United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of UNITED STATES DEPARTMENT OF THE AIR FORCE, FAIRCHILD AIR FORCE BASE, FAIRCHILD AIR FORCE BASE, WASHINGTON And ASSOCIATION OF CIVILIAN TECHNICIANS, #138	Case No. 19 FSIP 070

DECISION AND ORDER

This matter is a refiling of a case that the Panel dismissed[1] and has been filed by the U.S. Department of Air Force, Fairchild Air Force Base, Washington (Agency or Management). It concerns a dispute over one article in the parties' successor collective bargaining agreement that covers the parties' negotiated grievance procedure. The Agency hosts the 92nd Air Refueling Wing (92 ARW), which is assigned to the Air Mobility Command's Eighteenth Air Force. The 92 ARW is responsible for providing air refueling, as well as passenger and cargo airlift and aero-medical evacuation missions supporting U.S. and coalition conventional operations as well as U.S. Strategic Command strategic deterrence missions. The Association of Civilian Technicians, #138 (Union) represents over 460 appropriated funded and non-appropriated funded employees as part of a consolidated bargaining unit. Both of these groups of employees were previously represented by separate exclusive representatives until the Union became their sole representative sometime after 2010, and has been in that role for several years. The units were governed by a CBA that expired in 2010 but continues to roll over annually. This dispute concerns negotiations over a CBA that will replace the expired agreement.

BARGAINING AND PROCEDURAL HISTORY

The parties met on five occasions between April 2018 and May 2018. They then held two meetings with the assistance of the Federal Mediation and Conciliation Services (FMCS) in October and November. Working together, the parties reached agreement on everything within their CBA save for one article. Accordingly, the Mediator released the parties in November 2018 in FMCS Case No. 210911440012.

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[1] *See* 19 FSIP 029.

After being released from mediation, the Agency filed a request for assistance with the Panel on March 11, 2019. On April 30, 2019, the Panel voted to assert jurisdiction over the Agency's dispute and ordered the parties to provide Written Submissions with an opportunity for rebuttal statements. The parties provided their written arguments to the Panel. On August 12, 2019, the Panel issued a Decision and Order dismissing the Agency's request for assistance because of various legal issues contained in the Agency's arguments that the Panel determined, under those circumstances, it had no authority to resolve.

The Agency subsequently refiled this dispute with the Panel. On November 14, 2019, the Panel asserted jurisdiction over this dispute and ordered the parties to once again provide Written Submissions with an opportunity for rebuttal statements. The parties have submitted both sets of documents along with attachments. The Panel has considered all arguments provided other than those in the Union's motion discussed below.

PROPOSALS AND POSITION OF THE PARTIES

I. Preliminary Matters

A. Union Motion

Per the Panel's assertion of jurisdiction, the parties provided their written arguments in a timely manner. Afterwards, on December 13, 2019, the Union submitted an 11-page unsolicited "Motion by [Union] to Require Agency Withdrawal of Legal Arguments as a Condition of Retention of Jurisdiction and to Deny Consideration of Portions of the Agency Rebuttal Statement That Are Not Rebuttals" (Union Motion or Motion). In short, it asks the Panel to refuse to consider arguments in the Agency's rebuttal statement. The Panel will decline to consider the Union's Motion because the arguments therein could have been raised previously. The following timeline is important to the analysis that is to follow:

May 29, 2019	The Panel issues its Decision and Order in *Social Security Administration and AFGE*, 19 FSIP 019 (*SSA*) concerning, inter alia, grievance procedures and *AFGE v. FLRA*, 712 F.2nd 640, 649 (D.C. Cir. 1983) (*AFGE*).
October 3, 2019	The Federal court injunction concerning President Trump's May 25, 2018, Executive Orders expires.
November 14, 2019	The Panel asserts jurisdiction over this dispute and orders the parties to submit initial arguments by November 26, and rebuttal statements by December 6.
November 14, 2019	The Panel issues its Decision and Order in *U.S. Dep't of Transportation, Fed. Transit*

	Admin., Wash., D.C. and AFGE, Local 3313, 19 FSIP 043 (*FTA*), which discusses the Executive Orders, grievance procedures, and *SSA*.
November 26, 2019	The Union submits its initial arguments and relies heavily upon *SSA*.
December 6, 2019	The Union submits its rebuttal statement once again relying upon *SSA*; the Agency submits its rebuttal and relies upon *FTA* and the Executive Orders.
December 13, 2019	The Union files its Motion.

As can be seen above, in its rebuttal statement, the Agency – for the first time in this dispute – relied upon President Trump's May 25th Executive Orders within the context of *FTA*. The Union's Motion followed on December 13, 2019. The Motion seeks to prohibit the Agency's reliance upon the Orders because they are "illegal" for various reasons that are set forth in the Motion. Additionally, the Union complains that the Agency "improperly" waited until its December 6th rebuttal statement to raise issues pertaining to the Orders. Finally, the Union spends a significant amount of time attempting to explain why *FTA* is both inapplicable *and* illegal.

Assuming the Union's Motion is appropriately before the Panel,[2] the Union had an opportunity to raise the arguments in the Motion in its prior written submissions to the Panel but did not do so. In its initial November-26 Submission, the Union leaned heavily upon the Panel's decision in *SSA*. That decision addresses the scope of grievance procedures and the burden associated with proposing exclusions to these procedures. The Panel subsequently issued *FTA* on November 14, or 12 days before the parties' November 26th initial-submission due date. In *FTA*, the Panel directly addressed *SSA* and how it was impacted by the Orders and further noted that it considers the Orders to be important public policy that factor into the topic of proposed grievance exclusions.[3]

The Union leaned heavily upon *SSA* in its initial submission *and* its rebuttal statement. Both were submitted *after* the Panel issued *FTA*. Thus, the Union had *every* reason to address the Orders and *FTA* in its submissions, regardless of when the Agency raised this argument. Indeed, it should have addressed *FTA* irrespective of whether the Agency did so. The Union's failure to timely address arguments concerning

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[2] On December 16 – 3 days after the Union filed its Motion -- the Union officially requested leave to file the Motion. The Union claimed that Management's rebuttal statement raised legal/jurisdictional issues that should be addressed now rather than in a motion for reconsideration.

[3] *See FTA*, 19 FSIP 043 at 9-11.

the propriety of the Orders and *FTA*, when it had clear notice it should be prepared to do so, does not grant it freedom to submit yet another filing to the Panel.[4]

The Statute and the Panel's regulations are silent on how to address motions similar to the one filed by the Union. But, the foregoing conclusion is consistent with analogous situations that arise before the FLRA. In this regard, 5 C.F.R. §2429.26 states that the FLRA "as appropriate, may in their discretion grant leave to file other documents as they deem appropriate." This regulation applies to all proceedings before the FLRA and potentially allows a party to file a document beyond the limitations established by a particular set of circumstances. But, the FLRA generally will not consider new submissions when a party could have presented an argument previously.[5] The Panel believes it is appropriate to apply a similar framework to the Union's Motion in this case. As such, the Panel will decline to consider the Union's motion.

B. Other Union Arguments

In its submissions, the **Union** raises several "global" arguments in opposition to the Agency's proposed exclusions. The Panel presents these arguments for reference purposes. To begin with, the Union incorporates its prior submissions from 19 FSIP 029 into this dispute. The Union further notes that the Panel had adopted the rule of the Federal courts that a proponent of grievance exclusion bears the burden of justifying those exclusions. In this regard, the Panel has quoted approvingly language holding that a party proposing a grievance exclusion must "establish convincingly that, in [its] particular setting, its position is the more reasonable one."[6] This precedent is discussed below where applicable.

Additionally, the Union argues that, as a Federal agency, the Panel is without authority to depart from its prior decisions absent "reasoned explanation."[7] The Union contends that adopting many of the Agency's proposed exclusions would require the Panel to deviate from established Panel precedent without "reasoned explanation." In particular, the Union believes that several of Management's proposed exclusions are inconsistent with the Panel's prior decision in *Colorado Air National Guard and Local 48*, 2010 FSIP 137 (February 2011) (*CANG*). That decision is discussed in greater detail below, where applicable.

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[4] Throughout its submissions, the Union strenuously argues that *all* Panel decisions are binding precedent. Thus, the insinuation that the Union had to wait until the Agency cited to *FTA* – which, again, substantively discusses *SSA* – is not only implausible, but arguably inconsistent with the Union's own view of Panel decisions.

[5] *See, e.g., IFPTE, Local 4 and U.S. Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 70 FLRA 20, 21 (2016); *U.S. Dep't of Homeland Security, U.S. Customs Border Prot. and NTEU*, 68 FLRA 184, 185-86 (2015).

[6] Citing *SSA*.

[7] Union Initial Submission at 1-2 (Citing *IRS v. FLRA*, 963 F.2d 429, 434 (D.C. Cir. 1992).

The Union also takes umbrage with utterances offered by the Agency in its request for Panel assistance. It notes that the Agency states that its proposed exclusions would *not preclude* the Union from "grieving if law, rule or regulation [are] not applied appropriately."[8] This statement, the Union contends, undercuts *all* of the Agency's proposed exclusions because if the Agency allows for these types of grievances they must also allow grievances for "misinterpretation or violation" of "law, rule or regulation." This is because the definition of "grievance" under the Statute is defined as a "complaint" concerning breaches of a CBA or a "*violation, misinterpretation, or misapplication* of any law, rule, or regulation affection conditions of employment."[9] If the Agency is willing to allow grievances over "misapplications" of the foregoing categories, it logically follows they should permit grievances for "violations" and "misinterpretations." But, as the Union has already conceded, grievance exclusions turn on the "particular" circumstances of each proposal. The Panel will decline to accept the Union's suggestion that the foregoing argument per se blocks adoption of any of the Agency's proposals.

II. New Grievance Exclusions

A. Performance Rating

1. Management Position

Management proposes excluding grievances involving challenges to "assignment of ratings of record."[10] Such grievances are inefficient because these actions require supervisors to re-review the ratings that they have already issued. A grievance could also prevent a supervisor from placing an employee on a performance improvement plan. Furthermore, through a review of data, the Agency was unable to locate any grievances concerning performance ratings over the past 10 years.

The Agency also alleges that the Department of Defense (DoD) has "negotiated a comprehensive performance process that ensures employee participation throughout the process, through development of the performance plan, progress review, and appraisal."[11] Although not clear, this argument appears to refer to DoD publication, "DODI1400.25V431_AFI36-1002, *Performance Management and Appraisal Program Administration in the Air Force*" (November 2016) (DoD Instruction or Instruction). The Agency references this Instruction throughout its arguments discussed below for other proposed grievance exclusions. Management contends that the process established by the Instruction creates an "inclusive and cooperative approach to performance management" that would be disrupted by grievances. And, the Union could always grieve the "improper application" of the Instruction.

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8 *Id.* at 2 (citing Agency Request for Assistance, Attachment at 2).

9 5 U.S.C. §7103(a)(9)(C)(i) and (ii).

10 Management Proposal N.

11 Agency Initial Argument at 10.

Finally, the Agency argues that this proposed exclusion is consistent with Executive Order 13,839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (May 26, 2018) (Removal Order) and the Panel's recent decision in *FTA*. In *FTA*, that agency also proposed excluding challenges to performance ratings as part of the parties' grievance procedure, and the Panel adopted the proposal. The agency in *FTA* argued its proposal was warranted, in part, due to the Order. But, it also presented "unrebutted" arguments that "arbitrators' treatment of grievances related to performance ratings . . . were [ ] arbitrary and required significant resources to resolve."[12] Accordingly, the Panel concluded that even if, "in these circumstances where the Agency's argument is unrebutted on substance, the Executive Orders were not in effect, the Panel would conclude the Agency had carried its burden to justify the exclusion of the subject grievances from the grievance arbitration process."[13] The Agency in this dispute "incorporate[s]" the same positions taken by the agency in *FTA* and asks the Panel to adopt its proposed exclusion on this topic.

2. Union Position

The Union argues that the Agency's proposal is inconsistent with the Panel's decision in *CANG* because it would deprive employees of access to an independent decision maker.[14] Management's position, therefore, should be rejected. The Union also notes that, in its request for Panel assistance, the Agency stated that this proposal was put forward to "promote . . . efficient operations."[15] The Agency does not meet its burden under *SSA* to explain why this is so, however.

3. Conclusion

The Panel will impose the Agency's language. The Union makes much of the Panel's holding in its *SSA* decision, which concerned the imposition of various proposed grievance exclusions. The Union accurately notes that this decision – which issued in May 2019 – reiterated the holding of Federal court precedent that a proponent of exclusion must "establish convincingly" in a "particular setting" that exclusion is "reasonable." But, in the Panel's *subsequent* decision in *FTA* – which issued in November 2019 – the Panel examined this precedent through the lens of the Removal Order. The Panel examined the holding of its decision in *SSA* and agreed that it remained in effect. However, the Panel further stated that the Removal Order – and related Executive Orders – evidenced important Federal-sector labor policies that the Panel would not ignore.[16] Based on this policy, as well as the agency's unrebutted

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12 *FTA*, 19 FSIP 043 at 10-11.

13 *Id.* at 11.

14 *See* Union Initial Argument for 19 FSIP 029 at 12.

15 Agency Request for Panel Assistance, Attachment at 3.

16 *See id.* at 10 (citations omitted).

arguments concerning the impact of arbitration upon its operations, the Panel accepted the agency's proposed grievance exclusions in *FTA*.

The Agency has explicitly relied upon the Order and *FTA* in its arguments and, as such, it is appropriate for the Panel to consider them. Section 4(a)(i) of the Removal Order instructs agencies to exclude actions involving "ratings of records" from a negotiated grievance procedure in order to "promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service."[17] This language, then, establishes a policy that excluding challenges to an employee's rating of record supports the efficiency of an agency's operations. As already stated, the Panel in *FTA* acknowledged the importance of the policy expressed by the Removal Order. Additionally, as noted above, the Agency in this case "incorporate[s]" the various merits arguments discussed by the Panel in *FTA*. The Union elected not to rebut these arguments notwithstanding having reasonable notice that it should be prepared to do so. As the Union did not rebut any of the conclusions of *FTA*, and because the Agency has explicitly relied upon the rationale discussed in that decision, it is appropriate to conclude that the Agency's proposal represents an appropriate resolution of this topic.

In addition to attempting to rely upon the Panel's holding in *SSA*, the Union leans heavily upon the Panel's decision in *CANG.* This reliance is also misplaced. Prior Panel decisions are not binding decisions that have precedential value. To be sure, the Panel can, and often does, look to prior decisions for guidance. But, they are not binding as they do not involve the adjudication of the parties' legal rights. Indeed, the Panel's statutory authority is limited to resolving particular bargaining impasses between particular parties.[18] In addition, there is no language in *CANG* in which the Panel held, as a matter of fact or law, that every Union is entitled to an independent decision maker in every set of circumstances. So, the Union's caution against a hasty departure from the holding of *CANG* is misplaced. But, even if *CANG* were binding, it is distinguishable.

In CBA renegotiations, the agency in *CANG* proposed continuing a grievance exclusion for "disputes over performance appraisal ratings."[19] Under the proposal, employees dissatisfied with their ratings would have to continue to submit challenges to a review board overseen by an agency individual. In response, the union argued that employees were not confident in the process due to the involvement of agency officials and, as such, few employees chose to avail themselves of it.[20] The Panel ultimately rejected the agency's position. The Panel applied the rule regarding narrow grievance exclusions and accepted the employees' contentions concerning a lack of "confidence" in the review process. The Panel concluded that *those employees* "should be

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17 E.O. 13,839, Sec. 4(a)(i).

18 *See* 5 U.S.C. §7119(a).

19 *CANG*, 10 FSIP 137 at 3.

20 *See id.* at 5.

permitted" to utilize the grievance procedure to receive a decision from a "neutral" arbitrator.[21]

Although the *CANG* decision and this dispute involves performance ratings, the Panel in *CANG* relied upon evidence presented by that union that those employees were dissatisfied with their existing process due to fears of undue agency influence in the employee review process. The Union in this case provided no similar evidence. This lack of evidence is telling because the Union did not simply arrive upon the scene during negotiations over these parties' contract. Rather, it has been the employee's exclusive representative for several years.

Based on all the foregoing, the Agency's arguments are more persuasive under the "particular setting" of this dispute. Management's language, therefore, should be adopted. Due to this conclusion, it is unnecessary to address the Agency's argument concerning the DoD Instruction.

B. Removals

1. Management Position

The Agency proposes excluding grievances concerning "decisions to remove any employee from Federal service for misconduct or unacceptable performance."[22] Management acknowledges that Congress established a system in which employees could challenge removals through the grievance process or by filing an appeal with the Merit Systems Protection Board (MSPB). However, the Agency is "uniquely situated" so as to make the former option unnecessary.[23] Since 2010, the Agency has issued proposed removal actions only eight times. Only four employees appealed; two to the MSPB and two under the existing grievance procedure. Of the eight proposed removals, four were settled. One of the settlements arose through the grievance process, another as part of the MSPB procedure, and another settled without going through any appeal procedure. The Agency does not explain how the fourth action settled. The four non-settled decisions stood as issued. This data demonstrates that "settlement agreements were achieved regardless of the avenue pursued."[24]

In addition, going through the MSPB process results in cases being heard in a "timely manner" and eliminates redundancy in the process. Challenging a removal via the grievance procedure requires review by "3 members of [M]anagement."[25] This process, the Agency alleges, is inefficient.

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21 *Id.* at 7.
22 Management Proposal M.
23 Initial Agency Argument at 9.
24 *Id.*
25 *Id.* at 10.

Finally, the Agency again relies upon the Removal Order and the Panel's decision in *FTA*. According to Management, five factors were present in *FTA* that apply equally to this matter:

> (1) [T]the proposed language was pursuant to a binding Executive Order; (2) the [a]gency made the proposed language part of its position throughout the dispute; (3) the [a]gency admitted that its reliance on the Executive Order was not its sole reason for its proposal; (4) the Agency's argument was unrebutted on substance; and (5) the [a]gency showed convincingly that the arbitrators' treatment of grievances related to discipline and performance ratings and review were both arbitrary and required significant resources to resolve.[26]

Management further notes that the agency in *FTA* convinced the Panel that arbitration decisions involving discipline are "arbitrary" by examining two decisions out of the MSPB and the United States Court of Appeals for the Federal Circuit (both discussed below)[27]. In Management's view, the "same totality of circumstances which comprise the particular setting" of *FTA* are present in this dispute.[28] However, even if those circumstances are not present, Management "incorporate[s]" the agency argument in *FTA* that arbitration awards involving discipline are "arbitrary and require[ ] significant resources to resolve."[29]

2. Union Position

The Union argues that the Agency's proposed exclusion is inconsistent with 5 U.S.C. §7121(e)(1). This section states that removals that "also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of [5 U.S.C. §7701 et seq.] or under the negotiated grievance procedure, but not both." This language, the Union contends, establishes a right to pursue removals pursuant to a grievance. In addition, the Union opposes the exclusion because: (1) an employee's case before the MSPB could be delayed needlessly when a quorum is not present; (2) even when a quorum is formed, the backlog will still lead to case delays; (3) relying solely on the MSPB process deprives the parties of the ability to select a decision maker; and (4) the parties use the grievance procedure to negotiate procedures that are less formal than an MSPB setting. Based on all these factors, the Agency cannot justify its burden under *SSA* to justify exclusion.

3. Conclusion

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[26] Agency Rebuttal at 4.

[27] Citing *FTA*, 19 FSIP 043 at 6 (citing *Greenstreet v. SSA*, 543 F.3d 705 (Fed. Cir. 2008) (*Greenstreet*); *Jolly v. Dep't of the Army*, 2016 WL 1534085 (M.S.P.B. 2016) (*Jolly*)).

[28] *Id.* at 5.

[29] *Id.*

The Panel will order the Agency to withdraw its proposal. The Agency argues that these circumstances are similar to those found in *FTA* and, as such, adoption of its proposal is warranted. But, even if circumstances differ, the Agency asks the Panel to apply the same rationale to reach the same conclusion. These arguments are interconnected as they turn on the Panel's ruling in *FTA*. But, in the Panel's view, the arguments in this dispute do not lend themselves to an application of *FTA*.

Section 3 of the Removal Order directs that "[w]henever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated . . . any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance."[30] This language differs from the language found in Section 4 of the Order, discussed above. The latter language unambiguously states that federal agencies "shall" refrain from taking several actions with respect to bargaining over a negotiated grievance procedure. Among those actions, an agency is prohibited from agreeing to language that would permit such a procedure to challenge several types of personnel actions.[31] There is no qualifying statement in this language: it is a mandate. By contrast, the language in Section 3 of the Order directs agencies to exclude challenges to removals from the grievance procedure "[w]henever reasonable in view of the particular circumstances."[32] The exclusion in Section 3, then, is not automatic. Rather, it must be viewed through the lens of a particular set of circumstances. This language tracks the holding of the D.C. Circuit in *AFGE* – which calls for a review of the "particular setting" of the dispute[33] – which the Panel reinforced in *SSA*.

As already noted, the Panel has recognized that the Removal Order and related Orders represent important public policy. Section 3 of the Removal Order evidences the importance of a Federal agency carefully scrutinizing the particular facts of a situation to assess whether removal actions should be excluded from a grievance procedure. This language carries the implication that there may be situations where an agency could decide that exclusion of this topic is *not* warranted. Thus, it is in the interest of Federal agencies, Federal employees, and the taxpayer that agencies carefully examine the appropriate course of action under Section 3 of the Removal Order.

The Panel does not believe that the particular "setting" or "circumstances" presented by the Agency are similar enough to those found in *FTA* to justify adoption of Management's proposal. The Agency argues that it is "uniquely situated" because the low number of proposed removal actions have nevertheless resulted in "settlement agreements [being] achieved regardless of avenue pursued" to challenge a proposed

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30 E.O. 13,839, Sec. 3.

31 *See* E.O. 13,839, Sec. 4(a)(i) and (ii).

32 E.O. 13,839, Sec. 3.

33 *AFGE*, 712 F.2d at 649.

removal.[34] But, this argument undercuts the Agency's position. The grievance procedure represents an "avenue" for settlement opportunities: indeed, the Agency concedes that one of its eight proposed removal actions settled through this route. Adopting the Agency's proposal, then, would result in depleting the parties and employees of a possible avenue for settlement opportunities. Such an action would not be reasonable under this particular set of circumstances.

In addition to the foregoing, Management "incorporate[s]" the same arguments raised by the agency in *FTA* concerning the "arbitrary" results of arbitration decisions involving contested removals. The agency in *FTA* argued that appellate-review of such decisions demonstrated that grievances concerning removals led to arbitrary results and required devotion of agency resources to address those results. The Panel accepted the agency's citation of these decisions as support of the agency's proffered conclusion. However, the Panel also noted that the agency's position was unrebutted.[35]

In this dispute, the Union has not rebutted Management's claim concerning the arbitrary and time-consuming nature of removal-arbitrations. But, Management has undercut its own argument. Although Management makes much of the arguments in *FTA*, it ignores the foundation for those arguments. In this regard, the agency in *FTA* emphasized that an arbitration decision involving its workplace impacted its workplace negatively because that agency was ordered to reinstate a troublesome employee.[36] The *Jolly* and *Greenstreet* decisions were offered as *further* proof of the problems associated with the agency's grievance situation. Management, here, has not offered an example in which a removal grievance has created comparable issues. To the contrary, it has admitted that at least 25% of the removals arising out of Management's facilities that have ended in amicable settlement and did so via the negotiated grievance process. That is, in the Panel's view, Management's arguments demonstrate that grievances over removals have actually contributed to the efficiency and effectiveness of Management's operations under these "particular circumstances." Management's own arguments, then, distinguish *FTA*.

The Agency's other primary argument in support of adoption of its proposal is that the MSPB provides a more effective and streamlined process for resolution of proposed removals. In particular, Management notes that a grievance requires review by "3 members of Management."[37] The Agency did not provide details to elaborate on the foregoing statement, nor did it provide any data to buttress its claim that the MSPB process is any more effective than the grievance process. Indeed, as the Agency effectively concedes, both the MSPB forum and grievance process contributed to amicable resolutions of proposed removal actions.

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34 Agency Initial Argument at 9.

35 *See FTA*, 19 FSIP 043 at 10-11.

36 *See id.* at 6.

37 *Id.* at 10.

Management's proposed removal exclusion is not appropriate under these particular "setting[s]"[38] or "circumstances."[39] Accordingly, Management's proposed exclusions should not be added to the parties' grievance procedure. Based on this conclusion, it is unnecessary to address the Union's other arguments.

C. Incentive Pay

1. Management Position

Management proposes excluding grievances concerning "award[s] of any form of incentive pay, including cash award; or recruitment, retention or relocation payments."[40] The Agency argues the Union has not shown a need for this proposal because there have been no such grievances on any of these topics over the past decade. Grievances could also chill the policy recognized under the "newly implemented Department of Defense Performance Management Program," which promotes the "use of continuous awarding" to recognize performance.[41] And, grievances could also chill quick recruitment, retention, and relocation. Finally, Management raises once again its prior arguments concerning the Removal Order and *FTA*.

2. Union Position

The Union argues that its position declining Management's proposal should be adopted because it is consistent with the Panel's holding in *CANG*. The Union's position would grant employees access to an independent forum to challenge arbitrary and capricious decisions. The Union believes it is inappropriate for the Agency to suggest that utilizing the grievance process could "chill" awards; indeed, in the Union's view, that argument implies retaliation.

3. Conclusion

The Panel will adopt the Agency's proposal. Section 4(a)(ii) of the Removal Order calls for agencies to exclude, from a negotiated grievance procedure, grievances involving "the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments."[42] As discussed, this directive comes without qualification. And, as also discussed, the Union has not addressed the import of the Removal Order despite being on notice that it should be prepared to do so. Additionally, the Union's reliance upon *CANG* is misplaced for reasons that have already been stated. Accordingly, based on the foregoing, the Panel believes it is appropriate to accept the Agency's language to resolve this dispute.

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38 *AFGE*, 712 F.2d at 649.
39 E.O. 13,839, Sec. 3.
40 Management Proposal O.
41 Agency Initial Argument at 11.
42 E.O. 13,839, Sec. 4(a)(ii).

D. Performance Plans and Quality Step Increases

1. Management Position

The Agency offers the following exclusion: "[C]ontents (e.g., performance elements or standards) of an employee performance plan and decisions to grant or not grant a performance award or quality step increase (QSI)."[43] Management contends that this proposal restates language found in the DoD Instruction (discussed in greater detail below). DoD and "national unions" negotiated a "comprehensive performance process" that ensures employee participation in that process. This process "promotes an inclusive and cooperative approach to performance management" in which employees have the ability to address concerns throughout the process.[44] A grievance could disrupt that process. Indeed, there have been no grievances over any of these topics within the past 10 years. Arbitrations often provide "arbitrary decisions that require further litigation."[45] The language is necessary, notwithstanding the existence of the DoD policy, in order to serve as a "one-stop shop" for employees looking for information.

2. Union Position

On the topic of performance plans and elements, the Union believes it is necessary to allow grievances on these topics so that employees could pursue potential violations of the Administrative Procedures Act (APA). The Union also argues that adopting Management's exclusion would prevent employees from efficiently challenging "mixed-motive" claims of discrimination where performance elements simultaneously raise issues involving claims of discrimination and violations of other law.

Turning to QSIs and incentive pay, the Union first notes that the FLRA has concluded that it is negotiable to establish a *mandatory* performance award that is equal to certain percentages of their salary.[46] Additionally, Management's proposed exclusions would deny employees access to an independent decision maker. Arbitrary and capricious decisions are inconsistent with the APA and, therefore, should be open to challenge.[47] Additionally, an action could raise an unfair labor practice. Management's proposed exclusion would deprive an employee of their statutory right to pursue a ULP or a grievance under 5 U.S.C. §7116(d).

The Union also disagrees with the Agency's insinuation that the DoD Instruction binds the parties. The Instruction was promulgated as part of a "consultation" process with national unions, and consultation is *not* tantamount to bargaining. Thus, the parties did not enter into any sort of negotiated agreement with respect to the Instruction. The

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43 Management Proposal F.
44 Initial Agency Argument at 4.
45 Agency Rebuttal Argument at 1.
46 Citing *NTEU and PTO*, 30 FLRA 1219, 1221-24 (1988).
47 Citing 5 U.S.C. §701(a)(2).

Union also noted that the Agency, in its request for Panel assistance, stated that the Union's opposition to the Agency's proposal "conflicts" with the Instruction.[48] This claim, however, is a legal one. The Panel has no authority to resolve the Agency's contention.

Finally, the Union makes much of the Panel's prior decision in *CANG*. Relying on this decision, the Union argues that the parties' CBA should not deny employees access to an independent decision maker. Departing from this precedent is not warranted.

3. Conclusion

Management's proposal excludes two topics: (1) contents of performance plans; and (2) performance awards and QSI's. For the reasons to follow, the Panel will adopt the Agency's proposals for both topics.

i. Contents of Performance Plans

Management proposes that the Union should be prohibited from challenging, through the grievance process, the contents of an employee's performance plans. The Agency argues that this proposal is designed largely to bring the parties' CBA into compliance with the DoD Instruction. In particular, Section 3.5(d) of the Instruction states:

> Reconsideration of a Performance Appraisal. Employees may seek reconsideration of issues related to the performance appraisal process (e.g., individual performance element ratings and ratings of record) through the administrative grievance system or, where applicable, negotiated grievance procedures. *Employees may not challenge contents (e.g., performance elements or standards) of an employee performance plan and decisions to grant or not grant a performance award or quality step increase (QSI) through the administrative grievance system or, where applicable, negotiated grievance procedures.* (emphasis added).

The above language is clear that employees cannot raise challenges concerning the contents of performance plans. Much of the parties' dispute over this Instruction turns on whether it was negotiated and, therefore, contractually binds the parties. It is unnecessary to reach this conclusion, however, as the Instruction evidences a clear source of policy intended to create uniformity and efficiency regardless of negotiated status. The existence of the Instruction, therefore, serves as sufficient basis for adopting Management's proposal.

Another basis for adopting Management's proposal is the impact of management rights under the Statute. The statutory right to assign work under 5 U.S.C.

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[48] Union Initial Argument at 5 (quoting Agency Request for Assistance, Attach. at 1).

§7106(a)(2)(A) includes the right of agencies to establish performance plans and identify critical elements.[49] Implicit in the Union's view that grievances over the contents of performance plans should be permitted is that the Union should be able to challenge the Agency's statutory authority to create such plans. The Panel declines to accept that rationale. On balance, then, the Agency's proposal is the more reasonable one.[50]

The Union also alleges that Management's proposal is inconsistent with the APA, but that reliance is also misplaced. The APA permits individuals to challenge Federal agency actions when they have suffered a "legal wrong."[51] And, decisions may be challenged in Federal court if they are "arbitrary and capricious."[52] Challenges may not be brought pursuant to the APA, however, if a statute precludes judicial review.[53] The Union does not cite any portion of the APA nor does it offer precedent that supports the argument that employees have a right to challenge Agency personnel decisions via the APA. Indeed, Federal court precedent states that the APA may not be relied upon "to challenge agency employment actions."[54] Additionally, the Union once again offers no incident arising in the past several years in which an employee claimed a need for reliance upon the APA. For all these reasons, the Union's reference to the APA should be rejected.

Next, the Union contends that its position should be adopted due to the existence of so-called "mixed motive" claims of discrimination. Under the Federal sector EEO process, an employee who believes they have suffered a personnel action as a result of prohibited discrimination may initiate a discrimination process or file a grievance (where available). Initiation of the former process calls for an employee to contact an EEO counselor – who is employed by the relevant agency – who will investigate the claims to find possible resolutions; failing resolution, the counselor is to inform the employee of their ability to file a formal EEO complain with the agency. The agency will then investigate and ascertain whether it should issue a formal complaint of discrimination. If issued, the complaint may then proceed to a hearing; if a complaint is not issued, the employee may appeal that determination. A "mixed case complaint" is "a complaint of employment discrimination filed with a federal agency . . . that may be appealed to the

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49 *See, e.g., National Association of Government Employees, Local R1-144, Federal Union of Scientists and Engineers and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island,* 38 FLRA 456, 460 (1990).

50 Although the Agency indicated in its Panel submission that it would not be pursuing claims of management rights, Federal courts have recognized that statutory management rights cannot be waived. *See, e.g., U.S. Dep't of the Treasury, IRS, Office of Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13, 19 (D.C. Cir. 2014) (citation omitted).

51 5 U.S.C. §702.

52 5 U.S.C. §706(2)(A).

53 *See* 5 U.S.C. §704.

54 *Mahoney v. Donovan*, 721 F.3d 633, 635 (D.C. Cir. 2013) (citations omitted).

MSPB."[55] Such claims, therefore, must involve issues that are appropriate for resolution by the MSPB.

The Union argues that the above framework could result in "tangled, inefficient, costly proceeds" if mixed-case claims cannot proceed through one forum, i.e., the negotiated grievance process. For example, an employee who wanted to challenge a performance standard as arbitrary and capricious *and* discriminatory would find themselves forced to participate in multiple forums. Yet, mixed cases involve only those sorts of claims that may be appealed to the MSPB, and they may proceed in one selected forum only.[56] Moreover, the Union's worry about "arbitrary and capricious" actions involve its now discredited APA theory. And, in any event, as with every other Union-offered hypothetical discussed already, the Union offers not a single instance in its years of representation that so much as raised the specter of the Union's concerns. In short, none of the Union's arguments rebut adoption of the Agency's proposal.

ii. Performance Awards and QSI Exclusions

In addition to proposing the exclusion of performance-plan related grievances, Management proposes excluding challenges to "decisions to grant or not grant a performance award or a quality step increase(QSI)." As part of this dispute, the Agency provided four contracts involving the Agency and predecessor unions. This evidence reveals that there is a long-standing history of contracts at the Agency's facilities that exclude grievances over managerial decisions to grant performance awards and QSI's:

- Contract language between the Agency and the Union's predecessor, the Fairchild Federal Employees' Union (FFEU), covering August 2007 to August 2010;
- Contract language between FFEU and the Agency between the period of December 1999 to December 2002;
- Language between the National Federation of Federal Employees (NFFE) and Management from October 1996 through October 1999; and
- A CBA between NFFE and Management dated April 1990 (the duration is unclear).

The Agency's arguments do not address the above history, instead focusing on the DoD Instruction and its potential impact. Yet, the Panel believes that the foregoing history better addresses the parties' relationship. This record data – put forth by Management and unrebutted by the Union – establishes a pattern and practice in which

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[55] *See* 29 C.F.R. §1614.302(a)(1); *see also* Equal Employment Opportunity Management Directive For 29 C.F.R. PART 1614, Ch. 4.II.A (available at https://www.eeoc.gov/federal/directives/md-110_chapter_4.cfm#_Toc425745211).

[56] *See* 29 C.F.R. §1614.301(a) and (b).

it has long been understood by the parties that the above issues may not be challenged via the grievance process. Despite this – or perhaps as a result of it – the Union has not put forward a single instance in which it or a bargaining-unit employee has been prejudiced by the inability to challenge any of these topics via the grievance process. The Union's inability to do so is telling given that it has effectively represented this bargaining unit for multiple years. Thus, it is the Panel's belief that Management has satisfied its burden stated in *SSA* that, in these "circumstances," its language on this topic should be accepted.

To rebut adoption of Management's proposal, the Union once again relies upon the Panel's decision in *CANG.* That argument is misplaced for reasons that have already been stated. And, for reasons also stated, the Union's reliance upon the APA is flawed. The Union's assertion premised upon mixed-motive claims is also inapplicable.

The Union's remaining argument is that employees could be deprived of the "right" under the Statute to file a grievance alleging ULP violations if an award denial involves anti-Union animus. For matters pertaining to ULP's, 5 U.S.C. §7116(d) states that employees have the "option" of pursuing such claims through the ULP process or the grievance process, but only when they "can be raised" through the grievance process.[57] Stated differently, ULP challenges may proceed as a grievance when permitted by a negotiated grievance procedure. Nothing in this language states that the union or employee has an absolute right to file grievances over such issues; indeed, the Union offers no such authority that supports that proposition. Accordingly, for all the reasons stated, Management's language for this topic will be adopted in full.

III. Pre-Existing Exclusions

A. Non-Competitive Promotions, Non-Adoption of Awards, and Termination of Temporary Appointments/Promotions

1. Management Position

The Agency seeks to continue excluding the following three topics from the parties' grievance procedure:

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[57] 5 U.S.C. §7116(d) states as follows:

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

- "non-selection for promotion from a group of properly ranked candidates for a position or failure to receive a non-competitive promotion."[58]

- "the non-adoption of a suggestion or any other type of honorary or discretionary award that was disapproved by the appropriate authority designated by applicable regulation."[59]

- "the termination of a term or temporary appointment or promotion in accordance with conditions of the appointment or promotion, provided the employee was informed in advance of the temporary nature of the appointment or promotion and is returned to his or her former or equivalent position, if temporarily promoted."[60]

On the merits, the Agency argues that the above three exclusions have appeared in different CBAs involving the Agency and various exclusive representatives since 1990. Including these exclusions in the parties' successor CBA continues existing practice and alleviates confusion for individuals who will be reviewing the contract. Forcing employees and managers to consult lawyers in order to assess which matters are excluded from the grievance process would not be an efficient use of resources. There is no need to change the status quo and disrupt existing stable labor relations.

In addition to the foregoing arguments, Management alleges that the above history is consistent with the practice of DoD and the Air Force concerning administrative grievance procedures for non-bargaining unit employees. In this regard, those procedures also exclude the three topics covered by Management's proposals. Creating consistency between bargaining unit and non-bargaining unit employees would provide a benefit to supervisors and employees in terms of clarity and efficiency. This is beneficial to Agency operations given how often military supervisors turnover at its facility (every 12-18 months). The status quo allows new supervisors to adapt quickly.

2. Union Position

The Union opposes all three of Management's proposed exclusions in full. Although the Union's arguments in opposition differ slightly for each proposed exclusion, they all essentially raise the same concepts.[61] In this regard, the Union maintains it would be improper to deny the Union access to an independent decision maker where a manager chose to act in an arbitrary and capricious fashion within the meaning of the APA. This hypothetical denial is also inconsistent with the holding of *CANG*. Relatedly, if an employee were to encounter a mixed motive case, they could be compelled to utilize a lengthy and ineffective process rather than a simplified grievance. Employees could also be unfairly deprived of the ability to grieve anti-Union

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58 Agency Proposal G.
59 Agency Proposal I.
60 Agency Proposal J.
61 *See* Initial Union Submission at 6-9.

personnel actions. The Union also takes significant umbrage to Management's reliance on practices concerning non-bargaining unit employees. The Union views the Agency's arguments as an attempt to strip employees of their fundamental right to engage in the collective bargaining process.[62] For all these reasons, the Panel should decline to impose the Agency's requested language.

3. Conclusion

The Panel will adopt Management's proposal. The Agency bases its exclusions heavily upon significant historical data that is unrebutted by the Union. Management's three proposed exclusions appeared in all of the aforementioned contracts, albeit with some word modification that does not alter the substance of the exclusions. FFEU served as the predecessor to the Union and had agreements going back to 2002, or approximately 17 years. If one were to also include NFFE, the period of time extends to nearly 30 years. Regardless of which window applies, a significant amount of time has passed with the exclusions in place. That is, the record establishes a history of harmonious personnel dealings that support a continuation of excluding these matters from the grievance process.

The Union attempts to counter the foregoing by providing a series of hypotheticals, many involving violations of the APA, Union retaliation, and mixed motive EEO disputes. But, that is all the Union has to offer – hypotheticals. And, to the extent the Union insists it has some sort of legal claim to the type of grievances it lists, via *CANG* or otherwise, those arguments have been discussed elsewhere in this decision and rejected. Finally, the Union, once again, fails to offer a single instance in which one of its employees has expressed a need for the Union's proffered position, i.e., to permit grievances on these topics. And, none of the other arguments presented in the Union's submissions are persuasive.

For all the foregoing reasons, Management's proposals should be adopted as they present a better resolution in these "particular" settings. As a result, it is unnecessary to address the Agency's remaining arguments.

B. Equal Employment Opportunity (EEO) Matters

1. Agency Position

The Agency wishes to continue to exclude "[m]atters appealable under discrimination complaint procedures (EEO)."[63] For nearly 30 years, contracts at the Agency have excluded these disputes from the grievance procedure, and that should continue. The EEO process requires careful attention from carefully trained Agency individuals and employees who are skilled at analyzing and investigating EEO disputes filed by employees. These investigations require familiarity with a myriad of topics, such

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62 *See* Union Rebuttal, 19 FSIP 070, at 1.

63 Management Proposal H.

as EEO precedent and access to base facilities and Agency representatives. Union representatives lack the ability to easily avail themselves of the foregoing. Undergoing a grievance process would require Agency representatives who may have been accused of discriminatory acts to review EEO grievances. The Union's proposal, therefore, is inefficient. Additionally, Management believes that "Congress" envisioned that grievance procedures would not permit EEO-related grievances, as evidenced by 29 C.F.R. §§ 1614.301 and 1614.401(d).[64]

2. Union Position

The Union argues that employees should have the option to pursue EEO disputes under the grievance procedure. The EEO process requires EEO complaints to be investigated by Agency employees. Consistent with *CANG*, employees need access to an independent decision maker. Moreover, nothing prohibits the Agency from assigning its EEO officials to the investigation of EEO grievances. Finally, the right to pursue an EEO grievance is codified by 5 U.S.C. §7121(d).

3. Conclusion

The Panel will impose Management's proposal. Management maintains that there has been no demonstrated need for the Union's proposal based upon the facts of this dispute. There has been no evidence presented that employees have a need for EEO grievances, or that a lack of access to such claims have hampered employees. Additionally, the contractual history in the record discussed above shows that the topic of EEO actions has been consistently excluded from Agency contracts. The record, then, establishes an environment in which it does not appear that the Union's proposal is necessary. In response to the Agency's claims, the Union offers its standard refrain about hypotheticals involving APA violations, Union animus, and mixed-motive disputes. For reasons already stated, these arguments are unpersuasive.

The only "new" argument offered by the Union is its claim that it has a statutory right under §7121(d) of the Statute to pursue an EEO grievance. This provision contains no such right. Instead, it states that an "aggrieved employee affected by a prohibited personnel practice under [5 U.S.C. §2302(b)(1)] *which also falls under the coverage of the negotiated grievance procedure* may raise the matter under a statutory procedure or the negotiated procedure."[65] The emphasized language establishes that the ability to challenge prohibited discriminatory acts via grievance is an option when it "falls under the coverage of the negotiated grievance procedure." This language does

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[64] These are both *regulations promulgated by the Equal Employment Opportunity Commission* (EEOC) rather than acts of Congress. The first reiterates that an employee may pursue an EEO complaint through a negotiated grievance procedure or an EEO complaint, but not both. The second regulation details when an EEO grievance may be appealed to the EEOC.

[65] 5 U.S.C. §7121(d) (emphasis added).

not state such an option "*must* fall under the coverage of the negotiated grievance procedure." The Union's argument, therefore, is misplaced.

Based on the particular facts of this dispute, the Agency's position appears to be the most appropriate one under these circumstances. Accordingly, it is appropriate to adopt Management's proposal.

C. Probationary Period Matters

1. Management Position

Management proposes retaining the following exclusions: "[T]he separation, termination, or removal of an employee serving trial/probationary period."[66] On the merits, the Agency claims that this exclusion has been a part of collective bargaining agreements involving the Agency since 1990. Additionally, this provision is consistent with how the DoD and the Air Force approaches this issue for non-bargaining unit employees as part of the administrative grievance process. Again, consistency leads to efficiency.

2. Union Position

The Union acknowledges that the FLRA has concluded that "a grievance concerning the separation of a probationary employee is excluded from the scope of negotiated grievance procedures."[67] But, the FLRA has not addressed these types of grievances within the context of prohibited discrimination, e.g., race, gender, etc. Given that these types of disputes can be appealed to other forums, such as the EEOC and MSPB, it should be entirely appropriate to permit them to proceed within the context of a grievance.

3. Conclusion

The Panel will impose the Agency's proposal. The Union argues that the FLRA has not specifically addressed the topic of grievances involving probationary employees that touch upon claims of discrimination. However, the Union has not provided authority that *authorizes* these grievances. Indeed, as the Union concedes, the FLRA has held rather broadly that a "grievance *concerning the separation* of a probationary employee" is excluded from a grievance procedure.[68] The FLRA placed no qualifications upon that language, and the FLRA's position stems from well-settled Federal appellate decisions. Additionally, the Union does not dispute the Agency's claim that there is no previous contractual language involving the Agency that authorized these types of grievances. The Union has not established why this situation must now change. For all these

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66 Management Proposal K.

67 Initial Union Argument, 19 FSIP 029 at 9 (quoting *GSA and AFGE*, 58 FLRA 588, 589 (2003)).

68 *Id.*

reasons, the Agency's position should be adopted. It is unnecessary to address Management's remaining arguments.

D. Reduction-in-Force (RIF)

1. Union Position

The Union agrees to exclude RIF actions involving separations, demotions, or furloughs of more than 30 days because it believes that the MSPB has appellate jurisdiction over those actions *only* if they are excluded from the negotiated grievance procedure. But, the Union believes existing language in the CBA that excludes RIF "actions" is overbroad because it potentially excludes challenges to furloughs of fewer than 30 days as well as other types of RIF actions. Prohibiting grievances over these types of RIF actions is inconsistent with the independent right to an arbitrator established by *CANG*. Accordingly, the Panel should impose the following exclusion only: "[s]eparation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901)." The Union's proposed language is taken from Federal regulations and is discussed in greater detail below.

2. Management Position

The current CBA simply excludes "[RIF] actions" and the Agency intends on retaining this exclusion.[69] This matter has been excluded from Agency contracts for nearly 30 years, and there is no reason to justify altering this arrangement. The MSPB is capable of reviewing these types of actions. Although the law permits grievances over RIF actions, a grievance to the Management officials responsible for such actions needlessly complicates the processing of the action. Grievances, therefore, do not promote effective government operations. The Agency is also opposed to the Union's language because it believes the language could permit challenges to non-adverse actions, such as reassignments, that are taken to potentially stave off or ameliorate a RIF.

3. Conclusion

The Panel will impose Management's proposal. Pre-existing language in agreements dating back decades exclude grievances over RIF actions. Both parties agree that actions involving RIF-related removals, suspensions, and furloughs of 30 days or greater should be excluded from the grievance procedure. But, the Union wishes to leave the door open to grieve furloughs of 30 days or less and RIF "actions" that do not fall within this window. An analysis of the facts in this dispute and relevant RIF law, however, demonstrate that the Union's proposal is unnecessary because the Union's cited personnel actions do not appear to be RIF actions.

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69 Management Proposal L.

OPM has authority to promulgate RIF regulations pursuant to 5 U.S.C. §5302. Its regulations state that any "employee who has been furloughed for more than 30 days, separated, or demoted by a *reduction in force action* may appeal" to the MSPB.[70] By contrast, Federal statute and regulation treats furloughs of less than 30 days as an "adverse action" that falls under the purview of its review.[71] Those actions are also appealable to the MSPB, and Federal regulation specifically states that challenges to adverse actions may arise via MSPB challenge *or* a grievance.[72] The MSPB itself has also acknowledged that a "furlough of 30 days or less is appealable" to the MSPB as an adverse action under Title 5[73] whereas furloughs of 30 days or more are appealable as "*as a RIF action.*"[74]

Based on the foregoing, even with Management's language, the Union's concerns appear to be addressed. Management's proposal excludes solely grievances over "[RIF] actions." That phrase arguably does not cover furloughs of fewer than 30 days, which the Union wishes to be able to grieve, because those are "adverse actions." The Union also wishes to grieve RIF "actions" that are not demotions or removals, but it is not clear what such actions are. In its rebuttal statement, the Agency notes it may initiate demotion actions that do not arise to the level of an adverse action to ward off RIF actions. Whether such items would fall under the definition of "adverse action" or "RIF action" is something that could be addressed by the parties at a future opportunity, when appropriate. Finally, to the extent the Union relies upon *CANG*, for reasons already stated, that reliance is misplaced.

Even setting aside the foregoing legal framework, the merits of the parties' dispute serves as an independent basis for supporting adoption of Management's position. Decades-long contractual history has excluded RIF actions. And, Management notes that there has been no identified instance in which an employee claimed a need for the Union's requested language. The Union does not rebut this claim despite years of representation. Thus, there appears to be no need to disrupt current practice. Management's proposal, therefore, should be accepted in full.

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70 5 C.F.R. §351.901; see also 5 C.F.R. §1203.1(a)(6).

71 5 U.S.C. §7512(5); 5 C.F.R. §1201.3(a)(1).

72 *See* 5 C.F.R. §1201.3(c)(1).

73 *Salo v. Dep't of Def.*, 122 M.S.P.R. 417, 421 (2015) (citations omitted).

74 *Id.* (emphasis added).

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.

Mark A. Carter
FSIP Chairman

January 21, 2020
Washington, D.C.

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