UNITED STATES
FEDERAL SERVICE IMPASSES
PANEL
WASHINGTON, DC 20424-0001

September 25, 2024

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RE: U.S. Department of Labor
and
National Council of Labor Locals
Case No. 24 FSIP 058

Dear Representatives:

The Federal Service Impasses Panel (FSIP or Panel) has reviewed and considered a request for Panel assistance in the above-captioned matter. After deliberation and for reasons discussed below the Panel concludes, in accordance with the Federal Service Labor-Management Relations Statute (the Statute) and FSIP regulations, that it will decline jurisdiction over this matter for good cause within the meaning of the Panel's regulations[1] because the Union proposals raise negotiability issues that must be resolved in other forums.

This matter was presented to the Panel via a request for assistance filed by the Union. After investigation, the Panel determined to resolve it through an Informal Conference conducted by Member Howard Friedman. As part of this process, Member Friedman conducted separate caucuses with each party and also

[1] 5 C.F.R. §2471.6(a)(1)(Panel may "[d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction").

set a deadline for a pre-hearing exchange of documents and exhibits. On August 8, 2024, the Agency submitted a position paper in which it announced that it was declaring the Union's proposal to be non-negotiable, requested that the Panel examine FLRA precedent and find the proposal non-negotiable, and also insisted a "hearing in this matter [was] not appropriate."[2] On August 9th, the Panel reached out to the parties and asked for clarification as the Agency had not previously indicated an intent to challenge the Panel's authority to resolve the dispute. The Panel also clarified it lacked authority to resolve negotiability disputes. That same day the Agency submitted a "revised" statement in which it reiterated its authority under statutory management rights but otherwise removed its references to cancelling the scheduled hearing. Instead, it took the position that the Agency did "not *agree* to the [Union] proposal."[3] No further communication was received from the Agency on this topic.

With the foregoing seemingly resolved, the parties and Member Friedman participated in an 11-hour mediation/arbitration proceeding. As settlement was not possible, Member Friedman accepted the testimony of several witnesses, received the parties' written final offers, and also set a deadline for the parties to submit post-hearing briefs. On August 26, 2024, the parties submitted their briefs. The Agency's brief contained the following:

> The Agency declares the Union's proposals nonnegotiable because they excessively and unlawfully interfere with management's right to assign work and direct employees. The Federal Labor Relations Authority (FLRA) has held that the right to determine when work will be performed onsite falls under management's rights to assign work and direct employees under 5 U.S.C. [§]7106(a). The Union's proposal to restrict the Agency's ability to direct employees to work onsite runs afoul of management's rights.[4]

In addition to now formally declaring the Union's proposal non-negotiable, the Agency withdrew its own proposal. The Union did not submit a response to this claim or otherwise request to do so.

Under the FLRA's decision in *Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364,* 31 FLRA 620 (1988) (*Carswell*), interest arbitrators – and therefore the Panel – lack authority to resolve negotiability disputes as a matter of first instance. However, the Panel has authority to intervene if a party can demonstrate that their challenged proposals are "substantively identical" to ones that have been found negotiable in the past.

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[2] *See* Agency August 8 Statement at 9.
[3] Agency August 9 Statement at 9. (emphasis added).
[4] Agency Brief at 1.

There is a paucity of FLRA negotiability precedent on the topic of telework. The most prominent decision is *Department of Agriculture, Food and Nutrition Service and National Treasury Employees Union,* 71 FLRA 703 (FLRA 2020). In that dispute the union sought to negotiate over proposals that permitted up to 8 days of telework per pay period, and the FLRA concluded those proposals interfered with management's statutory right to assign work. The union appealed the decision to the United States Court of Appeals for the District of Columbia and the court vacated the FLRA's decision.[5] The court reached this decision on the grounds that the FLRA misinterpreted the meaning of the union's proposal, did not review other related portions of the parties' collective bargaining agreement, and ignored the fact that the proposal granted supervisors discretion to deny telework requests. Accordingly, the court remanded the decision to the FLRA to consider these and any other relevant facts in its decision. However, the FLRA never issued a subsequent decision.

The foregoing demonstrates ambiguity on the topic of telework in negotiability precedent. Although the FLRA found it to affect management rights, the D.C. Circuit reversed that conclusion. Yet, the reversal was based upon the premise that the FLRA did not do enough of an analysis and – in the Panel's opinion – left open the possibility that the FLRA could reach the same conclusion after doing a more thorough review. The FLRA has never issued a subsequent decision and, thus, has never affirmatively addressed the topic of telework negotiability. So, the court's reversal alone is not sufficient to satisfy the high standard established under *Carswell*. As a result, the Panel has no authority to resolve the negotiability dispute in this matter and must decline jurisdiction over the remaining proposals.

Accordingly, the Panel will dismiss jurisdiction over this matter for good cause. This matter is dismissed without prejudice to either party's ability to refile at a later date over negotiable proposals that are properly at impasse.[6]

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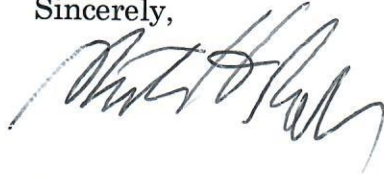
[5] *NTEU v. FLRA*, 1 F.4th 1120 (D.C. Cir. 2021).

[6] Despite dismissing the case, the Panel takes a moment to address concerns regarding the Agency's actions in this dispute. The Agency's negotiability argument was formally raised in its post hearing brief on August 26, 2024 – over *eighty days after the Union first sought the assistance of the Panel.* In those eighty days the Panel and its representatives devoted significant resources to seeking resolution via investigation, caucuses, and mediation. The Agency never indicated an intent to raise a negotiability argument other than in its August 8th statement mentioned above that it walked back the next day. The Agency's post-hoc decision to raise this argument has resulted in an ineffective and inefficient expenditure of taxpayer funded resources that cannot be justified in light of the results, i.e., a straightforward dismissal. To be sure, the Agency has every right to challenge the negotiability of proposals before it. But, it should take care to exercise that right with a concomitant degree of responsibility in the future.

Sincerely,



Martin H. Malin
FSIP Chairman