In the Matter of

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 16 FSIP 13

ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (NTEU or Union) filed this request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse arising under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Treasury, Office of the Comptroller of the Currency, Washington, D.C. (OCC, Agency, or Employer).

Following investigation of this request for assistance, arising from reopener negotiations over compensation and benefits, the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned, Panel Member Donald S. Wasserman. The parties were informed that if a complete settlement of the issues at impasse was not reached during mediation, a binding decision would be issued to resolve them.

Consistent with the Panel's procedural determination, on March 8 and 9, 2016, I conducted a mediation-arbitration (med-arb) proceeding with representatives of the parties at the Panel's headquarters in Washington, D.C. During the proceeding, the parties had ample opportunity to present all material, testimony, and other evidence to support their positions and to counter each other's presentation. The parties were also informed that in the absence of a voluntary agreement I was not obligated to make a decision based on either party's last best offer. Despite making sincere efforts the parties were unable to reach agreement over the two main issues in dispute. I am, therefore, now required to issue a final decision imposing terms for the disputed proposals 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-hearing submissions, those made during the hearing, as well as their post-hearing briefs submitted on April 1, 2016. The record is hereby officially closed.

ISSUES IN DISPUTE AND BACKGROUND

There are two issues in dispute: (1) a proposed modification of the method the Employer uses to award merit-based pay increases to high-performing employees; and (2) a proposed change to bargaining-unit employees' locality pay (or as the Employer refers to it, "geographic/geo pay"). To understand the basis for these disagreements, it is necessary to examine the path that brought the parties to the Panel.

The Employer's mission is to charter, supervise, and regulate national banks, federal savings institutions, and federal-licensed branches of foreign banks that operate in the United States. The Union represents a nationwide consolidated bargaining unit consisting of approximately 3,000 employees who mostly encumber bank examiner positions and are on a unique multi-tiered pay-band system of compensation. The unit also includes attorneys, accountants, and licensing specialists. Unlike the majority of other federal agencies, the Union has the right to negotiate over compensation as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) (Dodd-Frank Act).[1/] This law also charges the Employer with maintaining "comparability with, other Federal banking agencies" when it comes to the "total amount of compensation and benefits" of OCC employees.[2/] Accordingly, as part of negotiations over a master collective-bargaining agreement (MCBA)[3/] several years ago, the parties agreed to Article 39. This article covers "compensation and benefits," and also permits either party to reopen Article 39.

When the parties entered into Article 39, they both agreed (and still do) that it is essential for recruitment and retention purposes that high-quality performers should be

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1/ See 12 U.S.C. § 481.

2/ See 12 U.S.C. § 482.

3/ The MCBA was entered into on December 6, 2013, and expires on December 8, 2018.

rewarded for their accomplishments. Accordingly, section 1 of Article 39 establishes a system for awarding merit-based pay increases and merit-based bonuses to high-performance employees that is linked to the Employer's performance rating system. The performance system rates employees at four levels, with a 1 rating being the lowest rating and a 4 being the highest. Employees who receive an annual-performance rating of at least a 3 or the highest rating of 4 are eligible for merit-based increases to their overall pay. Additionally, under Article 39, for purposes of merit increases, an overall rating of 3 is further divided into three additional tiers: a "low 3," a "mid 3," and a "high 3." Thus, there are actually four distinct levels of merit-pay increase eligibility.

Once supervisors complete their annual employee ratings, each division - or "line of business" - creates a performance matrix chart that assigns a certain "performance multiplier"/percentage to each of the four eligible tiers.[4/] These percentages are used to help supervisors determine how much of a merit increase they should award employees based upon which of the four tiers they achieve. In addition to performance multipliers, Article 39 states that divisions should also use "range penetration" when they calculate the amount of an employee's merit-pay increase. Under range penetration, supervisors subtract or add *additional* points to each of the four tiers that permit merit-pay increases. The lower a tier, the *more* points an employee receives for range-penetration purposes. Conversely, the higher an employee's rating, the *less* points he or she receives. The end result is that employees who receive higher ratings still receive higher merit-pay increases, but those increases are lower than they would be in the absence of range penetration.[5/] The purpose of range penetration is to "stabilize" pay amongst employees who hold similar positions.

Finally, under Article 39, the Employer sets aside 3.1% of its budget for merit-pay increases. The Employer also sets aside .9 % of its budget for merit bonuses, which is something supervisors can award to employees in addition to merit increases. However, only employees with "high 3s" or 4s are eligible for these awards (.5% and 1% of their base pay, respectively). Article 39 also permits funding for "special

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4/ A "high 3" is entitled to a 1.67% multiplier. "Mid 3s" receive 1.33%. "Low 3s" have multipliers of 1.0%.

5/ This feature is displayed in greater detail in the Employer's final offer set forth below.

increases," which are performance-based cash awards that are distributed to employees who acquire new job-related skills. Any unused special-increase funds are divided between merit increases and merit bonuses.

Over time, numerous issues evolved that the Union found troubling in these provisions of Article 39. In particular, employees raised concerns about their annual ratings, believing them to be subjective and/or unduly inconsistent across Divisions. Because Article 39 states that ratings affect the amount of merit-pay increases/bonuses an employee receives, employees expressed frustration over the current performance-rating system and a desire to make changes. Thus, about 3 years ago, the Union and the Employer created a joint working group meant to assess potential problems with the current performance system. Solutions, however, were not easily forthcoming. The parties therefore agreed to hire an outside contractor to analyze the system and craft possible solutions to a variety of issues. The Employer's performance system, meanwhile, remained intact.

As the foregoing process was unfolding, the Department of Treasury Inspector General (IG) released a report in 2014 about the Employer's personnel practices. The report showed information that the Union considered alarming. Of particular note, the report found that there were "statistically significant differences between performance ratings of Whites and African Americans." In this regard, the report noted that the "performance ratings of Whites were higher than those of African American employees at a statistically significant level." In addition to the foregoing IG findings, the Union compiled information from several of the Employer's lines of business that demonstrated non-minority employees routinely received higher performance ratings than African-American employees.[6/] In addition, the IG report found that there were

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6/ The Union's review of 2014 annual ratings found that in one line of business 19.4% of non-minority employees received an overall rating of 4 compared to 11.3% of African-American employees. In a second line, 26% of non-minority employees received a 4, versus just 13% of African-American employees. And in a third line, 41% of the non-minority work force received 4s as compared to 31% of African-American employees who received the same rating. This discovery may have inadvertently revealed other concerns about the Agency's performance rating system. In one line, little more than 30% of employees received a 4 rating, differences between ratings of bargaining-unit employees and non-bargaining unit employees, with the latter receiving more favorable ratings. The report also showed ratings disparities amongst the various lines of businesses, as shown in footnote 6.

The Union's probing of concerns with merit-pay distribution dovetailed with discontent over administration of locality pay. Employees in some of the Employer's locales receive a locality-based pay adjustment based upon data that is compiled in a wage survey by an independent contractor, Towers Watson. Towers Watson reaches out to other participating agencies with a list of 68 different positions. Each agency then assesses whether it has jobs that match those positions. The contractor meets with the agencies, individually and as a group, to ensure accuracy. Based upon the foregoing, the contractor then releases a report to the agency showing, among other things, average salary for the positions. With this and its own data, the Employer also creates an "average" city that is used for salary calculation purposes. Locales that fall below this average wage do not receive any locality pay.

The Towers Watson survey process leaves a bitter taste for employees, in large part, due to its perceived opaqueness. The denial of locality pay to a significant number of OCC is also resented because numerous other Federal banking agencies provide locality pay to *all* of their employees. Additionally, the Union reviewed the salary information of certain Federal Deposit Insurance Corporation (FDIC) employees it believed performed duties that were comparable to specific OCC employees. The Union concluded that FDIC employees were compensated at a higher rate than comparable OCC employees. Specifically, the average pay for the FDIC group was $123,707 whereas the average pay for the OCC group was $116,727. Thus, the Union maintained that the Employer was failing in its statutory duty to ensure that its wages remain comparable to other Federal banking agencies.

These issues led to the Union request to reopen Article 39 to address problems with respect to the performance system and locality pay. The parties subsequently conducted nine face-to-face negotiation/mediation sessions, with the assistance of a private mediator, between September and November 2015. The parties reached agreement on several provisions, but they could not do so with respect to the two issues that are the subject of

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while in another line, 72% of the employees received a 4 rating.

this dispute. The language of the parties' competing proposals is set forth below; briefly summarized they are:

Merit Pay

The Union recognizes the importance of pay for performance, but it cannot ignore the failings of the Employer's current system. Thus, **the Union** seeks to remedy these objections by proposing that the Employer delink merit-pay increases to annual ratings for the life of the MCBA. The key component of the Union's proposal is that any employee who receives an overall rating of 3 -- regardless of tier -- or a rating of 4 would receive a merit-pay increase of at least 4% of their base salary. They also would be eligible for a .5% or 1% merit bonus for any 3 rating and 4 rating, respectively. Range penetration would vanish and the Employer also would be required to set aside an additional .5% for bonuses, raising the budget for merit increases and bonuses from 4% to 4.5%. In contrast, **the Employer** proposes largely maintaining the *status quo* but eliminating one tier within the 3 overall rating - the "mid 3;" "high 3s" and "low 3s" would remain. The budget set aside of 4% would remain as currently divided.

Locality Pay

The Union maintains that the Towers Watson wage-survey process is fraught with vagueness and should be abandoned. In its place, **the Union** proposes basing locality pay on the U.S. Department of Labor, Bureau of Labor Statistics' (BLS) locality pay program for General Schedule (GS) employees. This program also is used by virtually all Federal banking agencies and ensures that *all* employees receive locality pay. Several OCC locales would receive locality increases, but most significantly, employees located in Rest of the United States (RUS) locations -- who do not currently receive any locality pay -- would get such pay at the rate of 4%. Only then, the Union contends, will OCC employee pay truly be comparable to other relevant agencies. Moreover, the Union believes that a salary comparison of certain OCC positions to equivalent positions at the FDIC establishes that FDIC employees are better compensated despite performing similar work. Thus, OCC pay is not truly comparable to equivalent banking agencies. **The Employer** rejects the imposition of the BLS pay program but would agree to forego the reference to the Towers Watson process in Article 39. Some locations would receive an increase of several percentage points,[7/] remaining locations that already receive locality pay would get a 1% bump, and RUS employees would receive .5% in locality pay. The Employer believes that overall employee compensation ensures appropriate compensation for all employees, including RUS employees. But it is willing to offer .5% locality pay to RUS employees in a symbolic gesture to bring this matter to closure.

THE PARTIES' PROPOSALS

I. Union's Proposal

Merit Pay

A. For pay increases effective the first pay period in 2016, and each subsequent year until a new agreement is reached, the Employer will provide each employee rated "3" or higher a merit increase equal to 4.0 percent of his/her base pay.

B. In addition, the Employer will include in its payroll budget for each of these years an allocation for merit bonuses of 0.5 percent of base pay. For work performed during each fiscal year covered by this Article, the merit bonus pool will be divided into separate pools for each line of business. Employees rated "4" will receive a minimum of 1.0 percent of their current base pay as a merit bonus; employees rated "3 high" will receive a minimum of 0.5 percent of their current base pay as a merit bonus. Merit bonus determinations will be made fairly and equitably, based on strength of performance against performance objectives and standards, and/or contribution to business unit or Employer objectives.

C. This section may be reopened by either party following completion of the work of the joint working group on redesign of the performance management program. This work will be considered completed upon validation of performance standards (under a process mutually agreed-upon by the parties) covering

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7/ Specifically, it would increase locality pay for the New York City region, San Francisco, Boston, and Providence by 5%. Pittsburgh would receive a 4% increase, and Washington, D.C.'s locality pay would rise by 2%.

positions occupied by at least eighty percent of bargaining unit employees.

Special Increases

A. The Employer will distribute Special Increases in accordance with the existing compensation program policy and the subsequent policy modifications that went into effect on February 25, 2013. On a bi-annual basis, the Employer will take affirmative steps to provide guidance, education, and advice to managers and supervisors on the proper use of these Special Increases, with particular emphasis on their use for employees low in the pay range who have acquired or demonstrated new skills. However, all employees who meet the criteria identified in the policy are eligible for a Special Increase regardless of their position in the pay band; to the extent such an increase would otherwise result in the employee exceeding the maximum pay for the pay band, the employee will receive that portion of the increase as a lump sum.

B. A minimum of 50 percent of any unused Special Increase funds available within a line of business will be added to the merit pay distribution for employees in that line of business, with any remaining amount distributed as bonuses to all employees in that line of business. Funds designated for Special Increases for pre-commissioned examiners are restricted to that purpose and are not available for distribution as bonuses.

Data:

No later than April 1 of each year, the Employer will provide the Union, to the extent consistent with law, an electronic file identifying the bonus increase percentage and the special increase percentage for each bargaining unit employee along with the following fields: line of business/pay pool, position title, job series, pay band, district, gender, race/national origin, year of birth, rating (by strength of performance category).

Locality Pay[8/]

A. Locality pay is a salary differential that employees receive in addition to their base pay, based on differences in the cost of labor (and, to a lesser extent, cost of living) in the metropolitan areas of their respective duty stations.

B. Each duty station will be assigned to a locality pay area based on the definitions established by the President's Pay Agent.

C. For 2016-2018, the locality rate for each location is set forth in Attachment A. These rates reflect the relative cost of labor differences for the various cities, as identified by the Bureau of Labor Statistics in the calculation of private sector pay rates for use in the federal locality pay program.

II. Employer's Proposal

Section 1 - Merit Pay

A. Pay Pools

For pay increases effective the first pay period in January 2016, January 2017, and January 2018, and in each subsequent year until this Article is reopened, the Employer will administer a merit increase pool of 3.1 percent of aggregate base pay. In addition, the Employer will include in its payroll budget for each of these years an allocation for merit bonuses of 0.9 percent of base pay.

This merit increase pool will be divided into separate pools for each of the Employer's lines of business (*e.g.*, Chief Counsel, Chief National Bank Examiner, Mid-size and Community Bank Supervision,

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8/ The Union also attached a chart to its proposal laying out its proposed locality rate for every locale. That chart is attached as an appendix to this decision.

Large Bank Supervision, Ombudsman, Chief of Staff, Office of Management, and Economics).

This section (*i.e.*, Section 1) may be reopened by either party following completion of the work of the joint working group on redesign of the performance management program. This work will be considered completed upon validation of the performance plans by the HR services provider covering positions occupied by at least eighty percent of the bargaining unit employees.

B. Merit Pay Matrix

At the conclusion of each fiscal year covered by this Article, the Employer will gather information regarding the annual performance rating distributions for each line of business. Subsequently, after consultation with the Union, the Employer will publish a matrix for each individual line of business that will establish a distinct merit increase percentage for each strength of performance level (*i.e.*, 4, 3 high, and 3). These matrices will be developed utilizing the framework below, spending 3 percent of pay, and will guarantee a meaningful pay increase differentiation between varying levels of performance.

In addition to strength of performance, matrices based on the framework below will take into consideration an employee's current level of compensation within the pay band (range penetration). Pay bands will be divided into thirds (*i.e.*, lower, middle, and upper) to determine in which range an employee's existing base salary lies. Employees with existing salaries in the lower one-third of a pay band would receive 0.25 percentage points more than employees in the middle third. Employees with existing salaries in the upper one-third of a pay band would receive 0.25 percentage points less than employees in the middle one-third.

STRENGTH OF PERFORMANCE	LOWER THIRD OF PAY BAND	MIDDLE THIRD OF PAY BAND	UPPER THIRD OF PAY BAND
4	2.0(X) + 0.25	2.0(X)	2.0(X) - 0.25
3 High	1.5(X) + 0.25	1.5(X)	1.5(X) - 0.25
3	1.0(X) + 0.25	1.0(X)	1.0(X) - 0.25
2 or 1	0	0	0

** "X" will be defined within each line of business based on performance rating distributions.*

C. Determination of Strength of Performance for 3-Rated Employees

PERFORMANCE RATING	EXPLANATION
3	Means 0 or 1 skill element is rated 4
3 High	Means 5 skill elements are rated 4 when there are 6 elements rated, or means 4 skill elements are rated 4 when there are 5 elements rated, or means 3 skill elements are rated 4 when there are 4 elements rated

Note: This table applies when all elements are rated 3 or 4. If one element is rated 2-improving, the strength of performance is 3.

D. Merit Bonuses

For work performed during each fiscal year covered by this Article, the merit bonus pool will be divided into separate pools for each line of business. Employees rated "4" will receive a minimum of 0.9 percent of their current base pay as a merit bonus; employees rated "3 high" will receive a minimum of 0.5 percent of their current base pay as a merit bonus.

Merit bonus determinations will be made fairly and equitably, based on strength of performance against performance objectives and standards, and/or contribution to business unit or Employer objectives.

E. Data

Within a reasonable time after the completion of annual pay determinations, the Employer will provide the Union, to the extent consistent with law, an electronic file identifying the merit increase percentage, merit bonus percentage and special increase percentage for each bargaining unit employee along with the following fields: line of business/pay pool, position title, job series, pay band, district, gender, race/national origin, year of birth, and rating (by strength of performance category). If there is some legal reason why the data in all fields cannot be provided, then the parties shall discuss whether there are other options for providing necessary information to the Union.

Section 2 - Special Increases

C. The Employer will distribute Special Increases in accordance with the existing compensation program policy and the subsequent policy modifications that went into effect on February 25, 2013. On a bi-annual basis, the Employer will take affirmative steps to provide guidance, education, and advice to managers and supervisors on the proper use of these Special Increases, with particular emphasis on their use for employees low in the pay range who have acquired or demonstrated new skills. However, all employees who meet the criteria identified in the policy are eligible for a Special Increase regardless of their position in the pay band; to the extent such an increase would otherwise result in the employee exceeding the maximum pay for the pay band, the employee will receive that portion of the increase as a lump sum.

D. A minimum of 50 percent of any unused Special Increase funds available within a line of business will be added to the merit increase pool for that line of business. The Senior Deputy Comptroller for each line of business will have discretion to determine how to allocate the remainder of the unused funds between the merit increase pool and the merit bonus pool. Funds designated for Special Increases for pre-commissioned examiners are restricted to that purpose and are not available for distribution as merit pay or merit bonuses.

Section 3 - Geographic Pay[9/]

Geographic pay (GEO) is a salary differential that employees receive in addition to their base pay, based on differences in the cost of labor and cost of living in and/or around their respective duty station.

A. Based upon current Geographic Pay data and the Agency's interest to be able to recruit and retain employees—particularly in key locations—Geographic Pay will be adjusted for the term of this agreement (see Attachment 4) as follows:

1. The Agency will increase the GEO rate by 5% for New York City region, San Francisco, Boston, and Providence.

2. The Agency will increase the GEO rate by 4% for Pittsburgh.

3. The Agency will increase the GEO rate by 2% for Washington, D.C. region.

4. The Agency will increase the GEO rate by 1% for all other cities that currently receive GEO.

5. The Agency will pay a GEO rate of .5% for any other duty location not referenced above.

CONCLUSION ON THE MERIT-PAY DISPUTE

The Arbitrator will order a modified version of the Employer's final offer. The heart of this dispute lies with the Union's dissatisfaction over the Employer's performance system. The Union agrees that it is important to recognize meaningful

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9/ Like the Union, the Employer attached a chart to its locality-pay proposal that set forth its proposed rates for each locale. That chart also is attached to this decision in an appendix.

distinctions for different levels of performance. But, in its view, the system is broken beyond repair in its current form which, in turn, leads to employee dissatisfaction over pay.

Contrary to the Union's claim, however, survey data cited by both parties show that employees are largely satisfied with their performance ratings to the extent that they are tied to their compensation. Recently, the Employer conducted a Federal Employee Viewpoint Survey (FEVS) of its workforce that focused on employees' working conditions. The results showed that nearly 72% of the surveyed employees believe that, "[c]onsidering everything," they are satisfied with their pay. Additionally, nearly 73% of these employees agreed that their performance appraisals accurately reflect their performance. The Employer also conducted a separate employee engagement survey (OCC survey) of its work force for fiscal year 2015. The OCC survey shows that over 1,640 of the 2,490 bargaining-unit employees who participated in the survey (or virtually 2/3rds of all participating employees) believe they are fairly compensated for their performance. Interestingly, only 49% of employees surveyed in the FEVS agreed that pay raises are dependent on their performance. Similarly, only 45% of bargaining-unit employees who participated in the OCC survey agreed with the proposition that they will receive a greater reward for greater performance. It is unclear whether these low percentages arise because the Employer makes too many performance-based rating distinctions (as the Union argues) or because the Employer does not make enough distinctions (as the Employer maintains). On balance, therefore, I find the statistical evidence somewhat supports the claim that the majority of employees are satisfied with their pay in its current form.

Despite the foregoing conclusion, I cannot permit the IG's or the Union's evidence relating to potential adverse impact, *i.e.*, discrimination, pass without comment. These figures speak for themselves and, without question, are troubling. During the med-arb hearing, Employer witnesses attempted to explain away these findings by focusing on granular disparities between experience and pay level. I did not find the Employer's explanation persuasive. It is, however, unclear whether the Union's cited findings are endemic to the Employer's performance plan or the administration and implementation of that plan by individual supervisors, or both. Either way, these concerns demand further review and exploration. I urge the parties to do so as they work jointly to make appropriate modifications to their performance system. I understand that my jurisdiction is limited to examining the parties' stated interests, not remedying alleged claims of racial bias. Thus, it would be inappropriate for me to comment further on those matters. Similarly, other forums are better suited to address the Union's claims that its proffered calculations show adverse impact on the basis of bargaining-unit status.

Despite these issues, I do not ignore the Employer's common-sense goal of recruiting highly qualified individuals with financial incentives to entice them to work at the OCC and, equally important, to remain with the Agency. As noted above, OCC can demonstrate to perspective recruits that most OCC employees appear comfortable with their pay in its current form.

Unfortunately, the Union's final offer essentially dismisses these concepts and instead provides a baseline of 4.0% for any employee who receives at least an overall 3 rating. This offer does not provide any meaningful distinctions, thereby offering employees little financial incentive to strive for higher levels of distinction.

Moreover, the Union offered little justification for its budget increase to 4.5% (which was presented for the first time in its final offer). It merely argued that OCC could differentiate levels of performance through awarding bonuses. The funds for such bonuses would be available by accepting the Union's proposed .5% increase in the budget to 4.5%. Currently, such distinctions are recognizable within OCC's budget and the Union has not justified its proposed increase.

I, therefore, appropriately conclude to adopt the Employer's levels of demarcation for performance as stated in its final offer, *i.e.*, a 3, "high 3," and a 4. Likewise, I will retain the same budget split of 3.1% for merit increases and .9% for merit bonuses.

My ordering adoption of the Employer's different tiers is, however, accompanied also by ordering modifications. Most importantly, I hereby strike the "range penetration" requirement. Essentially, the Employer believes this feature is necessary to stabilize pay for employees that encumber similar positions. I conclude that this goal is at odds with the Employer's stated desire of distinguishing different levels of performance. After being rewarded with higher pay for higher performance, an employee could find themselves running into an artificially constructed pay ceiling. Given the Employer's self-professed interest in rewarding high performers, I cannot agree to the concept of imposing a structure that limits those rewards for worthy employees as they accumulate more years of service.

I further conclude it appropriate to change the percentage multipliers that the Employer assigned to each tier as part of its final offer. As written in the Background section, each line of business uses the tiers to create performance matrices that serve as the basis for merit-pay increases. Each tier is also assigned a certain percentage multiplier. The Employer's final offer jettisons the "mid 3," leaving only a "low 3" and a "high 3," but it also changes the multiplier percentage that would be assigned to "high 3s." Instead of receiving 1.67%, as it currently does, a "high 3" would get a 1.5% multiplier. This unwarranted change effectively penalizes high performers for reasons that were neither explained nor justified by the Employer. Thus, I modify the Employer's final offer so that "high 3s" will continue to be assigned 1.67%. All other percentages will remain as set forth in the Employer's final offer.

I note that the parties are in slight disagreement over how to properly handle special increases, specifically, the issue of unused special-increase funds. In its final offer, the Union proposes placing 50% of those funds in the merit-increase pool, and any remaining funds in bonuses.[10/] The Employer also would place 50% of funds into merit-increases, but then give Division heads discretion to divide up the remaining funds. Merit-increases are sufficiently addressed through the addition of a minimum of 50% of unspent special-increase funds. I, therefore, find it appropriate to accept the Union's proposed approach. Thus, I will impose its language that remaining unused special-increase funds will be distributed as merit bonuses.

One other issue appears to have escaped scrutiny by both parties, and that is the topic of "data collection." In short, under Article 39 the Employer is currently required to turn over to the Union certain data related to merit increases, merit bonuses, and special increases within "a reasonable time" after

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10/ This proposal arises from the Union's final offer submitted at the conclusion of the med-arb proceeding. Subsequently, in its post-hearing brief and without elaboration, the Union stated that it was seeking to use all unused funds for *merit increases*. *See* Union's Post-Hearing Brief at 2. In the absence of any explanation, however, I will rely upon the language of the actual offer it submitted to me on March 9.

"the completion of annual pay determinations." The parties are required to meet and discuss any legal objections the Employer might have concerning that data. Instead of a "reasonable time," the Union proposes a deadline of April 1, and it also proposes dropping the requirement to meet to discuss legal objections. Consistent with my belief that the parties should engage in open discussions about performance data, I will not drop Article 39's mandate that the parties should meet to talk about legal concerns arising from turning over collected data. I believe that it is appropriate to impose the Union's April 1st deadline to ensure discussions continue in an expedited fashion, particularly in light of the parties' ongoing and seemingly unending evaluation process of the current performance management system.

Finally, the parties have agreed to a reopener clause that permits reopening of Article 39 when an evaluation of the Employer's performance system is complete. This decision permits the current rating-based pay system to remain largely intact. I am disturbed, however, by the Employer's justification for there to be multiple levels of 3s. Rather, I am convinced that distinctions between employees cannot be so finely differentiated. It also places undue burdens on supervisors to determine what level of 3 an employee merits. It strikes me that, at the end of the day, a 3 should be a 3. The Employer appears to have acknowledged this by agreeing to delete the mid-level 3 during this process.

CONCLUSION ON LOCALITY/GEOGRAPHIC PAY DISPUTE

The Arbitrator will order a modified version of the Employer's proposal and accompanying rates to include a 1% increase for RUS employees rather than the .5% proposed by the Employer. Neither party provided particularly compelling evidence of their respective position. The Union failed to fully justify its request to alter the *status quo* as required of the party seeking change. The Union did, however, convince me that OCC employees in the RUS have not been treated fairly in the matter of locality pay. The Employer appears to have acknowledged an inequity in the fact that other Federal financial regulatory agencies provide locality pay to all of their locales while the OCC does not.[11/] Hence its offer to provide a .5% allowance in locality pay to RUS employees.

11/ These other agencies include the Securities and Exchange Commission, the U.S. Commodity Futures Trading Commission, I have earlier written that I am not persuaded by either party's presentation with pay comparability. The Union's limited comparison to FDIC is contrary to the statutory requirement.[12/] To the extent that it is worthy of any relevance, I am impressed with an unmarked exhibit introduced by the Employer during our discussion on locality pay. The exhibit purports to create a pay band equivalency chart between OCC and FDIC. It demonstrated to me only the fact that FDIC employees, for the most part, are in higher paid pay bands than their OCC counterparts.

- For example, 34% of all OCC employees are located below Pay Band 5 and only 1% are located in Pay Band 5, whereas only 16% of all FDIC employees are located below the equivalent of Pay Band 5 and 10% are located in the equivalent of Pay Band 7.

- In Washington, D.C., 20% of OCC employees are placed in Pay Bands 2, 3, and 4, while only 11% of FDIC employees are placed in the equivalent of Pay Bands 2, 3, and 4.

- In New York City, 28% of OCC employees are slotted in Pay Bands 2, 3, and 4, while only 16% of FDIC employees are slotted in the equivalent of Pay Bands 2, 3, and 4.

- In RUS, 49% of OCC employees are found in Pay Bands 2, 3, and 4 whereas only 21% of FDIC employees are located in the equivalent of Pay Bands 2, 3, and 4.

These facts may not shed light on the locality pay issue but it may explain some of the alleged disparity between salaries at the OCC and FDIC as well as raise other questions with respect to the performance evaluation system. In any event, it is understood that locality pay cannot be examined in isolation of other matters in reviewing comparability, which consists of the "total amount of compensation of benefits."

Clearly the Union's evidence in favor of a complete locality-pay overhaul was lacking. I do conclude, however, that

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the FDIC, the National Credit Union Administration, and the Consumer Protection Financial Bureau.

12/ See 12 U.S.C. § 482.

it did express the interests of RUS employees that merit weight. At the med-arb hearing, several members of the Union's bargaining team offered persuasive (and unchallenged) testimony that bargaining-unit employees at RUS locations lose motivation over their lack of any locality pay. In essence, they view themselves as second class employees, not comparable to their OCC colleagues at other locations. As fully discussed above, the Employer has consistently expressed a keen interest in attracting and *retaining* quality employees. This stated goal is in stark contrast to the feeling of dissatisfaction among RUS employees. It is, therefore, appropriate to conclude that they should receive locality pay because such an award meets the Employer's interests of retaining employees and the Union's interests of satisfying its employees through pay increases. On balancing these interests and considerations I arrive at an amount of 1%.

The Union requests 4% for RUS employees, but that request is premised upon the adoption of its total proposal, which for reasons discussed above, does not merit imposition. The Employer offered .5% in an effort to "close the gap" between the parties. This falls short of their proposed offer of a 1% increase to *all* of its other locales as part of its final offer. A lesser increase to RUS employees would perpetuate the feelings of second-class status that the Union has identified. Furthermore, the Employer did not explain why RUS employees should be treated differently, which raises another concern.

OCC's position appears to be partially driven by its reliance on the wage-survey process administered by Towers Watson. This process is fraught with numerous issues that should, in a perfect world, give the Employer serious pause about continuing to rely upon it. First, the process is plagued by one-sided vagueness. The contractor bases its wage survey on job position descriptions it creates, seemingly without input from the Union or the Employer. It then provides those descriptions solely to the Employer who, without employee feedback or input, decides whether it has positions that match those descriptions. Such a closed process can lead to unintended consequences, thereby skewering results.

The survey process also appears to present issues about accurate work-force representation. The survey is apparently limited to 68 positions. Yet, the Employer provided no evidence to indicate this number covers enough of its positions. To the contrary, in its post-hearing brief, the Employer noted that the survey reflected only 1,900 employees in the OCC, omitting more than 1/3rd of the bargaining unit. Thus, it is difficult to determine whether the contractor's process captures an accurate snapshot of the Employer's workforce.

Perhaps recognizing some of the foregoing concerns, the Employer proposes simply adopting certain rates for all of its locations without any reference to the methodology used to calculate the rates - fair enough. Given the current methodology, I believe it is appropriate to adopt this approach. I also suggest more: I urge the Employer to consider jettisoning this system if/when the parties next negotiate Article 39. It should be evident by now that the system - at least in its current form - creates no small amount of discord between the parties. The employees simply do not trust its validity. The parties are in the best position to remedy concerns over the system and, ultimately, create a more credible system to determine locality pay.

ORDER

The following wording is ordered to be adopted by the parties.

Section 1 - Merit Pay

F. Pay Pools

For pay increases effective the first pay period in January 2016, January 2017, and January 2018, and in each subsequent year until this Article is reopened, the Employer will allocate a portion of its budget for a merit increase pool of 3.1 percent of aggregate base pay. In addition, the Employer will include in its payroll budget for each of these years an allocation for merit bonuses of 0.9 percent of base pay.

This merit increase pool will be divided into separate pools for each of the Employer's lines of business (*e.g.*, Chief Counsel, Chief National Bank Examiner, Mid-size and Community Bank Supervision, Large Bank Supervision, Ombudsman, Chief of Staff, Office of Management, and Economics).

This section (*i.e.*, Section 1) may be reopened by either party following completion of the work of the joint working group on redesign of the performance management program. This work will be considered completed upon validation of the performance plans by the HR services provider covering positions occupied by at least eighty percent of the bargaining unit employees.

G. Merit Pay Matrix

At the conclusion of each fiscal year covered by this Article, the Employer will gather information regarding the annual performance rating distributions for each line of business. After consultation with the Union, the Employer will publish a matrix for each individual line of business that will establish a distinct merit increase percentage for each strength of performance level (*i.e.*, 4, 3 high, and 3). These matrices will be developed utilizing the framework below, spending 3.1 percent of pay, and will guarantee a meaningful pay increase differentiation between varying levels of performance.

STRENGTH OF PERFORMANCE	**LOWER THIRD OF PAY BAND**	**MIDDLE THIRD OF PAY BAND**	**UPPER THIRD OF PAY BAND**
4	2.0(X)	2.0(X)	2.0(X)
3 High	1.67(X)	1.67(X)	1.67(X)
3	1.0(X)	1.0(X)	1.0
2 or 1	0	0	0

** "X" will be defined within each line of business based on performance rating distributions.*

H. Determination of Strength of Performance for 3-Rated Employees

PERFORMANCE RATING	**EXPLANATION**
3	Means 0 or 1 skill element is rated 4
3 High	Means 5 skill elements are rated 4 when there are 6 elements rated, or means 4 skill elements are rated 4 when there are 5 elements rated, or means 3 skill elements are rated 4 when there are 4 elements rated

Note: This table applies when all elements are rated 3 or 4. If one element is rated 2-improving, the strength of performance is 3.

I. Merit Bonuses

For work performed during each fiscal year covered by this Article, the merit bonus pool will be divided into separate pools for each line of business. Employees rated "4" will receive a minimum of 0.9 percent of their current base pay as a merit bonus; employees rated "3 high" will receive a minimum of 0.5 percent of their current base pay as a merit bonus. Merit bonus determinations will be made fairly and equitably, based on strength of performance against performance objectives and standards, and/or contribution to business unit or Employer objectives.

J. Data

No later than April 1 of each year, the Employer will provide the Union, to the extent consistent with law, an electronic file identifying the merit increase percentage, merit bonus percentage and special increase percentage for each bargaining unit employee along with the following fields: line of business/pay pool, position title, job series, pay band, district, gender, race/national origin, year of birth, and rating (by strength of performance category). If there is some legal reason why the data in all fields cannot be provided, then the parties shall discuss whether there are other options for providing necessary information to the Union.

Section 2 - Special Increases

E. The Employer will distribute Special Increases in accordance with the existing compensation program policy and the subsequent policy modifications that went into effect on February 25, 2013. On a bi-annual basis, the Employer will take affirmative steps to provide guidance, education, and advice to managers and supervisors on the proper use of these Special Increases, with particular emphasis on their use for employees low in the pay range who have acquired or demonstrated new skills. However, all employees who meet the criteria identified in the policy are eligible for a Special Increase regardless of their position in the pay band; to the extent such an increase would otherwise result in the employee exceeding the maximum pay for the pay band, the employee will receive that portion of the increase as a lump sum.

F. A minimum of 50 percent of any unused Special Increase funds available within a line of business will be added to the merit pay distribution for employees in that line of business, with any remaining amount distributed as bonuses to all employees in that line of business. Funds designated for Special Increases for pre-commissioned examiners are restricted to that purpose and are not available for distribution as bonuses.

Section 3 - Geographic Pay

Geographic pay (GEO) is a salary differential that employees receive in addition to their base pay, based on differences in the cost of labor and cost of living in and/or around their respective duty station.

A. Based upon current Geographic Pay data and the Agency's interest to be able to recruit and retain employees—particularly in key locations—Geographic Pay will be adjusted for the term of this agreement (see Attachment 4)[13/] as follows:

1. The Agency will increase the GEO rate by 5% for New York City region, San Francisco, Boston, and Providence.

2. The Agency will increase the GEO rate by 4% for Pittsburgh.

3. The Agency will increase the GEO rate by 2% for Washington, D.C. region.

4. The Agency will increase the GEO rate by 1% for all other cities that currently receive GEO.

13/ The language will incorporate the Employer's attachment that is set forth in the attached Employer Appendix I, but it should be understood that the attachment is modified to include 1.0% for all RUS locales.

5. The Agency will pay a GEO rate of 1% for any other duty location not referenced above.

Donald S. Wasserman
Arbitrator

May 4, 2016
Washington, D.C.

EMPLOYER APPENDIX I

Employer Attachment to Locality Pay Proposal

No.	OCC Duty Station	Current Rate	NEW 2016-2018	Increase
1	Albuquerque, NM	0.0%	0.5%	0.5%
2	Alexandria, MN	0.0%	0.5%	0.5%
3	Amarillo, TX	0.0%	0.5%	0.5%
4	Arlington, VA	18.0%	20.0%	2.0%
5	Atlanta, GA	3.0%	4.0%	1.0%
6	Billings, MT	0.0%	0.5%	0.5%
7	Birmingham, AL	0.0%	0.5%	0.5%
8	Blue Ash, OH	3.0%	4.0%	1.0%
9	Boston, MA	18.0%	23.0%	5.0%
10	Carlsbad, CA	23.0%	24.0%	1.0%
11	Champaign, IL	3.0%	4.0%	1.0%
12	Charleston, WV	0.0%	0.5%	0.5%
13	Charlotte, NC	3.0%	4.0%	1.0%
14	Chicago, IL	13.0%	14.0%	1.0%
15	Cleveland, OH	3.0%	4.0%	1.0%
16	Columbus, OH	3.0%	4.0%	1.0%
17	Dallas, TX	8.0%	9.0%	1.0%
18	Denver, CO	8.0%	9.0%	1.0%
19	Downers Grove, IL	13.0%	14.0%	1.0%
20	Dublin, OH	3.0%	4.0%	1.0%
21	East Syracuse, NY	3.0%	4.0%	1.0%
22	Edison, NJ	33.0%	38.0%	5.0%
23	Evansville, IN	0.0%	0.5%	0.5%
24	Fargo, ND	0.0%	0.5%	0.5%
25	Fort Worth, TX	8.0%	9.0%	1.0%
26	Houston, TX	8.0%	9.0%	1.0%
27	Indianapolis, IN	0.0%	0.5%	0.5%
28	Iron Mountain, MI	0.0%	0.5%	0.5%
29	Irving, TX	8.0%	9.0%	1.0%
30	Jacksonville, FL	3.0%	4.0%	1.0%
31	Jersey City, NJ	33.0%	38.0%	5.0%
32	Joplin, MO	0.0%	0.5%	0.5%
33	Little Rock, AR	0.0%	0.5%	0.5%
34	Longview, TX	0.0%	0.5%	0.5%
35	Los Angeles, CA	23.0%	24.0%	1.0%
36	Louisville, KY	0.0%	0.5%	0.5%
37	Lubbock, TX	0.0%	0.5%	0.5%

38	Marlton, NJ	13.0%	14.0%	1.0%
39	Mclean, VA	18.0%	20.0%	2.0%
40	Memphis, TN	0.0%	0.5%	0.5%
41	Miami, FL	13.0%	14.0%	1.0%
42	Milwaukee, WI	8.0%	9.0%	1.0%
43	Minneapolis, MN	8.0%	9.0%	1.0%
44	Monroe, PA	0.0%	4.0%	4.0%
45	Monterey Park, CA	23.0%	24.0%	1.0%
46	Nashville, TN	0.0%	0.5%	0.5%
47	New Orleans, LA	0.0%	0.5%	0.5%
48	New York, NY	33.0%	38.0%	5.0%
49	Oklahoma City, OK	0.0%	0.5%	0.5%
50	Omaha, NE	0.0%	0.5%	0.5%
51	Cleveland Park, KS	3.0%	4.0%	1.0%
52	Peoria, IL	0.0%	0.5%	0.5%
53	Phoenix, AZ	8.0%	9.0%	1.0%
54	Pittsburgh, PA	0.0%	4.0%	4.0%
55	Providence, RI	18.0%	23.0%	5.0%
56	Roanoke, VA	0.0%	0.5%	0.5%
57	Salina, KS	0.0%	0.5%	0.5%
58	Salt Lake City, UT	0.0%	0.5%	0.5%
59	San Antonio, TX	0.0%	0.5%	0.5%
60	San Francisco, CA	33.0%	38.0%	5.0%
61	Santa Ana, CA	23.0%	24.0%	1.0%
62	Schaumburg, IL	13.0%	14.0%	1.0%
63	Seattle, WA	18.0%	19.0%	1.0%
64	Sioux City, IA	0.0%	0.5%	0.5%
65	Sioux Falls, SD	0.0%	0.5%	0.5%
66	Southfield, MI	13.0%	14.0%	1.0%
67	St. Louis, MO	3.0%	4.0%	1.0%
68	Stamford, CT	33.0%	38.0%	5.0%
69	Tampa, FL	3.0%	4.0%	1.0%
70	Trevose, PA	13.0%	14.0%	1.0%
71	Tulsa, OK	0.0%	0.5%	0.5%
72	Washington, D.C.	18.0%	20.0%	2.0%
73	West Des Moines, IA	0.0%	0.5%	0.5%
74	Wichita, KS	0.0%	0.5%	0.5%
75	Wilkes Barre, PA	0.0%	0.5%	0.5%
76	Wilmington, DE	13.0%	14.0%	1.0%

Notes:

Providence uses same rate as Boston

Carlsbad, Monterey Park, and Santa Ana use the same rate as LA Downers Grove and Schaumburg use the same rate as Chicago Fort Worth and Irving use the same rate as Dallas
Edison, Jersey City, and Stamford use the same rate as NY Arlington and McLean use the same rate as DC
Trevose, Marlton, and Wilmington use the same rate as Philadelphia

UNION APPENDIX I

Union Attachment to Locality Pay Proposal

Locality Rates for 2016 – 2018

Locality Pay Area	Location	Rate
Albuquerque	Albuquerque	5%
Atlanta	Atlanta	7%
Boston	Boston	24%
Boston	Providence RI	24%
Charlotte	Charlotte	7%
Chicago	Chicago	17%
Chicago	Downers Grove	17%
Chicago	Schaumburg IL	17%
Cincinnati	Blue Ash	7%
Cleveland	Cleveland	7%
Columbus	Columbus	7%
Columbus	Dublin OH	7%
Dallas	Dallas	12%
Dallas	Ft. Worth	12%
Dallas	Irving	12%
Denver	Denver	12%
Detroit	Southfield MI/Detroit	17%
Houston	Houston	12%
Indianapolis	Indianapolis	4%
Kansas City	Overland Park KS	6%
Los Angeles	Los Angeles	27%
Los Angeles	Monterey Park CA	27%
Los Angeles	Santa Ana CA	27%
Miami	Miami	17%
Milwaukee	Milwaukee	12%
Minneapolis	Minneapolis	12%
New York	Edison NJ	39%

New York	**Jersey City NJ**	**39%**
New York	**New York**	**39%**
New York	**Stamford CT**	**39%**
Philadelphia	**Marlton NJ**	**17%**
Philadelphia	**Trevose PA**	**17%**
Philadelphia	**Wilmington DE**	**17%**
Phoenix	**Phoenix**	**12%**
Pittsburgh	**Monroeville PA/Pittsburgh**	**6%**
Pittsburgh	**Pittsburgh**	**7%**
RUS	**Alexandria MN**	**4%**
RUS	**Amarillo TX**	**4%**
RUS	**Billings MT**	**4%**
RUS	**Birmingham AL**	**4%**
RUS	**Champaign IL**	**4%**
RUS	**Charleston WV**	**4%**
RUS	**East Syracuse**	**4%**
RUS	**Evansville IN**	**4%**
RUS	**Fargo ND**	**4%**
RUS	**Iron Mt. MI**	**4%**
RUS	**Jacksonville FL**	**4%**
RUS	**Joplin MO**	**4%**
RUS	**Little Rock AR**	**4%**
RUS	**Longview TX**	**4%**
RUS	**Louisville KY**	**4%**
RUS	**Lubbock TX**	**4%**
RUS	**Memphis TN**	**4%**
RUS	**Nashville TN**	**4%**
RUS	**New Orleans LA**	**4%**
RUS	**Oklahoma City**	**4%**

RUS	**Omaha NE**	**4%**
RUS	**Peoria IL**	**4%**
RUS	**Rest of U.S.**	**4%**
RUS	**Roanoke VA**	**4%**
RUS	**Salina KS**	**4%**
RUS	**Salt Lake City**	**4%**
RUS	**San Antonio TX**	**4%**
RUS	**Sioux City IA**	**4%**
RUS	**Sioux Falls SD**	**4%**
RUS	**Tampa FL**	**4%**
RUS	**Tulsa OK**	**4%**
RUS	**West Des Moines IA**	**4%**
RUS	**Wichita KS**	**4%**
RUS	**Wilkes Barre PA**	**4%**
San Diego	**Carlsbad CA**	**27%**
San Francisco	**San Francisco**	**40%**
Seattle	**Seattle**	**22%**
St. Louis	**St. Louis**	**7%**
Washington	**McLean VA/DC**	**24%**
Washington	**Washington, DC**	**24%**