

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. OFFICE OF PERSONNEL MANAGEMENT

And

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 32

Case No. 19 FSIP 071

**DECISION AND ORDER**

The United States Office of Personnel Management (Agency or OPM) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the American Federation of Government Employees, Local 32 (Union or AFGE) concerning negotiations over six articles in the parties' collective bargaining agreement (CBA). The OPM serves as the chief human resources agency and personnel policy manager for the Federal Government. Specifically, the OPM directs human resources and employee management services, administers retirement benefits, manages healthcare and insurance programs, oversees merit-based and inclusive hiring into the civil service, and provides a secure employment process. The AFGE represents 738 bargaining unit employees at OPM. The parties are governed by a CBA that became effective in August 1999. Since that time, the agreement has rolled over every three years and is currently in effect until the parties reach a successor agreement.

**BACKGROUND AND PROCEDURAL HISTORY**

In June 2017, the Agency provided the Union notice that it was reopening the parties' CBA. In July 2017, the parties initiated ground rules negotiations for a successor CBA. After engaging in mediation from the Federal Mediation and Conciliation Service (FMCS), the Agency filed a request for Panel assistance in Case No. 18 FSIP 036 over 12 ground rules articles. In August 2018, the Panel issued a Decision and Order, imposing ground rules for the parties to follow during their successor CBA negotiations. Later that month, the parties executed a ground rules agreement that established the parameters for successor CBA negotiations. Specifically, the ground rules indicated that the negotiations would be limited to only six articles.

In accordance with the ground rules agreement, on September 30, 2018, the Agency provided the Union proposals to reopen six articles in the CBA: (1) Article 2, Union and Management Rights; (2) Article 7, Performance Standards Development; (3) Article 22, Grievance Procedures; (4) Article 23, Arbitration; (5) Article 26, Details, Internal Training, and Facilities; and (6) Article 32, Labor Management Committee. The Union elected not to open any articles. On October 30, 2018, the Union sent the Agency counter-proposals for the six articles.

During the negotiations, the parties reached several tentative agreements, but were unable to obtain a full resolution over the six open articles. As a result, on June 13, 2019, the parties utilized the services of the Federal Mediation and Conciliation Service (FMCS) Mediator Larry Passwaters to provide mediation assistance over the remaining issues in dispute. The parties were unsuccessful in their attempts to reach agreement over the six articles in mediation. Therefore, on June 25, 2019, Mr. Passwaters released the parties from mediation. On September 11, 2019, the Agency filed a request for assistance with the Panel over the six articles in dispute.

On January 8, 2020, the Panel asserted jurisdiction over the six articles and determined that the dispute should be resolved by the parties resuming negotiations on a concentrated schedule with the assistance of Panel Member Robert J. Gilson and Panel Staff. The parties participated in five negotiation sessions with Member Gilson and Panel Staff on January 27, February 10 and 11, and March 2 and 3, 2020, successfully resolving three articles. At the conclusion of the last concentrated negotiation session, the parties were ordered to submit their positions on the issues in the three remaining articles in dispute by March 11, limited to 15 double-spaced pages. The parties were granted an extension of time and an additional five pages for their statement of position. The parties timely provided their arguments and evidence on March 17, over the three remaining articles in dispute.

### **PROPOSALS AND POSITIONS OF THE PARTIES**

There are parts of three articles for the Panel to consider: Article 2, Union and Management Rights; Article 22, Grievance Procedure; and Article 23, Arbitration. The parties' proposals will not be set forth in the body of this document. Rather, they are attached to this document and will be referenced as appropriate.

#### 1. Article 2 – Union and Management Rights

##### I. Agency Position

In 2018, the President enacted three Executive Orders (EO) on collective bargaining in the federal government: EO 13836 - Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining; EO 13837 - Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use; and EO 13839 - Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles. The Agency asserts that numerous disputed proposals before the Panel, including those relating to official time and adverse action procedures involve EO-related issues which OPM has delegated authority to issue regulations and government-wide guidance. Therefore, given OPM's unique stature as a regulating body and the President's management agent, the Agency requests that the Panel grant it substantial deference to determine how its own CBA best effectuates the President's EOs.

a. Sections 7(h) 1, 2, and 3

In Fiscal Year (FY) 2019, the Agency states that the Union reported using 3,211 hours of official time, with 2,431 of those hours utilized for activities that fell under 5 U.S.C § 7131(d). The Agency states that section 3(a) of EO 13837 provides standards agencies must follow when bargaining over official time. In accordance with the EO, the Agency argues that an authorization of more than one-hour per bargaining unit employee “is not ordinarily considered to be reasonable, necessary, and in the public interest, or consistent with effective and efficient Government.” Based on the EO, OPM issued implementing guidance under EO 13837, recommending that each federal agency assess its union time rate for previous years to make appropriate official time authorization adjustments moving forward. The Agency states that its proposal follows this guidance.

During the resumed negotiations with the Panel, the Agency states that the parties agreed to establish a bank of time allocated for representational activities performed pursuant to section 7131(d). However, the Agency claims that there are two important differences in each party’s proposal. The first being that the Agency proposes a bank of hours based on a one-hour per bargaining unit employee time rate. Currently, there are 738 bargaining unit employees, so the Agency would provide the Union 738 hours of official time if the CBA were executed today under the Agency’s proposal. This bank would only apply to 7131(d) time; there would be no limitations on official time authorized pursuant to section 7131(a) and (c) under the Agency’s proposal. The Agency’s proposal also requires the denial of section 7131(d) time once the bank is exhausted each year.

The Agency asserts that the Union’s proposal is for a bank of hours that gradually decreases each year under the parties’ successor CBA: 2000 hours in year one; 1,500 hours in year two; and 900 hours in year three. The Agency states that the Union’s proposal does not address what would happen if the bank of hours is exhausted. The Agency claims that the Union’s proposal either leaves the treatment of post-bank official time requests an entirely open question or permits authorization of additional section 7131(d) time after the bank is exhausted. Under section (h)(4) of Article 2, the Agency states that the parties agreed that Union representatives may use leave without pay and annual leave to engage in representational activities. The Agency argues that this agreement supports the assertion that the bank should represent a cap on 7131(d) time.

Next, the Agency proposes to cap 7131(d)-time activities at 25 percent of paid time annually, in accordance with section 4 of the EO, which requires employees to spend at least 75 percent of their paid time conducting agency business. The Agency agreed to permit the Union’s nine representatives to engage in representational activities, which the Agency states should provide it flexibility if a Union representative reaches his or her limit. By adopting percentage caps and restrictions contained in the EOs, the Agency asserts that this satisfies the EO’s policy goals. The Agency also asserts that its proposal will return resources to OPM in the form of human capital by utilizing employees in the capacity in which they were hired to perform in furtherance of the Agency accomplishing its mission.

The Agency argues that the Union's proposal far exceeds the Union time rate permitted under the EO. The Agency states that the Union has not provided any rationale as to why the one-hour per bargaining unit employee union time rate should not apply. Conversely, the Agency states that it has provided support for its proposal based on the numerous circumstances that have recently changed or will soon change, which will reduce the need for official time:

- Decreases in bargaining unit size: The bargaining unit decreased from 847 in 2016 to 738 in 2019;
- Decreases in grievances filed: Grievances filed decreased from 70 in 2016 to 30 in 2019;
- No more full-time Union representatives: Until recently, the Union had two full-time representatives;
- Elimination of mid-term bargaining subjects: The parties agreed in Article 26 to eliminate mid-term bargaining over items such as details and space moves that have consumed substantial amounts of official time for such matters;
- Streamlined mid-term bargaining: New mid-term bargaining procedures bring structure that will reduce the need for official time (requiring proposals within seven days of notice and two days before each meeting, general requirement to complete bargaining within 30 days, etc.);
- Elimination of the Labor-Management Committee: The parties agreed to eliminate the Labor Management Committee (LMC) for mid-term bargaining. The LMC authorized five Union representatives for mid-term bargaining and held weekly meetings irrespective of whether there were items to bargain. Now, mid-term bargaining will take place, as needed, with a maximum of three representatives per party;
- Elimination of Forums: Pursuant to EO 13812, rescinding labor-management partnerships, OPM eliminated 3 agency-wide and 3 organization specific forums that used substantial official time;
- Limitation on 7131(d) activities: In section 7(f) of this article, the parties agreed to a limited list of eligible 7131(d) official time uses;
- Relinquishment of Union Office: The Union relinquished its office by virtue of an MOU signed in 2018 and again through section 16 of this Article. This eliminates official time historically used for "office coverage" wherein a union representative staffed the office;
- Streamlined grievance process: The parties agreed that the new grievance process would reduce procedural steps from three to two and limit grievance meetings to 30 minutes generally. The Agency is also proposing that only one meeting take place, at Step 2;
- New performance development process: The current agreement in Article 7 contained a process, where the Union had an independent right to review and comment on any modification to employee performance standards. The new Article 7 grants the Union no such role in this process;

b. Section 8(a)

The Agency states that the parties agree on the need to obtain official time pre-authorization. The Union, though seeks exceptions for “emergencies” which it has explained to be “medical emergencies.” The Agency states that the Union’s proposal conflicts with EO 13837, section 4(b)’s requirement that all official time be pre-authorized. Further, the Agency contends that in a medical emergency, emergency medical personnel, not the Union, are appropriate first responders. The Agency asserts that it cannot endorse the suggestion that the Union, as opposed to line supervision is properly positioned to address medical emergencies in the workplace in lieu of or in addition to qualified medical personnel.

c. Section 12

The Agency argues that section 5 of EO 13837 states that employees using official time for unauthorized purposes, without advanced authorization, or for any other purposes not authorized by the Agency, will be considered absent without leave (AWOL) and subject to discipline. Conversely, the Agency states that the Union’s proposal limits the EO’s application and impermissibly infringes on management’s right to discipline by permitting AWOL/discipline only for non-compliance with pre-approval and use of official time for internal union business.

d. Section 16(e)

To conserve resources, the Agency proposes that the Union be required to use electronic means when distributing materials to bargaining unit employees using Agency equipment. The Agency states that the Union dilutes this requirement by including the word “usually.” With regard to an argument raised during the Informal Conference, the Agency states that it should be clarified that its proposal in no way limits the Union’s right to communicate with its members or its right to hand out materials when appropriate should the Union want to use its own resources to do so.

e. Section 17(b) and (c)

The Agency states that these sections provide clarity around the large number of bargaining unit employees that handle personally identifiable information in the course of their duties, including as Union representatives, in order to ensure that this information is adequately protected. The Agency contends that the parties’ disagreement stem from Union efforts to permit employees who access their own records, to obtain and disseminate that information without complying with the Freedom of Information Act (FOIA), or other formal processes. The Agency’s proposal clarifies that records from personal accounts (time and attendance, employee’s electronic personnel files, etc.) are independent of this restriction. However, as to those records to which employees have access only pursuant to their job duties, the Agency states that the Union must follow appropriate legal procedures for requesting this information and cannot circumvent their statutory obligation by requesting employees provide them that information. The Agency argues that the Union’s proposal would circumvent the Privacy Act.

## II. Union Position

### a. Sections 7(h) 1, 2, and 3

The Union's proposals in Article 2, section 7(h) 1, 2, and 3 provides for a bank of hours for 5 U.S.C. § 7131(d) time that includes 2,000, 1,500, and 900 hours during the first, second, and third years of the agreement, respectively. In addition, the Union proposes that there is no cap on the time spent by each Union representative as it relates to section 7131(d) time. The Union argues that section 7131(d) states that union representatives shall be granted official time that is "reasonable, necessary, and in the public interest." The Union states that its proposal meets this standard because its proposal constitutes a significant reduction to official time usage at OPM, consistent with the Agency's stated goal during bargaining. In this respect, the Union states it agreed that no Union representative would receive 100 percent official time, which is a departure from past 20 years that this contract has been in place (the President and Chief Steward have been authorized 100 percent official time).

In addition, the Union states that it had 20 representatives who utilized official time on a periodic basis. With those 20 representatives, the Union states that its official time usage was approximately 6,000 hours each year. The Union, however, agreed to reduce the number of representatives authorized to use official time to nine. Therefore, the Union argues that its proposal will now reduce the amount of official time by 65 percent, 75 percent, and 85 percent during the first, second, and third years of the agreement, respectively. The Union states that this proposal meets the definition of "reasonable, necessary, and in the public interest."

Second, the Union states that its proposal is consistent with the President's 2018 EO 13837. Specifically, the Union points to section 3 of the EO, which it says states, "[a]greements authorizing taxpayer-funded union time under section 7131(d)...that would cause the union time rate in representing bargaining unit employees to exceed 1 hour should...ordinarily not be considered reasonable, necessary, and in the public interest..." The Union contends that OPM presents more unique circumstances than those that exist in any agency in the federal government.

To illustrate its point, the Union states that OPM is charged with developing and implementing government-wide policies for all of the Federal government. The Union asserts that AFGE employees are often responsible for drafting and implementing such policies. The Union states that it has often helped management avoid inadvertent errors, inconsistencies with law, and other issues that stray from its policies. The Union argues that the 25 percent cap on official time will result in new, inexperienced representatives engaging with the Agency, as opposed to the Union President, who is a seasoned veteran. The Union asserts that if the Agency's proposal were adopted, it would strip the Union of official time by nearly 90 percent, which would not only negatively impact OPM, but Federal government policies it implements. Thus, the Union states that the forgoing illustrates that OPM does not present the "ordinary" circumstances that the EO seeks to address. Instead, the Union argues that OPM is well-suited to have official time that exceeds the recommended one-hour per bargaining unit employee and 25 percent limitation.

Third, the Union states that it must have a sufficient amount of official time to effectively negotiate with the Agency. The Union asserts that OPM provided the Union with 250 bargaining notices since June 2015. The Union states that it has to prepare for, research, present proposals, and be ready to efficiently bargain each of those situations concurrently. In addition, the Union filed approximately 200 grievances over the last five years. The Union claims that the official time proposed by the Agency will result in no official time for the parties to informally resolve grievances and negotiation disputes, requiring the parties to unnecessarily expend resources on matters that could have been resolved.

Finally, the Union states that its official time proposals are comparable to recently agreed upon CBAs. For example, the November 2019 AFGE and Customs and Border Protection CBA provides for a substantial increase in official time usage in their agreement. It also provides for 74, 100 percent official time slots, each of which is exempt from the recommended 25 percent cap on official time. In addition, the Union points to the AFGE and Defense Contract Management Agency CBA that was executed in August 2019, which provides for official time that exceeds the Union's request in this case. Specifically, the agreement provides for 100% official time, which the Union says is exempt from the 25% cap recommendation. Therefore, in this case, the Union asserts its representatives should too be granted similar amounts of official time.<sup>1</sup>

b. Section 8(a)

The Union proposes that its representatives obtain approval from the appropriate supervisor before using official time unless there is an unexpected emergency. During bargaining and the Informal Conference, the Union explained that its request is primarily based on situations where bargaining unit employees are experiencing a medical emergency at work. The reason for this issue is that OPM used to have a nurse on staff; however, OPM decided to remove the nurse position. As a result, employees who experience medical emergencies often contact the Union and request that the Union notify emergency personnel, their supervisor, OPM security, and all other necessary parties regarding their medical emergencies. The Union asserts that the Agency's proposal would preclude its representatives from aiding an employee who is having a medical crisis, would put the employee at risk, put other employees at risk, and increase OPM's potential liability.

c. Section 12

The Agency has proposed that it may issue disciplinary action in the event employees do not use the correct official time reporting code, and for not using official time as specifically authorized. The Union is opposed to both Agency proposals. The Union states that the Agency has provided the Union with a list of the official time reporting codes, which include General Labor Relations, Dispute Resolution, Labor Management Relations, and Term Negotiations. However, the Union states that it notified the Agency that employees in each OPM

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<sup>1</sup> According to the Defense Contract Management Agency website, it employs about 12,000 civilians servicing 15000 contractor locations. Customs and Border Protection has 60,000 employees in hundreds of sites nationwide. These Agencies are in no way comparable to OPM which has 738 employees in office environments in a few locations.

organizational area have a significant number of codes that fall into each such category. In some areas, the Union states that there are as many as 12 duplicative codes that employees see. For example, the Human Resource Solutions and the Chief Information Office at OPM have 12 different iterations of the same Union and Management codes. The Union argues that there is no way for the Union to identify which of these 12 Union and Labor-Management Relations codes is the correct one. The parties discussed this issue during bargaining and the Informal Conference, but the Union contends that the Agency stated that it must reprogram its system to address this issue. However, to date, the issue has not been addressed.

The Union also states that the Agency has proposed that it discipline employees for using official time for any purpose other than what is specifically authorized. However, the Union asserts that the parties have agreed that the Union must only identify the “general nature of the work” to be performed on official time in Article 2, section 8 (a)(1). Therefore, the Union argues Agency’s proposal is in contradiction to the agreement that the parties reached.

d. Section 16(e)

The Union has proposed that if it utilizes Agency resources to communicate with employees, it will generally utilize the Agency’s email system rather than paper copy distribution of Union materials. The Agency’s proposal, however, precludes the Union from distributing any paper materials printed on the Union’s printer on OPM premises. First, the Union states that OPM has no such rule that prohibits paper distribution of materials on its premises as it relates to any organization. The Union states that retirement parties, charities, food drives, and many other organizations routinely distribute paper materials on OPM’s premises. Therefore, the Union states that the Agency’s proposal is unlawful under section 7101 of the Statute because it singles out the Union, while not prohibiting that same activity for other entities.

e. Sections 17(b) and (c)

The Union proposes that employees are not disciplined for providing the Union and other appropriate authorities such as Congress, doctors, and attorneys with their personal information. The Union also proposes that it is not precluded from accepting employee’s own information during the course of representation. The Union states that the Agency has proposed to limit an employee’s ability to disclose their personal information depending on what account they use to access the information and whether they have made a formal request to receive such information. The Union states that the Agency’s proposal is nonsensical and does not exist elsewhere in the federal sector.

III. Analysis and Conclusion

a. Sections 7(h) 1, 2, and 3

The OPM serves as the chief human resources manager and personnel policy manager for the Federal government. Pursuant to its role, it effectuates guidance for other Federal agencies to follow. In accordance with this role, on October 4, 2019, OPM issued guidance advising Federal agencies to implement the President’s May 2018 Executive Orders on labor relations. As the

agency that is looked at by the Federal government for policy, guidance, rules and regulations, OPM is in a unique role unlike any other Federal agency. The Panel will provide OPM deference based on its role when determining what proposals to impose on the parties.

The Union's official time use for FY 2019, was 3211 hours for 14 representatives. That equates to roughly a 4.0 union time rate. The Agency proposed to align the Union's union time with the EO 13837. As such, the Agency offered the Union a bank of official time that would equate to a rate of one-hour per bargaining unit employee for section 7131(d) time that would also cap the amount of official time the Union uses each year. The Agency's proposal does not cap the amount of official time for section 7131(a) and (c). The Agency's proposal also calls for no Union representative to engage in more than 25 percent official time.

The Union argues that the Agency's proposed official time will not allow it to adequately represent its bargaining unit. Therefore, the Union proposed an alternative arrangement for its representatives. The Union agreed to a bank of official time for its representatives; however, that bank of hours would equate to 2,000 hours in the first year of the contract, 1,500 hours in the second year, and 9,000 hours in the third year for 7131(d) time. The Union's bank does not operate as cap against 7131(d) time and there is no limit on an individual Union representative's percentage of official time use.

The Panel has consistently taken the position that it will provide the President's Executive Order on official time deference, as these orders provide an important source of public policy that the Panel will choose to implement.<sup>2</sup> The Panel noted that agreements which exceed the one-hour per bargaining unit employee amount as indicated in EO 13837, "shouldn't ordinarily not be considered reasonable, necessary, and in the public interest."<sup>3</sup> The Panel expects that the party moving for greater time to demonstrate that their request is "reasonable, necessary, and in the public interest."<sup>4</sup>

The Union's official time proposal is laudable and represents a significant reduction in the Union's official time use. However, the Union has not demonstrated that its proposal is "reasonable, necessary, and in the public interest."<sup>5</sup> The Union argued that the Agency provided it with 250 bargaining notices since 2015, and the Union has filed approximately 200 grievances over the last five years; but, the Union's reliance on grievance filings herein is not convincing since such filings are frequently within its control.

The Panel believes that the Union should be able to sufficiently represent its bargaining unit with the Agency's proposed amount of official time. The parties agreed to reduce the Union's representatives from 20 to nine; no more 100 percent "official timers"; the parties agreed on procedures and arrangements for details and space moves, eliminating the need for mid-term bargaining over these subjects; abolished the Labor-Management Council, reducing the need to hold weekly meetings; and the parties agreed to an exhaustive list of 7131(d) activities that the Union may engage in during the term of the new CBA. These agreements made should significantly reduce the Union's need and use of official time under the contract.

The Union points to two other bargaining units at other agencies that agreed to official time that are above the suggested amount in the EO. Each bargaining unit is different; what one

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<sup>2</sup> HHS, *Indian Health Care Service and AFGE, Local 3601*, 19 FSIP 031 (2019).

<sup>3</sup> *Id.*

<sup>4</sup> 19 FSIP 031 (2019).

<sup>5</sup> 5 U.S.C. § 7131(d).

agency agreed to with the Union does not necessarily correlate to the current bargaining unit. The Union's role under the Statute is clearly limited to addressing the personnel policies, practices and working conditions of those employees in the unit of recognition covered by the CBA at issue not the entire Federal workforce, or for that matter non-unit employees of the Agency. Thus, based on the foregoing, the Panel will impose the Agency's offer on official time.

b. Section 8(a)

Next, the Union seeks an exception to the need to obtain supervisory approval prior to engaging in official time. The Union argues that there are circumstances where employees experience a medical emergency and contact the Union. In these cases, the Union contends that it is not always able to request supervisory approval before going on official time.

The Union offered no evidence that any of its representatives are better suited to respond to an employee medical emergency than supervisory personnel who are authorized to follow Agency procedures addressing such matters. The parties should direct employees to contact the appropriate medical personnel at the Agency to assist an employee in the need of medical attention. If no such personnel exist, then the employee should be directed to his or her supervisor to take the appropriate measures to ensure the employee is safe. As such, the Panel will impose the Agency's proposal, which will require the Union to obtain supervisory approval before using official time.

c. Section 12

The parties agree that Union officials should properly document and input their official time; however, the Agency seeks to discipline employees if they improperly code their official time in the Agency's time and attendance system. The Union demonstrated that there could be up to 12 iterations of the same code for official time use. Conversely, the Agency did not provide documentation supporting its position that it has a universal reporting system for official time. Without such documentation, it would be punitive to discipline employees for failing to input the proper coding.

The Union argues that the Agency's proposal contradicts the parties' agreement under section 8(a). While the parties agreed that Union representatives must request official time indicating the *general* nature of work, the Agency's proposal does not conflict with that agreement. It simply indicates that the authorization will be specific to the request for official time, not that the request must be specific. Thus, the Panel will adopt the Agency's proposal, but remove the language that disciplines employees for inputting the improper official time reporting code. Because the Panel is adopting the Agency's proposal, it's unnecessary to address their legal argument.

d. Section 16(e)

The parties disagree over the Union's use of Agency resources to communicate with its bargaining unit. The Agency proposes to limit the Union's communication to its bargaining unit via email only when using Agency equipment to save on resources. The Agency clarified that its proposal does not limit the Union's right to communicate with its bargaining unit when the Union is using its own resources. Therefore, the Union's argument that the Agency is limiting

its communication with its bargaining unit is misplaced. Notwithstanding, the Agency has not demonstrated that it has also prohibited other entities from utilizing Agency resources in such a manner. The Panel has consistently taken the position that it will not limit a party's right to speech. Therefore, the Panel will impose the Union's proposal, which requires Union representatives to limit their use of Agency resources. Because the Panel is adopting the Union's proposal, it's unnecessary to address its legal argument.

e. Sections 17(b) and (c)

Finally, the parties last disagreement in Article 2 is over the Union's access to information. Specifically, the Agency proposes to limit the Union's access to confidential or sensitive information. The Agency argues that this proposal stems from Union efforts to encourage employees, who have access to this type of information as a result of their job, to obtain and disseminate that information without complying with FOIA. The employee should not utilize his or her job as a way to gain access to information that would not be available to other employees but for their job duties. That type of information should be obtained through the proper channels. The Agency's proposals in these two sections ensure that is the case. As such, the Panel will impose the Agency's offers in section 17(b) and (c).

2. Article 22 – Grievance Procedure

I. Agency Article and Position

a. Sections 1(b) and 1(c)

The Agency states that its proposals in these two sections address a persistent practice wherein the Union files grievances over matters that were previously the subject of statutory challenges (or vice versa). The Agency states that the Union has perpetuated this practice by failing to disclose earlier filings, even when prompted at intake, resulting in the Agency processing both claims in contravention of 5 U.S.C. 7121 and at the expense of limited Agency resources. The Agency attached a decision from the Equal Employment Opportunity Commission (EEOC) dismissing portions of a complaint involving the same claims as a previously-filed grievance. Though the portions of the Equal Opportunity Office (EEO) complaint that overlapped with the grievance were ultimately dismissed, the Agency states that because the Union failed to disclose at intake that it had previously filed a grievance over the same matter, the Agency's EEO engaged in a lengthy investigation and discovery that had already commenced.

The Agency asserts that the Union seeks in its proposal to simply recite 5 U.S.C. 7121, however, the Agency states that the statutory language itself has been insufficient to dissuade the Union from engaging in these practices. The Agency states that its proposals provide the elaboration necessary under the circumstances on the subject of claim preclusion under section 7121 and how it applies in the context of grievances. It also provides guidance to Arbitrators should they determine that a section 7121 preclusion applies and stresses that attempts to undermine the system in this manner will result in dismissal of the grievance filed.

b. Section 2

i. Procedural Issues

Contrary to Union assertions made when briefing jurisdiction, the Agency states that it has not and does not seek to open any article that is not in dispute and its proposals remain squarely within the confines of the articles in which they were offered. The Agency contends that the Union cited Article 18 Adverse Actions to support its assertion that the Agency's proposal to remove certain matters from the grievance procedure would effectively – and impermissibly - reopen that article because Article 18 provides that adverse actions are grievable. However, the Agency argues that the grievability of these actions is tied to the substance of Article 22. Further, the Agency states that its clarifying language is in line with other agreements reached by the parties during CBA bargaining which indicate how changes to the CBA would apply to unopened articles.

ii. Merits of Proposals

c. Section 2(a)(6) and (7)

The Agency seeks to exclude challenges to matters previously raised in an unfair labor practice charge under section 2(a)(6), as well as conduct and performance-based removals from the negotiated grievance procedure under section 2(a)(7). The Agency states that section 3 of EO 13839 directs Agency Heads to seek to exclude removal actions for misconduct and unacceptable performance. It is OPM's position as the personnel-management agency, that the Merit Systems Protection Board (MSPB) should have exclusive jurisdiction over these actions. The Agency contends that MSPB employs administrative judges with personnel law expertise, who are bound by rules of evidence, and who require the parties to follow orderly procedures, including discovery, that make these hearings more efficient than arbitration hearings. The Agency argues that the arbitration process also disadvantages employees who have less control in the process to the extent that only the Union can invoke arbitration and they may be denied their day in court if a Union decides not to pursue a grievance to arbitration.

The Agency points to a Panel decision, where it states that the Panel gave weight to section 3 of EO 13839, while finding that the agency in question had provided evidence demonstrating that removal actions processed through the negotiated grievance process were "arbitrary and required significant resources to resolve."<sup>6</sup> The Agency states that OPM's experience has been no different than that experienced by the agency in that case. The Agency contends that the adjudication of removals pursuant to the arbitration process has been plagued by inconsistency, capriciousness, and waste.

d. Section 2(a)(13)

The Agency states that its proposal seeks to memorialize its intent to exclude non-selections from a list of properly ranked and certified candidates in the parties' CBA. The

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<sup>6</sup> *Dep't of Transportation and AFGE, Local 3313, 2019 FSIP 043 (January 2020).*

Agency contends that its proposal is established in law and included widely in CBAs.<sup>7</sup> The Agency states that the Panel also recently held that when non-selection grievances are excluded for non-bargaining unit employees, parallel exclusions in the negotiated grievance procedure promote consistency.<sup>8</sup> The Agency argues that since OPM's administrative grievance procedure contains this exclusion, the Panel's holding would apply here as well.

e. Section 2(a)(14)

The Agency states that its proposal is to exclude a performance progress review, oral or written counseling, or oral or written caution/warning from the grievance procedure. The Agency states that these actions are not grievable per Article 17 of the current CBA (which remains unopened). Also, to the extent performance reviews are excluded per the Agency's proposal in section (16) below, the Agency argues that there would be no basis for progress reviews, which are much less formal, to be grievable.

f. Section 2(a)(15) and (17)

The Agency would like to next exclude the content or decision to issue a performance improvement plan (PIP) and the content of performance standards and position descriptions. The Agency provides support for its proposal by stating that within management's right to assign work and direct employees under the Statute, is determining the content of performance standards and position descriptions, as well as the content of PIPs and the decision to place an employee on a PIP. Therefore, the Agency argues that these actions should not be subject to challenge through the grievance process.

g. Section 2(a)(16), (18) and (19)

The Agency contends that in section 4 of EO 13839, the President dictates that agencies may not subject grievance procedures or arbitration disputes to "assignment of ratings of record," or "the award of any form of incentive pay, including cash awards, quality step increases, or recruitment, retention, or relocation payments." The Agency states that its proposals fulfill this requirement, while the Union's proposal, to strike these exclusions, runs afoul of this Presidential directive. The Agency contends that the Panel recently adopted these same proposed exclusions,<sup>9</sup> and the Panel should adhere to that decision in this case.

Further, the Agency states that these exclusions will greatly improve the efficiency of OPM operations in that performance appraisal grievances have severely depleted Agency resources. Overall, of the 202 grievances that have been filed by the Union from 2016 to the present, the Agency states that 106 (52%) were performance grievances. This includes ten grievances where employees grieved ratings of "Exceeds Expectations" a measure of substantial accomplishment just below "Outstanding." The Agency states that the proposal to exclude awards is inseparable from the performance rating exclusion.

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<sup>7</sup> See e.g., *HHS and AFGCE, Council 242*, 84 FSIP 13 (1984).

<sup>8</sup> *Dep't of Air Force and Association of Civilian Technicians, No. 138*, 2019 FSIP 070 (January 2020).

<sup>9</sup> 2019 FSIP 070 (January 2020).

h. Section 3(c) and 3(d)

Under section 3(c), the Agency seeks to include language in its grievance procedure that directs an Arbitrator to dismiss a grievance if he or she finds that that the grievance was untimely, unless the Arbitrator finds that there were compelling reasons for the untimely filing. The Agency states that the Union's proposal that grievances will be untimely unless it alleges a continuing violation should not be considered because it was advanced by the Union just prior to the parties departing the Informal Conference. Further, the Agency states that the Union's proposal permits a mere allegation of a continuing violation to determine threshold issues of timeliness. In contrast, the Agency contends that its proposal is that an Arbitrator's determination is dispositive on this question as it vests Arbitrators with the authority to determine timeliness. Also, the language the Union would strike at the end of this section is the same as that agreed upon at the end of Article 23 section 2(a). Finally, the Union seeks to have the parties waive their legal right to make jurisdictional arguments at any stage of the proceeding by proposing to limit requests for dismissals prior to the arbitration hearing.

Under section 3(d), the Agency states that it seeks to make the grievance process more efficient than the current process, which contains three steps and two required meetings, often contains multiple Union officials and can last up to 90 minutes. The Agency's proposal provides for one opportunity for a meeting, at Step 2 of the process. The Agency states that this proposed structure is statutory compliant and permits the final deciding official to hear an oral presentation, as part of the overall record, before rendering a decision, striking a proper balance between employee and Union rights, and the Agency's need for efficiency in the process.

i. Section 4(a)(4), bullets 2-4 and 5(d)(4), bullets 2-4

This section pertains to the information that must be included when filing a grievance, such as the date submitted; name and work organization of the grievant; nature of the alleged breach; specific articles or law violated; date of the action; and the agency official alleged to have engaged in the violation. The Agency argues that the Union has a practice of refusing to provide any degree of specificity when filing grievances. The Agency states that grievances consistently contain no basis of support for allegations, no dates of alleged incidents, no names of officials involved, no discussion of harm to employee or Union, no authority in the CBA or elsewhere relied upon, and no specific relief requested. The Agency asserts that it is often entirely in the dark over the grievance subject matter until the time that the parties meet, at which point management has no time to consider allegations or ask questions, and no opportunity to consider relief.

The Agency states that the Union's actions have proven highly prejudicial to OPM because it is deprived of a written record and prevented from assessing timeliness. Further, the Agency asserts that the Union has used the non-specificity of grievances to raise new issues throughout the process, including during the arbitration hearing. The Agency argues that the Union's proposal would allow it to continue to plead generalized allegations, with no specific authority or CBA provision violated, and no date of alleged Agency action. The Agency seeks specific pleadings at both Step 1 and Step 2, which it states will make the process substantially more equitable and efficient.

j. Section 4(c) and 5(e)

The Agency states that its proposals provide guidance to the arbitrator should a Union file a grievance with pleading deficiencies. Section 4(c) proposes that if a party fails to include all information required in the Step 1 grievance mentioned above and it does not cure the defect(s), then that renders the grievance jurisdictionally deficient. Section 5(e) similarly states that if the Step 2 grievance does not include all of the required information then that would render the grievance jurisdictionally deficient. The Agency argues that it is necessary to state that failure to include all the specific pleading information, or failure to cure the deficient grievance at Step 1, renders the grievance jurisdictionally because the Union has disregarded the less specific pleading requirements in the current negotiated grievance procedure. The Agency asserts that its proposal provides the Arbitrator with the ultimate authority to determine whether deficient grievances can advance.

k. Section 4(d) and 5(i)

Section 4(d) indicates that within 15 days of filing of the Step 1 grievance, or the submission of the revised grievance, a written response will be provided to the Union or the alleged aggrieved employee. Section 5(i) is similar to 4(d), except that 5(i) details when a written decision will be issued after the Step 2 grievance, i.e., within 15 days after receipt of the Step 2 grievance if no meeting is held, and within 15 days from the grievance if a meeting is held. Also, in the interests of efficiently moving the grievance process forward, the Agency proposes that if the Agency does not issue a Step 2 decision within these timeframes, the Union should consider this a denial and automatic elevation to the next step (Step 2 or arbitration).

l. Section 5(b) and 5(c)

The Agency asserts that its proposals focus on timeliness and other jurisdictional requirements to correct the Union's practice of filing untimely grievances, which the Union has demanded to pursue at great cost to the Agency. Under section 5(b), which the Agency states involve the same issue as in 4(d) and 5(i), the Agency proposes that if no Step 1 decision is issued within the timeframes specified in section 4(c), the Step 1 grievance and all requested relief will be considered denied and the Union may file a Step 2 grievance within 10 days. Under Section 5(c), which the Agency states involve similar issues to 4(c), it indicates that if a grievance is filed after the timeframes established in section 5(a) and (b), i.e., within 10 days of receipt of the decision, it will be untimely and that a determination by an Arbitrator that the filing of the Step 2 grievance was untimely will result in a dismissal of the grievance in its entirety unless the Arbitrator finds that there were compelling reasons for the untimely filing.

m. Section 5(g)

In order to facilitate the efficient scheduling of grievance meetings, the Agency proposes that Union representatives agree to 1) maintain at all times an updated electronic calendar reflecting their availability; 2) ensure that a substitute representative is available to attend a grievance meeting should they be absent from the office; 3) put in place out of office email notifications when they will be out of the office, which includes information regarding the substitute Union representative that management should contact in their absence; and 4) voicemail notifications on their Agency work phone when they will be out of the office to

include information (including contact information) regarding which substitute representative Agency management should contact in their absence.

The Agency states that despite having 20 Union representatives eligible for official time in the current contract, the grievance process has been delayed due to unavailability of AFGE representatives. The Agency states that the Union has consistently refused to use the Agency's outlook calendar, causing OPM representatives to attend grievance meetings with no idea as to whether Union representatives will attend. When these issues were discussed at the table during bargaining, the Agency states that the Union President explained that she does not keep her calendar updated and has no intention of doing so. The Agency believes that the parties have a duty to utilize the technology at the employees' disposal to make this process efficient.

n. Section 6

The Agency proposes that grievance-related requests for information made under the Statute shall not alter the timelines contained under each step of the grievance process. The Agency states that the Union's proposal includes the phrase "promptly respond" in reference to the Agency's responsibility when it receives an information request. The Agency argues that this is a vague term that appears to seek to supersede the appropriate legal standard – that responses to information requests must be provided in a "reasonable time period."

o. Section 7

The Agency proposes that if the Union seeks to invoke arbitration, it must do so within fifteen (15) workdays of the written Step 2 decision, or if no Step 2 decision is issued, within fifteen (15) workdays from the Step 2 due date. The Agency proposes that notwithstanding section 10 of this Article, which states that time limits may be extended by mutual agreement, the Agency proposes that the time limit to invoke arbitration may not be extended under any circumstances. The Agency states that if the Union does not invoke arbitration within this (15) workday time period, the invocation will be untimely. A determination by an Arbitrator that the invocation of arbitration was untimely will result in the dismissal of the grievance in its entirety unless the Arbitrator finds that there were compelling reasons for the untimely invocation. The Agency states that this language stresses the importance of threshold jurisdictional issues and gives Arbitrators the ultimate authority to decide these questions. Therefore, the Agency states that it's important to have this language in the parties' CBA

p. Section 8

For a grievance to be arbitrable, the Agency proposes that parties must meet all deadlines in this Article, must fully comply with all written pleading requirements in this Article, and must fully satisfy each step of the process including timely invocation of Step 1, Step 2, and arbitration invocation. Other jurisdictional deficiencies over which an Arbitrator may dismiss a grievance, absent a finding of good cause, that the Agency proposes include, but are not limited to the following: mootness, ripeness, staleness, lack of standing to bring a claim, and failure to state a proper claim. Given the FLRA's recent and repeated edict that jurisdictionally deficient grievances are not permitted to advance, the Agency argues that the Union's practice of filing

and pursuing untimely and other non-arbitrable claims, the Agency asserts that its proposal provides guidance to the Arbitrator and to the parties around jurisdictional requirements.

## II. Union Article and Position

### a. Sections 1(b) and 1(c)

The Union asserts that its proposals for sections 1(b) and 1(c) constitute direct quotes from 5 U.S.C. § 7121 and 5 U.S.C. § 7116(d). Section 1(b), states in part, “[p]ursuant to 5 U.S.C. section 7121, an aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both.” Section 1(c) states in part that “issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section.”

The Union states that the Agency’s proposals refer to sections 7121 and 7116(d), but seeks to make modifications to those sections. For example, the Union contends that the Agency’s section 1(b) proposal seeks to waive employee rights when they are whistleblowers, have been discriminated against, and have been retaliated against if the Agency takes the position that its subsequent decision “stems from a prior Agency action.” The Union states that the Agency’s proposal is vague and inconsistent with the Statute, as the Statute is devoid of any mention of “decisions that stem from a prior Agency action.” Therefore, the Union submits that its Article 22, sections 1(b) and (c) proposals are lawful, appropriate, and should be adopted by the Panel because the language is a direct quote from the provisions that both parties refer to in their proposals.

### b. Sections 2

#### i. Procedural Issues

The Union contends that the Agency’s section 2 proposals which exclude matters from the grievance procedure violates the parties’ ground rules agreement. The Union argues that the parties’ ground rules provision in this regard is contained in section 5.2, which provides, in pertinent part: “[t]he articles identified in initial proposals submitted will be the *only* articles considered for negotiation purposes.” (Emphasis Added). Under section 5.3 of the ground rules, it provides, in pertinent part: “[e]ach party agrees to open and make proposals on no more than six (6) articles of the current CBA for a maximum total of twelve (12) articles.” The Union states that the Agency’s Article 22, section 2(a)(6) excludes matters that are covered under other opened parts of the parties’ CBA. The Union contends that this proposal would unlawfully modify articles not open for negotiation.

For example, the Union points to Article 18, section 7 of the CBA and states that this Article would be modified by the Agency’s proposal to remove certain adverse actions from the grievance procedure even though it was not one of the Articles open for negotiations. This section states: “[a]dverse actions taken under this Article are grievable under Article 22 (Grievance Procedure) section 6.” The Union also states that OPM has attempted to modify

Article 4, Equal Employment Opportunity, in violation of the ground rules agreement. Specifically, Article 4, section 5(c) of the CBA provides, in pertinent part: “[a]n employee has the option of filing a complaint under the negotiated grievance procedure (Article 22) or under the agency EEO complaint procedure, but not both.” Finally, the Union argues that OPM has attempted to improperly modify Article 9, Unacceptable Performance Actions, in violation of the ground rules agreement. Specifically, Article 9, section 4 provides the requirements for all written decisions related to unacceptable performance actions: [t]he written decision will state that the employee, if dissatisfied, *may file a grievance* or invoke the Alternative Dispute Resolution Procedure under the Negotiated Grievance Procedure. If the decision is one which is appealable to the Merit Systems Protection Board, the decision notice will notify the employee of this fact, of the procedures and deadlines applicable for filing such an appeal, *and of the employee's right to file a grievance in lieu of such an appeal[.]* (Emphasis added). Despite the ground rules mandate, the Union contends that the Agency has proposed language under section 2(a)(6) that modifies Articles 4, 9, and 18 of the parties’ CBA that are agreed upon and that may not be modified under the ground rules agreement. Thus, the Union states that the Agency’s proposal for section 2(a)(6) goes beyond the scope of the ground rules agreement and is not an appropriate proposal.

ii. Merits of Proposals 2(a)(6), (7), (13), (14), (15), (16), (17), (18), (19)

On the merits, the Union states that its proposals seek to allow employees to grieve removals, non-selection matters, progress reviews, counseling, the content and decision to issue performance improvement plans, performance ratings, the content of performance standards and position descriptions, and decisions regarding issuance of quality step increases, awards, and authorization of recruitment, retention, and relocation payments. The Union contends that the Agency’s proposal makes all such matters non-grievable.

The Union states that under 5 U.S.C. § 7121, collective bargaining agreements must include a procedure for fair resolution of disputes. The Union argues that the Agency’s proposal removes the only forum for dispute resolution for violations of the parties’ CBA. The Union states that Congress has expressed a strong preference for “broad scope” grievance procedures.<sup>10</sup> The Union contends that the matters the Agency seeks to exclude from the grievance process have been grievable over the course of the last 20 years. To this point, the Union has filed approximately 200 grievances on those matters in just the last five (5) years. Further, the Union states that the parties have settled over 50% of those grievances. For example, in 2015 alone, the Union had 25 active cases on performance appraisals and other performance issues, along with 11 grievances on promotions and non-selection issues, 10 of which currently remain open. In 2019, the Union had dozens of active grievances on performance issues. The Union states that the parties have resolved the majority of these matters, which illustrates that the grievance process is working and effective.

The Union states that it is noteworthy that the Panel has decided in two recent cases finding that the grievance exclusions advanced by management were not appropriate. In *SSA and AFGE*,<sup>11</sup> the Union states that the Panel declined to impose the Agency’s grievance

<sup>10</sup> See *AFGE Local 225 v. FLRA*, 712 F. 2d 640 (D.C. Cir 1983)(*AFGE*).

<sup>11</sup> 2019 FSIP 019 (May 2019).

exclusions. Similarly, in *HHS and NTEU*,<sup>12</sup> the Union states that the Panel imposed a broad negotiated grievance procedure that permitted grievances of telework. The Union asserts that the Agency has failed to assert or articulate any need during bargaining, during the Informal Conference, or at any other point to date, to exclude the proposed matters from the grievance procedure. Therefore, the Union requests that the Panel impose its Article 22, sections 2(a)(6), (7), (13), (14), (15), (16), (17), (18), and (19) proposals.

c. Section 3(c) and 3(d)

The Union proposes that it may allege continuing violations in accordance with long-standing FLRA precedent and well-settled practice throughout the federal sector. The Union contends that it has filed at least 15 grievances that have alleged a continuing violation. The Union argues that Arbitrators have exercised jurisdiction over those grievances and resolved them.

The Union's proposal also provides that any requests for dismissal of a grievance on procedural grounds should be made prior to an arbitration hearing. The Agency proposes that it may request dismissal during and after an arbitration hearing when the record is closed for further evidence and arguments. The Union argues that is inefficient waste of resources to have a hearing and after the time and costs have been expended attempt to dismiss a matter that could have been dismissed prior to the hearing. Moreover, the Union states that the Agency insisted upon and the Union conceded to a bifurcation procedure where procedural allegations are briefed prior to a merits hearing. Therefore, the Union asserts that the Agency's request for additional dismissal procedures are duplicative and may result in substantial government waste.

d. Section 4(a)(4), bullets 2-4, 4(c), and Section 5(d)(4), bullets 2-4

The Union proposes in sections 4(a)(4) and 5(d)(4), that in the Step 1 and 2 grievance, it identify the articles of the CBA, as well as general references to laws, rules, and regulations that are alleged to be violated. The Agency has proposed that the Union is required to identify every section of each article and law that has been violated. It also requires the Union to identify each and every date when the Agency took action. However, the Union asserts that its ability to provide every violation date and sections of an article is contingent upon the Union requesting information and the Agency providing the requested information. In cases when the Union has requested this information and not yet received a response, the Union states that it would have no mechanism to provide this information. Moreover, the Union states that the Agency will already know the dates that each of its managers took action and is in a better position to secure this information.

e. Sections 4(d), 5(b), 5(c), 5(i), and (7)

The Union states that the only difference between the Agency's and the Union's Article 22, sections 4(d), 5(b), 5(c), 5(i), and 7 proposals is that the Union's proposals permit it to wait for receipt of a decision from the Agency if the Agency is untimely with issuing a decision. The Union states that the parties have routinely requested extensions and have been able to successfully resolve matters using such extensions. The Union contends that the Agency's

proposal provides no flexibility in this regard. The Union states that if a management official wants to resolve a grievance with the Union, the Agency's proposal precludes the parties from doing so because the Union would have to advance the matter to the formal proceedings to protect the grievance.

f. Section 5(e)

The Union proposes that the parties utilize the procedures for curing grievances that is agreed upon by the parties for Step 1 grievances, i.e., section 4(b) for Step 2 grievances. That section states that the Agency will notify the Union if it believes that the Union has failed to meet the Step 1 pleading requirements, which will permit the Union three days to submit a revised Step 1 grievance. First, the Union states that its proposal merely refers to a provision that OPM drafted and the parties agreed upon. Second, the Union contends that this will enable the parties to resolve issues related to the information outlined in Union grievances, rather than waste government resources with the costs associated from an arbitration.

g. Section 5(g)

The Union states that all of its employee representatives are Agency employees who have to first request and receive approval of official time. Despite this fact, the Union states that the Agency has proposed that Union representatives maintain their calendars, emails, voicemails, and other Agency equipment in a certain fashion. First, the Union argues that employees may not utilize official time until after receipt of approval in writing from their supervisors. Thus, the Agency cannot solely utilize employee calendars to schedule meetings. Second, the Union states that the Agency wants to subject employees to disciplinary action if they do not maintain their calendars, emails, and voicemails in the fashion requested, despite the fact that no other employees at OPM have this requirement or are subject to disciplinary action for that requirement. The Union argues that this amounts to a penalty that is solely imposed on Union representatives in violation of the Statute. The Union claims that the Agency's proposal puts employees in a position where they are always subject to disciplinary action, either for following their work area requirements, or following the requirements of them as Union representatives. Therefore, the Union states that the Agency's proposal is an unlawful penalty for serving as a Union representative and an impractical means of scheduling meetings because employees must receive official time approval prior to scheduling all meetings.

h. Section 6

The Union proposes that it may request information in connection with grievances and that the Agency will respond to such requests in a timely fashion. The Union states that the Agency often has control over and access to all of the information necessary for the Union to process a grievance. Therefore, the Union argues that it is critically important that the Agency respond to such requests in a timely fashion.

i. Section 8 and Article 23, Section 6(b)

The Union argues that the Agency has proposed a litany of reasons for claiming a grievance is procedurally deficient. The Agency has proposed that grievances are dismissed because of mootness, ripeness, staleness, lack of standing, and failure to state a proper claim. The Union argues that the Agency's proposal fails to comport with the Union's legal obligation to represent bargaining unit employee through contract enforcement. For example, the Union states that OPM could claim that a matter is moot, not ripe and/or is stale when there are still violations of the CBA and law at issue. To illustrate this point, the Union states that the Agency recently made the argument that its decision to unilaterally implement a change that required bargaining was moot and stale because the employee was no longer in the same position that she was in at the time of the change. In that case, the Union contends that if employee circumstances change, it has no bearing on whether legal compliance occurred with respect to implementation of the change. Therefore, the Union argues that these concepts have no application to the grievance-arbitration procedures which contain their own requirements.

III. Analysis and Conclusion

a. Sections 1(b) and 1(c)

The parties disagree over how to memorialize the exceptions to the exclusivity requirement of the grievance procedure contained in section 7121(a) of the Statute. Specifically, the parties disagree over sections 7116(d), 7121(d), 7121(e) of the Statute. The Agency seeks to elaborate on the statutory language contained in those sections, while the Union seeks to memorialize the language contained in the Statute.

The Agency seeks to provide a comprehensive list of complaints (i.e., EEO; OSC; MSPB; and ULPs) that if filed by an employee or the Union, would be precluded under the parties' negotiated grievance procedure. The Union does not dispute that if a complaint is first filed in another forum, then it is precluded under the negotiated grievance procedure; however, it disagrees with the Agency's characterization of this preclusion. The Agency also seeks to memorialize FLRA case law in the parties' CBA over the standard of review that the FLRA uses to determine whether a claim is barred, so that the parties can apply this standard to grievance disputes. Rather than attempt to interpret case law, which may change, the Panel believes the better approach is to memorialize the language in the Statute, which both parties agree applies here. Thus, the Panel will impose the Union's language for these two sections. Because the Panel is adopting the Union's language, it's unnecessary to address their waiver arguments.

b. Section 2

i. Procedural Issues

The Union contends that the Agency violated the parties' ground rules agreement by advancing proposals over articles not open for negotiations. As previously discussed, the parties agreed to a limited reopener of six articles each for successor CBA negotiations and the Union argues that the Agency's proposals must be confined within the six articles. For example, the

Union states that the Agency has proposed to modify Article 18, section 7 with its proposals in Article 22, sections 2(a)(6). In section 2(a)(6), the Agency proposes to exclude “[e]mployee removals covered under sections 5 U.S.C. § 4303 and 5 U.S.C. § 7512”. The Union contends that because Article 18, which covers adverse actions, the Agency’s Article 22 requires the parties to reopen Article 18, which is not open for negotiations.

The Panel will accept the Union’s arguments. The parties have a separate article that addresses adverse actions, i.e., Article 18, which is not open for negotiations. Article 18 lists the possible adverse actions that employees may grieve under the negotiated grievance procedure, including suspensions for 14 days or less; reductions in grade or pay; furloughs of 30 days or less; and removals as defines in 5 U.S.C. 7501. Article 22, the parties’ negotiated grievance procedure article, which is open for negotiations addresses matters that are excluded from the grievance procedure such as prohibited political activities; retirement, life insurance, or health insurance; a suspension nor removal for national security; any examination, certification or appointment; reductions in force appealable to MSPB; and classification of any position that does not result in the reduction in grade or pay of any employee. The parties agree on those exclusions, but the Agency proposes to exclude additional matters, as previously discussed and discussed further below. Thus, the Agency’s proposal would require the parties to modify other articles, such as Article 18, which is not open for negotiations.

The Agency could have proposed to reopen the entire CBA, but it agreed to a limited reopener. The Agency should not now have the opportunity to modify other articles not open for negotiations. Where the parties need to make minor procedural changes to other articles in order to conform with the newly agreed to articles subject to negotiations, that is permissible. But to permit substantive changes to other articles not open for negotiations, that it not contemplated by the parties’ ground rules and the Panel will not allow the Agency the ability to do it in this forum.

The Agency argues that the parties have reached agreement in other articles which reflects how they will treat modifications to the CBA; however, the parties reached over how they will handle those specific changes in those specific articles. The parties did not reach an agreement in Article 22 over how they will treat other articles that may substantively change because of Article 22. Thus, the Panel will accept the Union’s arguments as colorable and remove its jurisdiction over Agency proposal 2(a)(6).

## ii. Merits of Proposals

The remaining matters that the Agency seeks to remove from the CBA are: (1) matters previously raised in an ULP charge (section 2(a)(7)); (2) a non-selection for an appointment from a group of properly ranked and certified candidates (section 2(a)(13)); (3) a performance progress review, oral or written counseling, or oral or written caution/warning (section 2(a)(14)); (3) content or decision to issue a PIP (section 2(a)(15)); (4) performance ratings (section 2(a)(16)); (5) content of performance standards and position descriptions (section 2(a)(17)); (6) receipt or non-receipt of any award pursuant to 5 U.S.C. Chapter 45 (section 2(a)(18)); and (6) failure to approve a quality step increase, performance award, special act award, recruitment, retention, or relocation payment (section 2(a)(19)). The Union opposes all of those exclusions.

The Panel has stated that it will not limit the grievance procedure unless the moving party to limit that scope is able to “establish convincingly” the need for a more limited scope.<sup>13</sup> The burden for exclusion turns on “the particular settling” of the dispute.<sup>14</sup> The Panel is not bound by *stare decisis* and reviews each case separately based on the facts and evidence of that case. It is the obligation of the parties in each case to establish convincingly that the Panel should adopt their proposals.

First, the Agency seeks to exclude from the grievance procedure matters previously raised in an ULP charge under section 2(a)(7); however, the Agency did not provide any rationale for this exclusion. The Union has already proposed language under section 1(c) which memorializes section 7116(d) of the Statute, precluding a party from filing a matter under the grievance procedure if it was first raised as an ULP (and vice-versa). The Agency did not establish why this exclusion is warranted. The Panel will not exclude section 2(a)(7).

The second exclusion that the Agency proposes is over non-selections from a list of properly ranked and certified candidates under section 2(a)(13). This means that once the Agency properly ranks and certifies the best qualified candidates for a position, all candidates on that list are deemed eligible for selection to that position. The Agency’s proposal is consistent with government-wide regulation. Under 5 C.F.R. § 335.103(d), 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. Thus, the Panel will impose the Agency’s exclusion under section 2(a)(13).

The third exclusion under section 2(a)(14) that the Agency seeks to remove from the grievance procedure is the ability of an employee to grieve a performance progress review, oral or written counseling, or oral or written caution/warnings. Under Article 17 of the parties’ current agreement, the parties agreed that “[o]ral and written counselings, including warnings and admonishments, are not disciplinary actions and are, therefore, not grievable.” Thus, because this language has been agreed to and is not in dispute, the Panel will impose the exclusion for oral or written counseling, and oral or written caution/warnings consistent with Article 17. The Panel will not, however, impose the exclusion for performance progress reviews because the Agency has failed to demonstrate in this particular setting that the exclusion is justified.

The next two exclusions that the Agency proposes applies to the content or decision to issue a PIP under section 2(a)(15) and the content of performance standards and position descriptions under section 2(a)(17). The Agency has demonstrated that it has the right under Statute to determine the content of performance standards, PIPs, and position descriptions, as well as the right to issue a PIP.<sup>15</sup> Thus, based on this right, the Panel will impose the Agency’s two exclusions here.

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13 2019 FSIP 019 (May 2019).

14 2019 FSIP 019 (May 2019).

15 See *Newark Air Force Station Activity*, 30 FLRA 616 (1987).

The final three exclusions that the Agency proposes include performance ratings under section 2(a)(16), the receipt or non-receipt of any award issued pursuant to 5 U.S.C. Chapter 45 under section 2(a)(18), and failure to approve a quality step increase, performance award, special act award, recruitment, retention or relocation payment under section 2(a)(19). The Agency contends that section 4 of EO 13839 directs agencies to remove these matters from the grievance procedure. Under section 4 of the EO, it requires agencies to remove disputes over “ratings of records” or “the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments the negotiated grievance procedure.” In this respect, the Panel has adopted agency proposals that rely on section 4 where the opposing party does not rebut the agency’s arguments.

The Union argues that there is no precedent for excluding these matters, as they have been part of the parties’ grievance procedure for 20 years and the parties have filed numerous grievances on these issues. However, the Union failed to provide any examples demonstrating the significance of the grievances that the parties have litigated. Thus, the Panel will rely on the Agency’s position. As such, because the Union has failed to offer sufficient justification for keeping these matters in the grievance procedure, the Panel will adopt the Agency’s three exclusions in this setting.

c. Section 3

The Agency argues that the Union’s continuous violations proposal should not be considered by the Panel because it was not offered to the Agency until the end of the Informal Conference. This argument will be rejected by the Panel. While the Union may have advanced this proposal toward the end of the Informal Conference, the parties had over two weeks to consider each other’s proposals from the conclusion of the Informal Conference until their position statements were due. Thus, the Agency had a sufficient amount of time to consider the Union’s proposal and determine if it would like to accept it or continue to offer its alternative proposal.

The parties agreed that in order to be timely, a grievance must be submitted within 15 workdays after the matter, issue, or incident out of which the grievance arose, or within 15 workdays after the date the aggrieved employee became aware or should have become aware of the matter under section 3(b). The Agency seeks to enforce this provision under section 3 and permit the Agency to request a dismissal from an Arbitrator due to an untimely grievance under section 3(c). The Union agrees with the Agency’s proposal; however, it seeks an exception if there is a continuing violation. Regardless of what type of violation occurs, e.g., a continuing violation or a singular incident, under the Agency’s proposal, the timeline for filing a grievance begins when the employee is aware or should have become aware of the incident. The Agency’s proposal will permit employees to file continuing violation grievances and allow Arbitrators to determine if they are untimely.

Also, under section 3(c), the Union seeks to limit the Agency’s ability to seek a dismissal of the grievance during or after the arbitration hearing under section 3(c). The Agency argues that the Union’s proposal waives its legal right to make jurisdictional arguments at any stage of the grievance proceeding. The parties did agree to bifurcate the arbitration process under section

6 of Article 23 into separate jurisdictional and merits proceedings, so that all jurisdictional issues of arbitrability are decided prior to a hearing on the merits of the grievance. Notwithstanding, the Panel will not impose such a limitation.

The Panel found compelling the Agency's argument, specifically that the Union's proposal waives the Agency's ability to make jurisdictional arguments at any stage of the grievance proceeding. The parties are permitted to agree to limit procedural arguments raised during or after an arbitration; however, the Agency does not agree to such a limitation and the Panel will not impose such language here. Accordingly, the Panel will not limit the Agency's, or the Union's right to make jurisdictional challenges to a grievance.

Finally, the parties disagree over the timeframe that the Union will be provided notification when the Step 1 grievance official has been designated. The Union did not explain why it needed the Agency to provide it with the delegated official within four workdays of the filing of the grievance. The Agency agreed it will notify the Union; therefore, this should be sufficient. Thus, the Panel will adopt the Agency's section 3(d) proposal.

d. Section 4(a)(4), bullets 2-4, 4(c), and Section 5(d)(4), bullets 2-4

These sections pertain to the amount of specificity required in Step 1 and Step 2 of the grievance procedure. The parties agree that specificity is necessary, but the Agency would like the Union to not only provide the specific articles that were alleged to be violated, but the specific sections of the article, as well as the specific provisions of law, rule, or regulation that were alleged to be violated, and the date of each and every Agency action at issue. The Agency defends its proposal by stating that the Union has repeatedly refused to provide any specificity in their grievances, which has made it very difficult for the Agency to determine the merits and timelines of the grievance.

The information that the Agency seeks to include in a grievance is necessary information that should be included in every grievance and it should be available to the Union. Without this information, the Agency cannot fully and appropriately respond to the claim(s). To the extent that the Union is concerned that it might not have all of the information needed, which could result in a dismissal of its claim, the parties have agreed in section 4(b) to allow the Union an opportunity to cure any defects after it has filed its Step 1 grievance. Further, the Panel has imposed, more fully discussed below, that the Union is provided another opportunity at Step 2 to cure any defects in the grievance. As such, the Panel will adopt the Agency's proposals here.

e. Sections 4(d), 5(b), 5(c), 5(e), 5(i), and (7)

The parties' main dispute in section 4(d), 5(b), and 5(i) of Article 22 is that the Agency proposes it provide a grievance response within 15 days from the filing of the grievance, but then proposes that it also may not issue a decision within the timeframes specified, and if that happens, the Union can advance the grievance to the next step. If the Agency is requiring the Union to adhere to strict timeframes, which could result in the dismissal of the grievance, it's only fair that the Agency should have to adhere to its own timeframes. Therefore, the Union's section 4(d) and 5(i) proposals will be adopted and the Agency will be required to withdraw its section 5(b) proposal.

Under section 5(c), the Agency provides the same cautionary language it did under Step 1, i.e., a Step 2 grievance that is untimely filed will result in a dismissal of the grievance by the Arbitrator. For consistency with the above order, the Panel will adopt the Agency's proposal. The Panel will adopt the Union's proposal 5(e), which will provide the parties an opportunity to address and resolve any jurisdictional defects prior to litigating the matter. This may prevent the parties from having to expend unnecessary resources litigating the grievance at a hearing. Finally, under section 7, the parties disagree over whether the Agency must provide a grievance response. Based on the above order, the Panel will modify the Agency's proposal to remove the language that permits the Agency to not provide a grievance decision.

f. Section 5(g)

The Agency proposes several requirements that the Union must comply with in order to facilitate the scheduling and holding of grievance meetings. The Union should, as a general practice keep its electronic calendar updated and ensure that there are appropriate representatives available to hold grievance meetings. Keeping electronic calendars, voicemails, and like updated will enable to the parties to timely schedule and hold meetings. However, this proposal seems to create more work for both parties than is necessary.

The proposal would require the parties to monitor the Union's compliance with this language and if the Union, for example, inadvertently did not update its out of office email, then the result would be that the Agency may file a grievance against the Union. The Agency has stressed the importance of efficiency throughout the Panel's proceedings, including the Informal Conference. This procedure would not contribute to efficiency. As such, the Panel will adopt the Union's proposal, which it commits itself to working with the Agency to schedule meetings in an efficient manner. The Panel will, however, modify the proposal to include language which indicates that the Agency may proceed with the grievance meeting should the Union fail to provide a representative to attend that meeting. Specifically, the Panel imposes the following language: "If the Union fails to provide a representative at a grievance meeting, the meeting may proceed."

g. Section 6

The parties each agree that the Union may request information under the Statute in connection with a grievance; however, they disagree over including language that requires the Agency to respond to such requests "promptly." Including such language opens up the possibility to grieve the meaning of "promptly." Rather than increase the possibility of more litigation, the Panel will adopt the Union's proposal and remove the word "promptly." Under the Unions' proposal, the Agency must provide a response "consistent with the law," which requires a timely response.

h. Section 8

The main disagreement in this section is that the Agency seeks to include a non-exhaustive list that an Arbitrator may use to determine that a grievance is not arbitrable, e.g., mootness, ripeness, staleness, lack of standing to bring a claim, and failure to state a proper

claim. The Agency claims that it's important that these matters are memorized in the parties' agreement; however, it's unclear why the Agency needs this additional language in the CBA. The Agency has not demonstrated that the Union's grievances have been moot, not ripe, stale, etc. Therefore, the Panel will order the Agency to withdraw its proposal. As such, it's unnecessary to address the Union's legal arguments.

### 3. Article 23 – Arbitration

#### I. Agency Article and Position

##### a. Section 2(a)

The Agency states that the disagreements in Article 23 raise the same issues as discussed in Article 22, sections 4(d), 5(i), and 5(b). The Agency seeks to keep the grievance process moving briskly by having the deadline of a decision at Step 2 of the grievance procedure trigger the next step, i.e., arbitration even when a decision is not issued.

##### b. Section 6(b)

The Agency states that this dispute is similar to the dispute in Art. 22, section 8. Under this section, the Agency proposes to include a list of jurisdictional issues of arbitrability that include timeliness, ripeness, mootness, staleness, failure to follow written pleading requirements, failure to properly follow procedural step 1 and step 2 invocation requirements, lack of standing to bring a claim, failure to state a proper claim, and "election of remedies" preclusion under section 7121 of the Statute. The Agency argues that the FLRA's position on questions of arbitrability, the Union's practice of pursuing non-arbitrable grievances, and comparable agreements reached by the parties elsewhere, supports the Agency's proposal.

##### c. Section 6(f)

Under this section, the Union proposes that if the party who initiated the bifurcated hearing does not prevail, then that party pay all of the arbitration costs. The Agency states that this proposal is in direct conflict with the agreement reached by the parties during CBA bargaining in section 5(a), which requires the parties to evenly split all fees and expenses. The Agency argues that it should be rejected on this basis alone. The Agency also states that it should be rejected because it conflates independent arbitrability and merits proceedings.

##### d. Section 7(d) and 8(g)

Under Section 7(d), the Agency proposes that the Arbitrator, when making pre-hearing determinations, will exclude witnesses who either party has demonstrated have no first-hand knowledge directly relevant to the disputed issues, and will exclude exhibits that either party has demonstrated are not directly relevant to the disputed issues to be resolved. Under section 8(g), the Agency proposes that the parties will limit witnesses and witness testimony to those that have direct knowledge that may impact the Arbitrator's determination over the issue(s) in dispute and

will limit duplicative witnesses. Witnesses at a hearing will be those that are agreed upon by the parties and approved by the Arbitrator prior to hearing. The Agency further proposes that the Arbitrator will disallow newly proposed witnesses to appear at the hearing if either party demonstrates that the proposed witness has no first-hand knowledge directly relevant to the disputed issues.

As referenced earlier by the Agency, it states that during the grievance and arbitration process, the Union has refused to offer detailed allegations, refused to cooperate in pre-arbitration exchange, and presented new claims, exhibits, and surprise witnesses, often with redundant and immaterial testimony, during arbitration hearings. The Agency states that this has resulted in expensive delays in arbitration proceedings and a process lacking in fairness and transparency while causing considerable prejudice to the Agency. The Agency contends that its proposals address these problems by requiring the parties to adhere to practices that are fair and efficient, while providing guidance to Arbitrators to limit witnesses and exhibits to those that are relevant and not duplicative.

## II. Union Article and Position<sup>16</sup>

### a. Section 2(a)

The Union's proposal permits the Union to wait for receipt of a decision from the Agency prior to invoking arbitration. The Union states that this will enable the parties to resolve matters to their mutual satisfaction. The Union's proposal also requires requests for dismissals based on procedural matters or occur prior to a hearing to ensure that there is not waste of government resources and time by having a hearing and failing to make procedural arguments prior to expending resources on a hearing.

### b. Section 6(f)

During the Panel's Informal Conference, an idea was discussed, which the Union adopted: if the party who initiated the bifurcation of an arbitration does not prevail, then that party will pay all arbitration costs. The Union believes that this proposal ensures that there is not a waste of government resources by having frivolous bifurcation requests without there being any consequence for such requests. The Union contends that this will hold the parties accountable with respect to the bifurcation process.

### c. Sections 7(d) and 8(g)

Under this section, the Agency has proposed that the Arbitrator, in making pre-hearing determination, will exclude witnesses who either party has demonstrated have no first-hand knowledge directly relevant to the disputed issue(s) to be resolved. The Union states that Arbitrators have the ability and the authority to determine the witnesses that are necessary for a hearing. The Union asserts that the Agency's proposal usurps the Arbitrator's authority to

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<sup>16</sup> The Union's 6(b) proposal is addressed under Article 22.

determine the witnesses that are relevant to a case. The Union also argues that the Agency's proposal may lead to both parties being unable to present necessary witnesses for their cases and, thereafter, exceptions being filed on that basis. Therefore, the Union requests that no proposal is made specific to this section, as it will lead to further waste of government resources at OPM and the FLRA.

### III. Analysis and Conclusion

#### a. Section 2(a)

The parties' section 2(a) proposals are similar to their proposals in Article 22, sections 4(d), 5(i), and 5(b), in that they address whether the Agency must provide a Step 2 grievance response within a specified timeframe to trigger the next step, which would be arbitration under this proposal. The Panel will adopt the Agency's proposal, but modify it to remove the language that states that the Agency will not provide a grievance response. Similarly, the Panel will also remove the language in the proposal that permits the Union to not provide a grievance response on an Agency-filed grievance, so that the parties are on equal footing with respect to required grievance responses.

#### b. Section 6(b)

The Agency proposes to include a list of grievability and arbitrability defenses in this section of Article 23, as it did under section 8 of Article 22. For the same reasons addressed by the Panel above, the Panel orders the Agency to withdraw its proposal here.

#### c. Section 6(f)

The Union proposes that if a party who initiates a bifurcated hearing does not prevail, then that party must pay all the arbitration costs. The parties agreed under section 5(a) of this Article that the Arbitrator's fees and expenses will be shared equally. This proposal is in conflict with that agreement. Therefore, the Panel will order the Union to withdraw this proposal.

#### d. Sections 7(d) and 8(g)

The Agency proposes in section 7(d) that an Arbitrator will exclude witnesses who either party demonstrates have no first-hand knowledge relevant to the issues and whose testimony is duplicative, as well as exclude exhibits that are not relevant. The Agency also proposes in section 8(d) that the parties agree to limit witness testimony to only those with direct knowledge of the issues, and in most circumstances, witnesses will be agreed by the parties and approved by the Arbitrator prior to the hearing. The Agency provided an email chain when the parties could not agree on a witness list. The Agency questioned the relevance of some of the witnesses that the Union wanted to testify at the hearing. The Agency asked for a short summary of their expected testimony. The Union argued that it had the right to call on these witnesses and it was not obligated to reveal its case to the Agency prior to the hearing.

As the Agency notes in the emails, it is ultimately up to the Arbitrator to decide whether witness testimony is relevant and, thus, will be permitted at the hearing. The parties, as the Agency is proposing to do here, are free to agree to limit the Arbitrator's authority; however, the Arbitrator can choose not to follow those limits. Nonetheless, the Agency's proposals ensure that hearings are focused and concentrated on the relevant issues. Otherwise, a party could unnecessarily drive up the costs of a hearing by proposing to include several witnesses whose testimony may be duplicative. Thus, the Panel will adopt the Agency's proposals here because they help to keep arbitration costs at a minimum, which is in line with an effective and efficient government.

### **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

June 14, 2020  
Washington, D.C.

### **ATTACHMENTS**

- Parties' Proposals

## Disputed Proposals

### Article 2 – Union and Management Rights

- Section 7(h)(1);(2);(3)

#### (h) Official Time for 5 U.S.C. § 7131(d) Activities.

- (1) **Agency Proposal: Bank of Hours.** The total amount of official time that may be authorized for 5 U.S.C. § 7131 (d) activities shall be limited to a total per fiscal year of 1 hour per bargaining unit employee (bank maximum). As an example, if there are 700 bargaining unit employees, the bank maximum for official time authorized pursuant to 7131(d) will be 700 hours. Official time requests for 5 U.S.C. § 7131 (d) activities will be denied for the remainder of the Fiscal Year once the bank maximum has been reached. At the beginning of each fiscal year, the bank maximum will be reset (up or down) based on the updated number of bargaining unit employees.

**Union Proposal: Bank of Hours.** The total amount of official time that may be authorized for 5 U.S.C. 7131 (d) activities shall ordinarily be 2000 hours in the first year, 1500 hours in the second year and 900 hours in the third year.

- (2) **Agency Proposal: Tracking and Modification of Bank of Hours.** Accordingly, at the beginning of each fiscal year, the Agency will provide the Union with the current number of bargaining unit employees and commensurate with this number, the Agency will provide the Union with a bank of official time that it may use, pursuant to 5 U.S.C. § 7131 (d), should it be requested and approved. During the fiscal year, the Agency will provide the Union with a quarterly update on how much of the bank has been utilized and how much of the bank remains available for use. The Agency will also notify the Union when the bank has been fully utilized. **Irrespective of when this occurs during the course of the fiscal year, once the bank is fully utilized, all official time requests made pursuant to 5 U.S.C. § 7131 (d) will be denied.**

**Union Proposal: Tracking and Modification of Bank of Hours.** Accordingly, at the beginning of each fiscal year, the Agency will provide the Union with the current number of bargaining unit employees and the Agency will provide the Union with a bank of official time that it may use, pursuant to 5 U.S.C. § 7131 (d), should it be requested and approved. During the fiscal year, the Agency will provide the Union with a quarterly update on how much of the bank has been utilized and how much of the bank remains available for use. The Agency will also notify the Union when the bank has been fully utilized.

- (3) **Agency Proposal: Cap on Hours Per Union Representative.** Official time for union activities under 5 USC 7131 (d) shall not exceed 25% of a union representative's paid time in a fiscal year.

**Union Proposal:** No counter.

- **Section 8(a) – Intro paragraph**

**Official Time Procedures**

**Agency Proposal:** Union representatives will in every instance obtain approval from the appropriate supervisor before using official time to conduct representational activities consistent with the following procedures:

**Union Proposal:** Union representatives will in every instance normally obtain approval from the appropriate supervisor before using official time to conduct representational activities unless there is an unexpected emergency **consistent with the following procedures:**

- Section 12

**Agency Proposal:** All Agency employees must comply with official time procedures contained in this agreement. Employees may be subject to appropriate disciplinary action, and, when applicable, charged absent without leave (AWOL), when utilizing official time without first requesting it and/or without prior, advance written authorization, and utilizing official time for any purpose **other than for what is specifically authorized, seeking and reporting official time under the improper reporting category,** and utilizing official time for the purposes of internal union business, as prohibited by 5 U.S.C. § 7131(b)

**Union Proposal: Misuse of Official Time and Non-Compliance with Official Time Procedures.** All agency employees must comply with official time procedures contained in this agreement. Employees may be subject to appropriate disciplinary action, and when applicable charged absent without leave (AWOL) when utilizing official time without first requesting it without prior, advance written authorization and utilize official time for the purposes of Internal union business, as prohibited by 5 U.S.C. 7131(b).

- Section 16(e)

**Agency Proposal:** In an effort to conserve Agency resources, union representative use of Agency photocopy equipment and photocopy paper shall be strictly limited to that which is necessary to carry out representational functions. Consistent with this principle, distribution of materials to bargaining unit employees shall be accomplished through scanning and emailing materials rather than hard copy distribution. Should the Union encounter technical difficulties with the Employer's email system, OCIO will assist the Union in resolving any such issue.

**Union Proposal:** In an effort to conserve Agency resources, union representatives use of Agency photocopy equipment and photocopy paper shall be strictly limited to that which is necessary to carry out representational functions. Consistent with this principle, distribution of materials to bargaining unit employees using Agency resources shall **usually** be accomplished through scanning and emailing materials rather than hard copy

distribution. Should the Union encounter technical difficulties with the Employer's email system, OCIO will assist the Union in resolving any such issue.

- **Section 17(b)(addendum)**

**Agency Proposal:** Employees that have access to documents, data, emails, and other information by virtue of duties are precluded from sharing, discussing, disseminating or otherwise utilizing this information for any purpose other than those required within the strict scope of their duties. This includes but is not limited to PII and other confidential and sensitive information. All laws, (i.e. the Privacy Act and others) will be observed by all Parties in the handling all agency documents, data, and records. Employees are not prohibited from accessing and disseminating their own personal information to the Union or other appropriate parties **which is obtained through either personal accounts (e.g., time and attendance records, earning and leave statements, performance appraisals, etc.) or through proper requests to the Agency for information.**

**Union Proposal:** Employees that have access documents, data, emails and other information by virtue of duties are precluded from sharing, discussing, disseminating or otherwise utilizing this information for any purposes other than those required within the strict scope of their duties. This includes but is not limited to PII and other confidential and sensitive information. All laws, (i.e. the Privacy Act and others) will be observed by all parties in the handling of all Agency documents, data and records. Employees are not prohibited from accessing and disseminating their own personal information to the Union or other appropriate parties.

- **Section 17(c)(addendum)**

**Agency Proposal:** Should the Union seek any agency records including documents, data, emails and other information, it is required to seek such information through a formal 7114 or FOIA request. It is not permitted to circumvent this process by requesting or obtaining agency records directly from employees that may have access to such information through the course of their duties **unless it is the employee's own information obtained through personal accounts or obtained through proper requests to the Agency for information. If the Union obtains any agency records including documents, data, emails, and other information through a formal request to Management, it is precluded from sharing, discussing, disseminating or otherwise utilizing this information for any purpose other than those stated and intended purposes described in its request to Management.**

**Union Proposal:** Should the Union seek any Agency records including documents, data, emails and other information, it is required to seek such information through a formal 7114 or FOIA request. It is not permitted to circumvent this process by requesting or obtaining agency records directly from employees that may have access to such information through the course of their duties unless it is the ~~own~~ employees' own information.

## Article 22 – Grievance Procedure

- **Section 1(b) and (1)(c)**

**(b) Agency Proposal:** Pursuant to 5 U.S.C. 7121, an employee or union is precluded from pursuing a grievance if the employee or union previously elected to challenge the same Agency personnel action or decisions stemming from that action through a separate statutory process. This preclusion applies to previously filed formal EEO complaints, OSC complaints, MSPB appeals, and ULP charges with the FLRA. The legal theory and relief requested in the grievance do not need to be the same as the previously filed action for the previously-filed action to preclude pursuit of the grievance if both actions concern the same matter(s). This preclusion also applies whether or not the employee or union subsequently withdraws or otherwise decides not to further pursue the complaint, appeal or charge. A determination by an arbitrator that the employee or union previously filed a formal EEO complaint, OSC complaint, MSPB appeal, or ULP charge with the FLRA concerning the same matter as a later-filed grievance will result in the dismissal of the grievance with respect to any matter at issue. Such a dismissal may be issued on an arbitrator's own accord or pursuant to a request for dismissal by the Agency prior to, during, or after an arbitration hearing.

**Union Proposal:** Pursuant to 5 U.S.C. Section 7121, an aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

**(c) Agency Proposal:** An employee or union is also precluded from pursuing a grievance under the negotiated grievance procedure if that grievance raises the same claims as a previously-filed grievance in which the same claims were previously raised and decided. A determination by an arbitrator that a grievance involves a claim that had been previously raised and decided will result in the dismissal of the grievance with respect to any claim at issue.

**Union Proposal:** In accordance with 5 U.S.C. Section 7116 (d), issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the

discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

- **Section 2(a)(3);(6);(7);(13);(14);(15);(16);(17);(18);(19)**

- 3) **Agency Proposal:** A suspension or removal under Section 7532 of Title 5 U.S.C;  
**Union Proposal:** A suspension or removal for national security reasons under Section 7532 of Title 5 U.S.C. The parties agreed 3-9-2020
- 6) **Agency Proposal:** Employee removals covered under sections 5 U.S.C. § 4303 and 5 U.S.C. § 7512.  
**Union Proposal:** No counter
- 7) **Agency Proposal:** Any specific matter previously raised in an unfair labor practice charge.  
**Union Proposal:** No counter
- 13) **Agency Proposal:** A non-selection for an appointment from a group of properly ranked and certified candidates.  
**Union Proposal:** No counter
- 14) **Agency Proposal:** A performance progress review, oral or written counseling, or oral or written caution/warning;  
**Union Proposal:** No counter
- 15) **Agency Proposal:** Content or decision to issue a Performance Improvement Period (PIP);  
**Union Proposal:** No counter
- 16) **Agency Proposal:** Performance ratings;  
**Union Proposal:** No counter
- 17) **Agency Proposal:** Content of performance standards and position descriptions;  
**Union Proposal:** No counter
- 18) **Agency Proposal:** The receipt or non-receipt of any award issued pursuant to 5 U.S.C. Chapter 45;  
**Union Proposal:** No counter
- 19) **Agency Proposal:** Failure to recommend and/or approve a quality step increase, performance award, special act award, recruitment, retention or relocation payment;  
**Union Proposal:** Failure to recommend a quality step increase, performance award, special act award, recruitment, retention or relocation payment.

- **Section 2 - last sentence**

**Agency Proposal:** This list of grievance exclusions is an updated, comprehensive list of matters excluded from the grievance procedure.

**Union Proposal:** No counter

- **Section 3(a);(c)(end of first sentence and toward end of last sentence);(d)(end of last sentence)**

- (a) **Agency Proposal:** The Union may file a grievance on its own behalf or on behalf of any employee in the bargaining unit. An employee may also file a grievance on

his or her own behalf but may seek representation from the union at any point. Should there be a meeting pursuant to Section 5(d), Human Resources will notify the Union. [The parties agreed 3-9-2020](#)

**Union Proposal:** The Union may file a grievance on its own behalf or on behalf of any employee in the bargaining unit. An employee may also file a grievance on his or her own behalf but may seek representation from the union at any point. Should there be a meeting pursuant to Section 5(d), Human Resources will notify the Union to schedule the meeting.

- (c) **Agency Proposal:** Grievances filed after the time requirements in Section 3(b) will be untimely. A determination by an arbitrator that the filing of the grievance was untimely will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the untimely filing. A dismissal based on untimeliness may be issued either on the arbitrator's own accord or pursuant to a request for dismissal by the Agency prior to, **during, or after an arbitration hearing.**

**Union Proposal:** Grievances filed after the time requirements in Section 3(b) will be untimely **unless it alleges a continuing violation.** A determination by an arbitrator that the filing of the grievance was untimely will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the untimely filing. A dismissal based on untimeliness may be issued either on the arbitrator's own accord or pursuant to a request for dismissal by the Agency prior to an arbitration hearing.

- (d) **Agency Proposal:** A grievance submitted to the Director of Labor Relations will be delegated to a first step official deemed appropriate by the OPM Human Resources based on the subject matter of the grievance and deemed by the Agency to have the authority to issue relief request, if appropriate. This will typically but not always be an employee's immediate supervisor in grievances filed by or on behalf of individual employees. That a supervisor or other agency official may have proposed or initiated an action against an employee over which that employee or union is challenging through the grievance in no way precludes that official from serving as a step 1 official. That a supervisor or other agency official may be alleged to have engaged in conduct alleged in the grievance to have violated the CBA, law, rule or regulation also in no way precludes that official from serving as a step 1 official. The Director of Labor Relations or his or her designee will notify the Union once the Step 1 official has been designated.

**Union Proposal:** A grievance submitted to the Director of Labor Relations will be delegated to a first step official deemed appropriate by the OPM Human Resources based on the subject matter of the grievance and deemed by the Agency to have the authority to issue relief request, if appropriate. This will typically but not always be an employee's immediate supervisor in grievances filed by or on behalf of individual employees. That a supervisor or other agency official may have proposed or initiated

an action against an employee over which that employee or union is challenging through the grievance in no way precludes that official from serving as a step 1 official. That a supervisor or other agency official may be alleged to have engaged in conduct alleged in the grievance to have violated the CBA, law, rule or regulation also in no way precludes that official from serving as a step 1 official. The Director of Labor Relations or his or her designee will notify the Union once the Step I official has been designated **within four (4) workdays of the filing the grievance.**

- **Section 4(a)(4), bullets 2-4**

**Agency Proposal:**

- Which specific articles **and sections** of the CBA were violated if any.
- **Which specific provisions** of law, rule or regulation were violated, misinterpreted or misapplied if any.
- **The date of each and every agency action at issue.**

**Union Proposal:**

- Which specific articles of the CBA were violated if any.
- Laws, rule or regulation that were violated, misinterpreted or misapplied if any
- [No Counter](#)

- **Section 4(c);(d)**

**(c) Agency Proposal:** Failure to include all information required in section 4(a) of this Article, or failure to cure a deficient Step 1 grievance pursuant to the procedures in section 4(b) of this Article renders the grievance jurisdictionally deficient. A determination by an arbitrator that any or all of the information contained in section 4 (a) of this Article was not included in the Step 1 grievance will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the exclusion of this information. A dismissal based on pleading deficiencies may be issued either on the arbitrator's own accord or pursuant to a request for dismissal by the **Agency prior to, during, or after an arbitration hearing.** Unless the union or employee can provide a compelling reason why information could not have been included in the Sep 1 grievance, a Union or employee is precluded from introducing any new information that was not provided in writing in the Step 1 grievance in later stages of the proceeding, including in the Step 2 written grievance, any Step 2 grievance meeting, and the arbitration hearing.

**Union Proposal:** No counter

(d) **Agency Proposal:** Within fifteen (15) days of the filing of a Step 1 grievance or the submission of a revised grievance pursuant to section 4(b) of this Article, **a written response will be provided via e-mail to the Union (President and Chief Steward) or to the alleged aggrieved employee should the grievance be employee initiated.** It will specify the reason(s) for the decision and designate who the Step 2 official will be, should the employee not be satisfied with the Step 1 decision. The decision at Step 1 will be decided solely on the written grievance submission.

**Union Proposal:** Within fifteen (15) days of the filing of a Step 1 grievance or the submission of a revised grievance pursuant to section 4(b) of this Article **or the meeting**, a **written response will be provided via e-mail to the Union (President and Chief Steward) and to the alleged aggrieved employee should the grievance be employee initiated.** It will specify the reason(s) for the decision and designate who the Step 2 official will be, should the employee not be satisfied with the Step 1 decision. The decision at Step 1 will be decided solely on the written grievance submission **as well as any evidence.** **If untimely, the Union may choose to wait for the Step 1 decision.**

- **Section 5(b):(c)**

(b) **Agency Proposal:** If no Step 1 decision is issued within the timelines specified in Section 4(c), the Step 1 grievance and all requested relief will be considered denied. In this case, the grievant may file a Step 2 grievance. However, the Step 2 grievance appeal must be filed within ten (10) workdays of the Step 1 decision due date.

**Union Proposal:** No counter

(c) **Agency Proposal:** Grievances filed after the time requirements in Section 5 (a) and (b) will be untimely. A determination by an arbitrator that the filing of the Step 2 grievance was untimely will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the untimely filing. A dismissal based on untimeliness may be issued either on the arbitrator's own accord or pursuant to a request for dismissal by the Agency **prior to, during, or after an arbitration hearing.**

**Union Proposal:** The Agency will provide a Step 2 decision in writing within 10 workdays or receipt of the Union's grievance. **If untimely, the Union may elect to wait for the Step 2 decision.**

- **Section 5(d)(4), bullets 2-4**

**Agency Proposal:**

- Which specific articles **and sections** of the CBA were violated if any.
- **Which specific** provisions of law, rule or regulation were violated, misinterpreted or

misapplied if any.

- **The date of each and every agency action at issue.**

**Union Proposal:**

- Which specific articles of the CBA were violated if any;
- **Which General** provisions of law, rule or regulation were violated, misinterpreted or misapplied if any.
- No counter.
- **Section 5(e)**

(e) **Agency Proposal:** If the Union fails to include all information required in section 5(d) of this Article **after the Union either initially complies with Step 1 pleading requirements contained in section 4(a) or does not comply with 4(a) requirements but is offered the opportunity to cure Step 1 grievance deficiencies pursuant to Section 4(b) of the Article, this renders the grievance jurisdictionally deficient. A determination by an arbitrator that any or all of the information contained in section 5 (d) of this Article was not included in the Step 2 grievance will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the exclusion of this information. A dismissal based on pleading deficiencies may be issued either on the arbitrator's own accord or pursuant to a request for dismissal by the Agency prior to, during, or after an arbitration hearing.**

**Union Proposal:** If the Union fails to include all information required in section 5(d) of this Article **section 4(b) will apply.**

- **Section 5(g)**
- (g) **Agency Proposal:** In order to facilitate the efficient scheduling of grievance meetings, **union representatives agree to 1) maintain at all times an updated electronic calendar reflecting their availability; 2) ensure that a substitute representative is available to attend a grievance meeting should they be absent from the office; 3) put in place out of office email notifications when they will be out of the office which includes information regarding which substitute representative Agency management should contact in their absence (to include the contact information of that substitute representative); and 4) voice mail notifications on their agency work phone when they will be out of the office which include information (including contact information) regarding which substitute representative Agency management should contact in their absence. It is anticipated that if a union representative's (or substitute representative when applicable) calendar reflects that they are available for a**

**grievance meeting they will be able to attend.**

**Union Proposal:** In order to facilitate the efficient scheduling of grievance meetings, union representatives agree to work with management to efficiently schedule meetings. If the Union fails to provide a representative at a grievance meeting, the meeting may proceed.

- **Section 5(h)**

- (h) **Agency Proposal:** It is anticipated that all parties will maintain the appropriate level of respect and professionalism during grievance meetings. Conduct that is unprofessional, hostile and harassing may be grounds to discontinue a grievance meeting. In such a case, there will be no additional meeting and a decision may be issued within fifteen (15) workdays. A decision may be issued without a meeting due to continued unavailability of employees or union representatives or repeated cancellation of a previously scheduled meeting. [The parties reached agreement 3-9-2020](#)

**Union Proposal:** It is anticipated that all parties will maintain the appropriate level of respect and professionalism during grievance meetings. Conduct that is unprofessional, hostile and harassing may be grounds to discontinue a grievance meeting this does not preclude robust discussion. In such a case, there will be no additional meeting and a decision may be issued within fifteen (15) workdays. A decision may be issued without a meeting due to continued unavailability of employees or union representatives or repeated cancellation of a previously scheduled meeting.

- **Section 5(i)**

- (i) **Agency Proposal:** Within fifteen (15) workdays after receipt of the Step 2 grievance if no meeting is held, and within fifteen (15) workdays from the grievance meeting if a meeting is held, a written decision will be provided via e-mail to the Union (president and Chief Steward) **or to the alleged aggrieved employee should the grievance be employee initiated. If no Step 2 decision is issued within these timeframes, the Step 2 grievance and all requested relief will be considered denied.** If the Union chooses to invoke arbitration after no decision is rendered, pursuant to section 7 of this Article, it must do so within fifteen (15) workdays from the date a decision was due.

**Union Proposal:** Within fifteen (15) workdays after receipt of the Step 2 grievance if no meeting is held, and within fifteen (15) workdays from the grievance meeting if a meeting is held, a written decision will be provided via e-mail to the Union (president and Chief Steward) **and to the alleged aggrieved employee should the grievance be employee initiated.** The Union may elect to wait for the Step 2 decision. If the Union chooses to invoke arbitration after no decision is rendered, pursuant to section 7 of this Article, it must do so within fifteen (15) workdays from the date a decision was due. **If the Union chooses to wait for a decision it must invoke within fifteen (15) workdays of receipt of the decision.**

- **Section 6**

**Agency Proposal:** Subject to Section 10 of this Article, grievance-related requests for information made pursuant to 5 U.S.C. 7114 shall not alter the timelines contained herein.

**Union Proposal:** The Union may request information in connection with grievances and the Agency will promptly respond to such requests consistent with law. Subject to Section 10 of this Article, grievance-related requests for information made pursuant to 5 U.S.C. 7114 shall not alter the timelines contained herein.

- **Section 7**

**Agency Proposal:** If the Union seeks to invoke arbitration, it must do so within fifteen (15) work days of the written Step 2 decision, ~~or if no Step 2 decision is issued, within fifteen (15) work days from the Step 2 due date.~~ Notwithstanding Section 10 of this Article, the time limit to invoke arbitration may not be extended under any circumstances.

**If the Union does not invoke arbitration within this fifteen (15) work day time period, the invocation will be untimely. A determination by an arbitrator that the invocation of arbitration was untimely will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the untimely invocation. A dismissal based on untimeliness may be issued either on the arbitrator's own accord or pursuant to a request for dismissal by the Agency prior to, during, or after an arbitration hearing.**

**Union Proposal:** If the Union seeks to invoke arbitration, it must do so within fifteen (15) workdays of the written Step 2 decision. Notwithstanding Section 10 of this Article, the time limit to invoke arbitration may not be extended under any circumstances.

- **Section 8**

**Agency Proposal:** For a grievance to be arbitrable, the parties must meet all deadlines in this Article, must fully comply with all written pleading requirements in this Article, and must fully satisfy each step of the process including timely invocation of Step 1, Step 2 and arbitration invocation. Other jurisdictional deficiencies over which an arbitrator may dismiss a grievance, absent a finding of good cause, include but are not limited to the following: mootness, ripeness, staleness, lack of standing to bring a claim, and failure to state a proper claim. If a question of arbitrability has been raised pursuant to Article 23 of this agreement, only after that issue has been decided by an arbitrator, and he/she has found the grievance to be arbitrable, may the merits of the grievance be heard.

**Union Proposal:** No counter

## Article 23 – Arbitration

- **Section 2(a)(the end of the first sentence and toward the end of the last sentence)**

(a) **Agency Proposal**: If the Employer issues a final decision at stage 2 of the Negotiated Grievance Procedure that does not provide relief requested or fails to issue a final Step 2 decision by the required deadline, the Union may invoke arbitration within fifteen (15) work days after the issuance of the Employer final decision ~~or within fifteen (15) work days from the date a decision was due if no decision was issued~~. If the Union issues a decision in response to an Employer-initiated grievance which does not offer relief requested or fails to issue a decision by the required deadline, the Agency may invoke arbitration within fifteen (15) work days after the issuance of the Union’s final decision ~~or within fifteen (15) work days from the date a decision was due if no decision was issued~~. Failure to timely invoke arbitration within fifteen (15) work days will –render the grievance untimely. A determination by an arbitrator that the invocation of arbitration was untimely will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the untimely invocation. A dismissal based on untimeliness may be issued either on the arbitrator’s own accord or pursuant to a request for dismissal by the Agency prior to, during, or after an arbitration hearing.

**Union Proposal**: If the Employer issues a final decision at stage 2 of the Negotiated Grievance Procedure that does not provide relief requested or fails to issue a final Step 2 decision by the required deadline, the Union may invoke arbitration within fifteen (15) work days after the issuance of the Employer final decision **or within fifteen (15) work days from the date a decision was received if the Union chooses to wait for a decision**. If the Union issues a decision in response to an Employer-initiated grievance which does not offer relief requested or fails to issue a decision by the required deadline, the Agency may invoke arbitration within fifteen (15) work days after the issuance of the Union’s final decision or within fifteen (15) work days from the date a decision was due if no decision was issued. Failure to timely invoke arbitration within fifteen (15) work days will –render the grievance untimely. A determination by an arbitrator that the invocation of arbitration was untimely will result in the dismissal of the grievance in its entirety unless the arbitrator finds that there were compelling reasons for the untimely invocation. A dismissal based on untimeliness may be issued either on the arbitrator’s own accord or pursuant to a request for dismissal by the Agency prior to, an arbitration hearing.

- **Section 6(b)**

(b) **Agency Proposal**: Jurisdictional issues of arbitrability include but are not limited to timeliness, ripeness, mootness, staleness, failure to follow written pleading requirements, failure to properly follow procedural step 1, step 2 and invocation requirements, lack of standing to bring a claim, failure to state a proper claim, and “election of remedies” preclusion pursuant to 5 U.S.C. 7121.

**Union Proposal:** No counter

- **Section 6(f)**

**Agency Proposal:** No Agency proposal.

**Union Proposal:** If the party who initiates the bifurcation does not prevail then that party will pay all arbitration costs.

- **Section 7(d), second paragraph starting with, “[i]n making pre-hearing determinations...”**

**Agency Proposal:** In making pre-hearing determinations, the arbitrator will exclude witnesses who either party has demonstrated have no first-hand knowledge directly relevant to the disputed issue(s) to be resolved and whose testimony is duplicative of other proposed witnesses and will exclude exhibits that either party has demonstrated are not directly relevant to the disputed issue(s) to be resolved.

**Union proposal:** No counter

- **Section 8(e)**

(e) **Agency Proposal:** Permissible Introduction of Evidence - The parties are not permitted to raise new allegations or make new claims during the grievance hearing that were not expressly included in the written grievance complaints. The arbitrator will exclude the introduction of any such new evidence. Evidence admissible at the hearing is limited to that which is directly relevant to the issue(s) in dispute that need to be decided by the arbitrator. The arbitrator will exclude the introduction of any evidence that does not meet this criteria whether presented through documentary evidence or witness testimony.

**Union Proposal:** The parties are not permitted to raise new allegations or make new claims during the grievance hearing that were not expressly included in the written grievance complaints. [The parties agreed 3-9-2020](#)

- **Section 8(g), second paragraph starting with, “[i]n an effort to ensure the efficiency of hearings...”**

**Agency Proposal:** In an effort to ensure the efficiency of hearings, the parties will limit witnesses and witness testimony to those that have direct knowledge that may impact the arbitrator’s determination over the issue(s) in dispute and will limit duplicative witnesses. Witnesses at a hearing will be those that are agreed upon by the parties and approved by the arbitrator prior to hearing except under limited circumstances when the arbitrator approves rebuttal witnesses or other newly proposed witnesses. The arbitrator will disallow newly proposed witnesses to appear at the hearing if either party demonstrates that the proposed witness has no first-hand knowledge directly relevant to the disputed

issue(s) to be resolved or if either party has demonstrated that a proposed witness is duplicative of other approved witnesses.

**Union Proposal:** No counter

- **Section 9(middle sentence regarding length of p.h. briefs)**

**Agency Proposal:** Each party will have the opportunity to submit post hearing briefs at the conclusion of an arbitration hearing. Post-hearing briefs will be submitted to the arbitrator within twenty-one (21) work days after the conclusion of the hearing or sooner if ordered by the arbitrator. The parties by agreement can jointly request an extension, e.g., in the event of a delay in receiving the transcript. The post-hearing briefs will be limited to 20 double spaced pages unless the arbitrator approves a longer submission based on the complexity of the case. Other than transcripts of the arbitration hearing, no new exhibits will be admissible with the post-hearing brief other than what was stipulated to by the parties and expressly admitted by the arbitrator.

**Union Proposal:** Each party will have the opportunity to submit post hearing briefs at the conclusion of an arbitration hearing. Post-hearing briefs will be submitted to the arbitrator within twenty-one (21) workdays after the conclusion of the hearing or sooner if ordered by the arbitrator. The parties by agreement can jointly request an extension, e.g., in the event of a delay in receiving the transcript. Other than transcripts of the arbitration hearing, no new exhibits will be admissible with the post-hearing brief other than what was stipulated to by the parties and expressly admitted by the arbitrator [The parties agreed 3-9-2020](#)