

In the Matter of

DEPARTMENT OF AGRICULTURE  
FOOD SAFETY INSPECTION  
SERVICE  
WASHINGTON, D.C.

and

NATIONAL JOINT COUNCIL OF FOOD  
INSPECTION LOCALS, AMERICAN  
FEDERATION GOVERNMENT OF EMPLOYEES,  
AFL-CIO

Case No. 14 FSIP 109

#### ARBITRATOR'S OPINION AND DECISION

The National Joint Council of Food Inspection Locals, American Federation Government of Employees, AFL-CIO (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 Department of the Agriculture, Food Safety Inspection Service, Washington, D.C. (Employer).

After investigation of the request for assistance concerning disputes over a reorganization and leave scheduling, the Panel determined that the leave scheduling issue should be resolved through mediation-arbitration with the undersigned.<sup>1/</sup> The parties were informed that if a complete settlement of the issue at impasse was not reached during mediation, I would issue a binding decision to resolve it.

Consistent with the Panel's procedural determination, on December 11, 2014, I conducted a mediation-arbitration proceeding by telephone with representatives of the parties. The parties were unable to reach agreement during this proceeding. Thus, I am required to issue a final decision imposing terms in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including the parties' pre-

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1/ The Panel declined to assert jurisdiction concerning the parties' dispute over the reorganization.

hearing submissions. By agreement of the parties, the record was closed after receipt of the parties' final offers and there were no post-hearing position statements.

### BACKGROUND

The Employer is a component of the U.S. Department of Agriculture (USDA). Its mission is to ensure that the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged. There are approximately 6,400 employees in the unit, mostly food and processing inspectors, GS-5 through -10. The parties are governed by a collective bargaining agreement (CBA) that was to have expired in 2011 but continues to roll over each year. They intend to reopen the CBA for negotiations within the next year.

In early 2012, the USDA announced that it would implement a new rule (the Poultry Slaughter Rule) intended to modernize how poultry would be inspected by line inspectors.<sup>2/</sup> Essentially, the rule would reduce visual poultry inspections in favor of equipment-assisted inspections. As a result, the number of inspectors at the Employer's 180 inspection facilities will eventually be reduced by about one third. In order to transition to this new system, the Employer began hiring temporary inspectors in September 2012. Temporary inspectors serve a 2-year term and are not a part of the bargaining unit. The group of inspectors hired in 2012 served their terms through September 2014, at which time the Employer hired new temporary inspectors.

Although the Employer initially declined to bargain over its decision to hire temporary inspectors, it eventually agreed to engage in impact and implementation bargaining as the result of settlement of an unfair labor practice complaint. The parties subsequently reached agreement on 41 items.

The sole disputed item at issue here concerns leave scheduling. Under the parties' current practice, leave requests for the upcoming calendar year (pre-scheduled leave requests) must be submitted by December 1st of the previous calendar year. Other leave requests made during the calendar year (day-to-day requests) are submitted to supervisors. For both of these categories of leave, conflicting requests are usually resolved through seniority.

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<sup>2/</sup> "Modernization of Poultry Slaughter Inspection," 77 FR 13,512 (January 27, 2012).

## ISSUE

The parties disagree over how leave requests should be considered when temporary inspectors and bargaining unit employees (BUEs) have competing requests with regard to leave. The Union's goal is to give priority to bargaining unit employee requests irrespective of whether they occur after temporary employee leave has been approved, except in enumerated circumstances.<sup>3/</sup>

## POSITIONS OF THE PARTIES

### 1. The Union's Position

The Union's final offer is as follows:

Bargaining unit employees leave shall take priority over temporary employees, regardless of the date of the request. Once the temporary employee's leave is approved by the supervisor, a request to replace the temporary employee's leave by a unit employee will be granted, unless the leave is for an event that cannot be recreated such as, a funeral, wedding, graduation, or where a sizable deposit has been made for airline tickets, cruise, etc.

As it relates to day-to-day leave, when there is a conflict between a permanent full time employee and a temporary employee regarding a request for the same day to day leave period, the supervisor will encourage an amicable solution between the employees. In the event an amicable solution cannot be reached regarding who shall be entitled to the leave time, the unit employee shall be granted the leave.

Language is only considered to set a precedent if there is a mutual agreement between the parties to consider it as precedent setting.

In the event a temporary employee has had their leave cancelled to provide requested leave to a permanent full time employee, the temporary employee shall have the leave granted after being cancelled twice before.

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<sup>3/</sup> The parties are in agreement that in the scheduling of pre-scheduled leave BUEs have an absolute preference over temporary employees.

Due to the morale of permanent full time employees, the agency sees a need to provide a benefit to permanent full time employees not granted to temporary employees whose time with the agency is short.

Under this proposal, if a BUE requests day-to-day leave for a certain period of time, and a temporary inspector has already been granted leave for that period, the Employer is obligated to cancel the temporary employee's leave (save for the limited circumstances described) unless the parties involved can work out an amicable solution, an outcome that is encouraged. No minimum advance notice is required prior to cancelling a temporary employees' leave in order to grant leave to a BUE.

The Union believes this preference to BUEs in the granting of leave is appropriate in the specific context presented here. The Employer's decision to hire temporary inspectors to facilitate a substantial reduction in the number of permanent BUE inspectors has created serious morale issues. The Union's proposal addresses this impact by granting BUEs a benefit that touches upon the very heart of employment, *i.e.*, pay and leave, and recognizes their status as permanent (and often long-term) employees by providing across-the-board priority for leave. The Union's proposal provides fair treatment for temporary employees by limiting the number of times a temporary employee's leave can be cancelled (twice) and barring the cancellation of leave where it is for "an event that cannot be recreated such as, a funeral, wedding, graduation, or where a sizable deposit has been made for airline tickets, cruise, etc." The Union has no interest in harming temporary employees; it simply wants to make sure full time employees are recognized and rewarded for their tenure.

The Union cannot accept the Employer's proposal. The 30-day notice requirement proposed by the Employer is inconsistent with the CBA. Under the CBA, the Employer is required to provide BUEs with only 72 hours' notice if it cancels a previously approved leave request. In the Union's view, to allow a significantly longer notice requirement for cancelling a temporary employee's leave is to grant temporary inspectors a greater privilege than BUEs when in fact they have very limited rights. Temporary employees can have no expectation that they will receive any sort of preferential leave treatment when they do not even get to use accrued leave when their terms of employment expire. This disparity in notice time disrespects the superior rights held by BUEs.

The Employer's claim that it needs 2 pay periods (or 30 days) to resolve scheduling issues is absurd in light of the reality of day-to-day scheduling for this bargaining unit. When employees become sick or unavailable, the Employer can - and does - turn to relief inspectors, intermittent inspectors, or inspectors from neighboring plants that might be available. Contrary to the Employer's assertion, this replacement process takes hours, not weeks.

## 2. The Employer's Position

The Employer proposes the following wording:

Bargaining unit employees' requests for pre-scheduled annual leave shall take priority over temporary employees' requests for pre-scheduled annual leave. After bargaining unit employees have made their selections for pre-scheduled annual leave, temporary employees may make their selections for pre-scheduled annual leave. The terms of this agreement address only circumstances in which a temporary employee has approved pre-scheduled annual leave scheduled for a specific time period and a bargaining unit employee subsequently requests leave for the same day(s) and granting the bargaining unit employee's request would cancel the temporary employee's pre-scheduled annual leave. When the bargaining unit employee requests annual leave that has not been pre-scheduled (a.k.a. day-to-day leave or convenience leave), management will explore options for obtaining coverage other than canceling or denying leave. Once a temporary employee's pre-scheduled annual leave is approved, it will not be revoked in favor of a bargaining unit employee's request for "convenience leave" unless the bargaining unit employee provides advance notice of 30 calendar days. Where coverage is not obtained, even when a bargaining unit employee provides the required notice, the request to take leave may be denied if the event for which the temporary employee had pre-scheduled leave cannot be recreated or where the temporary employee will lose money due to the cancellation. This agreement shall become moot when the Agency no longer employs temporary employees.

The focus of this proposal is on pre-scheduled annual leave. When BUEs and temporary employees submit their leave requests on December 1<sup>st</sup>, the former group shall receive priority

over the latter. During the year, however, a BUE's request for leave (day-to-day or convenience leave) will not be automatically granted if it conflicts with leave that has already been granted to a temporary employee. The Employer will first determine whether work can be covered by other means so that both employees can be on leave. If not, the BUE's request will not be granted unless the Employer has been given at least 30 days' notice (or 2 pay periods) or, even if that notice has been given, if the temporary employee's leave is for an event that cannot be recreated or cancellation would cost the employee money.

The Employer values its BUEs and its temporary employees. It recognizes that the former are entitled to privileges that the latter do not possess. It also recognizes the particular context which makes this a very sensitive issue. Thus the Employer agrees with bargaining unit employees receiving priority over temporary employees for pre-scheduled leave, and is willing to take the extraordinary step of allowing a permanent employee to cancel a temporary employee's leave in some circumstances. The Employer has never had such an arrangement. But certain limitations must be in place, chief among them a 30-day notice requirement. This period is necessary for two reasons.

First, two pay periods will give managers and supervisors enough time to resolve any potential coverage issues. Plants sometimes have relief and intermittent inspectors who can fill in for missing employees, but that is not always the case. If those employees are unavailable, the Employer has to turn to neighboring plants. The Employer may, therefore, have to go through the district level and even escalate it higher to the circuit level. This entire process is not simply a matter of making a few phone calls. The Employer's second justification for the 30-day notice period is morale. Temporary employees will undoubtedly be unhappy to discover that previously approved leave has been cancelled because preempted by another employee. 30 days would at least give temporary employees a reasonable period of time to cope with this situation and/or make other arrangements. The Employer has an interest in maintaining morale in its entire workforce.

In the Employer's view there is no real need being addressed by the Union's proposal. The Employer is unaware of any problems that have arisen concerning leave issues related to temporary employees since they began employment in September 2012 while conceding that it has not done any sort of formal

research on this point. It appears that supervisors have simply worked with permanent and temporary employees to resolve leave disputes.

Contrary to the Union's claim regarding the 72-hour notice provision in the CBA, the Employer is not holding BUEs to a different standard. The CBA's notice requirement concerns when the Employer cancels an employee's leave request; the Union's proposal addresses when an employee cancels another employee's leave request. That the Employer is allowing BUEs to cancel other employees' leave in any circumstances shows that it is BUEs, and not temporary inspectors, who are receiving preferential treatment.

### CONCLUSIONS

BUEs, and the Union that represents them, are facing challenging times - a major change in work processes and dramatic reduction in the inspector workforce. In the transition period BUEs are working side-by-side with temporary employees. By what is shown in the record and what was described by representatives on both sides, although the situation seems ripe for tensions, for the last 2 years, leave has been handled well enough that no grievances have been filed or complaints sent up into management channels. Neither party had information about actual challenges arising from competition for leave between BUEs and temporary employees.<sup>4/</sup> BUEs are getting the first shot at prescheduled leave, and requests coming up during the subsequent year are apparently being handled well enough that no one has been complaining. So this case is not about addressing a demonstrated problem. It is a case about principle for the Union, the principle that BUEs have superior employment rights when it comes to working conditions including leave. The Employer does not challenge that principle.

Both parties have already agreed to giving BUEs absolute preference for pre-scheduled leave. The Employer has gone

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<sup>4/</sup> The Arbitrator finds it implausible that BUEs will be often forcing the cancellation of the planned leave of people with whom they work every day, whether temporary or not. The evidence, such as it is, supports a supposition that in the interests of common decency people will aim for amicable outcomes. Since the BUE's large blocks of leave will already be assured, these day-by-day requests presumably will be for short periods or a day, making accommodation more likely.

further, agreeing in these negotiations to the Union's proposal that BUE requests for day-to-day/convenience leave can trigger cancellation of a temporary employee's leave that has already been approved including pre-scheduled leave.<sup>5/</sup> The Panel is not aware of, nor could the Union cite, any other examples where a similar right has been afforded.

Therefore the essential principle most important to the Union is quite significantly given effect here. Where the disagreement lies is not over the principle or the basic broad preference on leave but what limitations exist on the latter when it involves a BUE triggering the cancellation of a temporary employee's leave. Both parties agree that leave for an event that cannot be recreated (a wedding, funeral or graduation, for example) will not be cancelled. Both parties agree that a nonrefundable financial cost should require the same result, though the Union describes this as where there is a "sizeable" deposit or expense (like an airplane ticket) and the Employer in its last proposal makes the threshold "where the temporary employee would lose money," presumably of any amount. This is a much lower threshold than it has earlier put forward.

The Union adds to these two limitations a limit on the number of times that a temporary employee's leave can be preempted by a BUE which the Arbitrator regards as an intended assurance of fairness. The Employer has taken no position on that proposal. The Employer adds to the limitations a requirement that the employer have 30 days' advance notice from the date when BUE leave is desired to ensure adequate time to try to work out some arrangement to accommodate both employees, and/or to give a temporary employee time to make accommodations for the cancelling of his or her leave. To this the Union strongly objects citing Article 14 language requiring only 72 hours' notice when management cancels leave for BUEs. The Union's argument misses the mark. The situations covered by Article 14, Section 2 and the one at issue here are utterly different. Article 14 protects a BUE's pre-scheduled leave from cancellation "except in cases of emergency," in which case the 72 hours' notice applies. The provision under discussion makes the threshold for cancelling a temporary employee's leave much lower - it is simply a BUE's request to have annual leave at

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5/ The Arbitrator believes that the issue at impasse covers either type of situation where a temporary employee has been granted leave (in the December pre-scheduled leave process or where temporary employees request day-to-day/convenience leave).



that same time. A 30-day notice requirement for that type of cancellation in no way makes the temporary employee's right to leave comparable, let alone superior to, that of BUEs who cannot have leave cancelled except by the Employer, for very limited reasons.

The parties put a fair amount of energy into arguing over one of the Employer's justifications for 30 days' notice, *i.e.*, how much time it takes management to find replacements to cover for absent inspectors. On a routine basis (e.g., when someone calls in sick or has an emergency) this gets done quickly, in hours not days or weeks. If the time to cover is longer (like a week) it is plausible that more time might be needed. But more compelling to the Arbitrator is the other justification - giving the temporary employee a chance to adjust to a cancellation of pre-scheduled leave that might be for something like a planned family vacation.

The Order below is a compromise that draws on language from both parties' proposals. BUEs will be able to trigger cancellation of temporary employees' approved leave subject to what the Arbitrator considers reasonable limitations considering the submissions and arguments of the parties. This will apply whether the leave to be cancelled is granted as part of the pre-scheduled leave process or as day-to-day/convenience leave. Restricting this to only pre-scheduled leave (per the Employer's final proposal) would leave unaddressed competing requests for day-to-day/convenience leave which does not reflect the scope of proposals previously exchanged by the parties. No case was made for why this is advisable. At the same time the Arbitrator will not adopt the Union approach in its last proposal to oblige the Employer to explore means to accommodate both leave requests only when day-to-day leave is being cancelled. Cancelling pre-scheduled leave seems much more likely to be disruptive of long-held expectations and plans and deserving of efforts to cover the schedule in ways other than cancellation. With regard to timing requirements, after considering this further the Arbitrator believes that distinguishing between the two types of situations is called for since requests for day-to-day/convenience leave are not expected to be made far in advance. It is fair to give stability to temporary employees' expectations of using their pre-scheduled leave by creating a 21-day window when cancellation cannot be triggered by a BUE request. For day-to-day/convenience leave this is unnecessary.

The Arbitrator's language also makes clear that the cancelling of leave is done by the Employer. Employees do not

cancel leave. The BUE's request is the trigger for management action.

#### DECISION

The following wording shall be incorporated into the parties' agreement concerning the impact and implementation of the Employer decision to hire temporary employees:

1. In the approval of pre-scheduled annual leave, bargaining unit employees' (BUEs) requests shall take priority over temporary employees. Only after BUEs have made their selections for pre-scheduled annual leave will temporary employees may make their selections for pre-scheduled annual leave.
2. BUEs subsequently requesting day-to-day/convenience leave will not be denied leave that would otherwise be granted on the basis that leave for the same period has already been granted to a temporary employee (either as pre-scheduled or day-to-day.) Where situations arise where granting the BUE leave will require cancellation of the temporary employee's leave, supervisors will first explore alternatives for providing necessary coverage that would allow both employees to take leave, including an amicable solution between the employees affected. In the event an alternative solution cannot be achieved, the unit employee shall be granted leave and the temporary employee's leave cancelled, subject to the following conditions:
  - a. If the temporary employee's leave is pre-scheduled leave, it will not be cancelled unless the BUE's request has been made at least 21 days prior to the start of the pre-scheduled leave.
  - b. The temporary employee's leave will not be cancelled if it is for: (1) an event that cannot be recreated such as a funeral, wedding, graduation; (2) where a sizable deposit has been made for airline tickets, cruise, hotel, etc.; or (3) where day-to-day

leave has been requested for a personal or family emergency.

- c. If the temporary employee's leave has already been cancelled once to accommodate a BUE leave request.



Mary E. Jacksteit  
Arbitrator

January 13, 2015  
Washington, D.C.