Judges will be eligible to participate in telework.

8. Article 15 - Telework - § 7.L.3. & 4.

a. The Employer's Position

The Panel should impose the Factfinder's recommendation to adopt the Employer's proposals on these issues, which are as follows:

> **§ 7.L.3.:** Judges will schedule hearing days prior to selecting the days on which they telework. Selection of telework days will be made consistent with this Agreement and the Telework Act. If the Agency determines that a Judge has not scheduled a reasonably attainable number of cases for hearing, then after advising the Judge of that determination and further advising the Judge that his or her ability to telework may be restricted, the Agency may limit the ability of the Judge to telework until a reasonably attainable number of cases are scheduled. The Parties agree that any dispute as to whether the Agency has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures.
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> **§ 7.L.4.:** The Telework Act recognizes that telework may not diminish employee performance or agency operations. If: a) a Judge has one or more seriously delinquent cases in status controlled by a Judge (ARPR, ALPO, EDIT, and/or SIGN) and b) has also been advised of that situation and of the fact that a failure to correct the matter may lead to a restriction of his or her ability to telework until the matter is resolved, and c) the Judge has not corrected the matter in the period consisting of the

> Judge's next fifteen working days, then the Agency may restrict the ability of the Judge to telework until the matter has been resolved and also direct that the Judge report to the office on a previously scheduled telework day(s) to work on those cases and move them into the next status. The Parties agree that any dispute as to whether the Agency has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures.

The adoption of the recommendation essentially would provide the Employer with a way to incentivize ALJs to schedule a reasonably attainable numbers of cases, and to timely address cases in a judicially-controlled status, something the Factfinder concluded is necessary given the backlog of disability cases and the Employer's inability to use many of the traditional tools and processes available to address performance issues with respect to ALJs. In this regard, **the Factfinder** [he] was persuaded that giving management a more limited mechanism for influencing performance than those which would have a disproportionately serious impact on affected ALJs would benefit the Agency, the Union and the bargaining unit. As **he**[the Factfinder] stated, the Employer's ability to limit an ALJ's telework is based upon a determination that he or she has failed to schedule a "reasonably attainable" number of hearings, a standard which is not defined but is expected to be situation-specific, taking into account all relevant and appropriate factors. In the Factfinder's view, the recommendation "is modest and measured when viewed in context and as a whole." It addresses only the entitlement to continue to select telework days and, if invoked, would not necessarily trigger a complete loss of all opportunity to telework. The recommendation also is part of the *quid pro quo* for allowing ALJs to schedule up to 8 telework days per month (and potentially more with Hearing Office Chief ALJ, or HOCALJ, approval) on days of their own choosing, *i.e.*, the recommendation to adopt the Employer's wording on these sections was part of a trade-off whereby the Employer agreed to significant concessions in Article 20 (Reassignments) and Article 27 (Judicial Training and Education), items he asserts are "considered very important by the Union and obtaining Agency agreement to those provisions was linked explicitly to the adoption of the new Article 15, Section 7.L.3. and 7.L.4. language." As the Factfinder explained in footnote 5 of the *FR&R*, failure to adopt his recommendation on these provisions would automatically rescind the parties' tentative agreements on Articles 20 and 27; conversely, if the Panel fails to adopt

conditionally agreed upon provisions in Articles 20 and 27 "then Article 15 would similarly become reopened and unresolved."

The recommendation also is reasonable because it requires the Employer to provide prior notice, an appropriate period for the ALJ to cure the matter, and allows the Union to grieve and arbitrate the propriety of any action taken. Contrary to the Union's assertions, the recommendation does not violate 5 C.F.R. § 930.206[11/] or 5 U.S.C. Chapter 43 because the Employer is not creating or applying a performance appraisal program to ALJs nor, if applied properly, would it interfere with judicial independence. In this regard, the Factfinder explains that the recommendation would not provide an improper "incentive" for particular performance but is consistent with the Employer's right to limit telework based upon criteria set forth in the Telework Enhancement Act of 2010. The fact that it may affect the efforts of one or more Judges in performance related ways "was not shown to render this provision a prohibited performance incentive." Overall, the adoption of the Factfinder's recommendation would reinforce the notion that telework is only appropriate where it does not diminish employee performance or Agency operations.

b. The Union's Position

The Panel should reject the Factfinder's recommendation on these sections and impose the following wording instead:

> Judges will schedule hearing days prior to selecting the days on which they telework. Selection of telework days will be made consistent with this Agreement and the Telework Act. Official duties performed at the ADS will be performed with the quality, consistency, and in the same manner as performed at the official duty station.

11/ 5 C.F.R. § 930.206, Performance rating and awards, states as follows:

> (a) An agency may not rate the job performance of an administrative law judge.
> (b) An agency may not grant any monetary or honorary award or incentive under 5 U.S.C. 4502, 4503, or 4504, or under any other authority, to an administrative law judge.

The imposition of its proposal essentially would maintain the *status quo* whereby management does not have the ability to limit ALJs' teleworking opportunities "until a reasonably attainable number of cases are scheduled." The continuation of the current practice is reasonable because management has alternative actions that it can take if it believes ALJs are not performing satisfactorily, such as the issuance of directives, counseling, reprimands, suspensions, and the removal of ALJs who do not schedule enough cases or move them in a timely fashion, or it can deny the use of earned annual leave or unilaterally schedule hearings, all of which it has done in the past.

As to the Factfinder's recommendation, it is based on his mistaken view that there was an understanding between the parties that the Union would agree to accept the Employer's proposal in Article 15, § 7.L.3 and 7.L.4 in exchange for Union proposals in Articles 20 and 27. In this regard:

> [W]e do not accept the trade-off between the Agency's concessions to Articles 20 and 27 in exchange for the Agency's language in Article 15, 7.L.3 and 7.L.4. It was imposed on us by the [Factfinder]. We were not a party to this trade-off, we do not agree with it, and we do not want it under any circumstances. Article 15 is far, far more important to us than the proposed Articles 20 and 27.[12/]

Linking telework to the scheduling of a "reasonably attainable number of cases for hearing" is also an inappropriate approach to addressing the backlog of disability cases: "Judicial productivity has never been greater, so the Agency's need is specious." In addition, under his recommendation the parties' fundamental disagreement over the number of cases ALJs should handle every year undoubtedly will be shifted to the grievance/arbitration procedure, creating an indeterminate

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12/ In the Union's view, because the Factfinder linked Article 20, § 1.A. & B. and Article 27, § 2.D., E. & F. with its acceptance of his recommendation on Article 15, 7.L.3 and 7.L.4., "these Articles may now be at issue." As a result, the Union proposes that the Panel impose "the mutually agreed upon language in Article 20, § 1.A. & B.," but wants the Panel to adopt its proposed wording on Article 27, § 2.D., E. & F. and Article 15, § 7.L.3. & 4. Given the Panel's *Order* in this case, the Union's proposal that the mutually agreed upon language in Article 20, § 1.A. & B. be imposed has been rendered moot.

number of disputes that will strain the parties' resources. Finally, the recommendation should be rejected because, while the Telework Enhancement Act requires an agency to ensure that telework does not diminish employee performance or agency operations, it does not "authorize an employer to wring more work out of Federal employees."

9. Article 15 - Telework - § 8.

a. The Employer's Position

The Panel should impose the Factfinder's recommendation to adopt the Employer's proposal that: "Suspension of telework or altered telework days does not (1) constitute a termination of the telework arrangement; or (2) entitle a judge to a 'replacement' or 'in lieu of' telework day." In agreement with the Factfinder's rationale, a change in the *status quo* is justified by the significantly increased number of opportunities to telework that will be provided under the parties' successor CBA. In this regard, the parties' agreement to increase the maximum number of telework days in a month, and the maximum number of consecutive telework days, is based upon permitting maximum flexibility for the ALJs while recognizing the primary obligation to schedule hearings appropriately. The new Article 15 also includes a provision that allows additional telework days to be worked with the approval of the HOCALJ. As the Factfinder stated, one *quid pro quo* for the enhancements in Article 15 was the understanding that it would mirror the Agency's June 2011 Telework Policy. Therefore, "contractual language providing replacement days is no longer reasonable or necessary."

b. The Union's Position

Rather than imposing the Factfinder's recommendation, the Union proposes the following wording to resolve the parties' dispute over this section: "Suspension of telework or altered telework days does not (1) constitute a termination of the telework arrangement; and (2) any telework workdays lost as a result of any suspension of telework, shall be available for rescheduling by the [ALJ]." The adoption of its proposal would maintain the *status quo*. Contrary to the rationale provided by the Factfinder, his recommendation "diminishes the opportunities to telework, as the Agency will be able to further reduce the number of telework days whenever it wishes." The Union also denies that one of the *quid pro quos* for the enhancements in the article was the understanding that it would mirror the Agency's

June 2011 Telework Policy. In the Union's view, "these assertions are simply untrue."

10. Article 21 - Records - § 4.C.

a. The Union's Position

The Panel should reject the Factfinder's recommendation and impose the following wording:

> During the term of this agreement a [ALJ] may make a one-time request for copies of all written complaints alleging a complaint of bias or misconduct pertaining to the [ALJ] received and retained by SCS since 1993. SCS shall provide the copies to the [ALJ] as soon as practicable.

Preliminarily, the Union renews its claim that this issue is not before the Factfinder because a Settlement Agreement (SA) reached by the parties on September 1, 2011, carved out "Section 4 - Bias and Misconduct Complaints" from the rest of Article 21, and any proposals currently on the table concerning that process were severed from the CBA negotiations by virtue of the SA. On the merits of the issue, there have been "many problems" regarding bias and misconduct complaints lodged against ALJs during the last few years, including approximately 40 grievances over the Employer's failure to comply with the requirement in the current Article 21, § 4.B. to timely advise ALJs of complaints, and the creation of an electronic complaint database which "gravely concerns" ALJs. Its proposal, which would continue the current § 4.C., would provide ALJs with a way of knowing if anyone has made a complaint against them, and is justified because counseling and discipline can flow from such complaints. Conversely, the removal of § 4.C. at this point would put the Union at a disadvantage during bargaining that will ultimately occur over the "Bias and Misconduct Complaint" issue once the discussions under the terms of the SA have been completed. Moreover, the Union has never agreed with the Agency's assertion, accepted by the Factfinder, that the provision was designed to address a "hole" that existed with regard to the time period before the 2001 CBA provisions became effective. In the Union's view, the requirement of § 4.C. "stands on its own merits and [] the need for it continues to date." The fact that the parties continued the provision during three extensions of the 2001 CBA supports its view that § 4.C. was not meant to be read as restrictively as the Factfinder and Employer insist.

b. The Employer's Position

The Panel should impose the Factfinder's recommendation and order the Union to withdraw its proposal. In agreement with the Factfinder, the Union's contention that this matter is not properly part of the successor CBA negotiations should be rejected because: (1) the Panel asserted jurisdiction over all disputed items, including the Employer's proposal that the current § 4.C. be eliminated, "not simply those affirmative proposals of the Union"; and (2) the Union's reliance on the September 1, 2011 SA is unwarranted as it only severed from term negotiations proposals concerning "the ALJ bias and misconduct complaint process." With respect to the latter, § 4.C. involves a "one time request" for information "during the term of [the 2001 Agreement]" and, therefore, does not concern that process. On the merits of the issue, the Factfinder concluded that "no reason was shown to include meaningless language as part of the new Agreement," *i.e.*, § 4.C. was limited to one-time requests made during the term of the 2001 CBA and, once the current CBA is replaced by the successor CBA, it has no application. In addition, removal of the provision would not bar a request in the context of a grievance, or a current complaint of bias or misconduct, for information that is retained by the Agency and that is reasonably necessary to the pursuit of the grievance or other appeal.

11. Article 27 - Judicial Training and Education - § 2.D., E. & F. [13/]

a. The Employer's Position

The Employer agrees with the Factfinder's recommendation that the parties' impasse over this article should be resolved by adopting a combination of the Employer's last best offer and a modified version of additional wording it proposed during the Factfinding process. Its last best offer before the Factfinder is the following:

> All AALJ conference attendees, including the AALJ President, AALJ Education Conference Chair, and the AALJ Education Committee members, facilitators and presenters will be entitled to up to five (5) days of administrative leave for the time traveling to and from and attending the AALJ Conference.

13/ The Union contends that the Factfinder's recommendations "should be more accurately labeled as Section 1G."

The additional wording recommended by the Factfinder states:

> In addition, the AALJ President may use official time from the bank for matters related to the planning of the conference and preparation of any presentations made by the AALJ President at the Conference. To the extent authorized by the AALJ President from the bank, the AALJ Education Conference Chair and AALJ Education Committee Members may use official time for matters reasonably related to the planning of the Conference. Presenters at the Conference will be provided reasonable paid time (not to exceed 8 hours for any individual presenter) in the form of administrative leave for preparation of their presentations. At the discretion of the AALJ President and so long as available from the bank, presenters at the Conference may also be allotted official time from the bank if such time is needed for preparation of their presentations. Under no circumstances may official time provided under this Article result in any presenter who is a Union official exceeding his or her individual cap on official time hours contained in Article 9 of this Agreement.

In essence, the Factfinder's recommendation would change the *status quo* concerning the support the Employer provides for the AALJ Annual Education Conference by granting up to 5 days of administrative leave for attendees, presenters and the listed Union officials involved in a variety of Conference efforts. Such a change is justified given that the Agency now conducts its own training for incumbent ALJs. As indicated by the Factfinder, this portion of his recommendation "is appropriate and ensures that the Conference will be able to continue to both occur and be well attended." His additional recommended wording is a modification of a proposal the Employer offered during factfinding that presenters be given reasonable time, up to a maximum of 4 hours of administrative leave, to prepare their presentations, and that others involved in the planning of the conference be permitted to do so on official time to the extent available, in accordance with Article 9. While he noted that the "record is admittedly barren of details as to how much time is actually needed or how much time has been actually used in the past" for these purposes, the Employer nevertheless assents to the Factfinder's recommendation that the Employer provide reasonable paid time, not to exceed 8 hours for any individual presenter, and that others involved in the planning of the conference be permitted to do so on official time to the extent

available, in accordance with Article 9.

Contrary to Union's position, the Factfinder concluded that "changes in the circumstances surrounding the Conference merit treating the time planning the Conference as an official time activity, rather than as one in which administrative leave is to be granted." Among the changes is the fact that the Agency now provides alternate training on a 3-to-4-year cycle and that the current CBA provisions regarding Agency involvement and control over the Conference "have been significantly diminished." The recommendation also takes into consideration the change in Article 9's exclusions from official time, as well as the Employer's opposition to the continuation of its indirect support for the AALJ Annual Education Conference, the mixed nature of the AALJ Annual Education Conference, and the tradeoffs the parties made in connection with Article 15, Section 7.L.3. and 7.L.4., Article 20, and Article 27. The Employer also agrees with the Factfinder's conclusion that, given the expansion of the bank of official time hours in Article 9, and lack of Agency preapproval or oversight in the Conference planning process, requiring that Conference planners receive official time, rather than administrative leave or duty time, is appropriate.

b. The Union's Position

The Panel should impose the following wording, and not the Factfinder's recommendation, to resolve the parties' impasse over this matter:

> D. The AALJ President, AALJ Education Conference Chair, and AALJ Education Conference Committee members (not to exceed 8), will receive a reasonable amount of duty time to prepare for the Conference.
>
> E. The Employer will provide a reasonable amount of duty time for any Judge who will participate in the Conference as a presenter or session facilitator to prepare for [] the Conference. The AALJ Dean of Continuing Legal Education will receive a reasonable amount of duty time to organize, prepare for, participate in, and travel to all meetings and conferences necessary to effectuate the AALJ Continuing Legal Education Program.

> F. The Employer will provide 5 days of administrative leave for any Judge who wishes to attend the AALJ Annual Education Conference.

The adoption of the Union's proposal would continue the level of support for the AALJ Annual Education Conference that the Agency has provided for many years. In this regard, "presenters have always had a reasonable amount of duty time to prepare for the conference" and there has been a past practice of granting the Dean of Continuing Legal Education duty time to effectuate the AALJ CLE program. The diminishment in the level of support recommended by the Factfinder would affect the ALJs' ability to continue to receive annual CLE credits for attendance at the Conference. Furthermore, permitting presenters to receive official time from the Union's annual bank of hours, subject to the caps set forth in Article 9, would further diminish its ability to ensure that there are enough hours for it to meet its representational requirements. As is the case in previous issues, the Union denies that it made any tradeoffs during the Factfinding process that included Article 27. Although it agreed to change the type of time attendees would receive for the AALJ Conference from "duty time" to "administrative leave," the training provided by the Employer is inadequate to meet ALJs' needs. While the Agency has recently begun to put on its own training conferences, ALJs are not permitted to attend annually, but only every 3 to 5 years, and "Agency conferences do not address many of the legal, medical and vocational issues that our [ALJs] need and want." In conclusion, the Factfinder failed to justify changing the Agency's long-standing practices in support of the Conference, *i.e.*, reasonable amounts of duty time for Conference presenters and planners, including the Dean of Continuing Legal Education.

12. Article 30 - Facilities and Services - § 2.B.8. [14/]

a. The Employer's Position

In agreement with the Factfinder, the following wording should be imposed by the Panel to settle the parties' dispute

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14/ Although the Factfinder refers in his *FR&R* to "recommended substitute language" for § 2.B.7., as well as § 2.B.8., the record reflects that the wording he recommends for § 2.B.7. is identical to the provision in the current CBA. Moreover, the Union did not identify the Factfinder's recommendation on § 2.B.7. as unacceptable. Therefore, there appears to be no disagreement over § 2.B.7.

over this matter:

> At the discretion of the Agency, AALJ's designated representative may be invited to accompany the Agency's representative, at the AALJ's expense, on a site survey in connection with acquisition of office space after signing the GSA's Statement of Conflict of Interest and Nondisclosure (See Appendix A).

His recommendation represents a modification to the current section of this article. As the Factfinder concluded, even though previous Union participation has been helpful in avoiding the selection of office space in inappropriate locations, such decisions are "a core management responsibility." Therefore, changing the *status quo* by granting the Agency the discretion to invite the Union to participate in site surveys would result in a "contractual commitment [that] is lawful and appropriate and not inconsistent with the role afforded to Union representatives in other bargaining units relative to the site survey process." In this regard, the adoption of the Factfinder's recommendation would bring the AALJ contract into conformity with the CBA provisions of the other unions representing SSA employees.

b. The Union's Position

The Factfinder's recommendation should be rejected. Instead, the Panel should maintain the *status quo* by imposing the following wording:

> AALJ's designated representative shall be entitled to accompany the Agency's representative at the AALJ's expense, on any site survey in connection with acquisition of office space after signing GSA's Statement of Conflict of Interest and Nondisclosure (See Appendix A).

The continuation of the current provision would entitle Union representatives to accompany managers on site selection surveys so they can point out relevant factors that may otherwise be overlooked without infringing on the Agency's managerial right to decide where to locate a new hearing office. After acknowledging that previous AALJ input has been helpful in the site selection process, the Factfinder inexplicably recommended the adoption of the Employer's proposal. In addition, contrary to the Factfinder's claim that SSA has been successful in negotiating the elimination of such provisions with "other unions," only AFGE has agreed to eliminate such a provision in

its contract. The Union also fails to see why the CBA provisions the Employer has negotiated with its other unions is relevant to the merits of its position on this matter.

CONCLUSION

Having carefully considered the Union's response to the *OSC* and the Employer's rebuttal statement, we conclude that the Union has failed to show cause why the Factfinder's recommendations should not be imposed to resolve the parties' impasse over their successor CBA. In our view, the Factfinder has supported his recommendations with clear and convincing rationale and they do not otherwise appear to be illegal. Accordingly, we shall order the adoption of his recommendations in their entirety.

ORDER

Pursuant to the authority invested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under 5 C.F.R. § 2471.11(a) of its regulations, orders the following:

The parties shall adopt the Factfinder's recommendations in their entirety.[15/]

By direction of the Panel.

H. Joseph Schimansky
Executive Director

April 30, 2013
Washington, D.C.

15/ We note that, as explained in an email message received from the Union on April 18, 2013, the parties have mutually agreed to a corrected version of Article 14.