

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

National Labor Relations Board

And

National Labor Relations Board
Professional Association

Case No. 19 FSIP 045

DECISION AND ORDER

This case, filed by the National Labor Relations Board (Agency) on May 20, 2019, concerns a dispute between it and the National Labor Relations Board Professional Association (Union) over ground rules for negotiating the parties' successor Collective Bargaining Agreement (CBA). The Agency filed its dispute with the Federal Service Impasses Panel (FSIP or the Panel) pursuant to Section 7119 of the Federal Service Labor-Management Relations Statute (Statute). On August 8, 2019, the Panel asserted jurisdiction over this dispute and directed it to be resolved in the manner that is discussed below.

BACKGROUND AND PROCEDURAL HISTORY

The Agency is an independent federal agency that administers and enforces the National Labor Relations Act. The Agency consists of two components: (1) the General Counsel (GC); and (2) the Chairman and Members of the Board (Board). The Agency consists of twenty-six regional offices and is headquartered in Washington, D.C. The Union represents Agency employees in two separate bargaining units: the GC-unit and the Board-unit. The Union represents approximately 120 employees at the Agency's headquarters.

In August 2018, the Agency notified the Union of its intent to terminate the existing CBAs for both the GC and Board units in October 2018. The parties started negotiating one set of ground rules to be used in bargaining successor CBAs for the GC and Board units in November 2018. From November 2018 to January 2019, the parties met face-to-face three times to bargain the ground rules. They received mediation assistance from the Federal Mediation and Conciliation Services (FMCS) at two mediation sessions with FMCS Mediator Turner. The Agency declined to continue mediation efforts after the Union failed to provide a written counter-proposal in advance of an upcoming third mediation session.

On August 6, 2019, the Panel voted to assert jurisdiction over the remaining ground rules and to resolve them through a Written Submissions procedure, with an opportunity for rebuttal statements. The parties timely submitted their written positions on August 21, 2019, in accordance with the Panel's instructions. However, the Union submitted its position's attachments and a copy of its final proposals shortly after the 5:00 P.M. deadline.¹ On August 28, 2019, the parties timely submitted their rebuttal statements to the Panel, with the Union sending an email copy to the Agency shortly thereafter.

PROCEDURAL ISSUES

I. Timeliness of Submissions

In its August 28th rebuttal statement to the Panel, the Agency argues, over objection from the Union, that the Panel should not consider the Union's written position or rebuttal statement because the Union's submissions were untimely and not in accordance with the Panel's instructions.² The Agency, however, did not provide any evidence that it was disadvantaged or conversely that the Union was advantaged by: (1) the Union submitting the proposals that it submitted to the Staff prior to the deadline just minutes after the deadline in a different

¹In the Union's final proposals submitted to the Panel, the Union proposes, in Union Proposal #18, the exact same language that the Agency has proposed in Agency Proposal #17. The Union also submitted to the Panel in Union Proposal #23 the same language that the Agency proposed in Agency Proposal #23. Accordingly, the parties are no longer an impasse over these proposals.

² Citing *DHS, Immigration and Customs Enforcement*, 19 FSIP 008 (2019) ("[B]ecause the Procedural Determination letter did not explicitly state that the parties' submissions were due by 5:00 p.m. eastern standard time, the Panel will consider the Union's submission").

format; or (2) the Union resubmitting its rebuttal statement in order to include the Agency 1 minute after the deadline. The Union made its substantive submissions in accordance with the Panel's deadline, with attachments being sent shortly thereafter, and the Agency has failed to identify how it was disadvantaged by the late attachments. Accordingly, the Panel will consider all of the Union's submissions.

II. Jurisdiction

First, the Union, in its August 21st submissions to the Panel, renewed its objections to the Panel's jurisdiction in this matter. The Union again claims that the Panel lacks jurisdiction over this dispute because, in its view, the parties are not at impasse, the FMCS Mediator did not release the parties from mediation, the Agency engaged in bad faith bargaining, and the parties are scheduled for arbitration over the Union's allegation of bad faith. The Panel considered and rejected all of the Union's objections prior to asserting jurisdiction over this matter, and the Union's reasserted objections remain unpersuasive.

Next, the Union alleges the Panel lacks jurisdiction over this impasse because the Panel's current members were appointed in violation of the United States Constitution. The Union asserts that the Panel's composition violates the Appointments Clause of the United States Constitution and, therefore, the Panel cannot act. The Union's argument is unpersuasive, the Panel is appropriately appointed, and the Panel's jurisdiction over this matter is appropriate.

SUBSTANTIVE ISSUES

The parties are in dispute over the remaining 14 ground rules proposals. The parties' proposals are summarized below with complete proposal text available in the accompanying attachment.

1) Dates of Bargaining: Number of Bargaining Team Members

a) Agency's Position

The Agency proposes that each party will be entitled to have up to 7 team members on its bargaining team, which would allow the Agency to be represented by a cross-section of management. The Agency proposes that each bargaining team shall consist of a minimum of 4 permanent bargaining team members, and all bargaining sessions will be closed to anyone other than

bargaining team members. The Agency believes that 4 bargaining team members is sufficient for both parties to be adequately represented at negotiations while maintaining the Agency's fiscal responsibility in granting official time for representation of 125 bargaining unit employees. In support of its position to keep bargaining sessions limited to bargaining team members only, the Agency claims that closed sessions will keep bargaining focused and productive.

b) Union's Position (*Union Proposal #2*)

The Union proposes that each party will be entitled to have up to 8 team members on its bargaining team. The Union believes that 8 is a reasonable number of bargaining team members because the parties will be bargaining two CBAs simultaneously and it is the number the parties have used in past negotiations. The Union proposes that each bargaining team shall consist of a minimum of 3 permanent team members, and all bargaining sessions be closed to anyone who is not a bargaining team member or as provided in the Union's subsequent proposals permitting expert advisors and witnesses. The Union takes the position, and restates it in its rebuttal, that the Agency's proposal of 7 bargaining team members would create unequal representation over the two units and that the Agency has engaged in indefensible recessive bargaining because it previously proposed 8 bargaining team members.

c) Conclusion

It is important to note that the parties will be simultaneously bargaining two separate CBAs and the ground rules are anticipating a bargaining team for each of the two units. Here, the parties agree over several provisions involving the bargaining teams including designating a chief negotiator. The parties disagree over the allotment of bargaining team members (i.e., Agency 7, Union 8), the minimum number of permanent bargaining team members (i.e., Agency 4, Union 3), and access to the bargaining sessions.

The Union's proposal of each bargaining team consisting of a minimum of 3 permanent members is more in line with promoting an effective and efficient government than the Agency's proposal. Based on using a minimum of 3 permanent bargaining members and in light of the Union's request for even bargaining teams for both units; 6 is an appropriate total of bargaining team members. Adopting the Agency's restriction of bargaining sessions to only bargaining team members is discussed as part of

the Union's subsequent proposals permitting non-bargaining team members access to negotiations. Accordingly, the Panel imposes the following modified version of the Agency's proposal on the parties:

Each party will be entitled to have up to 6 team members. At each bargaining session, each party will designate a chief negotiator who will be responsible for initialing agreements reached during bargaining. Changes to the chief negotiator will be provided in advance of the bargaining session. The absence of any individual team member or members shall not preclude any bargaining or mediation session or tentative agreement. Each team shall have at least 3 permanent bargaining members. All bargaining sessions shall be closed to anyone who is not a bargaining team member.

2) Dates of Bargaining: Expert Advisor

a) Agency's Position

The Agency does not propose language providing for subject matter experts. As discussed in support of the Agency's previous proposal, the Agency seeks to have the bargaining sessions closed and opposes permitting the Union to dictate the use of one of the Agency's employees.

b) Union's Position

The Union proposes that if the Agency includes a subject matter expert at negotiations, then that person shall not be considered a team member. Additionally, the Union would be permitted to arrange to have an Agency subject matter expert present in bargaining. The Union supports its proposal based on the potential benefit subject matter experts could have on negotiations and cites the parties use of subject matter experts at previous successful negotiations with the Agency involving headquarters relocation. Finally, the Union argues that: (1) the Agency had proposed a similar proposal earlier in negotiations; (2) the Agency's exclusive access to such experts would disadvantage the Union; and (3) subject matter experts would reduce the Union's need to file information requests.

c) Conclusion

First, the Union here, and in support of several other proposals, argues that the reasonableness of the Union's

proposal is demonstrated by the Agency previously submitting a similar proposal. The Union has provided no authority to support such an argument. The Agency opposes the Union's proposal for the use of subject matter experts at negotiations largely based on the potential disruption to the Agency's employees. The Union proposes that permitting subject matter experts would benefit both parties as well as the negotiations overall. It is possible to permit the parties to benefit from the assistance of subject matter experts while addressing the Agency's concern regarding potential disruption of its employees. Empowering only the Agency to be able to make decisions involving subject matter experts (i.e., selection, schedule, etc.), who are Agency employees, preserves the Agency's right to assign work under Section 7106(a)(2)(B) of the Statute.³ The Panel imposes on the parties a modified version of the Union's proposal permitting either party to offer a subject matter expert with the Agency retaining exclusive control over Agency employees, as follows:

If either party offers an expert or technical advisor on an article to the negotiation, that person shall not be considered a member of the team and will only be present to discuss the specific topic. The PA may request to have an Agency employee as an expert or technical advisor present in bargaining for information gathering and feedback, but the Agency shall have sole discretion in approving and arranging an expert or technical advisor.

3) Dates of Bargaining: Observers

a) Agency's Position

The Agency does not propose language related to observers. As discussed in support of its previous proposal, the Agency seeks to have the bargaining sessions closed.

b) Union's Position

The Union proposes permitting one employee with a particular interest or expertise to attend bargaining as an observer and not "be part of the bargaining." Again, the Union

³ Management's right under Section 7106(a)(2)(B) of the Statute includes not only the right to assign work but also the discretion to determine "the particular employees to whom or positions to which [work] will be assigned." *NTEU*, 3 FLRA 769, 775 (1980), aff'd sub nom. *National Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982); See also *NTEU*, 29 FLRA 422 (1987).

suggests that the proposal is appropriate because the Agency proposed a similar proposal earlier in negotiations.

c) Conclusion

The Union fails to identify any benefit that an observer would bring to negotiations. Further, the Union's criteria for selecting the observer (i.e., someone invested in the specific negotiations) suggests a strategic motivation in selecting a particular observer beyond witnessing negotiations. Without an identifiable benefit, there is no basis to support that the use of official time for an observer to attend negotiations is reasonable, necessary, and in the public interest. The Panel therefore orders the Union to withdraw its proposal.

4) Dates of Bargaining: Exchange Initial Proposals

a) Agency's Position

The Agency proposes the parties exchange initial written proposals within 30 days of the finalization of these ground rules. The Agency reasons that the Union has been on notice of the Agency's intent to bargain a successor CBA since August 2018. Further, the Agency supports its proposal to require mutual consent for a party to submit additional proposals by referencing an earlier decision by this Panel that found such a procedure facilitates efficiency.

b) Union's Position

While the Union largely agrees with the Agency's proposed procedure for exchanging proposals, the Union claims the 30-day timeframe for exchanging initial written proposals is insufficient and would require the Union to bargain during a busy time for the Agency. Rather, the Union proposes 60 days for the parties to submit initial written proposals. The Union also objects to the Agency's proposal that the parties would have to mutually agree to additional proposals after the initial exchange. Specifically, the Union argues that the Agency's language to prohibit additional proposals would require the Union to waive its right to complete bargaining, and the Union declined to bargain the permissive subject.⁴ The Union also claims that the provision equates to the Agency insisting "on piecemeal negotiations regarding mandatory subjects of bargaining" and would prohibit the Union from introducing

⁴ Citing *Dep't of the Treasury, U.S. Customs Serv. & U.S. Customs Serv., Region IX, Chi., Ill.*, 17 FLRA 221, 222-23 (1985).

proposals to address unforeseen developments such as a Metro closure.⁵

c) Conclusion

The Union's assertion that the Agency's proposed procedure for exchanging initial proposals would equate to piecemeal negotiations or a waiver of any of the Union's statutory rights is without supported authority. The Panel imposes the Agency's proposal on the parties so that they may begin negotiations sooner and, absent mutual agreement, avoid being bogged down by endless exchanges of new proposals.⁶

5) Dates of Bargaining: Scheduling and Length of Bargaining Sessions

a) Agency's Position

The Agency proposes a set bargaining schedule, which includes 5 consecutive days of bargaining each month for 7 months. Each bargaining session will be held from 9:00 A.M. - 4:30 P.M. with a 30-minute break for lunch resulting in 7 hours of bargaining each day. The Agency asserts that a set bargaining schedule will "facilitate a quicker resolution to negotiations" and will permit the Agency to plan and manage the Agency's workload by providing predictability.⁷ The Agency ensures that additional necessary bargaining is not foreclosed, as the parties are able to mutually agree to additional sessions beyond the set schedule.

b) Union's Position

The Union's proposal would require the parties to again bargain and come to agreement over six sets of dates for the first 3 months of bargaining within 30 days of the signing of the Ground Rules. Citing the proper balance of mission-critical work and bargaining, the Union proposes bargaining 3 consecutive work days per week, twice a month. In proposing bargaining sessions from 10:00 A.M. to 3:30 P.M. with a 30-minute break for lunch and rejecting the Agency's previous proposal, the Union cites adherence to the Agency's core hours and personnel

⁵ Citing *U.S. Dep't of the Treasury, IRS*, 64 FLRA 934, 938 (2010).

⁶ Agency Proposal #3

⁷ Citing *U.S. Dep't of Housing and Urban Dev.*, 18 FSIP 075 (2015).

conflicts of commuting and childcare.⁸ The Union also takes exception to requiring mutual consent of the parties to continue to bargain even in the absence of a good-faith impasse, which would require the Union to waive its right to bargaining to completion before seeking third-party impasse resolution.⁹ In its rebuttal, the Union claims that the Agency's proposed bargaining schedule would prevent the Union's president, who is on a long-standing accommodation schedule of 10:30 A.M. - 7:00 P.M., from participating in bargaining without changing her tour of duty.

c) Conclusion

As established by the FLRA, permissive topics of bargaining include proposals that require a waiver of a statutory right. Contrary to the Union's argument, requiring parties to mutually agree to additional bargaining sessions does not waive a party's statutory right to bargain. Given the parties' track record of bargaining and noting that bargaining over these Ground Rules began in November 2018, the Union has given the Panel no reason to believe that their proposal to bargain dates for negotiations would be setting up the parties for anything other than continued delay and ultimately a repeat appearance for impasse assistance. Furthermore, under the Union's proposed bargaining schedule, the parties would spend less time at the bargaining table each month than under the Agency's proposed schedule, despite the parties spending more days each month bargaining. Accordingly, the Panel imposes the Agency's proposal on the parties.¹⁰

6) Caucuses and Tentative Agreements

a) Agency's Position

The Agency proposes to strike the Union's proposed language involving tentatively agreed upon articles. In its rebuttal, the Agency opposes the Union's proposal as it would unreasonably delay the parties to have to wait until an entire agreement is reached.

b) Union's Position

⁸ The Union also took issue with one of the Agency's proposed bargaining session dates, but as that bargaining session has passed, this objection is moot.

⁹ Citing *NLRB*, OALJ 16-16, 2016 WL 769173.

¹⁰ Agency Proposal #4

The Union proposes that the parties may tentatively agree to provisions during bargaining, but that no such provision becomes effective until the entire agreement is ratified. According to the Union, such a provision is not only a longstanding collective bargaining practice but would provide clarity and minimize bargaining disruptions.

c) Conclusion

The Panel rejects the Union's unsupported argument that its proposal would provide clarity and minimize bargaining disruptions. Rather, the Union's proposal would permit the parties to manipulate unrelated provisions into bargaining contingencies. Accordingly, the Panel orders the Union to withdraw its proposal.

7) Negotiability: Declarations

a) Agency's Position

The Agency proposes to have any matter declared non-negotiable to be severed from negotiations and bargained later if found to be negotiable. Having severance allows specific issues to be resolved while the parties continue with negotiations, in support of the Agency's interest in an efficient and effective bargaining process. The Agency also argues that this Panel has ordered similar language.¹¹ In its rebuttal, the Agency rejects the Union's argument that its proposal would require the Union to engage in piecemeal bargaining. Rather, the Agency's proposal would encourage effective and efficient bargaining, which the Agency alleges is an ongoing issue with the Union as evidenced by the parties' bargaining of these ground rules.

b) Union's Position

The Union proposes that the parties handle negotiability disputes in accordance with law and regulations and states there is no dispute over the proposal. The Union objects to the Agency's proposed language in other provisions regarding severance as they: (1) involve permissive subjects of bargaining; (2) unlawfully require the Union to engage in piecemeal bargaining; and (3) are outside the duty to bargain.¹² Citing a decision by a previous Panel, the Union claims that the Panel has specifically declined jurisdiction over a dispute

¹¹ Dep't of Defense Education Activity, 19 FSIP 001 (2019).

¹² Citing 06 FSIP 109 (2007).

involving a proposal to sever provisions disapproved on agency head review.¹³ Ultimately, the Union's theory is that there is no logical distinction to warrant treating a negotiability dispute arising from agency head disapproval any different than a written declaration of non-negotiability, over which the Panel would, absent applicable FLRA caselaw, have to decline jurisdiction.

c) Conclusion

Severance in negotiability disputes facilitates an expedited bargaining process that runs concurrent with, rather than in opposition to, the Authority's negotiability determinations. The Union has not provided any authority to support its claim that the Agency's proposal is inappropriate. Further, the Union's argument that such a provision would subject the Union to piecemeal bargaining is unsupported. Finally, the Union's theory incorrectly compares the Panel's response to an agency's declaration of non-negotiability within a bargaining impasse to the Union's response to the Agency's denial upon agency head review. Accordingly, the Panel imposes the Agency's proposal on the parties.¹⁴

8) Information Requests: Outstanding Requests

a) Agency's Position

The Agency did not propose language related to outstanding information requests and opposes the Union's proposal. Additionally, the Agency objects to the Union's assertion that a party can declare an impasse for this Panel's jurisdictional purposes, noting in its rebuttal that only the Panel is permitted to do so. The Agency also objects to the proposal because it does not contemplate the Agency denying part or all of the Union's request for information. Overall, the Agency sees the Union's proposal as an additional mechanism for the Union to delay bargaining.

b) Union's Position

The Union proposes that the Agency will provide the Union with requested information consistent with Section 7114(b)(4) of the Statute. The Union includes language that would prohibit either party from declaring an impasse over any issue that is related to an outstanding request for information by the Union.

¹³ *Id.*

¹⁴ Agency Proposal #14.

According to the Union, Federal law prohibits the Agency from unlawfully attempting to declare impasse over a subject that the Union has not received adequate information enabling it to effectively bargain.

c) Conclusion

The Union's proposal is not appropriate for ground rules as the parties are already subject to Section 7114(b)(4) of the Statute. Further, the proposal erroneously suggests that a party can determine whether negotiations are at an impasse for this Panel's jurisdictional purposes. As only the Panel is authorized to identify such an impasse, the Union's proposal is incorrect. Even without this proposal, the Union remains entitled to information pursuant to section 7114(b)(4) of the Statute. The Panel orders the Union to withdraw its proposal.

9) Information Requests: Information Received

a) Agency's Position

The Agency objects to the Union not defining what constitutes information "relevant to the subject of negotiations" and claims this procedure would permit the Union to stall bargaining by requesting information.

b) Union's Position

The Union proposes that it be given 10 days from the date it receives requested information to submit amended or additional proposals related to the information. The Union claims that its proposal is a logical outgrowth of the Agency's duty to bargain and provide information. The alleged objectives of the proposal include providing the Agency with an expectation regarding the Union's use of official time related to information requests and permitting the Union to use information requests to assist the Union "because it cannot know what it does not know."

c) Conclusion

The Union has failed to provide support that the Agency must allow the Union to delay bargaining under either the Agency's duty to bargain or the Agency's duty to provide information pursuant to section 7114(b)(4) of the Statute. Accordingly, the Panel orders the Union to withdraw its proposal.

10) Impasse Procedures: Assistance**a) Agency's Position**

The Agency proposes that either party may seek the assistance of the Panel when the parties are unable to reach an agreement following mediation. This language is reasonable and consistent with the Panel's regulations and recognizes the Panel's role in bargaining disputes.¹⁵ In its rebuttal, the Agency reiterates its concern that the Union's proposal is side-stepping the Panel's authority.

b) Union's Position

The Union first proposes a reiteration of the parties' statutory right for either party to seek mediation assistance from FMCS. Next, the Union proposes that, if the parties are not able to reach an agreement following mediation, then the parties shall follow an alternative impasse procedure unique to the parties. This alternative impasse procedure requires the parties to have the Panel approve a binding arbitration process in advance of any disputes. Under the Union's alternative impasse procedure, a party would only be permitted to seek the Panel's assistance if: (1) neither party elects advisory arbitration and (2) the parties request assistance. The Union conditions its proposal to limit and/or exclude the Panel from all potential negotiation impasses based on its perceived untimely delay of the Panel process and seeking to allow the arbitrator to issue piecemeal recommendations on outstanding impasses.

c) Conclusion

The Statute entrusts the Panel with broad authority to resolve impasses using a variety of methods. The Union proposes to have the parties preemptively request the Panel's permission to exclusively utilize interest arbitrators for any future bargaining impasses. Such a request to the Panel is unprecedented and, on its face, is inconsistent with the Statute because the Panel's jurisdiction is contingent on the presence of an actual bargaining impasse. The Union's request for the Panel's "approval" in relation to future impasses is both impossible under the Statute and inappropriate as only the Panel can determine if an impasse exists.

¹⁵ Citing 5 C.F.R. 2470.2(e).

Here, the Union's numerous references to "impasses" erroneously treats one parties' declaration of an impasse as legally significant under the Statute. The Union does not provide a justification, other than claiming the Panel process takes too long, as to why any potential disputes should automatically be heard by an interest-arbitrator. Either party is permitted to file a request to the Panel over a dispute and request external arbitration, but imposing the Union's proposal would force the Agency to waive its statutory right to seek the Panel's assistance. Accordingly, the Panel rejects the Union's proposal. The Panel also orders the parties to adopt the Agency's proposal regarding seeking assistance from the Panel as it is also a proper recitation of the parties' statutory right.

The Union also proposed in a separate proposal that a party may seek mediation assistance from the FMCS, which is a proper recitation of the parties' statutory right to seek mediation and the Panel will order for its inclusion. However, the Panel orders a modified version of Union's language in order to remove a redundancy. The Panel therefore imposes following language on the parties:

Either party may request FMCS assistance at any time. If mediation assistance is requested but no agreement is reached, either party may thereafter request assistance from the Federal Service Impasses Panel on any proposals where agreement is not reached.

11) Completion of Agreement: Union Ratification

a) Agency's Position

To address Union ratification of an agreement, the Agency made three separate proposals. First, the Agency proposes that the executed agreement may be referred by the Union to its membership for ratification but that, if the Union's membership fails to ratify the term agreement, in whole or in part, the parties may negotiate a resolution at the Agency's election. If the parties are unable to negotiate a resolution or if the Agency elects to not engage in further negotiations, then the Agency shall submit the executed term agreement to the Panel within 7 days of failed ratification. The Agency points to similar language ordered by this Panel.¹⁶ The Agency is seeking

¹⁶ Citing 19 FSIP 001 and 18 FSIP 036 (2018);

a timely resolution to any disputes occurring after an agreement is reached, pointing to the Union's past conduct during ground rules bargaining. The Agency also notes that the Union's assertion that ratification is an explicit statutory right is contrary to this Panel's past decisions and FLRA caselaw.¹⁷

Next, the Agency proposes that, if the Union fails to complete the ratification process within 15 days from the chief negotiators' execution, then the agreement shall be considered final subject to agency head review. This timeline is seen as appropriate and necessary in order to avoid delays and is similar to other language ordered by this Panel.¹⁸

Finally, the Agency proposes that the Union will notify the Agency via email after ratification is complete. The day the Agency receives the email notification will begin the 30-day period for agency head review under the Statute. Setting a procedure with a timeframe will ensure the parties avoid stalling and ensure timely completion of an agreement.

b) Union's Position

To address Union ratification of an agreement, the Union made two separate proposals. First, the Union proposes to include language indicating that the Union has previously informed the Agency that its constitution requires member ratification of tentative collective-bargaining agreements reached by the parties. Next, the Union proposes that the Union will complete the ratification process within 30 days, and that the 30-day period for agency review under the Statute will begin when the Union notifies the Agency that ratification is complete.

The Union argues that its proposal for 30 days for the Union to complete the ratification process is consistent with the Union's constitution and bylaws and, therefore, the Panel must adopt it. According to the Union, implicit in the Union's right to insist upon membership ratification of a tentative agreement is the Union's right to insist ratification occur consistent with the Union's constitution and bylaws. In applying its constitution and bylaws, the Union anticipates that, if the Union's executive committee took immediate action following an agreement, it would take 9-days to schedule a vote. Accordingly, the Agency's proposed 15-days could deprive the

¹⁷ Citing *OPM*, 18 FSIP 036 (2018) (citing *Social Security Admin.*, 46 FLRA 1401 (1993), and *Dep't of the Air Force*, 25 FLRA 579, 592 (1987)).

¹⁸ *Id.*

Union of its right to seek membership ratification. The Union then provides an example based on the parties reaching a tentative agreement on December 20th to support its contention that the Agency's proposed 15 days would be problematic. The Union also argued, in its rebuttal, that the Agency's reliance on previous orders from this Panel is misplaced as the current impasse is distinguishable.¹⁹

The Union objects to the Agency's proposal claiming: (1) the proposal involves the permissive subject of the Union's statutory right to ratify an agreement; and (2) the Agency would deprive the Union of its statutory right to bargain if bargaining over a failed ratification is at the Agency's election. In support of its position, the Union cited to numerous FLRA decisions and relies heavily on an FLRA decision that it alleges held ratification to be a right from the Statute if: (1) the union notifies the agency that an agreement is subject to ratification; and (2) the union does not waive its right to ratification.²⁰

c) Conclusion

The Union's claim that the Agency's proposal contains permissive topics and would result in the Union being forced to waive its statutory rights to ratification and bargaining is inaccurate. Contrary to the Union's position, FLRA decisions consistently authorize the use of union ratification of a negotiated agreement but have not identified union ratification as an explicit statutory right.²¹ Permitting the Agency, upon a failed ratification, to either reengage in bargaining with the Union or take the dispute directly to the Panel does not waive the Union's right to bargain. Rather, the Agency is afforded the choice after the Union, via ratification, rejects the agreement to either return to bargaining or expedite the process to the Panel; just as in traditional bargaining. The Union's reliance on *SSA*, 46 FLRA 1401, is misplaced, as the agency in that case implemented an agreement after union ratification failed, whereas here, the Agency proposes to either continue to bargain or seek the Panel's assistance. To follow the Union's interpretation of FLRA case law would result in parties bargaining to perpetuity.

The Union made the argument that it needs 30 days for ratification under its constitution and bylaws. However, the

¹⁹ Citing 19 FSIP 001. Also relies on *NLRB*, 2016 WL 769173.

²⁰ *Social Security Admin.*, 46 FLRA 1401 (1993).

²¹ *Id.*; *Dep't of the Air Force*, 25 FLRA 579, 592 (1987).

Union's supporting argument affirmed that it was possible under the Union's bylaws and constitution to complete ratification in 9 days and therefore would be feasible within the Agency's proposed 15-day timeframe. Therefore, the Panel rejects the Union's two proposals and imposes the Agency's three proposals on the parties.²²

12) Completion of Agreement

a) Agency's Position

The Agency proposes that, if any provision of the agreement is disapproved on agency head review, the Union can file a negotiability appeal while all approved provisions will go into effect. The Agency's strategy to sever any provisions the Union submits to the FLRA for a negotiability appeal, which this Panel has ordered for other parties, is consistent with the Agency's goal of ensuring efficient and effective bargaining.²³

b) Union's Position

The Union proposes that the Union may file a negotiability appeal of any provision disapproved by agency head review but is silent on what effect the negotiability appeal would have on the approved provisions of the agreement. The Union takes the position that the Agency's proposal involves a permissive subject of bargaining that the Union elects not to bargain and is outside the Union's duty to bargain.²⁴

c) Conclusion

The Union's claim that severance of a provision based on a declaration of non-negotiability would cause the Union to waive a statutory right is unsupported. Moreover, under the Agency's proposal, the Union would be able to enforce its statutory right to file a negotiability appeal. The Union's desire to not implement any provisions prior to a complete agreement so that the Union may use a certain bargaining technique is not an entitlement under the Statute. Accordingly, the Panel imposes the Agency's proposal on the parties.²⁵

13) Completion of Agreement: Final Version

²² Agency Proposals #18, #19, and #20.

²³ 18 FSIP 036 (2018).

²⁴ Citing *Customs*, 17 FLRA at 222-23; 06 FSIP 109.

²⁵ Agency Proposal #21.

a) Agency's Position

The Agency proposes that it will prepare an electronic version of the agreement for the Union's review within 30 days of Agency-head approval. The Agency will then upload the final version to the Agency's intranet site. The Agency objects to any requirement that it publish the executed agreement anywhere other than on the Agency's intranet site, which is accessible by all Agency employees.

b) Union's Position

The Union agrees with the Agency's proposal but seeks to have the Agency provide the Union with bound copies of a new CBA. The Union asserts that the Agency should provide the Union with bound copies of the agreement because the Agency provided bound copies following the parties' last agreement in 2002. The Union also argues that its proposed budgetary cap of \$2000 for the bound copies is an insignificant portion of the Agency's overall \$274 million budget. Finally, the Union disagrees with the Agency's wording related to agency head review (i.e., Chairman and General Counsel rather than Agency).

c) Conclusion

The Union identifies no benefit to the Union, the bargaining unit, or the Agency in its demand for the Agency to provide bound copies. In light of the accessibility of the agreement via the Agency's intranet and the Agency's efforts to promote an efficient and effective government, the Union's request is rejected. The Panel orders the parties to adopt a slightly modified version of the Agency's proposal replacing the reference to specific Agency positions for the all-encompassing "Agency." Accordingly, the Panel imposes the following language on the parties:

The Agency will use its best efforts to submit an electronic version of the agreement to the PA within 30 days following agency-head approval. Thereafter, the PA will use its best efforts to advise the Agency of any typographical, grammatic or other non-substantive corrections within 30 days of receipt of the agreement executed by the Agency. The Agency will upload the final electronic version to the Agency's intranet site.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.

A handwritten signature in black ink, appearing to read 'D. Osborne', with a stylized flourish at the end.

David R. Osborne
FSIP Member

November 29, 2019
Washington, D.C.

**GROUND RULES AGREEMENT
NATIONAL CONTRACT NEGOTIATIONS**

**BETWEEN THE NLRB GENERAL COUNSEL
and
NLRB PROFESSIONAL ASSOCIATION**

&

**BETWEEN THE NATIONAL LABOR RELATIONS BOARD
and
NLRB PROFESSIONAL ASSOCIATION**

The National Labor Relations Board (Board-side), the General Counsel of the National Labor Relations Board (General Counsel-side), and the National Labor Relations Board Professional Association (PA) hereby agree to the following ground rules that will govern negotiations for collective-bargaining agreements covering all attorneys and other professional employees performing comparable legal work in the Headquarters Office of the Board and the Headquarters Office of the General Counsel.

Bargaining Teams

- 1.
2. Each party will be entitled to have up to 7 team members. At each bargaining session, each party will designate a chief negotiator who will be responsible for initialing agreements reached during bargaining. Changes to the chief negotiator will be provided in advance of the bargaining session. The absence of any individual team member or members shall not preclude any bargaining or mediation session or tentative agreement. Each team shall have a minimum of 4 permanent members. All bargaining sessions shall be closed to anyone who is not a bargaining team member.

Dates of bargaining

3. Within 30 calendar days of the ground rules agreement, the parties will exchange initial written proposals in electronic format. After this date, additional proposals may only be submitted by written mutual consent of parties. The parties will provide proposals and counterproposals electronically. The proposals will identify the party making the proposal and the date of the proposal. When multiple proposals are exchanged on the same day, the parties will endeavor to also include the time. The parties will identify changes made in any counterproposal in track changes format.
4. The bargaining sessions will be conducted from 9 a.m. to 4:30 p.m.
with a 30 minute-hour break period. Bargaining sessions will be

conducted on the following dates. The parties may mutually agree to conduct further bargaining sessions.

December 2-6, 2019
January 6-10, 2020;
February 3-7, 2020;
March 2-6, 2020;
April 6-10, 2020;
May 4-8, 2020; and
June 1-5, 2020.

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Negotiability

14. Any matter in which a declaration of non-negotiability has been issued is severed from negotiations. If the provision is later found to be negotiable, the term agreement shall be reopened solely to permit negotiation on that provision.

15.

Impasse Procedures

16. If mediation assistance is requested, but no agreement is reached, either party may thereafter request assistance from the Federal Service Impasses Panel on any proposals where agreement is not reached.

Completion of Agreement

17. The parties agree that when the parties have reached a tentative term agreement on all matters, the agency will provide a completed draft agreement to the PA for review. Within 7 calendar days of receiving the completed draft agreement, the chief negotiators shall meet, if necessary, and resolve any details incident to finalizing the agreement. Once finalized, such agreement shall be executed by a dated signature of the chief negotiators. The last dated signature shall be the execution date.

18. After execution, the parties agree that the executed term agreement may be referred to the PA for ratification. If the PA fails to ratify the term agreement in whole or in part, at the agency's option, the parties may negotiate a resolution. If the parties cannot reach a resolution or the agency elects not to negotiate a resolution, the agency shall submit the executed term agreement to FSIP within seven (7) calendar days after the date the PA fails to ratify the term agreement. The parties may present their respective arguments to FSIP.
19. If the PA fails to complete a ratification process within 15 days of the execution by the chief negotiators, the tentative term agreement shall be considered final subject to agency head review pursuant to 5 U.S.C. § 7114(c)(1).
20. Upon ratification, the PA will notify the agency's chief negotiator by email that ratification has taken place. The thirty (30) day period for agency head review, pursuant to 5 U.S.C. § 7114(c)(1), will begin on the day the Agency's chief negotiator receives the PA's email.
21. Should the head of the agency disapprove any provision, the PA may file a negotiability appeal pursuant to applicable law and regulation. The approved provisions shall go into effect.
22. The agency will use its best efforts to submit an electronic version of the agreement to the PA within 30 days following agency-head approval by the General Counsel and the Chairman. Thereafter, the PA will use its best efforts to advise the agency of any typographical, grammatic or other non-substantive corrections within 30 days of receipt of the agreement executed by the Chairman and General Counsel. The agency will upload the final electronic version to the agency's intranet site.
23. The parties agree that the term agreement shall become effective by date of the last signature to the agreement.

**GROUND RULES AGREEMENT
NATIONAL CONTRACT NEGOTIATIONS**

**BETWEEN THE NLRB GENERAL COUNSEL
and
NLRB PROFESSIONAL ASSOCIATION**

&

**BETWEEN THE NATIONAL LABOR RELATIONS BOARD
and
NLRB PROFESSIONAL ASSOCIATION**

The National Labor Relations Board (Board-side), the General Counsel of the National Labor Relations Board (General Counsel-side), and the National Labor Relations Board Professional Association (PA) hereby agree to the following ground rules that will govern negotiations for collective-bargaining agreements covering all attorneys and other professional employees performing comparable legal work in the Headquarters Office of the Board and the Headquarters Office of the General Counsel.

Bargaining Teams

1. The parties will simultaneously bargain contracts covering General Counsel-side employees and Board-side employees.
2. Each party will be entitled to have up to 8 team members. At each bargaining session, each party will designate a chief negotiator who will be responsible for initialing agreements reached during bargaining. Changes to the chief negotiator will be provided in advance of the bargaining session. The absence of any individual team member or members shall not preclude any bargaining or mediation session or tentative agreement. Each team shall have a minimum of 3 permanent members. All bargaining sessions shall be closed to anyone who is not a bargaining team member, except as provided in paragraphs 3 and 4 below.
3. If the Agency offers an expert or technical advisor on an article to the negotiation, that person shall not be considered a member of the team and will only be present to discuss the specific topic. The PA may arrange to have an Agency expert or technical advisor present in bargaining for information gathering and feedback.
4. One observer from either party shall be allowed to attend a bargaining session. An observer will submit notification to his or her supervisor and request approval to attend any bargaining session.

Dates of bargaining

5. Within 60 calendar days of finalization of ground rules procedures, the parties will exchange initial written proposals in electronic format intending to be a comprehensive collective-bargaining agreement. The parties will provide proposals and counterproposals electronically. The proposals will identify the party making the proposal and the date of the proposal. When multiple proposals are exchanged on the same day, the parties will endeavor to also include the time. The parties will identify changes made in any counterproposal in track changes format.
6. Giving appropriate and necessary priority to the Agency mission, the parties will bargain for three consecutive workdays per week, twice per month. They will mutually agree on the first six sets of dates (covering the first three months of bargaining) within 30 days of finalizing the ground rules procedures. Thereafter, the parties will continue to calendar three consecutive workdays per week, up to two weeks per month. The parties, upon mutual agreement, can agree to additional days per week, schedules permitting. Bargaining sessions will be conducted from 10AM to 3:30PM with a 30-minute break for lunch.

Caucuses and tentative agreements

7. Caucus time may be taken during bargaining sessions only to the extent necessary. The party taking a caucus shall keep the other party advised of its anticipated length. If the caucus exceeds ninety (90) minutes or begins ninety (90) minutes before the end of the bargaining session, the parties will meet to discuss the possibility of tabling the issue or meeting later when the party calling the caucus is prepared to continue negotiating.
8. The parties may tentatively agree (TA) to certain proposals as they proceed, but TA'ed provisions are not effective until an entire agreement is reached.

Location of bargaining

9. The parties may participate in bargaining sessions at the Agency's Headquarters or via Adobe Connect/Skype conference with video. The Agency will provide and reserve a furnished conference room as a meeting and caucus space for the PA's bargaining team.
10. The Agency will not be responsible for any travel, lodging, and attendant expenses of the PA's bargaining team members in connection with negotiations, including mediation and impasse proceedings, if necessary, and any joint meetings that may be required to finalize contract language.

Official Time

11. PA bargaining team members will be entitled to official time in accordance with 5 U.S.C. § 7131 and the parties' negotiated agreements, respectively.

Bargaining notes

12. Each party shall keep its own notes and is not required to share notes with the opposing party. Verbatim or electronic recording of negotiations or meetings between the parties pursuant to the negotiations is strictly prohibited.

Negotiability

13. Negotiability disputes shall be handled in accordance with law and regulation.

Information requests

14. The Agency will provide the Union with requested information consistent with 5 U.S.C. § 7114(b)(4). Information requested will be provided within a reasonable time. The parties agree that they will not declare impasse over any issue for which there is an outstanding information request.

15. If, at any time, the Union submits a request for information pursuant to 5 U.S.C. § 7114(b)(4), which is relevant to the subject of negotiations, the Union will be allowed ten (10) calendar days after receipt of the requested information to submit amended or additional proposals based on the information received.

Mediation Assistance and Impasse Procedures

16. Either party may unilaterally request FMCS assistance at any time.

17. If mediation assistance consistent with paragraph 16 is requested, and no agreement is reached, the parties will proceed consistent with this paragraph.

A. Unless the parties adopt and the Federal Service Impasses Panel approves a process under 5 USC Section 7119(b)(2) for binding arbitration of any negotiation impasse, either party may invoke advisory arbitration when good-faith efforts have not resolved the impasse.

1. Upon invocation of advisory arbitration, the party invoking arbitration shall request from FMCS a list of five (5) arbitrators who meet the following criteria:

- a. At least 10 years of experience in federal-sector mediation and arbitration);
- b. Is an attorney; and
- c. Is a member of the National Academy of Arbitrators.

2. If the parties cannot mutually agree upon an arbitrator within three (3) work days of receiving the list, after a coin flip to determine which party

strikes first, the parties will alternately strike names until only one name remains.

3. The interest arbitrator shall not conduct a hearing, unless the parties mutually agree otherwise. The parties will offer written submissions within two (2) weeks of selecting the arbitrator, unless a different date is mutually selected. The arbitrator will strive to issue an advisory opinion within thirty (30) days of receiving written submissions. The arbitrator may issue his or her recommendation piecemeal. Each party may identify up to 10 issues for which it seeks initial resolution.
 4. If either party rejects the recommendation of the interest arbitrator, the objecting party may, within fourteen (14) days of receiving the award, request assistance from FSIP on any outstanding disputes. The objecting party must show good cause for not adopting the interest arbitrator's recommendation.
 5. The parties will share the cost of the arbitrator provided each accepts the recommendation. A party objecting to the recommendation, in whole or in part, shall bear the full cost of the interest arbitrator.
 6. If neither party elects advisory arbitration, the parties will request FSIP assistance (or binding arbitration, if a FSIP-approved procedure is in place) upon the exhaustion of mediation.
- B. As an alternative to advisory arbitration outlined in paragraph A above, the parties may, by mutual consent, jointly request that the FSIP appoint an arbitrator from the National Academy of Arbitrators to resolve, through binding arbitration, all outstanding impasses.

Completion of Agreement

18. The parties agree that when they have reached a tentative term agreement on all matters, the Agency will provide a completed draft agreement to the PA for review. Within 7 calendar days of receiving the completed draft agreement, the chief negotiators shall meet, if necessary, and resolve any details incident to finalizing the agreement. Once finalized, such agreement shall be executed by a dated signature of the chief negotiators. The last dated signature shall be the execution date.

19. The PA has informed the Agency that its constitution requires membership ratification of any tentative collective-bargaining agreements reached by the parties.

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UNION FINAL OFFER

August 21, 2019

20. The PA will complete the ratification process within 30 days of the execution date. If ratified, the PA will notify the agency's chief negotiator by email that ratification has taken place. The thirty (30) day period for agency head review, pursuant to 5 U.S.C. § 7114(c)(1), will begin on the day the Agency's chief negotiator receives the PA's email.

21. Should the head of the agency disapprove any provision, the PA may file a negotiability appeal pursuant to applicable law and regulation.

22. The Agency will use its best efforts to submit an electronic version of the agreement to the PA within 30 days following agency-head approval. Thereafter, the PA will use its best efforts to advise the Agency of any typographical, grammatical or other non-substantive corrections within 30 days of receipt of the approved agreement. The Agency will upload the final electronic version to the Agency's intranet site. Subject to a budgetary cap of \$2000, the Agency will provide 35 bound hard copies of each final agreement to the PA.

23. The parties agree that the term agreement shall become effective by date of the last signature to the agreement.