

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, NATIONAL INSTITUTES OF HEALTH

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2419, AFL-CIO

Case No. 20 FSIP 038

DECISION AND ORDER

This case was filed by the U.S. Department of Health and Human Services, National Institutes of Health (Agency or NIH) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, over the parties' successor collective bargaining agreement (CBA). The mission of the Agency is to foster fundamental creative discoveries, innovative research strategies, and their applications as a basis for ultimately protecting and improving health. The American Federation of Government Employees, Local 2419, AFL-CIO (Union) represents approximately 503 non-professional bargaining-unit employees in three sub-components at the NIH located in Maryland, North Carolina, and Montana: the Clinical Center Hospital (CC); the Office of Research Services (ORS); and the Office of Research and Facilities (ORF). The bargaining unit is comprised of Wage Grade and General Schedule employees, including but not limited to Electricians, Maintenance Mechanics, Contract Specialists, Boiler Plate Operators, Food Service Workers, and Emergency Communication Dispatchers. The parties are covered by a CBA that became effective on August 14, 2001, and expired on August 14, 2005. Since it expired, it has continued to roll-over in one-year increments.

BACKGROUND AND PROCEDURAL HISTORY

In 2006, the parties executed a ground rules agreement for their successor CBA negotiations. The parties negotiated their successor CBA from 2007 to 2009, reaching agreement on 20 articles, but failing to reach agreement over parts or all of another 45 articles. On July 29, 2009, the Union filed a request for Panel assistance in Case No. 09 FSIP 105. The Panel declined jurisdiction because the parties had not exhausted voluntary efforts to reach an agreement.

From 2009 to 2010, the parties reinitiated bargaining efforts over a new CBA and signed off on several articles to their successor CBA, but were unable to reach a resolution when the Federal Mediation and Conciliation Service (FMCS) Mediator released the parties from mediation. The Agency then filed a second request for assistance in Case No. 17 FSIP 002.

However, the Panel declined to assert jurisdiction because it was unable to determine the proposals that were at impasse due to the parties differing interpretations of their ground rules agreement.

Thereafter, on February 7, 2017, the parties executed a new set of ground rules for successor CBA negotiations. The parties agreed that each party could renegotiate up to 12 articles from the current CBA. The Agency opened seven articles, the Union opened ten articles, and the parties mutually agreed to open five additional articles, totaling 22 articles to be negotiated.

The parties exchanged proposals and commenced bargaining on April 27, 2017. The parties continued those negotiations on the following dates: May 4; May 11, May 23; May 25; May 30; June 1; June 6; July 20; and August 1, 2017. The parties enlisted the services of FMCS and engaged in mediation on the following dates: August 2; August 3; September 5; September 6; September 7; October 4; November 1; and December 6, 2017; February 21; March 27; April 3; May 30; June 27; August 1; August 21; August 28; September 25; October 10; October 24; and October 31, 2018. The parties were unable to reach agreement on 19 out of the 22 open articles. As such, the FMCS Mediator released the parties on November 1, 2018.¹ On February 13, 2019, the Agency filed a third request for Panel assistance in Case No 19 FSIP 021.

On May 10, 2019, the Panel declined jurisdiction over the case because it could not determine which articles were properly at impasse due to the parties' colorable arguments over whether their ground rules agreement permitted the Agency to withdraw tentative agreements made during negotiations. At the time of the investigation, the Union had filed a grievance over the Agency's failure to comply with the parties' ground rules agreement. The Panel advised the parties in its procedural determination letter, that if the parties remained in need of assistance from the Panel upon the release of the Arbitrator's decision over the Union's grievance then they could file another request for assistance.

On February 21, 2020, the Arbitrator issued his decision. He found that the Agency did not violate the parties' ground rules agreement when it withdrew tentative agreements made by the parties.² Thereafter, on March 11, 2020, the Agency filed its fourth request for Panel assistance in the instant case.

On June 23, 2020, the Panel asserted jurisdiction over the Agency's request for assistance pertaining to the 19 articles in dispute. The Panel ordered the parties to participate in concentrated negotiations with the assistance of FMCS mediation for up to 30 days, followed by written submissions over any unresolved articles. The parties participated in mediation from July 13 to July 27. During the mediation sessions, the parties reached agreements over some provisions contained within each article, but did not resolve any of the articles in full. On July 29, the parties provided their written submissions over the articles in dispute.

¹ FMCS Case Number 2017N1802140.

² The Union did not file exceptions to the Arbitrator's decision.

ISSUES

There are 19 articles in dispute: Article 2, Mid-Term Bargaining; Article 6, Official Time; Article 8, Annual Leave; Article 9, Sick Leave; Article 12, Personnel Records; Article 13, Hours of Work; Article 14, Timekeeping and Attendance; Article 16, Shift Assignment/Rotation Policy; Article 19, Safety and Health; Article 21, Training; Article 22, Performance Management Appraisal Program; Article 25, Employee Awards; Article 27, Temporary Promotions, Details, and Reassignments; Article 31, Grievance Procedure; Article 33, Contracting Out; Article 44, Environmental Pay; Article 56, Overtime; Article 57, Attire and Appearance; Article 60, Mid-term negotiations. Due to the number of articles in dispute, the parties' proposals are attached to this Decision and Order.

The Agency's position on the successor CBA is that it is necessary for management to have flexibility to determine policies and procedures that will govern the way that it does business and the employees perform their work. To accomplish this goal, the Agency proposes to reduce or remove articles from the parties' current CBA and instead propose a more streamlined CBA. The Union proposes to retain the articles that the Agency seeks to eliminate in the new CBA, while also making modifications to those articles. The Union contends that it is important that supervisors and managers have a CBA that will act as a guide to assist them to understand, implement, and make any necessary changes to the terms and conditions of employment at NIH.

The Union argues that a substantial majority of the proposals that it submits as its last best offers are proposals that the parties agreed to during bargaining and, therefore, the Panel should impose. The Union also asserts that some of the Agency's proposals are permissive subjects of bargaining, which waive the Union's rights under the Statute. The Panel will reject the Union's argument that the agreements made during the parties' bargaining should be imposed by the Panel. The Union's argument is a collateral attack on the arbitration award issued in February 2020, in which the Arbitrator found that the Agency was permitted to withdraw tentative agreements made by the parties and offer the Union new proposals. If the Union was unsatisfied with the award, it should have filed exceptions with the Federal Labor Relations Authority (FLRA or Authority). As to the Union's argument that some of the Agency's proposals are permissive, the Panel will address those arguments below within each article.

POSITIONS OF THE PARTIES

1. Article 2 Mid-Term Bargaining

I. Agency's Position

The Agency states that its proposal provides for an effective and efficient bargaining schedule that will permit the Union 10 calendar days to submit a written request to bargain over the impact and implementation of a change, with the parties scheduling bargaining within 30 days from the Union's request to negotiate. The Agency also proposes that if the Union fails to respond or submit written proposals within the designated time, the Agency may implement the

change. In section 4, the Agency proposes that the language in the CBA supersedes any memoranda of understanding (MOU), memoranda of agreement (MOA), or past practice relating to topics covered by the new CBA. In section 5 of its proposal, the Agency proposes that “[i]n the event of any inconsistency or conflict between this Article (Article 2) and any other Article contained in the Agreement, the terms, conditions and provisions of this Article shall govern and control.”³ The Agency contends that this language is important because some of the portions of the current CBA that will carry over were negotiated over 13 years ago and may need to be modified where there are inconsistencies.

II. Union’s Position

The Union asserts that over the last 20 years, the parties have not had any issues with respect to bargaining in an efficient and effective manner under Article 2 of the current CBA. Despite this, the Union states that the Agency’s proposals seek to waive the Union’s right to bargain. The Union argues that it is well-established that a party who insists upon a permissive topic of bargaining to impasse violates its statutory duty to bargain in good faith. On August 5, 2020, the Union states it filed a grievance over the Agency’s failure to negotiate in good faith, which includes insisting to impasse over permissive topics of bargaining.

The Union contends that the Agency’s Article 2, section 2(2) proposal is permissive because it allows the Agency to unilaterally identify provisions in the CBA and sever those if it determines that they are inconsistent with law, government-wide rule, regulation, and executive order without negotiating with the Union. The Union next states that its section 3 proposals are based on the existing CBA and the effective 20-year bargaining practices between the parties. It provides for email notification of workplace changes and 15 calendar days for a briefing or proposal submission, with failure to adhere to the 15-day requirement permitting implementation. The Union asserts that its proposals, unlike the Agency’s provides for written notification of the change, along with a description of the change.

Finally, the Union takes issue with the Agency’s section 3, 4, and 5 proposals. The Union argues that the Agency’s proposals waive the Union’s right to bargain and are permissive topics of negotiations. The Union also argues that the Agency’s proposals fail to comply with sections A and B of the parties’ ground rules agreement, which prohibits modification of articles not opened by the parties.⁴

III. Conclusion

The Panel will impose the Agency’s proposal, with modification. The Agency’s position for all of its articles, including Article 2 is to provide management flexibility administering policies, practices, and the terms within the parties’ successor CBA. It asserts that

³ The Agency proposes this language in four different Articles: Article 2; Article 6; Article 16; and Article 31.

⁴ Provision A of the parties’ ground rules agreement states, “[t]he parties, American Federation of Government Employees, Local 2419, AFL-CIO (“AFGE” or “the Union”) and National Institute of Health (“NIH” or “the Agency”), hereby enter in this Agreement concerning negotiations over a successor collective bargaining agreement (“CBA”). Upon completion of the negotiation of the articles outlined below, the agreement will be submitted for Agency Head Review and Union Ratification.” Provision B states that “each party will be allowed to open up to twelve (12) articles...”

in order to have an effective and efficient operation, it must take a streamlined approach with respect to the CBA. To accomplish this objective, the Agency proposes to reduce or eliminate articles from the parties' current CBA, so that the new CBA will not have "cumbersome procedures, redundancies of law, or filler language of no value." The Union disagrees with this approach and instead is in favor of a more comprehensive CBA that reiterates law, rule, and regulation.

The parties negotiations for a new CBA have lasted for 14 years. The Agency's mid-term bargaining article offers the parties a welcomed approach to bargaining that will ensure negotiations take place in an effective and efficient manner. In this respect, the Union must submit a request to negotiate within 10 calendar days of receiving notice of a change in conditions of employment and the parties will commence bargaining within 30 days of the Union's request. The Union agrees in its proposal that if it fails to request to negotiate and submit proposals in a timely manner, then the Agency may implement the change. Thus, it appears that both parties are in agreement over the Union's timely submission of negotiable proposals.

The Union argues that the Agency's proposal, specifically section 2(2) is a permissive subject of bargaining. As a result, the Union filed a grievance on August 5 over the allegation. Section 2(2) of the Agency's proposal states, "[p]rovisions of this Agreement that are or become inconsistent with the law, government wide rule, executive order/memoranda, regulation, will be severed in compliance with the law, rule, order, or regulation."

The Union points to no authoritative source which suggests that the Panel must cede its jurisdiction due to a pending grievance. Nevertheless, the Union argues that the Agency's section 2(2) proposal is a permissive topic of bargaining. In *Patent and Trademark Office*, the Authority held it is an unfair labor practice to enforce any rule or regulation which is conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the regulation was prescribed.⁵

The Agency's proposal, which permits it to invalidate a provision in the CBA if a later issued rule or regulation conflicts with a provision of the CBA will be struck, as the Union has advanced a colorable duty to bargain argument. The Union can voluntarily agree to such a provision as a permissive matter; however, it cannot be compelled to negotiate away a right provided to it under Statute.

Regarding conflicts between the law and a CBA, the Authority has held that CBA provisions that are contrary to law are not enforceable under the Statute.⁶ As such, an Agency's refusal to comply with such a provision is a lawful proposal. Finally, the Agency's proposal permits it to invalidate a provision in the CBA if it conflicts with a later issued executive order. The Authority has held that executive orders issued pursuant to statutory authority are to be accorded the force and effect given to law enacted by Congress.⁷ As such, the Panel will impose the following modifying language:

⁵ 65 FLRA 817, 819 (2001).

⁶ See, e.g., *Office of the Adjutant Gen., Ga. Dep't of Defense, Atlanta, Ga.*, 54 FLRA 654 (1998).

⁷ See *NFFE, Local 15*, 30 FLRA 1046, 1070 (1988).

“Provisions of this Agreement that are or become inconsistent with law or executive orders issued pursuant to statutory authority may be severed from the Agreement in accordance with the Statute.”

The Union also argues that the Agency’s section 3 proposals are permissive topics of negotiations. However, the Agency’s section 3 proposal indicates that it will notify the Union of changes in conditions of employment, then permit the Union an opportunity to request to negotiate. The Union correctly notes that the Agency’s proposal does not specify how it will notify the Union of changes that require bargaining or indicate how the parties will handle due dates during negotiations that fall on the weekend or a holiday. The Panel will modify the Agency’s proposal to include the following language from the Union’s proposal:

“The Agency will notify the Union, in writing through email, of changes in conditions of employment that are more than *de minimis* and that affect the bargaining unit. For notice purposes, the Union is defined as President, Executive Vice President, Treasurer, and Secretary. The notice will include a description of the nature and scope of the proposed change, the proposed implementation date, the work areas affected, the impacted employees, and the name of the Agency contact person. For this Article, if a due date falls on a weekend, Federal Holiday, or date when the Federal Government is closed, then the due date will be the next business day where it is not a Federal Holiday and the Federal Government is open.”

Finally, the Union takes issue with the Agency’s section 4 and 5 proposals that appear under this Article, as well as several other opened Articles. Under section 4, the Agency proposes that all MOUs, MOAs, and past practices related to topics covered by the parties’ new agreement will terminate upon the execution of the new CBA. In section 5, the Agency proposes that in the event of any inconsistency or conflict between this Article and any other Article contained in the CBA, the terms, conditions and provisions of this Article shall govern and control. The Union argues that these proposals are permissive topics of bargaining because they do not allow the Union to negotiate. The Union also argues that those proposals violate provisions A and B of the parties’ ground rules agreement because it modifies terms that are not open for negotiation.

The Union has not advanced a colorable argument that the Agency’s proposals waive the Union’s rights under the Statute. The parties have been bargaining this new contract since 2006. The Union has had ample time to advance proposals and negotiate over the Agency’s proposals. The Agency should not have to engage in perpetual bargaining because the Union is unhappy with the Agency’s proposal and would like to continue negotiations over them.

To the latter argument of the Union, the parties did not address in their ground rules agreement how they would handle whether current MOUs, MOAs, and past practices would continue to remain in effect, and how they would handle conflicts between negotiated articles and articles of the current CBA. Absent an indication in the ground rules agreement to limit the topics or matters to be negotiated under each reopened article, the Panel will permit the Agency to propose that the terms of the newly negotiated articles will be in effect moving forward over

previous agreements, past practices, and conflicting language. Therefore, the Panel will impose the Agency's proposal, with the above-mentioned modifications.

2. Article 6 Official Time

I. Agency's Position

The Agency's proposal permits the Union to receive a bank of official time hours to be used for representational activities under the Statute that shall not exceed a rate of one hour per bargaining unit employee. As of June 2020, the Union represents 503 bargaining unit employees, so the Agency's proposal would permit the Union to receive 503 hours of official time per year. The Agency contends that the Union's proposal for a bank of 1,000 hours of official time is excessive and inconsistent with past use. For example, the Agency asserts that the Union used 493 hours of official time in Fiscal Year (FY) 2019.⁸

The Agency also states that the Union has routinely submitted official time requests that do not provide sufficient information for the Agency to evaluate whether the request is reasonable. The Agency contends that specificity is necessary when making official time requests because it may need to recall an employee due to an emergency (e.g., if the employee has a specialized skill that is needed, the Agency must know where the employee is located). Therefore, the Agency proposed an Appendix Form A to this Article, which is an official time request form that will require the Union to specify information, such as the Union representative's and the employee's name, representational activity, and the amount of time requested.

The Agency asserts that it must have the ability to hold Union officers accountable for official time use. In furtherance of this, the Agency proposes in section 6E to K that Union officials must obtain prior approval to leave their worksite on official time. The Agency also proposes in section 6 that it will be implementing a new electronic official time system to replace the manual process used to better track and record official time. The Agency asserts that it will provide the Union notice and bargaining rights under the Statute.

Finally, the Agency states that its proposal does not permit Union representatives to be on official time while teleworking because it is not best for operations. Conversely, the Union's section 9 proposal does permit such use while teleworking. Historically, the Agency argues that Union representatives have tried to meet with bargaining unit employees at unapproved locations, including in public, raising concerns over confidentiality of personnel matters.

II. Union's Position

In sections 2, 3, and 4, the Union states that its proposals require the Union to notify the Agency of its officers, request official time prior to its use, and prohibit official time for internal Union business. The Union contends that these sections establish that reasonable schedule adjustments for official time may be authorized, which the Union argues has been problematic at

⁸ Agency Ex. 2.

NIH.⁹ For example, the Union states that the President works a night shift and the Agency has denied the President's request to adjust his schedule to participate in representational activities. The Union states that its proposal will enable the Union to effectively utilize official time.

The Union's proposal provides for a bank of 1,000 hours of official time which it states is "reasonable, necessary, and in the public interest" and consistent with section 7131(d) of the Statute. The Union contends that the Agency did not provide any evidence to support its position that the Union's official time use has impaired the Agency's ability to meet its mission. The Union states that its proposal is comparable to recently effective CBAs that exceed the one hour per bargaining unit employee rate.

The Union contends that the Agency has not provided notice or information on the electronic official time system that the Agency proposes to implement in section 6. The Union argues that the Agency's proposal violates its right to negotiate, while the Union's section 11 proposal ensures that it maintains the right to bargain over the system in accordance with law.

Finally, the Union states that its official time form should be adopted in the Appendix of the parties' successor CBA. The Union states that its representatives and employees share a confidentiality privilege that is akin to the attorney-client privilege during disciplinary proceedings.¹⁰ The Union argues that the Agency's proposal requires the Union to identify employees and disclose their information in violation of the confidentiality privilege. The Union states that the Agency's proposal is not consistent with law and, therefore, the Union's official time form should be adopted.

III. Conclusion

The Panel will adopt the Agency's proposal with modification. The parties' main disagreement is over the amount of official time that the Union's representatives will receive each year under the successor CBA. The Agency's proposal offers the Union a bank of hours that is equivalent to the number of employees in the bargaining unit, which equates to 503 employees at the time that the Agency submitted its written position. The Union proposes that it receive a bank of 1,000 hours of official time.

The Agency supported its position that the Union should receive a bank of official time hours that corresponds directly to the number of employees in the bargaining unit. In this respect, the Agency provided a declaration from an Employee and Labor Relations Specialist who tracks official time requests at NIH. In her declaration, it indicates that for FY 2019, the Union used 493 hours of official time. The Union did not explain why it needs an additional 500 hours of official time to represent the bargaining unit. The Agency's proposal, however, does not address what might occur if the Union exhausts the bank of hours, but still needs to engage in section 7131(a) and (c) time. Therefore, the Panel will order the following language to remedy this issue:

⁹ Union Ex. 3 n.8.

¹⁰ See, e.g., *U.S. Dep't of the Treas.*, 38 FLRA 1300, 1308 (1991); *Long Beach Naval Shipyard*, 44 FLRA 1021, 1037 (1992); *Dep't of Veterans Affairs*, 56 FLRA 696, 697 (2000).

“If the bank or cap authorized is exceeded in any given year, the Union may use the following year’s official time allotment for section 7131(d) and will continue to be provided section 7131(a) and (c) time under the Statute.”

The Union does provide support for its section 4(C) proposal that the Agency should make reasonable efforts to adjust an employee’s schedule to allow them to perform representational duties during their tour of duty. The Union provided an affidavit from the Business Agent for the Union, who was also the President and Vice President of the Union.¹¹ She stated that the Agency has failed to approve schedule adjustments to allow the Union President, who works night shifts to engage in representational activities. The Panel will credit her statement and modify the Agency’s proposal to include the following Union language:

“All Union representatives are expected to perform the duties of their official position to which they are assigned when not on approved official time. The Agency has a duty to consider reasonable workload adjustments for individuals proportional with the amount of official time approved and used.”

The Union argues that the Agency’s section 6 proposal violates the Union’s right to negotiate a change prior to implementation. That section indicates that the Agency will implement a new electronic official time system in place of the current manual process. However, the Agency’s proposal also states that it will provide the Union notice and an opportunity to bargain the new system to the extent required by the Statute.

Finally, the parties propose an official time form in the Appendix “Appendix Form A” of the new CBA that employees must complete prior to engaging in official time. The Union cites to three Authority cases to support its argument that the Agency’s form requires the Union and the employees to disclose personal information in violation of confidentiality privileges enjoyed under the Statute. However, the circumstances in those cases are different than in the present case.

In those cases, the Authority found that the agency violated the Statute by requiring a representative of the union to disclose, under the threat of disciplinary action, the content or substance of statements made by an employee to that union representative. Here, the Agency is only asking that the Union disclose information about the official time requested, such as amount of time used; representational activity; person(s) involved in the meeting; etc., to allow the Agency to make a determination as to whether the official time request is reasonable. The cases the Union cites to do not state that requiring the Union representative to document this information violates the Statute. This information will allow the Agency to approve and track official time use.

Finally, the Agency’s proposal does not permit the Union to receive official time while teleworking. The Agency provides support for its proposal based on a concern that the Union has met with bargaining unit employees in inappropriate places raising its own confidentiality concerns. The Union did not address the need for its representatives to telework while on official time. Therefore, the Panel will adopt the Agency’s proposal, which will not permit the

¹¹ Union Ex. 3 n. 8.

Union to telework while on official time, as well as adopting the remainder of the Agency's Article 6 language.

3. Article 8 Annual Leave and Article 9 Sick Leave

I. Agency's Position

The Agency proposes for these two articles that “[u]pon implementation of the contract, supervisors will set and communicate expectations and procedures for [annual and] sick leave in accordance with law, rule and executive orders.” The Agency contends that the intent of its proposal is to allow managers within each work group to set and change leave expectations in accordance with their needs. The Agency states that the Union's leave procedures do not meet NIH's needs to allow managers the flexibility to set and change expectations consistent with their unique operational needs. In this respect, the Agency contends that the Union's “one-size-fits-all” language does not acknowledge the unique situations that occur within each organization that warrant differing leave procedures.

The Agency asserts that supervisors of employees in the Division of Facilities and Operation Management (DFOM), the Boiler Plant/Divisions of Technical Resources (DTR), and Emergency Communications Center (EEC) have unique needs. In this respect, the employees work 12-hour shifts from either 6 p.m. to 6 a.m. or vice-versa and cannot be released until relief arrives.¹² The Agency states that these groups keep the NIH campus operational and it is often difficult to find coverage for an unexpected absence with little advance notice.¹³ The Agency asserts that DFOM supervisors require at least two hours advance notice before an employee is permitted to take leave and DTR supervisors require four hours of advance notice so that they can find back-up coverage. However, the Agency states that Program Support Assistants who work in those units may not require coverage for absences and those employees may be able to take leave without the stringent advance notice requirements. Based on the differing needs of each work unit, the Agency proposes to implement a leave procedure for each unit and negotiate with the Union in accordance with the Statute and CBA.

The Agency provided two affidavits to support its position. One from the Branch Chief in the Utilities Generation Branch, who oversees the operation of the Central Utility Plant (CUP), which generates steam, chilled water, compressed air, and electricity for the NIH-Bethesda, Maryland Campus. He states that the CUP serves an excess of 12 million square feet of clinics, research departments, and hospital and administrative facilities. Based on his declaration, the CUP has been assessed as mission-critical, which means that if it fails, NIH operations will cease to function and would cause severe consequences to patients and research. Boiler Plant Operators, Utility System Repair Operators, Engineering Technicians, and High Voltage Electricians work 12-hour rotating shifts in the CUP. He contends that the CUP staffing levels are constantly fluctuating due to employee attrition, military deployments, and the use of leave. He asserts that the current leave procedures have made it challenging to find adequate coverage when employees are on leave.

¹² Agency Ex. 3 n. 3 and Ex. 4 n. 5.

¹³ Agency Ex. 3 n. 5a.

The second statement was provided by the Deputy Director of the DFOM, who oversees the operation of real property at NIH, which includes a predictive, preventative, and emergency maintenance program to ensure the safety and physical security of occupants and the physical integrity of NIH property. DFOM employees include Electricians, Maintenance Mechanics, Program Assistants, Operations Specialists, and Engineering Technicians. The Deputy Director states that over the life of the current CBA, DFOM has exercised the need to change tours of duty of employees and the tours of the shift program in order to ensure that its operations are carried out efficiently. He states that flexibility with leave procedures is necessary in order to ensure that the appropriate staff are available to work and cover the shifts in the DFOM.

The Agency asserts that the Union's proposals duplicate information already contained in NIH policy, with law, rule, and regulation, which is unnecessary to reiterate in the parties' CBA. The Agency also states that the Union's Article 8, section 2 proposal establishes procedures that requires the Agency to permit employees to take annual leave of one or two weeks after March 30 of each year. The Agency states that DFOM has system shutdown, unforeseen repairs, and vendor upgrades during which employees must remain available.¹⁴ The Agency contends that under the Union's proposal, a supervisor may have to cancel an employee's previously approved leave based on these mission-related needs, which would result in disrupting the employee's leave plans and impacting morale. The Agency asserts that by allowing each work unit to set expectations for the scheduling of leave based on their operational needs, it will allow supervisors to make decisions that best fit their needs.

II. Union's Position

The Union asserts that its proposals sets a leave calendar where employees may request leave a year in advance. The Union states that its proposal also addresses important issues such as "use or lose" leave, sick leave documentation, and the use of leave under the Family Medical Leave Act. The Union asserts that the Agency's proposal is devoid of any information, which will require employees and managers to sift through hundreds of pages of NIH policies to try and discern their application and meaning.¹⁵

The Union also asserts that the Agency's bargaining proposals over annual and sick leave will require the Union to engage in piecemeal bargaining because the parties will have to negotiate over issues related to these matters at a later date.¹⁶ The Union contends that it is a well-established principle that it is evidence of bad faith bargaining when a party forces another party to engage in piecemeal bargaining.

III. Conclusion

The Panel will adopt the Agency's Article 8 and Article 9 language. The Union argues that the Agency's proposal is piecemeal bargaining in violation of the Statute pursuant to the *IRS* case that it cites. However, unlike in the *IRS* case where the Agency insisted that subjects that were part of the parties' successor CBA negotiations must be bargained separately

¹⁴ Agency Ex. 4 n.15.

¹⁵ Union Ex. 3 n.9.

¹⁶ See U.S. Dep't of the Treasury, *Internal Rev. Serv. & NTEU*, 64 FLRA 934, 938 (2010) (*IRS*).

from their CBA negotiations, the Agency here is not insisting that the parties bargain separately over annual and sick leave procedures. Instead, the Agency proposes for Article 8 that “[s]upervisors will set expectations and procedures for annual leave in accordance with law, rule, and regulation. All such expectations and procedures will be communicated to employees.” For Article 9, the Agency proposes that “[u]pon implementation of the contract, supervisors will set and communicate expectations and procedures for sick leave in accordance with law, rule, and regulation and executive orders.” The Agency’s proposal provides managers with the discretion to implement leave procedures that best fit each work unit’s need. The Agency supported its need for its proposal by providing affidavits from two managers who indicated that flexibility is paramount to ensuring that they have the appropriate staff needed to fulfill the mission of their divisions. Any bargaining obligations under the Agency’s proposal that may ensure, would be limited to impact and implementation bargaining as a result of the manager’s implementing modifications to the procedures and arrangements once they have been established. The Union has not advanced a colorable argument that this sort of bargaining is in violation of the Statute. As such, the Panel will adopt the Agency’s Article 8 and 9 language.

4. Article 12 Personnel Records

I. Agency’s Position

The Agency proposes to eliminate Article 12 from the successor CBA. The Agency asserts that it rejects the Union’s section 2A and 2B proposals that employees must be shown all records, notes, and diaries in order to be disciplined. For example, the Union proposes in section 2 that “[r]ecords, notes, or diaries shall not be used as the basis to support any disciplinary or adverse action against an employee unless the employee has been shown and provided a copy when generated.” The Agency asserts that this requirement would limit the managers’ ability to rely on documentation for disciplinary actions, expand employee rights to review documentation beyond what is required by law, rule, regulation, and severely hinder the efficiency of operations.

II. Union’s Position

The Union asserts that its proposals are clear, concise, and capture important legal provisions related to employee records. The Union contends that there is no other succinct means for employees to be made aware of these provisions regarding their personnel records at NIH. The Union states that the Department of Health and Human Services’ policies are extensive and confusing. In addition, the Union asserts that the Article maintains and clarifies issues related to supervisory notes used in connection with disciplinary actions, which provides employees the ability to respond to the notes and have their responses maintained in the event that the notes result in disciplinary action.

III. Conclusion

The Panel adopts the Union’s proposal with modification. The parties’ main disagreement is over whether the Agency may use records, notes, or diaries as a basis to support disciplinary or adverse action against an employee. The Union proposes that management may not use these documents unless the employee has been shown and provided a copy and permitted

to refute the document. While the Agency should provide an employee the material relied upon to support a disciplinary or adverse action and permit the employee an opportunity to respond, the Union's proposal may interfere with management's right to take disciplinary action.¹⁷ As a result, the Panel will not impose this requirement contained in sections 2(A) and (B) of the Union's proposal.

The Agency did not explain why it is opposed to including the remaining sections within the Union's proposal in the parties' CBA. Those sections merely commit the Agency to ensuring that the employee's personnel files are maintained in accordance with law, regulations and the CBA. As such, the Panel will adopt the Union's Article, but remove sections 2(A) and (B) from its proposal.

5. Article 13 Hours of Work

I. Agency's Position

The Agency asserts that its proposal supports NIH's objectives of a streamlined CBA, allowing for flexibility of its managers to make decisions that promote operational effectiveness. In this respect, the Agency states that over the course of the parties' CBA, various changes to work schedules have been needed to ensure that mission critical functions are completed efficiently and effectively. The Agency asserts that its section 1 allows for maximum flexibility for managers to set and change work schedules to meet operational needs. Conversely, the Agency states that the Union's section 2A proposal requires the Agency to schedule tours of duty and assignments so that all employees will have at least two consecutive days off per pay period except when it would handicap the Agency's mission. The Agency contends that this proposal restricts its ability to set work schedules based on operations and could hinder mission critical functions from being completed.

The Agency contends that the Union's section 3 proposal includes extensive requirements for employee breaks and clean-up. The Agency asserts that these proposals hinder management's ability to determine when breaks can be permitted based on operational needs. The Union also proposes in section 3 that the Agency provide notice and an opportunity to bargain for all permanent tour of duty changes. The Agency argues that this requirement would significantly delay changes to employee tours of duty. The Agency contends that the remainder of the Union's proposal is covered by law, rule, regulation, or Agency policy, making it unnecessary.

II. Union's Position

The Union asserts that its Article is derived from the current CBA and explains hours of work, work schedules, and the Agency's right to change such schedules. The Union's proposal requires the Agency to provide it with notice and an opportunity to bargain in the event that the Agency makes a change that is more than *de minimis* to its hours of work policies. The Article requires the parties to maintain existing MOUs and practices, identifies employee breaks and

¹⁷ See, e.g., *American Federation of Government Employees, AFL-CIO, Local 1931*, 32 FLRA 1023, 1047-50 (1988).

lunch periods, requires advance posting of employee work schedules, and addresses overtime. The Article also provides clean-up periods for employees. Conversely, the Union argues that the Agency's proposals do not address these important matters, which are necessary for employees to understand their schedules as well as maintain proper safety protocols and procedures.

III. Conclusion

The Panel will impose the Agency's proposal, with modification. The Agency's proposal is intended to provide managers with the ability to balance the needs of their work units, with the employees' interests in working an alternative work schedule along with their right to overtime and holiday pay, as well as meal and break periods. The Agency, however, proposes that if it makes a change to the hours of work of the employees, it does not wish to negotiate over those matters. Under the Statute, the Agency has an obligation to negotiate over a more than *de minimis* change to employee conditions of employment. Making a change to this matter would arguably result in a more than *de minimis* change, which would require the Agency to negotiate with the Union in accordance with the Statute unless the Union has agreed to waive such a right. The Union has agreed to no such waiver. Therefore, the Panel will make the following modifications to the Agency's proposal:

"Changes to Agency policy will be handled in accordance with the Statute and this Agreement."

"The Agency has discretion to schedule basic workweeks, pay periods, establish or reschedule tours of duty, and assign or change tours of duty in the interest of effective management of operations. The Agency will notify employees of their tour of duty. In the event that the Agency makes a change which is more than *de minimis*, the Agency will provide the Union notice and an opportunity to bargain in accordance with the Statute."

6. Article 14 Timekeeping and Attendance

I. Agency's Position

The Agency states that it is proposing to eliminate this Article from the CBA in order to change its timekeeping methods and systems based on operational needs and available technology. The Agency asserts that changes to the time and attendance system would be handled in accordance with the Statute and Article 2, Mid-Term Bargaining. The Agency contends that the Union's proposal limits its ability to implement new methods of timekeeping in the future, if those listed methods become inefficient or there are technological advancements. The Agency also states that the Union's language draws no distinctions between the implementation of an entirely new timekeeping system and a *de minimis change* to the current system.

II. Union's Position

The Union asserts that this Article is necessary for the parties and responsive to the current NIH employee needs, yet the Agency proposes to eliminate this Article without identifying an issue that it creates. Moreover, the Union asserts that the policies outlined in this Article currently exist for employees, so the Agency would not need to make any changes in the workplace to implement it. The Union states that the purpose of this Article is to provide for employee usage of the electronic timekeeping and attendance system, as well as the paper system at the NIH's direction. The Union contends that it provides the Agency with the flexibility to implement new time and attendance systems, permitted that employees receive a pay period's notice. The Union states that the Article provides for employee and supervisor communication, and places employees on notice that if they fail to comply with timekeeping and attendance policies, they will be subject to disciplinary action. The Union contends that all of these proposals within this Article are necessary for advising employees of the Agency's procedures and will ensure employee compliance. Finally, the Union once again argues that the Agency's proposal will require piecemeal bargaining in violation of the Statute.

III. Conclusion

The Panel will adopt the Union's proposal, with modification. The Agency proposes to eliminate this Article from the new CBA in order to change its timekeeping and attendance systems that are in place. The Agency, however, has not provided sufficient justification to support its position to remove this Article from the new CBA.

The Union's proposal requires the managers and employees to follow time and attendance procedures currently in place, permits management the ability to make changes to the systems, and holds employees accountable for documenting proper and accurate time and attendance records. Further, the Union's proposal permits management to make changes to the existing methods for time and attendance in section 2, with the minimal requirement that it provide employees information over the change at least 14 days prior to implementation. Thus, should the Agency want to implement new time and attendance systems, it will be permitted to do so under the Union's proposal.

The Panel will, however, modify the Union's section 2 proposal, which requires the Agency to notify and bargain with the Union over changes to the existing methods for accounting for time and attendance. Instead, the Panel will impose, "the Union will be notified prior to changes that are more than *de minimis* in the existing methods of accounting for time and attendance in accordance with Article 2." Thus, the Panel adopt the Union's proposal, with the modification suggested. As a result of this order, it is unnecessary to address the Union's legal argument.

7. Article 16 Shift Assignment/Rotation Policy

I. Agency's Position

The Agency asserts that its proposal addresses the 24-hour shift workers who are part of the Shift Program, which is a program specific to ORF bargaining unit employees that work in DFOM. Shift work is defined as 12-hour tours of duty without a specified lunch break. The Agency states that its proposal clearly lays out its expectations for employee coverage and allows management the flexibility to assign staff based on skill. Regarding the Union's proposal, the Agency states that it is not effective for operations because section 2, for example, requires the Agency to create a qualified bargaining unit employee list and solicit volunteers for shift assignments by seniority each time there is a vacancy on a shift. The Agency asserts that it cannot select the most capable employee for the shift when it must select based on a seniority rotation list. The Agency states that a rotation list is not the best way to solicit employees because it can result in less qualified employees performing the job, which could result in injury and mishaps. Finally, the Agency states that the inclusion of the Nutrition Department employees, who do not work a 24-hour operation is unnecessary and burdensome. The Agency asserts that the Union has not provided a compelling reason to include these employees in this Article.

II. Union's Position

The Union states that several of its proposals are taken from the Agency's current proposals in sections 1, 2, and 4, except that the Agency's proposals contain important omissions. First, the Agency is opposed to including the shift employees in the Nutrition Department in this Article, but the Union states that there are Maintenance Mechanics who are shift employees that work in the Nutrition Department. The Union states that these employees work the day and night shift and have been included in this Article for 20 years.¹⁸ The Union contends that there is no rationale for excluding these employees and to do so would require the parties to piecemeal bargain in violation of the Statute.

The Union further asserts that the Agency fails to adequately address how employees will be selected to work a shift. The Union also states that the Agency's proposal permits employees to request shift changes, but does not have a response process. To address this issue, the Union proposes in section 4 that management respond to such requests and provide rationale for its decision.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The parties disagree over who this Article will apply to and the procedures that they will use for shift assignments and the rotation policy. The Union argues that the Agency's proposal does not adequately address how employees will be selected for a shift. However, the Agency's section 1 proposal indicates the procedure the Agency will follow. This procedure will allow the Agency to assign the most skilled employees for the work.

¹⁸ Union Ex 3 n. 12.

Next, the parties disagree over whether this Article should apply to Maintenance Mechanics in the Nutrition Department. The Union argues that these employees are shift-employees but did not provide any evidence to support its position aside from a statement made by the Union's Business Agent. Further, the Union has not explained how excluding these employees from the shift assignment/rotational policy in this Article is evidence of piecemeal bargaining in violation of the Statute.

Finally, the Union asks that managers notify employees of their decision to permit employees to change to their shift. The Agency has not established why or how this proposal would harm the Agency. Therefore, the Panel will modify the Agency's proposal to include the following Union language:

“Employees will be notified of the decision to change their shift normally within two (2) weeks from the date of the request. The Employer will explain the reason(s) for its decision.”

8. Article 19 Health and Safety

I. Agency's Position

The Agency states that its proposal provides clear and concise language regarding the safety and health of bargaining unit employees who are in a variety of positions across multiple campuses at NIH. The Agency states that its proposal allows it flexibility to ensure the safety of employees and the NIH community, while considering its operational needs, budget, and technological advances necessary for the efficiency and effectiveness of its mission. The Agency contends that the Union's proposal in sections 8 and 9 references a safety committee that serves as a forum for addressing concerns affecting employees. The Agency asserts that the parties do not currently have such a committee and that Union has not attended a meeting over safety at the Agency in years, despite receiving emails providing information over it.

II. Union's Position

The Union asserts that Health and Safety are of utmost importance at the NIH. The Union contends that bargaining unit employees work with harmful pathogens, work in facilities with asbestos, work with dangerous microorganisms, and now have to work extensively with COVID-19 patients. The Union states that these dangers create harm for employees and the general public.

The Union asserts that its proposals put the responsibility on NIH, the employees, the Union, and supervisors to be diligent about identification of workplace hazards. It requires prompt action to address such hazards, requires that the Occupational Safety and Health Administration (OSHA) and industry standards are followed by the Agency, supervisors, employees, and the Union. The Union contends that the Agency's proposals puts the responsibility on employees and the Union to identify and raise safety hazards. However, the Union argues that the Agency has always had and should maintain the joint responsibility to

raise and identify hazards, especially during a global pandemic. For example, the Agency's section 2 goes into detail about the responsibilities of the Union and employees, but does not mention the Agency's responsibilities.

Finally, the Union contends that the Agency addressed for the first time during the parties' mediation, employee drug testing. The Union is opposed to such language in the parties' CBA, as it states that the Agency's proposal is vague and based on a program that does not exist. If the Agency wishes to implement a program in the future, the Union states that at that time the Agency can negotiate with the Union in accordance with the Statute. The Union states that to implement a drug testing program now is bad faith bargaining.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The parties' main disagreement in this Article is over how to address employee safety. The Union argues that the Agency's proposal does not provide a commitment to maintain and adhere to appropriate safety standards, procedures, and protocols; however, the Agency's proposal commits the NIH to ensuring that it provides a safe and healthy work environment for the employees, which includes following applicable standards from OSHA, as well other relevant health and safety codes. The Agency's proposal further establishes that it will inform employees of the procedures that are in place to protect employees in the event of an emergency, and will provide emergency supplies and equipment at each office.

The Union's proposal offers it the opportunity to make safety and health suggestions in section 2(B). While the Union may not have participated in meetings with the Agency over employee safety, permitting the Union the ability to make suggestions at health and safety meetings will allow employee concerns to be addressed and heard. Therefore, the Panel will modify the Agency's proposal to include the Union's section 2(B).

Finally, the Agency's section 7 proposal implements an Employer Drug Testing Program; however, the Union is opposed to implementing such a program. The Department of Health and Human Services (HHS) has established the scientific and technical guidelines for federal workplace drug testing programs.¹⁹ These guidelines are mandatory for all federal agencies. Therefore, it follows that NIH, which falls under HHS, should have a drug testing program in place.

The Union argues that the parties did not bargain over the Program during CBA negotiations because the Agency introduced the idea during mediation. Contrary to the Union's argument, discussing the Program during mediation is evidence that the parties did bargain over the proposal. The Union has not presented any disproving evidence. As such, the Union's argument is rejected by the Panel. Further, the Union's bad faith argument is advanced in the wrong forum.

¹⁹ Mandatory Guidelines for Federal Workplace Drug Testing Programs, 82 FR 7920 (2017).

9. Article 21 Training and Employee Development

I. Agency's Position

The Agency's Article on Training and Employee Development is applicable to training and development for bargaining unit employees pertaining to their officially assigned duties and meeting the mission of the Agency. The Agency's proposal indicates that training must be in the best interest of the government and may not be solely for the benefit of the employee. The Agency will assign training opportunities based on its budget and the specific skill requirements of employees. The Agency's proposal also allows managers to assign training to employees who need remedial classes, or to those who show an aptitude or interest in a particular skill. The Agency contends that this flexibility and discretion will create a skilled workforce that can help improve the overall efficiency and effectiveness at NIH. Conversely, the Agency states that the Union's proposal requires the Agency to provide training and developmental opportunities "fairly and equitably," which the Agency states are vague and subject to interpretation. The Agency argues that the Union's proposal limits its ability to manage its training budget and provide training to those most deserving of it.

II. Union's Position

The Union argues its proposal provides an important resource to employees and managers to utilize for training opportunities. In this respect, the Union proposes an Article that encourages employee development, provides for fair and equitable training opportunities, establishes a training request process, addresses travel expenses for training, and maintains the Agency's right to determine training and its budget. The Union asserts that none of these matters are addressed in the Agency's proposal, with the exception of training being determined by the Agency based on its budget.

III. Conclusion

The Panel will adopt the Agency's proposal. The parties each agree that employee training is important; however, they disagree over how to address it within the context of the parties' new CBA. The Agency's proposal offers a clear and concise commitment to provide employees with training and developmental opportunities that enable them to attain their career goals, while advancing the mission of the Agency. The Union's proposal offers the same benefits, but it requires the Agency to fairly and equitably distribute training opportunities to employees. A proposal which requires that management select employees on a fair and equitable basis may interfere with management's right to assign work under the Statute.²⁰ As such, the Panel will implement the Agency's proposal in full, which will ensure that NIH provides employees training opportunities that will allow them to better contribute to the Agency's mission, while also enhancing their career objectives.

²⁰ See, e.g., *NTEU*, 53 FLRA 539 (1997) (Article 19, Section 2(A)).

10. Article 22 Performance Management System

I. Agency's Position

The Agency asserts that its proposal provides it with the ability to establish rating levels, critical elements, and standards based on operational needs. Under the Union's proposal, the Agency states that it requires management to provide oral and written feedback to employees every 90 days. The Agency argues that this requirement would hinder its ability to maintain effective operations, particularly in units where supervisors continually oversee manual work and provide verbal feedback. The Agency asserts that no formal performance-based actions were issued to bargaining unit employees in 2019; therefore, the Agency contends that the employees are receiving the necessary and appropriate feedback needed for success.

Under the Union's proposal, the Agency states that section 2B does not allow for management to establish the number of critical elements; section 2H does not allow management to establish the number of rating levels; sections 2C and 2F do not allow management to establish performance measures; section 3D does not permit management to establish the minimum rating periods; and under section 5E, it does not allow management to determine the period of time that the rating year will follow. The Agency contends that the ability to make these decisions is key to holding bargaining unit employees accountable. The Agency further states that these proposals fall under management rights.

Finally, the Agency asserts that the Union's section 6 proposal does not permit managers the ability to determine the appropriate timeframe for employees to demonstrate an ability to improve when an employee's performance is determined to be unacceptable in one or more critical elements. Instead, the Union requires management to provide the employee an opportunity to demonstrate improved performance for a period of at least 90 calendar days. The Agency asserts that this matter is more appropriately addressed in another Article 24, Reduction in Grade and Removal Based on Unacceptable Performance.

II. Union's Position

The Union states that its proposal provides a simple, yet comprehensive performance management system that maximizes employee performance. Its proposal incorporates language from the current CBA that it states is effective, long-standing, and clear and easy for the parties to administer. The Union asserts that its proposal clearly defines each rating level, establishes a minimum appraisal period, provides directives for performance improvement plans, addresses record keeping, and position description changes. The Union asserts that its proposals are not only common in the Federal government, but address many issues that the Agency failed to address in its proposal. In this respect, the Union argues that the Agency's proposal does not identify employee rating levels, which the Union states are basic and fundamental to this Article. The Union contends that this information is needed for employees to understand how to maintain and achieve high levels of performance at NIH.

III. Conclusion

The Panel will require the parties to withdraw their proposals and order that they follow the current Article 22 Performance Management System.²¹ The Agency's proposals under this Article continues the theme of an abbreviated, simplistic approach toward memorializing the parties' performance management system. The Agency argues against the Union's proposal, but provides little support for its own proposal. The Agency did not explain where or how employees and managers will learn about a system that governs employee performance, ratings, and expectations.

In accordance with 5 U.S.C. § 4302(c), agencies are required to establish performance standards which will permit accurate evaluation of job performance and communicate to the employees the performance standards and critical elements of the employee's position. The Agency's proposal makes no mention establishing the specific performance standards which will govern employee evaluation in the CBA, nor does it address whether it intends to do so in any other policy or guidance. The Union's proposal goes into unnecessary detail, some of the proposals may interfere with management rights,²² and some of the citations to the law and regulations on performance management are incorrect.²³ Therefore, the Panel will require the parties to withdraw their proposals and order them to maintain the current Article 22 Performance Management System.

The current performance system references the correct citations to the law and regulations governing performance management (e.g., 5 U.S.C. Chapter 43 and 5 C.F.R. Part 430); establishes the purpose and objective of the system, along with the critical elements and performance standards that the employees can and will be expected to meet; establishes when the employees will receive their initial appraisals, performance plans, and annual rating of record; provides for supervisory feedback, including a mid-year and final review; and a performance improvement period. The Panel does, however, order that the parties strike section 3(B) of the current language,²⁴ as that section may interfere with the Agency's right to direct employees and assign work.²⁵

²¹ Agency Ex. 5, Art. 22, p. 113.

²² For example, the Union's section 2(B) requires that the Agency not delineate all of the employees' performance elements as critical; establish a five-tier rating system in section 2(B); and requires the Agency to write performance standards in a specific manner in sections 2(C) and 2(F).

²³ For example, the Union references 5 U.S.C. § 4301(a)(1) to address the Agency's responsibility to provide performance appraisals throughout the year; however, the section of the Code is 4302.

²⁴ That section states "[a] performance standard will not be written in a manner in which a single failure results in unacceptable performance unless a single failure to meet the standard could result in death, injury, breach of security, or great monetary loss."

²⁵ See, e.g. *NTE, Chapter 213*, 32 FLRA 578 (1988) (A proposal that prescribes how the Agency will write performance standards interferes with management's rights to direct employees and assign work).

11. Article 25 Awards

I. Agency's Position

The Agency states that its proposal allows it full discretion to analyze all facts and circumstances before issuing awards, and allows management full discretion to set the budget for awards. The Agency takes issue with the Union's section 2 proposal that requires the Agency to allocate a percentage of its award's budget to each summary rating that is equivalent and above a level 3 rating. The Agency states that the Union's proposal attempts to mandate awards and limits its flexibility. The Agency also states the Union's section 3, 7, and 8 interfere with the Agency's ability to determine its budget. Finally, the Agency contends that the Union's section 9 requires it to provide the Union with information about employee awards each year, including each employee's award amount, as well as their title, grade, and performance rating. The Agency argues that this language exists in the current contract; however, despite that, the Union has not asked for this information since the CBA has been in existence.

II. Union's Position

The Union asserts that its proposals coincide with the existing CBA, as well as NIH policies and past practices related to employee awards. The Union states that its proposal describes the awards that are available to bargaining unit employees and notifies employees that awards are subject to management's discretion. The Union states that its proposals provide transparency to the award process by requiring the Agency to deliver to the Union employee award information.

III. Conclusion

The Panel will adopt the Agency's proposal. The Panel has written that "[i]n order for the Agency to be fiscally responsible, the Agency must maintain flexibility in determining when and if to issue awards, so it can balance its awards budget with mission-critical priorities."²⁶ Under the Agency's proposal, it will allow the Agency to retain the necessary flexibility to determine whether it can issue awards, while also rewarding employees if and when the budget permits. The Agency's proposal also ensures that it will follow the applicable laws and regulations for employee performance awards, i.e., 5 U.S.C. Chapter 45 and 5 C.F.R. Part 451.

The Union states that it is necessary to describe the different awards that are available to employees; however, the Agency's section 3(B) proposal ensures that employees know the different types of performance awards available. The Union also asserts that it is necessary for the Agency to provide the Union with the title, series, grade, step, work area, performance rating level, and performance award amount for each employee, during each year in order to maintain transparency about the award program. The Union has not demonstrated the need for this information. Should the Union determine that it needs this information during the term of the parties' CBA, it may make a request under the Statute for such information at that time. Thus, the Agency's proposal will be adopted by the Panel, as it affords the Agency the ability to

²⁶ See *U.S. Dep't of Defense Education Activity*, 18 FSIP 061 (2018).

balance its budget, while ensuring that qualified and deserving employees receive awards. Based on this order, it is unnecessary to address the Agency's legal arguments.

12. Article 27 Temporary Promotions, Details, and Reassignments

I. Agency's Position

The Agency proposes to remove this Article from the CBA because it states that it supports efficiency of operations. The Agency contends that the Union's section 2 proposal impacts its ability to assign work in an efficient manner and is burdensome because it creates a requirement outside of its legal duty. The Agency asserts that the remainder of the proposal duplicates what is required of the Agency by law and regulation.

II. Union's Position

The Union proposes to maintain the provisions of Article 27 that exist in the current CBA. The Union states that its proposal addresses when temporary promotions are necessary, when employees are eligible for promotions, notice requirements, and the employee request process. The Union contends that removing this Article from the CBA would require employees and managers to sift through laws, regulations, and policies in order to uncover guidance over promotions, details, and reassignments.

III. Conclusion

The Panel will adopt the Union's proposal with modification. The Agency proposes to remove Article 27 on Temporary Promotions, Details, and Reassignments from the parties' successor CBA, while the Union proposes to maintain this Article in the parties' new CBA. The Agency asserts that the reason for eliminating this Article is to support efficiency of operations. However, aside from this conclusory statement, the Agency provided no other rationale to understand the reasons behind the proposed removal.

The Agency is opposed to the Union's section 2 proposal, which describes the employee selection process for temporary promotions, because it states that it interferes with the Agency's ability to assign work. The Union proposes that "the duties of a position that is vacant for a period of fourteen (14) days or less will be assumed by another employee of the same or higher grade as the employee being replaced. When this is not practicable, an employee of lower grade can be assigned." This language may interfere with the Agency's ability to assign employees and assign work under the Statute. Therefore, the Panel imposes the following modifying language in place of that section of the Union's proposal:

"A position that is vacant for a period of fourteen (14) days or less will be assumed by another employee."

The remainder of the Union's proposal describes the length of time that an employee may be detailed, i.e., 120 days; the Agency's ability to detail an employee based on staffing, mission, and workload needs; and the ability of an employee to request a reassignment. Other than the

Agency asserting that this information may be repetitive, the Agency has not explained the harm that would ensue from including such information in the parties' CBA. Thus, the Panel will adopt the remainder of the Union's proposal.

13. Article 31 Grievance Procedure

I. Agency's Position

The Agency contends that its proposal provides a two-step grievance process, with one grievance meeting taking place, in an effort to make the grievance procedure more efficient for the Agency, the Union, and the employees. The Agency asserts that the Union's proposal for a three-step grievance procedure with multiple meetings taking place could delay decisions being issued. The Agency states that these delays are harmful to the process because witnesses' memories fade, which could substantially impact the outcome of a case. Further, the Agency asserts that it has had difficulty scheduling grievance meetings with the Union.²⁷ The Agency also proposes in section 6(F)(2)(a) to bifurcate an arbitration to allow the Arbitrator to hear any procedural issues prior to ruling on the merits of the case. In support of its proposal, the Agency contends that it is unnecessary to spend money on a hearing when there is a threshold matter that can be addressed prior to litigating the case.

In section 6, the Agency proposes to exclude several matters from the grievance procedure. The Agency contends that there are alternative processes in place for employees to address these matters. The Agency seeks to remove complaints concerning veteran's preference, since it states that a grievance over these matters "can be pursued as outlined in the Office of Personnel Management (OPM) Vet Guide, and in some circumstances directly at the Merit Systems Protection Board" (MSPB)." The Agency proposes to exclude disputes arising out of Equal Employment Opportunity matters (EEO), including accommodations, disparate treatment, reprisal, or affirmative action complaints. The Agency asserts that there already exists an established process for employees to appeal these matters. The Agency contends that this is also the reason for proposing to exclude unfair labor practice (ULP) charges because they can be filed with the FLRA. Similarly, the Agency contends that OPM has a classification and pay claims program that allows employees to file Federal Labor Standards Act (FLSA) claims and pay and compensation disputes. Finally, the Agency states that claims related to environmental differential pay have been particularly burdensome to NIH, resulting in grievances during the term of the current CBA. In this respect, the Agency states that arbitrations can take a year to litigate these matters and are costly.

The Agency also proposes to exclude performance ratings from the grievance procedure "to assist NIH in ensuing accountability, which will assist the accomplishment of our mission." The Agency asserts that this rationale can be applied to the exclusion of progress reviews, counselings, the substance of performance standards and elements, and the determination as to whether an element or measure is critical since these matters directly relate to management's ability to assign work. The Agency contends that the managers must have the full latitude to evaluate employee performance and conduct feedback without extensive grievance litigation.

²⁷ Agency Exs. 4 n. 9; 33 n. 15.

Thus, the Agency argues that if these actions were subject to the grievance procedure each and every time guidance was provided, it would be burdensome, costly, and halt operations.

Finally, the Agency proposes to exclude “any action which is administratively appealable pursuant to 5 USC Chapter 75.” The Agency asserts that these matters have been excluded under the parties’ grievance procedure since 2001, and it has proven to be operationally effective for the parties. The Agency also proposes to remove “any action which is administratively appealable to 5 USC Chapter 43.” The Agency states that there have not been any performance-based actions under Chapter 43 that were grieved in the last 10 years.

II. Union’s Position

The Union asserts that each matter in dispute under the Agency’s grievance exclusions provision is appropriate for the grievance process and should be grievable. The Union argues that under section 7121 of the Statute, CBAs must include a procedure for fair resolution of disputes.²⁸ The Union argues that the Agency’s exclusion proposals provide no recourse to employees who seek to grieve those issues. In this respect, the Union contends that the Agency’s proposal violates due process under the Fifth Amendment of the U.S. Constitution because it deprives employees of their choice of forum. The Union states that all but one of the matters that the Agency seeks to exclude from the grievance process have been grievable over the course of the last 20 years. The Union contends that it has raised approximately 201 grievance issues relating to those matters within the last five years, with the parties settling over 63 percent of those issues.

The Union states that the Agency has failed to articulate a reason to exclude important matters such as performance ratings, performance standards, disciplinary actions, Veteran’s preference, hiring issues, and counselings from the grievance procedure. The Agency proposes to remove ULP charges from the grievance procedure, which the Union asserts are currently not being processed because the FLRA has no General Counsel. The Union states that it routinely files and settles grievances with the Agency when it files ULPs.

Finally, the Union argues that the Agency’s proposed grievance form seeks to compel the Union to provide information that might violate confidentiality privileges under the Statute.²⁹ The Union states that the Agency’s form fails to account for delays and refusals to providing information to the Union, and curtails the Union’s right to address violations of the CBA and law. The Union also argues that the Agency’s proposal unlawfully attempts to usurp an Arbitrator’s authority to make procedural determinations.

III. Conclusion

The Panel will impose the Agency’s proposal with modification. The parties’ main disagreement is over the matters that the Agency proposes to exclude from the negotiated grievance procedure. For disputes over removal actions, the Panel has held that it will not automatically exclude these topics from the grievance procedure. Instead, the Panel has required

²⁸ *AFGE*, 712 F. 2d 640 (D.C. Cir. 1983) (*AFGE*).

²⁹ *See, IRS*, 38 FLRA 1300, 1322-1324 (1991).

the party who seeks to exclude the matter to demonstrate “persuasively” in the “particular setting” of the dispute whether the grievance exclusion is warranted, consistent with *AFGE*.³⁰ The Panel has now repeatedly written³¹ that it will not limit matters that can be grieved in the parties’ negotiated grievance procedure unless the moving party presents persuasive evidence that its proposal is the more “reasonable” proposal under *AFGE*.³² The Agency has not established persuasively that the Panel should exclude these matters from the parties’ negotiated grievance procedure.

Here, the Agency seeks to exclude “[a]ny action which is administratively appealable pursuant to 5 USC Chapter 45” and “[a]ny action which is administratively appealable pursuant to 5 USC Chapter 75.” These two statutes permit agencies to remove an employee for performance or conduct. The Agency’s rationale for excluding matters under the Chapter 75 is based on the parties excluding those issues since 2001. The Agency’s rationale for excluding Chapter 43 issues is because there have been no performance actions grieved in the last ten years. The Agency also contends that because an employee may seek redress elsewhere, such as the MSPB or EEOC then they should be excluded in the grievance procedure. The Panel has considered and rejected similar arguments in the past.³³ The Agency has not provided any other rationale for its position. Further, the Agency’s position actually supports the opposite argument, that maintaining these matters in the parties’ grievance procedure will not be overly burdensome. As such, the Panel will reject the proposed removal exclusion.

Next, the Agency proposes to exclude “[d]ecisions regarding awards,” and “[p]erformance ratings; including summary ratings and ratings on individual performance elements and performance measures,” as well as the substance of performance standards and elements, and the determination as to whether an element or measure is critical. The Agency provides sufficient rationale to meet its burden here. As the Agency notes, these exclusions will ensure employee accountability and provide managers with the full discretion to evaluate and effectively manage employee performance.

The Union has offered little in the way of a rebuttal to these exclusions. The Union argues that these two proposed exclusions are inconsistent with *AFGE*. However, aside from this conclusory statement, the Union does not elaborate on its position. The Union does state that the Agency’s proposed exclusions deprive the employees the ability to seek redress over these matters. The employees may continue to pursue redress over these matters in other appropriate forums, e.g., before the EEOC, or the Office of Special Counsel depending on the legal argument advanced.

The Agency also proposes to exclude complaints concerning individual rights related to a reduction-in-force; complaints concerning veteran’s preference; progress reviews and counseling sessions; any ULP allegations; an action terminating a temporary promotion; claims alleging violations of FLSA; disputes arising out of Title VII, including accommodation, disparate treatment, reprisal, or affirmative complaints; and disputes regarding premium pay, including

³⁰ *AFGE*.

³¹ *Social Security Administration*, 2019 FSIP 019 (2019).

³² *AFGE*.

³³ *See NASA*, 20 FSIP 025 (2020); *See also, Dep’t of the Air Force, Fairchild Air Force Base*, 19 FSIP 070 (2020).

environmental differential pay, overtime, holiday pay, and compensatory time. The Agency only asserts that there are other forums in place for employees to pursue a dispute over these matters and that it has been burdensome and costly for the Agency to process grievances over these matters. The Panel will reject this argument as explained above. If Congress had intended to exclude these matters from the grievance procedure because employees have other available forums to pursue these claims, it would have done so when formulating the Statute. Further, the Agency did not provide any data to support its position that grieving these matters has been burdensome or costly.

The Panel will adopt the Agency's proposed exclusion over a non-selection of an employee for a position from a group of properly ranked and certified candidates. The Agency's proposal is consistent with 5 C.F.R. § 335.103(d). That section states that the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances; however, the non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. Therefore, the Panel will impose this exclusion here.

The remaining issues in dispute under this Article pertain to a disagreement over the number of steps and meetings in the grievance process. The Agency's proposal provides for a more effective and efficient grievance process that will ensure a timely resolution to the grievance. The Agency's proposal also provides for specificity of a grievance to allow the defending party an opportunity to fully and appropriately respond to the claims at issue.

The Union argues that the Agency's grievance form curtails the Union's right to address violations of the CBA and violates privileges enjoyed by Union representatives and employees under the Statute. First, it is not clear how the grievance form does not permit the Union the ability to grievance violations under the CBA. The Agency proposes to include within the grievance form pertinent information about the grievance (e.g., name of the grievant and representative, as well as description of the events relating to the grievance) to allow it to investigate the matter. Without such information, the Agency will be unable to assist it in the resolution of the grievance. Secondly, the Panel previously addressed its position over the Union's argument pertaining to confidentiality under Article 6. The Union's argument will be rejected once again here.

Finally, the Agency seeks a bifurcated grievance process, but the Union is opposed to such a process and argues that such a process is unlawful. The Union's argument is without merit. The Panel has written that it is in favor of a grievance procedure that reduces unnecessary costs.³⁴ The Agency supports its proposal for a bifurcated grievance procedure, since it will aim to reduce the costs associated with the parties litigating issues that ultimately have been found to be procedurally deficient. As such, the Panel will impose the Agency's proposal, with the aforesaid modifications.

³⁴ See e.g., *Dep't of Commerce, NOAA, NWS*, 20 FSIP 021 (2020).

14. Article 33 Contracting Out

I. Agency's Position

The Agency proposes to remove this Article from the parties' new CBA "because it is most effective for operations." The Agency asserts that it will abide by appropriate law, rule, and regulation over contracting out, but is concerned over the 45-day notice period required by the Union's proposal. The Agency states that the notice period is excessive and would delay the contracting out process.

II. Union's Position

The Union asserts that its proposal maintains the existing contracting out article, but reduces the time period for notification to the Union for bargaining purposes. The Union initially proposed a 120-day period. The current CBA has a 90-day period. The Union states that it now proposes a 45-day period for the Agency to notify the Union prior to contracting out work performed by bargaining unit employees. The Union contends that this amount of time assures adequate notice such that bargaining may be completed prior to the Agency's implementation date.

III. Conclusion

The Panel will impose modified language. The parties disagree over whether the new CBA should contain an article on contracting out. Contracting out government services is to permit the private sector to perform functions of the Federal government.³⁵ The Federal government, whenever possible, should conduct competitions between public agencies and the private sector to determine who should perform the work.³⁶ Competitions are conducted under OMB guidance (i.e., Circular A-76) that allows for the comparison of costs and overall service among private sector and Federal government providers. Currently, there is a Congressional moratorium on conducting the A-76 studies.³⁷ That moratorium can be lifted at any time by Congress, as the OMB policy remains in place.

The Union's proposal focuses on providing it notification and bargaining rights in accordance with the law. The Agency has explained it will abide by law, rule, and regulation when the moratorium is lifted and it determines to contract out work; however, it is concerned that the Union's lengthy notification period may inhibit its ability to contract out. Therefore, the Panel will impose the below language, which will require the Agency to abide by law, rule, and regulation for contracting out purposes. This includes providing the Union advance notification and a reasonable opportunity for the Union to request to bargain over the change in conditions of employment.

"Prior to contracting out work, the Agency will abide by appropriate law, rule, and regulation."

³⁵ Consolidated Appropriations Act 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2494 (2019).

³⁶ *Id.*

³⁷ *Id.*

15. Article 44 Environmental Pay

I. Agency's Position

The Agency proposes to eliminate Article 44 from the successor CBA in order to achieve its objective of a streamlined CBA. The Agency contends that Environmental Pay is provided for by law, rule, and regulation. The Agency states that many of the Union's proposals are addressed in other articles, such as Article 19 Safety and Health and, therefore, are unnecessary to include here. The Agency is also opposed to the Union's language because it states that it conflicts with OPM's Operating Manual over environmental pay differentials for exposure to hazards,³⁸ which has caused confusion and obligated NIH safety experts to review two sets of guidelines: one for all the NIH staff that work in the laboratories and one for the bargaining unit employees. The Agency states that the Union has filed two grievances in recent years related to conflicts with environmental pay in the parties' CBA and the OPM Operating Manual. The Agency's position is that the parties should follow the OPM Operating Manual for this type of pay and not include additional language in the CBA, which can lead to confusion and ultimately grievances where the two conflict.

II. Union's Position

The Union states that this Article refers to regulations, policies, and procedures related to environmental pay. The Union contends that it provides for pay to employees who risk their lives and the lives of their families. As such, the Union contends that Environmental Pay Article should be maintained because it clarifies potential hazards, the process for dealing with such hazards, and the pay authorized for such work, which the Union asserts has been the subject to many grievances.

III. Conclusion

The Panel will impose modifying language. The parties disagree over whether the successor CBA should contain an article over Environmental Pay. The parties, however, agree that they must recognize the differing conditions under which employees work and the pay that they may receive while working under these conditions, such as working in cold and hot environments, working at extreme heights, and with explosive and poisonous chemicals. When employees work under such conditions, they are entitled to differential pay.³⁹ The Agency has explained that it is committed to following the OPM Manual, Appendix J for the different environmental pay categories. That manual details the differential rates of pay that employees can expect to be paid for performing various types of work under hazardous conditions. The Union has not explained why following OPM regulations on environmental differential pay would not satisfy its interest in this Article. As such, the Panel will impose the following language:

“The parties will follow law, rule, and regulation for environmental pay.”

³⁸ Agency Ex. 35 (OPM Appendix J).

³⁹ 5 CFR 550.902.

16. Article 56 Overtime

I. Agency's Position

The Agency's proposal is to eliminate the Overtime Article from the parties' successor CBA, as it states that this issue can be addressed under Article 13 Hours of Work. The Agency states that much of the bargaining unit work is essential facility maintenance and patient care work, which requires flexibility so that managers can assign overtime. The Agency contends that many of the Union's proposals contain references to government-wide rules and regulations. The Agency states that it is best to let these governing rules and regulations speak for themselves rather than duplicate them in the parties' CBA.

II. Union's Position

The Union proposes to maintain the existing provisions in Article 56. The Union states that employees frequently work overtime and some departments, including the Maintenance Department provide overtime on a nearly daily basis.⁴⁰ The Union contends that the Agency has not proposed an overtime Article despite the frequency of overtime assignments at NIH. Instead, the Agency has insisted on including one sentence regarding overtime in Article 13 that only indicates overtime assignments will be made based on the nature of the work and the skill required of the job.

III. Conclusion

The Panel will impose modifying language. The Agency proposes to eliminate the parties' Overtime Article from the new CBA, while the Union proposes to maintain it. Neither party provided sufficient rationale to justify adopting their position. The parties, however, both agree that overtime should be paid consistent with law, rule, and regulation. Therefore, the Panel will impose language which will honor that commitment. This approach is more efficient than duplicating language that is provided by law, as suggested by the Union's proposal, and is also more effective than removing the Article altogether as proposed by the Agency. The parties are ordered to adopt the following language:

“Overtime will be paid in accordance with law, rule, and regulation.”

17. Article 57 Attire and Appearance

I. Agency's Position

The Agency proposes to eliminate this Article from the new CBA, as it states that attire is linked to Article 19 Safety and Health, where the Agency proposed attire language for the parties to follow. The Agency asserts that the Union's proposal does not allow the Agency the flexibility to determine if uniforms are needed, nor does it permit the Agency the ability to make changes to the composition of uniforms due to operational needs, health and safety requirements,

⁴⁰ Union Ex. 3.

and technological advances, which the Agency contends have been necessary over the term of the parties' CBA. The Agency provided two statements from supervisors to support its position. Specifically, the Branch Chief in the Utilities Generation Branch of the ORF stated that he needs the ability to modify the composition of uniforms due to possible OSHA updates to personal protective equipment regulations.⁴¹ The Chief of Food Services in the Nutrition Department also stated that food hygiene standards were updated during the term of the parties' current CBA, which has required changes to attire, accessories, and personal grooming standards.

II. Union's Position

The Union asserts that its proposals identify the attire for employees who must wear specific clothing to perform their job. It also identifies instances when NIH issues uniforms and the amount issued. The Union asserts that having no article on Attire and Appearance, as the Agency proposes will reduce the likelihood of employees knowing about important attire and appearance requirements.

III. Conclusion

The Panel will impose modifying language. Once again, the Agency proposes to remove from the new CBA Article 57 on Attire and Appearance. The Agency contends that it must have flexibility to determine if uniforms are needed, as well as the ability to make changes to employee attire. Therefore, it proposes that the parties follow Article 19 for guidance on appropriate attire for employees. Article 19, section 1(D) provides management with the right to determine the appropriate apparel and to provide employees such apparel at its discretion. The Union would like a more elaborate policy on attire.

On balance, the Agency better supported its proposal with statements from its supervisors to bolster its argument that its managers need flexibility in order to maintain appropriate attire and personal grooming standards.⁴² The Union provided little rationale to demonstrate support for its proposal. However, the Agency's reference to Article 19 only indicates that management reserves the right to determine the appropriate apparel for employees. Article 19 does not contain any guidance to employees on the appropriate clothing or personal grooming standards necessary for employees to perform their jobs. As addressed previously, the employees work under hazardous conditions. It is important that employees understand the appropriate clothing and grooming standards permitted. Therefore, the Panel will impose the following language:

“The Agency will provide the employees within each division policy and guidance on the appropriate attire and appearance requirements.” Should the Agency determine it needs to make changes that are more than *de minimis*, it will comply with its statutory bargaining obligations.”

⁴¹ Agency Ex. 3.

⁴² Agency Exs. 3 and 33.

18. Article 60 Midterm Negotiations

I. Agency's Position

The Agency contends that given the short-term duration of the contract, four years, there is no need to reopen bargaining at the midpoint of the CBA. The Agency states that the parties have been bargaining the successor CBA since 2006, which has demonstrated to be costly and inefficient for both parties. The Agency asserts that its proposal is consistent with the Panel's approach toward bargaining, i.e., to prevent the parties from perpetually bargaining. Therefore, the Agency proposes to remove this Article from the parties' successor CBA.

II. Union's Position

The Union asserts that its proposal for this Article permits either party to open five articles for renegotiations two years after the CBA becomes effective. The Union states that this proposal will enable the parties to update the CBA as needed.

III. Conclusion

The Panel will impose the Agency's proposal. The final article that the Agency proposes to eliminate is the parties' mid-term reopener, Article 60. As the Agency points out, the parties have been negotiating a new contract since 2006. The Panel is not confident that providing the parties another opportunity to negotiate mid-term would be beneficial to the parties, along with being an effective and efficient use of either of their resources. As such, the Panel will order the parties to follow the Agency's proposal, which will ensure that the parties have much needed stability during the term of the new contract. Should the parties determine that they need to negotiate at any point, they are free to mutually agree to engage in bargaining.

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

September 28, 2020
Washington, D.C.

ATTACHMENTS

- Parties' Proposals