United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of ENVIRONMENTAL PROTECTION AGENCY And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 20 FSIP 051

DECISION AND ORDER

This case, filed jointly by the Environmental Protection Agency (EPA or Agency) and the American Federation of Government Employees (AFGE or Union), concerns a dispute over the parties' successor collective-bargaining agreement (CBA). This dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). The Federal Service Impasses Panel (Panel or FSIP) asserted jurisdiction over this dispute and directed the matter to be resolved in the manner discussed below.

The mission of the EPA is to ensure that Americans are protected from significant risks to human health and the environment, national efforts to reduce environmental risk are based on the best available scientific evidence, and that federal laws protecting human health and the environment are enforced fairly and equitably. The Union represents approximately 7,500 professional and non-professional bargaining unit employees in the consolidated nation-wide unit[1]. This is the largest bargaining unit in the EPA. The current EPA/AFGE Collective Bargaining Agreement (CBA) was effectuated on July 8, 2019. The terms of that agreement remain in effect until all bargaining requirements are met, per a December 2019-Settlement Agreement.

BARGAINING AND PROCEDURAL HISTORY

The bargaining history of this CBA dates back to the re-negotiations of the 2007-CBA. In August 2007, the 2007-CBA went into effect for a three-year duration, with one-year increment extensions if neither party provides notices of intent to terminate and renegotiate. In May 2010, the Union gave notice that it intended to reopen the

[1] The consolidated unit is made up of 13 AFGE locals.

2007-CBA. In January 2016, the parties signed a tentative agreement on five articles and a "clean-up" agreement; all the remaining articles remained unchanged.

In February 2016, the Union notified the Agency that its membership failed to ratify the tentative agreement. In September 2016, the parties agreed to commence the reopened negotiations. After years of back and forth discussion about reconvening bargaining and the matters that would be open for renegotiations, in May 2018, the Agency notified the Union that pursuant to Article 41, Section 3 of the CBA, the Agency was reopening the full CBA in light of President Trump's Executive Orders, issued May 25, 2018.

In June 2018, the Agency sent AFGE new Ground Rules proposals. In June 2018, the Union gave notice to the Agency that AFGE had now ratified the 2016-tentative agreement (TA'd agreement) and was awaiting Agency Head Review. The Agency responded to AFGE's ratification notice stating that when AFGE failed to ratify the first time, the TA'd agreement was no longer on the table and consequently AFGE did not have the right to a second ratification vote. On August 1, 2018, the Agency informs the Union that the CBA expired and the CBA was thereby terminated, pursuant to its Article 41, Section 3 notice given in May 2018. On August 8, 2018, AFGE and Agency met with the FMCS mediator to discuss ground rules to the negotiations.

Between August 2018 and May 2019, the parties continued to litigate over their obligation to bargain. In May 2019, the Arbitrator denied in its entirety the Union's ratification and no Agency Head Review grievance. Following that decision, in July 2019, the Agency unilaterally implemented the new CBA. The Union filed a ULP with the FLRA Chicago Regional office over the unilateral implementation of the July 2019-CBA. In December 2019, the parties settled the ULP. In that settlement, the parties agreed to negotiate parts of the July 2019-CBA and outstanding parts of the 2007-CBA. The parties agreed that the settlement resolves all of the ongoing litigation between the parties over the negotiations of the 2007-CBA.

The parties returned to the bargaining table in January 2020. The parties engaged in bargaining between January 2020 and March 2020. The parties engaged in mediation in May 2020. The parties were released from mediation and the parties jointly requested FSIP assistance. In June 2020, the Panel determined that it would decline jurisdiction over the remaining provisions in Article 2 – Official Time because the Union raised a colorable duty to bargain argument. The Panel asserted jurisdiction over the remaining provisions in Article 6 – Negotiated Grievance Procedure and ordered the parties to engage in a Written Submissions procedure.

PARTIES' ARGUMENTS AND PANEL DECISIONS

At the conclusion of mediation, there remained 5 outstanding exclusions within the Negotiated Grievance Procedure article. The scope of the grievance procedure, meaning the types of matters considered, is fully negotiable. However, the party proposing to exclude matters from the negotiated grievance procedure should be

prepared to persuasively establishing a reasonable basis for excluding subjects and narrowing the scope of the grievance procedure because Congress has expressed a preference for "broad scope" grievance procedures. (*AFGE Local 225 v. FLRA*, 712 F. 2d 640 (D.C. Cir 1983)). If a bargaining impasse is reached on the scope of the negotiated grievance procedure, the FLRA established a standard for evaluation of the resolution for these disputes.(*Pension Benefit Guarantee Corporation*, 59 FLRA 937 (FLRA 2004)) In *PBGC* the FLRA enforced an arbitral award where the arbitrator concluded that the Agency had persuaded the Arbitrator that a more narrow scope of the grievance procedure was appropriate. Id.

In PBGC the parties contracted with a private arbitrator to resolve a bargaining impasse. The Agency had proposed exclusions in the parties grievance arbitration procedure. The Arbitrator determined that it was the Union's burden to demonstrate why the scope of the grievance procedure should not be narrowed and ultimately ordered the exclusion. The Union appealed to the FLRA arguing that the assignment of the burden to the Union violated the holding in *AFGE v. FLRA,* 712 F.2nd 640, 649 (D.C. Cir. 1983). The Authority rejected this argument writing:

> In this case, the Arbitrator's factual findings show that he examined the Evidence and found the Agency's arguments as to a limited-scope Grievance procedure 'persuasive' (citations omitted) The Arbitrator's Findings show that he did not unlawfully place the burden on the Union but properly assessed the persuasive weight of each side's presentation in reaching his conclusion. Accordingly the Union has not established that the award is contrary to AFGE v. FLRA.

Id.

The following issues remain outstanding:

1. Removals for Performance or Conduct

   Agency Proposals[2]: 12 and 13
   Union Proposals[3]: 11 and 12

The parties shared that there has been one case of appeal of a removal action taken by the Agency over the last five (5) years. The Agency removed an employee for abuse of transit subsidies. The arbitrator overturned the removal of the employee, determining that the level of penalty did not fit the offense. The arbitrator ordered

[2] Agency (12) - Removal of an employee pursuant to Title 5, U.S.C., Chapter 75, and the implementing regulations at Part 752 of Title 5, Code of Federal Regulations (C.F.R.).
Agency (13) - Removal of an employee pursuant to Title 5, U.S.C., Chapter 43.

[3] Union (11) - Removal of an employee pursuant to Title 5, U.S.C., Chapter 75, and the implementing regulations at Part 752 of Title 5, Code of Federal Regulations (C.F.R.). This does not preclude grievances where the Agency has not taken into account the particular circumstances and where removals are not warranted for the circumstances.
Union (12) - Removal of an employee pursuant to Title 5, U.S.C., Chapter 43; This does not preclude grievances where the Agency has not taken into account the particular circumstances and where removals are not warranted for the circumstances.

instead that a 30-day suspension was appropriate under the circumstances. There is no indication that the Agency appealed the arbitration decision. Instead, the Agency now uses that example, along with reliance on the guidance of the Executive Order 13839 (EO 13839)[4], to support its proposal to exclude all removal actions from the CBA. The Agency cites another Panel case (*OPM and AFGE*, 19 FSIP 071; OPM case), where the Panel addressed a number of exclusions, but ultimately ordered the exclusion of awards (but not removals) from the OPM CBA. In that case, the agency presented a compelling argument for excluding awards, that the Union did not refute. Relying on that case ruling, the Agency argues that the Panel should also exclude removals from this CBA. The Panel has been clear that the moving party must establish the need for a more limited scope in its NGP in this particular setting. The Agency's reliance on another agency's presentation in another bargaining unit is rejected.

Also, relying on arguments presented in the OPM case[5] and a Department of Transportation and AFGE case[6] (19 FSIP 043), the Agency argues that excluding removals from the NGP is consistent with public policy when the employees have alternative avenues of redress to expert adjudicators. The Agency argues that because removals are otherwise appealable to the Merit Systems Protection Board (MSPB), they don't need to be appealed in the negotiated grievance procedure. The Agency argues that the MSPB is staffed with judges that have more expertise to address those claims than an arbitrator.

The Agency has failed to demonstrate that in this setting, exclusions are more reasonable than allowing the matters to be subject to the negotiated grievance procedure. The Agency goes on to argue that while the Agency may have the initial burden of persuasion, if the Agency relies on the EO as its primary reason for the proposed exclusion, the burden should then shift to the Union to demonstrate with evidence that there should be no exclusion. Absent a demonstration that in this setting that the proposed exclusion from the NGP meets the test established by the FLRA applying the DC Circuit analysis, the Panel orders the parties to withdraw their proposals to exclude removals from the NGP in this CBA.

[4] Executive Order 13839 - "Sec. 3. Standard for Negotiating Grievance Procedures. Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. If an agreement cannot be reached, the agency shall, to the extent permitted by law, promptly request the assistance of the Federal Mediation and Conciliation Service and, as necessary, the Federal Service Impasses Panel in the resolution of the disagreement."

[5] The Panel did not rule in favor of OPM; removals were not excluded from the NGP.

[6] The Panel ruled in favor of the DOT; removals were excluded from the NGP. In that case, the Agency presented compelling arguments and examples of arbitrators' mismanagement of removal cases. The Union offered no substantive rebuttal to the Agency's argument.

2. Awards

Agency Proposals[7]: 7, 20 and 21
Union Proposals[8]: 19 and 20

Section 4 of EO 13839 dictates that agencies may not subject grievance procedures or arbitration disputes to "the award of any form of incentive pay, including cash awards, quality step increases, or recruitment, retention, or relocation payments." Both parties have proposed the exclusion of awards from the NGP, but use different language to articulate the exclusion.

The Agency's proposal mirrors language found in the EO. The Agency argues that the Panel should rely on the EO and exclude awards.

The Union's proposal mirrors the language found in the EPA Administrative Grievance Procedure (AGP), Section 5 (m) and (n). While the Negotiated Grievance Procedure (NGP) in the CBA is the exclusive procedure available to bargaining unit employees for resolving grievances which fall within its coverage[9], the AGP is the procedure created to give non-bargaining unit employees[10] an opportunity to present and obtain consideration of grievances. The Union argues that if the parties are going to exclude awards, it should use the same language the Agency has in its AGP.

As the parties both propose to exclude awards, the burden analysis is not necessary. As for the language that should be ordered to reflect the exclusion, the Union makes a compelling argument that the language should be the same as the exclusion language that applies to the non-bargaining unit employees using the AGP. The Panel orders the parties to adopt the language used in the AGP for excluding awards:

* Receipt or non-receipt of: 1) an incentive, honorary, time-off, cash or performance award under the provisions of 5 U.S.C. 45, 5 U.S.C. 5384 and 5403; or 2) a quality step increase under the provisions of 5 U.S.C. 5336.

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[7] Agency (7) - The receipt or non-receipt of an honorary or cash award.
Agency (20) - Decisions regarding performance awards, on the spot awards or any other types of awards.
Agency (21) -Decisions regarding incentive pay. Incentive pay means cash awards; quality step increases; or recruitment, retention, or relocation payments.

[8] Union (19) - Receipt or non-receipt of: 1) an incentive, honorary, time-off, cash or performance award under the provisions of 5 USC 45, 5 USC 5384 and 5403; or 2) quality step increase under the provisions of 5 USC 5336
Union (20) - Receipt or non-receipt of recruitment, retention, or relocation payments in accordance with 5 USC 5753 and 5754 and 5 CFR 575 Subparts A, B and C.

[9] 5 C.F.R. 7121.

[10] AGP Section 3 – the procedures exclude bargaining unit employees, as defined in 5 C.F.R.771.202, grieving issues falling within the scope of the negotiated grievance procedure. Bargaining unit employees may utilize the administrative grievance procedure for any matters covered in subpart (4) below which are not covered under the applicable negotiated grievance procedure.

* Receipt or non-receipt of recruitment, retention, or relocation payments in accordance with 5 U.S.C. 5753 and 5754 and 5 C.F.R. 575 Subparts A, B and C.

ORDER

Pursuant to the authority vested in the 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 8, 2020
Washington, D.C.