

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF AGRICULTURE, FPAC-BC

And

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 858

Case No. 20 FSIP 085

DECISION AND ORDER

BACKGROUND

This case, filed by the U.S. Department of Agriculture, Risk Management Agency (Agency or Management) on September 18, 2020, concerns a dispute over the parties' collective bargaining agreement (CBA). As background, in 2019, these same parties filed a request for FSIP assistance regarding the ground rules for this CBA (Case No. 20 FSIP 007). The Panel asserted Jurisdiction in January 2020 and ordered the parties to engage in an Informal Conference with Member Vernuccio. The parties resolved their outstanding issues short of needing a final order by the Panel.

The mission of the Agency is to serve America's agricultural producers through effective, market-based risk management tools to strengthen the economic stability of agricultural producers and rural communities. The National Federation of Federal Employees, Council 858 (Union) currently represents approximately 138 bargaining-unit employees who are mostly in professional positions. Most employees are located in the employee's headquarters in Kansas City, but several are spread throughout various regional offices. The parties are covered by a collective bargaining agreement (CBA) that expired in January 2017. However, it rolled over and continues to be in effect pending the negotiations of this successor CBA.

BARGAINING HISTORY

The ground rules were finalized on February 18, 2020. The initial exchange of proposals occurred on March 19, 2020. The parties had substantive discussions over all of the 14 opened articles. Of the 14 articles, 4 articles were agreed upon at the table prior to mediation.

Mediation was requested on August 14, 2020. At the end of mediation, the parties remained in dispute over seven (7) articles. The FMCS mediator released the parties in September 2020. On November 10, 2020, the Panel asserted jurisdiction over the remaining 7 articles. The Panel ordered the parties to a Written Submissions procedure. The Agency was timely with the filing of its written submission. The Union was late in filing its written submission. With its filing, the Union indicated that their tardy submission was due to technical problems, causing the Union representative to lose parts of its document earlier in the afternoon. The representative noted that in her haste she may have omitted some things in error. Both parties submitted timely rebuttals on December 7, 2020.

On December 21, 2020, the Union sent the Agency an email conveying the Union's acceptance of the Agency's proposals as provided in the Agency's November 30, 2020 Last Best Offer (LBO). The Panel staff followed up with the parties to confirm that agreement had been reached. While the Union indicated a willingness to accept the Agency's proposal, on December 29, 2020 the Agency confirmed that the parties had not reached final settlement of the successor CBA; the agreement had not been signed by the parties¹. The Agency asked that the Panel maintain jurisdiction and issue a Decision and Order to bring final resolution to the impasse over the article by ordering the parties to adopt the Agency's proposals.

In discussions with the Agency, it is clear that the Agency is concerned that the Union's "final hour" agreement is simply an attempt to stave the implementation of a new CBA. Agreements reached by the parties during the negotiations are tentative because they are subject to Union ratification; the membership of the Union, through a vote, can disagree with the agreement reached, sending the parties back to the bargaining table. On the other hand, under the Statute², the Panel may take whatever final action is necessary to resolve the dispute, including the issuance of a Decision and Order.

In a recent Panel decision, *Department of Interior, National Park Services and AFGE, Council 270*, 20 FSIP 068 (December 2020), the Panel was faced with a similar scenario where the Panel was asked to maintain jurisdiction over an impasse where the Union was willing to agree to the Agency's final offer, but the Agency sought a final Decision and Order by the Panel, in order to bring closure to the negotiations. As the Panel did in *U.S. Nuclear Regulatory Commission and NTEU*, 20 FSIP 035 (July 2020), notwithstanding the union agreement to the agency's proposals after the Panel had asserted jurisdiction, the Panel issued a final Decision and Order.

The Statute is clear that the Panel has jurisdiction to resolve negotiation impasses properly before it.³ If the parties do not arrive at a settlement after the Panel's assistance, the

¹ While failure of a party to sign an agreement is an unfair labor practice concern, neither party has filed a ULP complaint with the FLRA or filed a grievance over an alleged violation of the bargaining ground rules; the more appropriate forums for challenging concerns over bargaining behavior in these negotiations.

² Section 7119 (c)(5)(C) – the final action of the Panel shall be binding on such parties during the term of the agreement.

³ Section 7119(a) of the Statute states: "The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall

Panel may, in accordance with Section 7119(c)(5)(b)(3), “take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.”⁴ Here, the Panel asserted jurisdiction over the Agency’s request for assistance with the impasse on November 10, 2020, and since then the parties have not entered into a settlement. Furthermore, there is no signed agreement between the parties as evidence that the parties resolved the impasse. While the Union is now agreeable to the Agency’s language, which is attached, there remains no binding agreement between the parties. Without that signed agreement, the impasse is not resolved and the Panel’s jurisdiction continues. The Panel has determined that it will maintain jurisdiction and order the parties to adopt final language to resolve the impasse.

9 ISSUES AT IMPASSE

- 1) ARTICLE 3: DURATION AND EXTENT OF AGREEMENT
- 2) ARTICLE 7: OFFICIAL TIME – Grievance Preparation
- 3) ARTICLE 7: OFFICIAL TIME – Union Bank
- 4) ARTICLE 7: OFFICIAL TIME – Individual Cap
- 5) ARTICLE 7: OFFICIAL TIME - Number of union representatives allowed on official time at meetings with the Agency
- 6) ARTICLE 10: HOURS OF WORK AND OVERTIME – Ending time of work hours
- 7) ARTICLE 11: LEAVE - Annual Leave
- 8) ARTICLE 11: LEAVE - Sick Leave
- 9) ARTICLE 11: LEAVE - Administrative Leave (also referred to as “Excused Absence”)
- 10) ARTICLE 17: GRIEVANCE PROCEDURE – Exclusions
- 11) ARTICLE 25: INCENTIVE AWARDS
- 12) ARTICLE 26: TELEWORK – How Often

determine under what circumstances and in what matter it shall provide services and assistance.” 5 C.F.R. 2470.2(e) defines an impasse as follows: The term “impasse” means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

⁴ The Statute commits to the Panel broad authority to make swift decisions in order to end disputes when the negotiation process has failed. *Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984). As federal employees have no legal right to strike, the Civil Service Reform Act, Title VII authorizes the Panel to complete the bargaining process, ensuring the duty to bargain has a practical effect. *Dep't of Def., Army-Air Force Exch. Serv. v. Fed. Labor Relations Auth.*, 659 F.2d 1140, 1146 (D.C. Cir. 1981).

13) ARTICLE 26: TELEWORK – Probationary Employees

POSITIONS OF THE PARTIES AND PANEL DETERMINATION

1) ARTICLE 3: DURATION AND EXTENT OF AGREEMENT

There is one issue regarding travel expenses for bargaining team representatives to conduct negotiations. In the Agency's proposal for Section 3.3C4, the Agency has proposed that all travel expenses (and official time) associated with a Union representative traveling to participate in bargaining will not be paid for by the Agency. Section 3.3C.1, a provision the parties have already agreed to and is not before the Panel, provides in situations where a Party's members are not stationed at the main office location in Kansas City, negotiations will be conducted virtually. All agency employees have agency-issued equipment which provides for video conferencing and may be used to conduct negotiations. In the Agency's perspective, its proposal operationalizes the requirements of 5 U.S.C. §7101 and §7131(a), as well as, the policy goals of Executive Orders (EO) 13836 and 13837, by offering maximum flexibility for the Parties to independently determine the individuals they wish to have representing their interests; while also, eliminating unnecessary, inefficient, or unreasonable expenditures of taxpayer funds. The Agency argues that it is not necessary for any agency personnel representing either the Agency or the Union to travel to conduct mid-term negotiations. If a representative does make the choice to travel, the Agency argues that the Union should incur that expense, not the Agency.

The Union proposes that official time shall be authorized for members of the Union's negotiating team if they must travel to a negotiation session being held outside of the normal commuting distance and during the time they would otherwise be in a duty status. The Union is not proposing travel and per diem expenses be paid. The Union recognizes that for this particular bargaining unit, negotiations will most likely take place in the Kansas City, MO area where the Agency's main office is located and official time for travel would not be necessary. However, there is a section of the bargaining unit that work and reside in Raleigh, NC. The Union makes a parity argument that when management must travel between those facilities to fulfill their duties under the Federal Service Labor Management Relations Statute ("FSLMRS" or the "Statute") (e.g., negotiations), the Agency will commit to paying management to do so, and their travel and per diem is covered (even though the Union is not seeking travel and per diem). Under the Unions proposal, the Union representative traveling for the same purpose as the management representative would be traveling, the Agency will at least grant that Union representative official time for their time spent in traveling the distance.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal⁵, the Agency has issued equipment which provides the necessary platform to conduct mid-term bargaining virtually for any participant.

⁵ By email dated December 21, 2020, the Union accepted the agencies' last best offer for all of the remaining issues at impasse.

The bargaining team members in Raleigh, NC will have access to participate in the negotiations without being required to travel.

2) ARTICLE 7: OFFICIAL TIME – Grievance Preparation

The first three issues under this article relate to Executive Order 13837 Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use. EO 13837, Section 4(v) essentially provides that it is not an efficient and effective use of agency time and resources for an employee to use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances).⁶ The Agency's proposal is consistent with EO 13837. The Agency argues that since the CBA was established in 2011, the number of programs the Agency has been tasked with administering has increased from 72,086 to 132,094, as well as the overall personnel costs. Meanwhile, the budget granted by Congress to administer the programs has been limited and in application has decreased. The increase in workload along with the budgetary realities have demanded efficient strategies to meeting the challenge. Employees are tasked with managing a growing and increasingly more complex workload and, as a result, need to spend more of their time at work on Agency-related tasks. The Agency argues that the cost of official time to pursue grievances or arbitration are not efficient uses of the limited resources (i.e., employee time) nor are they in the public interest.

The Union's proposal provides for an official time bank, but provides no limitation on using that official time for grievance preparation activities. Perhaps this was material that was lost by the Union when they had technical problems with the submission of their written submission, but the Union provided no argument in its submission for this issue. In its rebuttal it stated that the pressure to do more with less is why the employees need the protections of the Union.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Union provided no proposal or rationale in their position statement.

3) ARTICLE 7: OFFICIAL TIME – Union Bank

EO 13837, Section 3 (a) provides that, no agency shall agree to authorize any amount of taxpayer-funded union time that would cause the union time rate in a bargaining unit to exceed 1

⁶ EO 13837, Section 4(v) provides that, employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation; with the exception of an employee's use of taxpayer funded union time to prepare for, confer with an exclusive representative regarding, or present a grievance brought on the employee's own behalf; or to appear as a witness in any grievance proceeding; an employee using taxpayer-funded union time to challenge an adverse personnel action taken against the employee in retaliation for engaging in federally protected whistleblower activity, including for engaging in activity protected under section 2302(b)(8) of title 5, United States Code, under section 78u-6(h)(1) of title 15, United States Code, under section 3730(h) of title 31, United States Code, or under any other similar whistleblower law.

hour per bargaining unit.⁷ The Agency's last offer during negotiations was 0.5 hours per bargaining unit employee for the official time bank, however, to ensure that the Union would not face a year of potential deficits (for example, in 2017 and 2020, deficits of approximately 9 hours in each year would have resulted using 0.5 hours), the Agency now offers 0.6 hours per bargaining unit employee in 7131 (d) official time⁸ as the last best offer. There are currently around 138 bargaining unit employees, which would equal 83 hours of official time for the bank using the Agency's proposal.

The Union proposes an annual union bank of 5 hours of Section d Official Union Time per bargaining unit employee. With the current 138 bargaining unit employees, that would equal 690 hours of official time for the bank using the Union's proposal. The Union argues that the 690 hours of official time is reasonable because it is far less than the 1,040 hours allotted in the existing CBA. While the Union recognizes that they have used far less than the contract allotted 1040 hours, the Union argues that it would not be wise to cut that amount so severely because we cannot know in advance what the future holds. The Union argues that it is better to have more time available and not use it than to need it and not have it.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Union also acknowledges that they need far less time than the CBA provided for in the past. The Agency's offer provides for a small surplus as the parties navigate working under the new CBA.

4) ARTICLE 7: OFFICIAL TIME – Individual Cap

EO 13837, Section 4(ii) provides that employees shall spend at least three-quarters of their paid time performing agency work.⁹ Consistent with the Executive Order, the Agency has proposed that Union representatives cannot spend more than 25% of their time on official time hours, and is still subject to the union's available bank of hours. Under the Agency's proposal, if

⁷ EO 13837, Section 3 (a) provides that, no agency shall agree to authorize any amount of taxpayer-funded union time under section 7131(d) of title 5, United States Code, unless such time is reasonable, necessary, and in the public interest. Agreements authorizing taxpayer-funded union time under section 7131(d) of title 5, United States Code, that would cause the union time rate in a bargaining unit to exceed 1 hour should, taking into account the size of the bargaining unit, and the amount of taxpayer-funded union time anticipated to be granted under sections 7131(a) and 7131(c) of title 5, United States Code, ordinarily not be considered reasonable, necessary, and in the public interest, or to satisfy the "effective and efficient" goal set forth in section 1 of this order and section 7101(b) of title 5, United States Code. Agencies shall commit the time and resources necessary to strive for a negotiated union time rate of 1 hour or less, and to fulfill their obligation to bargain in good faith.

⁸ 5 U.S.C. 7131(d) provides for time to engage in General Labor-Management Relations – prepare for term and mid-term negotiations and any other matters.

⁹ EO 13837, Section 4(ii) provides that, (1) except as provided in subparagraph (2) of this subsection, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training (as required by their agency), in order to ensure that they develop and maintain the skills necessary to perform their agency duties efficiently and effectively; (2) employees who have spent one-quarter of their paid time in any fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by sections 7131(a) or 7131(c) of title 5, United States Code; and (3) any time in excess of one-quarter of an employee's paid time used to perform non-agency business in a fiscal year shall count toward the limitation set forth in subparagraph (1) of this subsection in subsequent fiscal years.

a union representative has exceeded their cap they may still be authorized official time in accordance with 7131(a) and 7131(c) of Title 5, however, if the annual bank of union hours has already been exhausted, the union must “borrow” official time from the following year’s bank of hours for representational activities authorized official time under the Statute.

Twenty-five percent of an employee’s paid duty time is approximately 522 hours per year. The Agency presented data demonstrating that the maximum percent any employee has spent in recent years was less than 6 percent. The Agency is small with only about 138 bargaining unit employees covered by this agreement. Also, the Agency argues, there is limited overlap of employees’ skillsets or duties, such that other employees can easily “pick up the slack” if one or more employees are unable to perform their duties. Most employees have a specific list of assignments they alone handle, with few duties that are accomplished by a group of employees. The Agency argues that the 25% is more manageable given their small work unit and that charging any amount of official time in excess of 25 percent of a single employee’s paid duty time to future bank allotments would be an appropriate incentive to encourage efficient use of official time.

The Union argues that this a convoluted system that will create more work than necessary as both union and agency representatives attempting to keep track of which hours of official time requested fall under which individual’s cap and under what year’s bank of hours. The Union proposes a 50% cap in lieu of the Agency’s 25% cap and proposes that any representational duties authorized official time in accordance with 7131(a) and 7131(c) of the Statute not be subject to any annual bank of hours. The Union did not explain their proposals or provide justification for their proposals.

The Panel orders the parties to adopt the Agency’s proposal. In addition to the fact that the Union has agreed to the Agency’s proposal, the Union did not explain their proposal or provide a justification. Additionally, the Union failed to explain how the Union would be hindered by a 25% cap. On the other hand, the Agency’s proposal is more consistent to how the official time responsibilities have been typically shared among Union representatives in this unit.

5) ARTICLE 7: OFFICIAL TIME - Number of union representatives allowed on official time at meetings with the Agency.

5 U.S.C. § 7131(a) provides that a Union representative is entitled to official time to negotiate a collective bargaining agreement. The number of Union representatives on official time cannot exceed the number of agency representatives.¹⁰ The Agency’s proposal reflects that limitation.

¹⁰ 5 U.S.C. § 7131(a) provides that any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

The Union proposes that when meeting with the agency, there may be a minimum of two union representatives present who will both be utilizing official time at the meeting. The Union's proposal allows for the minimum of two union representatives to be waived if a prior arrangement is reached with the Agency or, when there is one agency representative and one union representative and one additional bargaining unit member.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, The Union's proposal would essentially require the Agency to always authorize official time for a minimum of two representatives in any meeting with management, even if there is only one management official. That may be a violation of the Statute, which provides that the number of employees for whom official time is authorized *shall not exceed* the number of individuals designated as representing the Agency for such purpose. Furthermore, the Agency's proposal does not prohibit the Union from having additional representatives it may choose to be present on other than official time (e.g. non-duty time or leave without pay). So, the Union would be free to bring as many representatives as it sees fit, but, consistent with the Statute, the number of representatives that will be on official time would be limited to the number of Agency representatives present.

6) ARTICLE 10: HOURS OF WORK AND OVERTIME – Ending time of work hours.

The work schedule agreed to by the parties is a flexible work schedule, which includes flexible hours. This is unchanged from the existing CBA. At issue is when the ending time of the flexible hours should be. Currently, flexible hours are from 6:00 a.m. to 9:30 a.m. and 2:30 p.m. to 6:00 p.m., with core hours from 9:30 a.m. to 2:30 p.m. The Agency proposes to keep the ending time of flexible hours at 6:00 p.m. The Union has proposed that the work hours will end no later than 6:30 PM. The Union explained that the language was proposed at the request of employees at the Raleigh location who have frequently worked until 6:30pm.

The Agency stated that in preparation for bargaining, they solicited each of their 3 regional offices to verify the work practices as it relates to the flexible work schedules. Each office indicated there was no regular and recurring operational need for extending flexible hours until 6:30 p.m. and the bargaining unit employees only infrequently worked until 6:30 p.m.¹¹ They were unaware of any issues caused by having an ending time of 6:00 p.m. The Agency explained that there are additional costs associated with allow work schedules beyond 6:00PM (e.g., night differential day for hours worked beyond 6:00PM and increase costs associated with building security¹²). The Agency is one of many Agencies in the Kansas City building and

¹¹ The Agency recognizes that overtime or compensatory time could be authorized for any required work past 6:00 p.m. Additionally, other agreed-upon language in the article allows for a fixed schedule with starting and ending times to occur within the flexible hours. Allowing an employee to be on a fixed schedule with an ending time after 6:00 p.m. would result in increased Agency costs for mandatory premium pay for the work completed after 6:00 p.m.

¹² The Beacon Facility, Kansas City, MO is the primary duty station where approximately 80 percent of the bargaining unit employees work. This facility is a Level IV security building. Security at the Beacon Facility is managed by Federal Protective Services Protective Security Officers (FPS PSOs) which operate under a very strict contract with specific Post Orders for the security personnel. Extending work hours to 6:30 p.m. impacts the

occupies one of six levels of the building. Since no other agency working in the Beacon building has working hours that extend past 6:00 p.m., the full cost of the security contract renegotiation, and staffing security for the additional time would be fully borne by the Agency. Finally, the Agency argues that because the Agency's primary customers (private insurance companies that administer the Federal crop insurance program) do not work beyond 6:00PM, offering work hours for bargaining unit employees beyond 6:00PM would not promote the efficient delivery of service.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Agency makes a compelling argument that the shift of the operating hours to 6:30pm adds additional expense (e.g., premium pay, contract expenses) where there are no obvious additional benefits to the taxpayer.

7) ARTICLE 11: LEAVE - Annual Leave

The first leave issue relates to situations in which annual leave that an employee requested and was preapproved may be cancelled. The Agency agrees that as a general rule an employee's preapproved leave request should not be cancelled; however, there are times that such action may be necessary. The Agency argues that the Union's proposal constrains management to only cancelling an employee's preapproved request for annual leave in the event of an emergency, as defined in Article 1: General Provisions, to which the Parties have reached agreement and closed. The definition states an emergency is, "A situation which poses sudden, immediate and unforeseen work requirements as a result of natural phenomena or other circumstances beyond control or ability to anticipate." The Agency argues that this definition of emergency, while appropriate for other uses within the CBA, is too restrictive in this instance; would not allow the Agency to cancel pre-approved leave to address operational needs when needed. The Agency argues that in an exceptionally small agency, an employee's urgent individual work assignment may not be easily delegated to another employee.

The Union's position is that management should only cancel an employee's preapproved request for annual leave in the event of an emergency, that is defined in Article 1: General Provisions, to which the Parties have reached agreement and closed, as "A situation which poses sudden, immediate and unforeseen work requirements as a result of natural phenomena or other circumstances beyond control or ability to anticipate." The Union argues that the scheduled leave should generally be relied upon.

The Panel orders the parties to adopt the Union's proposal. In considering the approval of an employee's requested leave, the Agency can and should take into consideration the impact that granting that requested leave will have on, among other things, the ability of the program to deliver the mission. Once approved, an employee should be able to rely on that approval, but for the rarest, unanticipated circumstances; an emergency that must be addressed.

security requirements of the building and would likely require amendments to the security contract; a procurement process and cost.

8) ARTICLE 11: LEAVE - Sick Leave

The second leave issue regards when a supervisor may require an employee to furnish a medical certificate in relation to an employee's request to use sick leave. 5 C.F.R. § 630.405 (a) provides that an agency may grant sick leave only when the need for sick leave is supported by administratively acceptable evidence. An agency may consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence. An agency may also require a medical certificate or other administratively acceptable evidence as to the reason for an absence for any of the purposes described in § 630.401(a) for an absence in excess of 3 workdays, or for a lesser period when the agency determines it is necessary. The language in the current CBA only provides that, "Employees may be required to furnish a medical certificate if such sick leave exceeds three (3) consecutive work days (sic)." The Agency argues that in only including partial information from the CFR, there has been confusion that can lead to contention when a supervisor attempts to obtain information determined necessary in relation to an employee's absence for a period of less than three consecutive workdays. The Agency's proposal is a restatement of 5 C.F.R. § 630.405(a).

The Union has proposed that self-certification is sufficient, regardless of the number of days of absence, unless the supervisor requests medical certification after 3 days of absence.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Agency's proposal is a restatement of the regulation.

9) ARTICLE 11: LEAVE - Administrative Leave (also referred to as "Excused Absence")

The third leave issue is the Union's proposal to add a new section for "wellness leave,". This is essentially a provision to take leave (up to 3 hours of administrative leave¹³ per week) to pursue physical fitness. Under the Union's proposal, an employee could be granted up to 156 hours of administrative leave per year (a violation of 5 U.S.C. § 6329(b)(1)). The Agency does not have a counter proposal. The Agency's guidance (although not binding on this negotiations) on the appropriate uses of administrative leave, to the extent allowed by law, comes to the Agency from the Secretary of Agriculture (Secretary). The purposes for which administrative leave may be granted in limited circumstances are set forth in a departmental level regulation, DR-4060-630-0. As it relates to administrative leave for physical fitness for employees who do not have an established fitness standard required for their position, the Secretary specifically instructs that an excused absence for ongoing personal health and fitness programs may not be granted. Rather, employees are to be informed of and encouraged to use work scheduling and leave flexibilities available to them. The Agency argues that they cannot deviate from the Secretary's guidance through this contract negotiations. Additionally, the Agency notes the flexibilities granted through the flexible work schedules.

¹³ 5 U.S.C. § 6329(b)(1) provides, in general, during any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 workdays.

The Panel orders the Union to withdraw its proposal for Wellness Leave. The Union's statement of position, nor rebuttal, included no proposed language and no justification.

10) ARTICLE 17: GRIEVANCE PROCEDURE – Exclusions

This dispute is related to Executive Order 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles. Consistent with the Executive Order 13839, the Agency seeks additional exclusions from the negotiated grievance procedures: Performance ratings; Awards or incentive pay (such as cash awards, quality step increases, and recruitment, retention, or relocation payments); and Removal of an employee from Federal service for misconduct or unacceptable performance. In addition to rely on the Executive Order, the Agency argues that, in accordance with the Federal View Point Survey (FEVS), very few employees agree that the Agency takes appropriate steps to deal with poor performers. The Agency offers that supervisors would be more likely to deal with poor performers and misconduct if they were not disincentivized by the possibility of lengthy litigation with grievances and arbitration. The Agency makes similar argument of disincentivizing supervisors with awards and ratings.

The Union opposes the Agency's additional exclusions. The Union argues that employees deserve a venue to exercise their due process rights when actions are proposed against them. The MSPB has lacked a quorum since January 2017, and, as such, it has had no authority to resolve any appeals continuing on until the present and cannot be relied upon as a sole forum for redress. The Union did not address any of the other proposed exclusions.

The Agency relies on the Executive Orders to exclude these matters from the grievance procedure and they also conclude that the reason supervisors are not addressing poor performers, for example, is because supervisors are disincentivized from doing their job out of fear of potential challenge to their actions through litigation. Because the Union has agreed to the exclusions, the Panel orders the adoption of the Agency's proposal.

11) ARTICLE 25: INCENTIVE AWARDS

There is one issue in this article relating to an ongoing/recurring union request for information. The Agency has proposed to provide a list at the end of each fiscal year (instead of quarterly) of the awards given to bargaining unit employees. The Agency argues that the Union's request to provide the information quarterly is an unnecessary burden on the Agency. The Agency argues that the Union has provided no demonstrated need for the information to be provided so frequently.

The Union proposes to keep existing CBA language requesting that the Agency provide the Union with a list (including the name, date, award type, and award amount) of all awards given to bargaining unit employees each quarter. In terms of the frequency for information, the Union argued that receiving information in May is out of sync when most of the employees receive awards; in September.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Agency's proposal provides the awards information on an annual basis. Under the Statute¹⁴, if the Union can demonstrate a particularize for information, the Union could request and receive additional information as needed.

12) ARTICLE 26: TELEWORK – How Often

The first issue in this article is how much telework is allowed (e.g., the number of days per week an employee may be allowed to telework). The Agency has proposed that an employee must be in the office 4 days a week; they can telework 1 day per week. The Agency's proposal is consistent with the Telework Program Regulation, issued by the USDA Secretary. This program applies to all USDA Mission Areas, agency, and staff offices. This regulation also provides that the determination as to the amount of telework suitable for eligible employees is reserved for supervisors and managers. The Agency acknowledged that telework has been beneficial, particularly during the COVID-19 pandemic, where many Agency operations were able to continue with little interruption. The Agency offered observations regarding communication from employees who telework vs employees in the office. The Agency argues that on conference calls, teleworking employees rarely speak and are less engaged. As a result, the meetings are less of an opportunity for new employees to receive on-the-job training from colleagues. Additionally, supervisors tend to wait to have meetings when all or most employees are in the office; causing scheduling delays.

The Union has proposed that Agency employees be permitted to telework up to four days in a week and that probationary employees, after three months, become eligible to telework up to half the time as non-probationary employees. The Union argues that the ability to telework has also proven its value during the COVID-19 pandemic. Without telework programs and infrastructure already in place, the U.S. could not have continued providing quality services to the public, safely, in a reliable manner. In recognition of value and necessity of telework, OMB issued a memorandum on March 12, 2020, in relation to the COVID-19 pandemic, explaining that “[a]ll Federal Executive Branch departments and agencies are encouraged to maximize telework flexibilities.” The Union argues that their proposal aligns with the interests and the needs of the federal government.

¹⁴ Under Section 7114(b)(4) an Agency must provide information to a Union, upon request and “to the extent not prohibited by law,” if that information is:

- normally maintained by the agency in the regular course of business;
- reasonably available;
- necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and
- does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

In 1995, the Authority adopted the “particularized need” standard to determine whether requested information is “necessary” under the Statute (3rd bullet above). *IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kansas City, Mo.* 50 FLRA 661,669 (1995).

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Union's argument that a more extended telework program is a cost savings to the Agency is not supported by the facts. Under the telework program, employees may discontinue participation in the telework program at any time, as a result, the Agency must maintain adequate work space for all employees, even those who are on telework. Additionally, the Union's proposal is inconsistent with the USDA guidance, with no justification for the variance. Finally, as the USDA has implemented mandatory telework to support operations during an emergency, e.g., Covid-19 Pandemic, there would be no restrictions to exercising that option when operations demand.

13) ARTICLE 26: TELEWORK – Probationary Employees

The second issue in this article relates to the eligibility of probationary employees to participate in telework. Under the Party's current CBA, probationary employees are entirely excluded from participation in the Telework Program. The Agency has proposed that probationary employees can telework up to half the amount of a non-probationary employee after 3 months of working, but would leave that decision solely at the discretion of the supervisor (and it would be a non grievable decision). The Agency discussed the importance of probationary employees coming to the office for training, mentorship and oversight of the supervisor. As an alternative to adopting the Agency's proposal, the Agency requests that the Panel keep the status quo and that probationary employees remain excluded entirely from telework. The Union proposed that probationary employees can telework up to half the amount of a non-probationary employee after 3 months of working, with no limitations.

The Panel orders the parties to adopt the Agency's proposal. In addition to the fact that the Union has agreed to the Agency's proposal, the Union provided no rational or justification for their revised proposal. Both parties agree that the decision on participation of a probationary employee is best left to the discretion of the supervisor.

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 provision as discussed above.



Mark A. Carter
FSIP Chairman

January 17, 2021
Washington, D.C.

Attachments:

- Agency's Final Offer
- Union's Final Offer

Case No 20085

Agency proposals

1) ARTICLE 3: DURATION

Any and all travel expenses associated with a team member's participation in negotiations will be borne by the Party they are representing. The Agency will not reimburse the Union or pay for travel expenses for Union officials attending mid-term bargaining sessions, nor will the Agency grant official time or travel.

2) ARTICLE 7: OFFICIAL TIME – Grievance Preparation

Official time is not allowed for pursuing grievances or binding arbitration, except in cases of whistleblower retaliation or for activities covered by 5 U.S.C. 7131(c).

3) ARTICLE 7: OFFICIAL TIME – Union Bank

7.4 B. Union Bank: Total available hours of official time per fiscal year for activities identified in section 7.4 A 4 is calculated by one-half hour per bargaining unit employee (e.g. 1/2 hour x 138 bargaining unit employees = 69 hours available) as of October 1 of each year. Unused union bank hours do not carry over into the next fiscal year. The agency will inform the Union no later than October 15 as to the number of BUEs and the number of hours in the bank available to use for that fiscal year. Activities identified in sections 7.4 A 1 through 7.4 A 3 do not count against the union bank.

4) ARTICLE 7: OFFICIAL TIME – Individual Cap

7.4 C. Union representatives may be authorized official time hours (subject to the bank noted in section 7.4 B) on a fiscal year basis not to exceed 25 percent of their paid duty time in the performance of union representational activities as described in section 7.4 A, with the exception of section 7.4 D below. 7.4 D. Union representatives who reach the 25 percent cap will continue to be authorized official time in accordance with sections 7131(a) or 7131(c) of title 5, United States Code. However, time for these activities is charged to the union bank for that fiscal year when the 25 percent cap is exceeded, and if the union bank for that fiscal year is exhausted, time will be charged to the union bank for the following fiscal year (or years).

5) ARTICLE 7: OFFICIAL TIME - Number of union representatives allowed on official time at meetings with the Agency

The union will be allowed an equal number of representatives on official time at a meeting with the agency.

6) ARTICLE 10: HOURS OF WORK AND OVERTIME – Ending time of work hours

Flexible Hours: The hours within the designated working hours which fall outside of the core time period. Flexible hours are from 6:00 AM to 9:30 AM and from 2:30 PM to 6:00 PM.

7) ARTICLE 11: LEAVE - Annual Leave

Annual leave is a benefit earned by employees which requires supervisory approval. Consistent with the needs of the employee(s) and the Agency, annual leave requested in advance will generally be approved. Except in the event of an emergency, annual leave which has been approved should not be canceled. A supervisor who must cancel the leave will make every effort to reschedule it at times desired by the employee. Annual leave may be taken in increments of fifteen (15) minutes and may be used in lieu of sick leave.

8) ARTICLE 11: LEAVE - Sick Leave

Supervisors may only grant sick leave when supported by administratively acceptable evidence. Employees may be required to furnish a medical certificate if such sick leave exceeds three (3) days or for a lesser period when the supervisor determines it necessary. A supervisor may consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence.

9) ARTICLE 11: LEAVE - Administrative Leave (also referred to as "Excused Absence") - The Agency has no alternative language – the Agency does not accept the Union's proposal to add a provision to the CBA granting administrative leave to allow employees to pursue physical fitness activities.

10) ARTICLE 17: GRIEVANCE PROCEDURE – Exclusions - Performance ratings; Awards or incentive pay (such as cash awards, quality step increases, and recruitment, retention, or relocation payments); and Removal of an employee from Federal service for misconduct or unacceptable performance

17.2 C. Except that it [grievance definition] will not include a complaint concerning: 1. Any claimed violation relating to prohibited political activities; 2. Retirement, life insurance or health insurance; 3. A suspension or removal; 4. Any examination, certification or appointment; 5. The classification of any position which does not result in the reduction in grade or pay of the employee; 6. Personnel actions as a result of a RIF; 7. Performance ratings; 8. Awards or incentive pay (such as cash awards, quality step increases, and recruitment, retention, or relocation payments); or 9. Removal of an employee from Federal service for misconduct or unacceptable performance. 17.3 (1st paragraph) Unless excluded in section 17.2 C matters may, at the discretion of the aggrieved employee, be raised either under the appropriate Statutory procedures (MSPB) if applicable, or under the negotiated grievance procedure, but not both.

11) ARTICLE 25: INCENTIVE AWARDS

At the end of each fiscal year the Agency will provide the Union with a list (including the date, award type, and award amount, by Division) of all awards given to bargaining unit employees.

12) ARTICLE 26: TELEWORK – How Often

An employee must be in the office at least 4 days per week; an employee working four 10-hour days per week will not be approved for routine telework.

An employee may telework 1 day per week. The appropriateness of the amount of telework suitable for eligible employees is a determination reserved for supervisors and management officials; the frequency of telework or geographic location of an employee's telework location shall not be subject to grievance-arbitration procedures.

13) ARTICLE 26: TELEWORK – Probationary Employees

Probationary employees may telework up to half the amount of non-probationary employees after three months subject to the sole discretion of their supervisor, and the decision may not be grieved.

Article 3: Duration and Extent of Agreement

Issue at Impasse #1

3.3C4:

Official time shall be authorized for travel occurring during when the Union team members would otherwise be in a duty status per U.S.C. 7131(a).

Article 7: Official Time

Issue at Impasse #2

7.4B:

Union Bank: Total available hours of official time per fiscal year for activities covered by 5 U.S.C. 7131(d) is calculated by 5 hours per bargaining unit employee (e.g. 5 hours x 50 bargaining unit employees = 250 hours available) as of October 1 of each year for the activities identified in section 7.4 A 4. Unused union bank hours do not carry over into the next fiscal year. The agency will inform the Union no later than October 15 as to the number of BUEs and the number of hours in the bank available to use for that fiscal year. Activities identified in sections 7.4 A 1 through 7.4 A 3 do not count against the union bank.

Article 7: Official Time

Issue at Impasse #3

7.4C:

Union representatives may be authorized official time hours (subject to the bank noted in section 7.4 B) on a fiscal year basis not to exceed 50 percent of their paid duty time in the performance of union representational activities as described in section 7.4 A, with the exception of section 7.4 D below.

7.4 D. Union representatives who reach the 50 percent cap will continue to be authorized official time in accordance with sections 7131(a) or 7131(c) of title 5, United States Code. Time for these activities are not charged to the union bank.

Article 7: Official Time

Issue at Impasse #4

7.4H:

The union will be allowed an equal number of representatives on official time at a meeting with the agency with a minimum of two (2), unless prior agreement is reached between the Agency's representative and the Union. In the case of a meeting where there is one Agency representative, one Union representative, and one additional bargaining unit member, the requirement for a minimum of two (2) union representatives will be waived.

Article 10: Hours of Work and Overtime

Issue at Impasse #1

10.2 (Flexible Hours)

Flexible Hours: The hours within the designated working hours which fall outside of the core time period. Flexible hours are from 6:00 AM to 9:30 AM and from 2:30 PM to 6:30 PM.

Article 11: Leave

Issue at Impasse #1

11.1a:

Annual leave is a benefit earned by employees which requires supervisory approval. Consistent with the needs of the employee(s) and the Agency, annual leave requested in advance will generally be approved. Except in the event of an emergency, annual leave which has been approved will not be canceled. A supervisor who must cancel the leave will make every effort to reschedule it at times desired by the employee. Annual leave may be taken in increments of fifteen (15) minutes and may be used in lieu of sick leave.

Article 11: Leave

Issue at Impasse #2

11.2b:

Employees may be required to furnish a medical certificate if such sick leave exceeds three (3) consecutive work days or there is sound reason to believe the employee is improperly using sick leave. A supervisor may consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence.

Article 11: Leave

Issue at Impasse #3

11.11 Wellness Leave:

The Parties recognize the benefits of a physically fit and healthy workforce and agree upon the appropriate arrangements whereby employees may voluntarily participate in a wellness program, which would include administrative leave not to exceed 3 hours per week, if workload permits. Normal workload should not prevent employees from being eligible to participate in the wellness program, including use of administrative leave. The individual supervisor has the responsibility to determine whether a particular employee, or group of employees, can be spared to participate in fitness activities based on specific or unusual work assignments.

The use of administrative leave for wellness activities is authorized only in accordance with a personal fitness plan (PFP), signed and approved by the supervisor. The PFP must specify the authorized activity/activities which are being performed and the authorized time at which they will be performed.

For employees on a flexible work schedule, wellness activities should be performed during, immediately preceding, or immediately following an employee's already established work schedule, unless specified otherwise in an employee's PFP.

For employees on fixed work schedules, wellness time must be taken during their established work schedule.

Administrative leave for wellness activities should not be granted when greater than 4 hours are previously scheduled for sick or annual leave or on non-work days.

Administrative leave for wellness is not intended to be the routine granting of additional work hours in a pay period. Authorization for administrative leave for wellness activities may be withdrawn where employees exhibit a continued pattern of earning credit hours, compensatory time, or overtime in conjunction with administrative leave for wellness.

Employees whose normal work schedule does not entitle them to night pay or night shift differential but who elect to exercise between 6 PM and 6 AM are not entitled to night pay or night shift differential.

Administrative leave for wellness will be coded using TC 66 and 06 descriptor code. It is the employee's responsibility to ensure that they are participating in wellness activities during the period for which they are claiming administrative leave. The employee's submittal of their T&A certifies that the employee participated in fitness activities during the time administrative leave was charged.

Article 17: Grievance Procedure

Issue at Impasse #1

17.2C:

Except that it [grievance definition] will not include a complaint concerning:

1. Any claimed violation relating to prohibited political activities;
2. Retirement, life insurance or health insurance;
3. A suspension or removal **for national security reasons;**
(the Union agreed to the language "A suspension or removal for national security reasons." The Union did not agree to remove "national security reasons" from 17.2C3.
4. Any examination, certification or appointment;
5. The classification of any position which does not result in the reduction in grade or pay of the employee; or
6. Personnel actions as a result of a RIF.

17.3 (first paragraph):

Matters covered under Sections 4303 (reduction in grade, or removal for unacceptable performance) and 7512 (removals, suspensions for more than fourteen (14) days, reduction in grade or pay, or furlough for thirty (30) days or less), of Title 5 of the U.S.C. may, at the discretion of the aggrieved employee, be raised either under the appropriate Statutory procedures (MSPB) or under the negotiated grievance procedure, but not both.

Article 25: Incentive Awards

Issue at Impasse #1

25.3 (Recognition of Employee Representative):

The Agency will provide the Union with a list (including the name, date, award type, and award amount) of all awards given to bargaining unit employees each quarter.

Article 26: Telework

Issue at Impasse #1

26.6B:

- a. An employee must be in the office at least 2 days per pay period.
- b. An employee may telework up to 4 days in a week.

Article 26: Telework

Issue at Impasse #2

26.3A9:

Probationary employees may telework after three months.