

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

Federal Communications Commission

And

National Treasury Employees Union

Case No. 19 FSIP 058

**DECISION AND ORDER**

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

**BACKGROUND AND PROCEDURAL HISTORY**

The Agency is an independent Federal agency overseen by Congress that regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia, and U.S. territories. The Agency is managed by five commissioners, appointed by the President of the United States and confirmed by the Senate, with one commissioner selected by the President serving as Chairman to lead the Agency. The National Treasury Employees Union (Union) represents Agency employees in two separate bargaining units. The first unit includes all professional General Schedule employees of the Agency, nationwide. The second unit includes all nonprofessional General Schedule and Wage Grade employees of the Agency, nationwide. The Union represents approximately 836 Agency employees: 509 professional employees and 327

nonprofessional/Wage Grade employees. The parties' current CBA, executed in 2014, applies to both units.

After terminating the parties' CBA in December 2018, the Agency provided the Union with its first set of ground rules proposals in early March 2019. In May, the parties met to negotiate and received FMCS mediation. On June 24<sup>th</sup>, the Agency sent the Union its last, best offer (LBO) and requested the Union respond by June 28<sup>th</sup>, a few days prior to the parties' next scheduled mediation session. The Union did not respond to the Agency's June 24<sup>th</sup> offer and the Mediator subsequently released the parties to the Panel upon the Agency's request on July 8<sup>th</sup>.

On August 8, 2019, the Panel voted to assert jurisdiction over the remaining ground rules and to resolve them through a Written Submissions procedure, with an opportunity for rebuttal statements. The parties timely submitted their positions and rebuttal statements. Prior to submitting rebuttal positions to the Panel, the parties agreed to adopt one of the Union's proposals and strike both parties' proposals involving collective bargaining training. In the Union's October 7<sup>th</sup> rebuttal position, it agreed to the language of two of the Agency's proposals. The Panel has only decided the remaining four proposals in dispute.

### PROCEDURAL ISSUE

The Union renewed its argument that the Panel does not have jurisdiction over this dispute because of unresolved duty-to-bargain issues but did not present any novel arguments. The Panel appropriately addressed the Union's argument prior to asserting proper jurisdiction over this dispute.

### SUBSTANTIVE ISSUES

#### 1) Memorandum of Understanding

##### a) Agency's Final Offer:

Memoranda of Understanding (MOUs) executed by the Parties during the previous term BNA and those executed from the effective date of these Ground Rules up to the date a new term BNA becomes effective will be incorporated into the new BNA. In the event that language in an incorporated MOU conflicts with language in the new term agreement, the language from the

new term agreement will control. Within thirty (30) calendar days of the new term agreement becoming effective, either Party may identify concerns related to the application of new BNA terms to the provisions in incorporated MOUs. The parties will meet to discuss and, to the extent feasible and consistent with the new BNA and law, rule, and regulation, attempt to resolve the issue(s).

#### **b) Agency's Position**

The Agency proposes that all existing memoranda of understanding (MOUs) at the time of the execution of the new CBA will be incorporated unless there is a conflict with the new CBA; then the new CBA will control. The parties will meet within 30 days of the execution of the new CBA to identify any concerns related to the application of the new CBA with the incorporated MOUs and attempt to resolve, where feasible. The Agency takes the position that treating the MOUs in this manner will provide for full force and effect of the new CBA and help provide clarity.

As it relates to the impact of this proposal on bargaining of the new CBA, the Agency suggests that it will prevent a party from expanding the scope of bargaining beyond the already agreed to limited re-opener by excluding subjects in previous MOUs and eliminating duplicative bargaining. In its rebuttal, the Agency argues that the Union failed to provide any rationale in support of its proposal other than the parties will figure it out. The Agency's concern regarding efficient and effective bargaining is based on the Union's potential to delay completion of bargaining the CBA by expanded the scope of the limited reopener.

#### **c) Union's Final Offer**

Memoranda of Understanding (MOUs) executed by the Parties during the previous term BNA and those executed from the effective date of these Ground Rules up to the date a new term BNA becomes effective will be incorporated into the new BNA in a manner determined by the parties during bargaining (e.g., appended thereto or by reference). In the event that language in an incorporated MOU conflicts with language in the new term agreement, the language from the new term agreement will control.

#### **d) Union's Position**

The Union proposes that the parties determine during bargaining how existing MOUs will be incorporated into the new CBA. The Union disagrees with the Agency's proposal as it makes no sense to require the parties to meet and discuss the terms of MOUs until negotiations are complete.

#### **e) Conclusion**

The Union provides no rationale in support of its proposal for the parties to figure things out at bargaining. Further, the Union has misread the Agency's proposal that requires the parties to meet 30 days after the new CBA is executed, rather than after the Ground Rules are executed, to discuss any conflicts with the CBA and incorporated MOUs. The Agency's proposal to incorporate the MOUs, allowing the new CBA to control, will enable the parties to engage in effective and efficient bargaining followed by a streamlined implementation process. Accordingly, the Panel will impose the Agency's proposal.

#### **2) Exchange Proposals**

##### **a) Agency's Final Offer:**

The Parties will electronically exchange written proposals in electronic format (Microsoft Word) no later than 4:00pm Eastern Time, on the thirtieth calendar day after the article list is finalized and distributed. To the extent the thirtieth calendar day after the finalized article list is distributed is not a work-day, the proposals will be exchanged no later than 4:00pm Eastern Time on the next business day. The Parties may agree to extend or alter the timeline for exchange of proposals for good cause. Failure of a Party to submit proposals by the agreed upon deadline will result in: 1) a forfeit of the right to negotiate that Party's newly proposed article, if any, and any of that Party's reopened non-duplicate articles; 2) the imposition of the other Party's desired language for any duplicate reopened articles; and 3) bargaining over the other Party's non-duplicate reopened articles and newly proposed article, if any. The Parties will confirm the proposal exchange date by email one day after the distribution of the finalized article list.

##### **b) Agency's Position**

The Agency proposes procedures for the parties' exchange of written proposals within 30 calendar days of the signing of the Ground Rules. The Agency includes a provision that if a party fails to submit proposals by the 30-day deadline, then the following will occur: 1) the delinquent party will forfeit its right to negotiate that party's newly proposed article, if any, and any of that party's reopened non-duplicate articles; 2) the other party's desired language for any duplicate reopened articles will be imposed; and 3) both parties will engage in bargaining over the other party's non-duplicate reopened articles and newly proposed article, if any.

The Agency stresses that a deadline with clearly defined consequences is critical for successful bargaining between the parties. The Agency believes that this deadline, which is consistent with the Statute, will incentivize the parties to achieve good faith bargaining in an efficient manner. In the Agency's position and rebuttal, it stresses the consequences to be necessary because the Union has shown a consistent pattern of delay, including failing to review the Agency's proposals in a timely manner, failing to timely agree on dates to bargain, and other dilatory tactics. In its rebuttal, the Agency objects to the Union's position, calling the deadline and consequences unnecessarily punitive as the consequences reflect what would ordinarily happen by law. The Agency also cites to the parties' current CBA that includes a provision that the parties will mutually agree on a timeline for among other things, the submission of proposals and counter-proposals.<sup>1</sup>

**c) Union's Final Offer:**

The Parties will electronically exchange written proposals in electronic format (Microsoft Word) no later than 4:00 pm Eastern Time, on the thirtieth calendar day after the article list is finalized and distributed. To the extent the thirtieth calendar day after the finalized article list is distributed is not a work-day, the proposals will be exchanged no later than 4:00 pm Eastern Time on the next business day. The Parties may agree to extend or alter the timeline for exchange of proposals for good cause. The Parties will confirm the proposal exchange date by email after the distribution of the finalized article list.

**d) Union's Position**

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<sup>1</sup> Article 48, Section 3 of the Parties' 2014-BNA.

The Union does not propose an exchange of proposals prior to the first face-to-face negotiation session. The Union claims that the Agency's proposal requires the Union to waive its statutory right to bargain and is a permissive subject, and the Union is not clearly and unmistakably waiving its right to bargain over term provisions that the Agency elects to open.<sup>2</sup> Next, the Union argues in its rebuttal that the Panel should reject the Agency's proposal because it illegally usurps the parties' statutory right to have the Panel rule on the merits of a party's proposal. In support of its argument, the Union relies on Section 7119(c)(5)(B)(iii) of the Statute, which vests the Panel with the authority to "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse."<sup>3</sup> The Union claims that the Agency's proposal would "operate to impose language that, in the Panel's view, may not have merit."

#### e) Conclusion

When it comes to including an explicit consequence for a party's failure to meet a deadline, the Union claims the Agency's proposal would require it to waive its right to bargain. A union can waive its statutory right to bargain by inaction.<sup>4</sup> And, a union can also waive its statutory right to bargain by contract, but the negotiated agreement must use "clear and unmistakable" language to establish the waiver.<sup>5</sup> If the parties were to operate with a proposal exchange process that included a deadline, but no explicit consequence for failing to meet that deadline, then if the Union were to fail to meet the deadline, the Agency could take remedial measures, through a grievance or ULP, alleging that the Union waived its right to bargain by inaction. Generally, a finding that a union waived its right to bargain by inaction results in an order similar to the three consequences the Agency proposes. The deadline and consequence approach here, for this one exchange of proposals, would result in the Union waiving its right to bargain its own proposals, but would still permit the Union to bargain over any of the Agency's proposals involving reopened articles that only the Agency decided to reopen.

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<sup>2</sup> Citing *NTEU*, 64 FLRA 982, 985 (2010).

<sup>3</sup> The Union later, in support of this argument, cites to the "*Carswell* doctrine" and *POPA v. FLRA*, 26 F.3d 1148 (D.C. Cir. 1994).

<sup>4</sup> A union may also waive the right to bargain by inaction if the union does not timely request bargaining, or request additional information, or request an extension of time. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 753 (1999).

<sup>5</sup> *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 528 (2009).

The Union fails to provide any proper authority to support its argument that the Agency's proposal would illegally usurp the parties' statutory right to have the Panel rule on the merits of a party's proposal. One party forfeiting its right to negotiate its own proposal due to missing a deadline (i.e., inaction) does not directly impact a party's right to seek the Panel's assistance over two proposals in dispute; this argument appears to inappropriately apply the Panel's authority and role in resolving a bargaining impasse.

In this case, 30-days to provide written proposals is a sufficient amount of time given the previously agreed upon limited re-opening of the CBA and the parties being on notice of impending bargaining for an extended period of time. Further, the Union has not provided any argument that such amount of time is insufficient. As the Union is fully entitled to its right to bargain its own proposals, so long as it meets the 30-day deadline, the Agency's proposal itself does not waive the Union's statutory right to bargain but rather establishes a method to specifically exchange these initial proposals with an associated consequence for failure to comply. Therefore, the Panel will impose the Agency's proposal.

### **3) Counter-Proposals**

#### **a) Agency's Final Offer:**

The Parties will electronically exchange written counter-proposals at least one week prior to the beginning of the first face-to-face negotiation session. The Parties may agree to extend or alter the timeline for exchange of counter-proposals for good cause. For any articles for which a Party fails to submit counter-proposals by the agreed upon deadline, that Party waives the right to negotiate those articles, and the new term agreement will incorporate the other Party's initial proposals for those articles, consistent with law and subject to ratification and Agency-head review. Prior to the submission of written counter-proposals, the Parties may consult at mutually agreeable times, either in person, by telephone, or via email, to ask/answer questions and/or clarify anything in their initial proposals.

#### **b) Agency's Position**

The Agency proposes a timeline with consequences for the exchange of counter-proposals just as it proposed for the

exchange of initial proposals. If a party misses a deadline, then they waive their right to negotiate those articles and the new term agreement will incorporate the other party's initial proposals for those articles, consistent with law and subject to ratification and Agency-head review. Following similar rationale from its proposals exchange proposal, the Agency, in its position and rebuttal, sees this method as necessary to incentivize the parties to engage in efficient and effective bargaining. The Agency also references the parties' current CBA, which includes a provision that the parties will establish timelines for bargaining sessions and submissions of proposals and counter proposals. Specifically, the Agency proposes this language for the exchange of counter-proposals as it would require the parties to be prepared for bargaining, assist the parties in identifying areas of agreement, and facilitates early resolution of negotiability and other legal issues.

**c) Union's Final offer: Strike Agency's Proposal**

**d) Union's Position**

The Union proposes that either party may amend or modify their proposals during bargaining and does not propose an exchange of counter proposals prior to the first face-to-face negotiation session. The Union claims that the Agency's proposal requires the Union to waive its statutory right to bargain and is a permissive subject and the Union is not clearly and unmistakably waiving its right to bargain.<sup>6</sup> The Union also rejects the Agency proposal as: (1) it is not within the normal collective bargaining process; (2) would prevent a party from negotiating over any open articles; and (3) would require the parties to submit counter-proposals without ever discussing them. The Union argues that the Agency's proposal contains punitive provisions that are contrary to the law on good faith bargaining. To support its position, the Union provides an excerpt from the *Trump* Federal District Court decision.<sup>7</sup> Last, the Union references the parties' 2010 Ground Rules and other CBAs the Union has bargained with other federal agencies that do not have deadlines and consequences.

**e) Conclusion**

For the reasons discussed in the Panel's conclusion involving exchanging of the initial proposals, the Panel rejects

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<sup>6</sup> Citing *NTEU*, 64 FLRA 982, 985 (2010).

<sup>7</sup> The Union cites: *AFGE v. Trump*, 318 F.Supp.3d 370 (D.D.C. 2018).

the Union's waiver of statutory rights argument involving the exchanging of the counter-proposals. Again, the Union's waiver argument is unsupported and should be rejected as the Agency's proposal does not waive the Union's statutory right to bargain but rather establishes a method to specifically exchange only these counter-proposals with an associated consequence for failure to comply. Therefore, the Panel will impose the Agency's proposal.

#### 4) Ratification

##### a) Agency's Final Offer:

If NTEU fails to submit the agreement for ratification in accordance with the procedures and timeframes set forth in its constitution and bylaws in effect as of June 2019, such failure will constitute an adoption of the agreement in full, and a waiver of the right to renegotiate the agreement notwithstanding the results of a ratification vote.

##### b) Agency's Position

The Agency proposes the Union will submit an agreement to its bargaining unit in accordance with the Union's constitution and bylaws as of June 2019.<sup>8</sup> Consistent with the Agency's earlier proposals using a deadline and consequences, the Agency proposes that if the Union fails to submit an agreement for ratification in accordance with its constitution, then the ratification process is nullified and the agreement can proceed to agency head review. Again, the Agency suggests a deadline and consequence as necessary to avoid the Union delaying the ratification process to the detriment of the Agency. In its rebuttal, the Agency cites to two decisions from this Panel that ordered similar language and clarified that the Agency's proposal does not foreclose the Union's right to bargain or otherwise respond to a disapproval on agency head review.<sup>9</sup> As the parties have already agreed to various ratification procedures, the Agency includes this proposal to ensure a promptly scheduled ratification, consistent with the Union's constitution and bylaws.

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<sup>8</sup> The Agency specifically references June 2019 as the Agency is unaware if the Union changed any of its constitution or bylaws at its annual convention in June 2019.

<sup>9</sup> See *Dep't of Def. Educ. Activity*, 19 FSIP 001 (2019); *U.S. Office of Pers. Mgmt.*, 18 FSIP 036 (2018).

**c) Union's Final Offer:**

When all bargaining is complete, including any impasse proceedings, and the Parties finalize a draft of the BNA, the agreement will be subject to NTEU ratification and NTEU will promptly schedule a ratification vote. The ratification process shall not negate any term lawfully imposed during the impasse resolution process unless otherwise agreed to by the Parties.

**d) Union's Position**

The Union proposes that the agreement will be subject to ratification and the Union will promptly schedule a ratification vote. The Union states in its rebuttal that there are no time requirements in its constitution for an agreement to be submitted to its Chapters (i.e., separate bargaining units all represented by National Treasury Employee Union (NTEU)) for ratification. Interestingly, the Union then identifies a provision in its constitution requiring a Chapter, such as the Union, to hold a ratification vote within 30 calendar days from when the agreement is received by NTEU. The Union alleges in its position that the Agency's proposal would waive the Union's right to bargain over the agreement if any part of it was disapproved on agency head review. In its rebuttal, the Union argues that the Agency's proposal would prevent it from any future bargaining, thus waiving the Union's statutory right to "renegotiate the agreement," if it failed to submit the agreement for ratification in accordance with its constitution and bylaws.

**e) Conclusion**

Here, the parties both agree that the Union shall be permitted to submit an executed agreement to its members for ratification. However, the parties have been unable to agree on what is the Union's own process for ratification, and have both failed to propose a clear and appropriate timeframe for ratification. The Union's process for ratification is the Union's business and as such the Agency's proposal for the Union to follow its own process, whatever that may be, gives room for disagreement over whether the Union met its own processes. Compliance with such processes is critical in light of the Agency also proposing that the Union's failure to do so would result in the agreement being sent directly for agency head review. The Union's proposal does not give a specific timeframe for completing the ratification process, but does reference that its constitution contemplates holding a ratification vote within

30 days of the Union's receipt of the agreement. The Union did not present the Panel with an argument that the constitution's timeframe was unreasonable or insufficient in this case. The Panel, therefore, orders the parties to adopt language giving the Union a reasonable amount of time, in this case 30 days, to complete the ratification process. Accordingly, the Panel will impose the following language on the parties:

The Union will complete the ratification process within 30 days of the execution date of an agreement.

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

November 14, 2019  
Washington, D.C.