United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. and NATIOAL TREASURY EMPLOYEES UNION	Case No. 07 FSIP 10

DECISION AND ORDER

The Department of the Treasury, Internal Revenue Service, Washington, D.C. (Employer or IRS) 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 National Treasury Employees Union (Union or NTEU).

Following an investigation of the request for assistance, the Panel determined that the dispute, which concerns ground rules governing negotiations over the parties' successor National Agreement (NA), should be resolved through an informal conference with Panel Members Mark A. Carter and Grace Flores-Hughes. The parties were informed that if a complete settlement was not reached during the informal conference, Member Carter and Flores-Hughes would notify the Panel of the status of the dispute. The notification would include, among other things, the final offers of the parties for resolving the issues. After considering this information, the Panel would take whatever action it deemed appropriate, which may include the issuance of a binding decision imposing one of the parties' final offers on a package basis.

In accordance with the Panel's procedural determination, Members Carter and Flores-Hughes convened an informal conference with the parties on June 6 and 7, 2007, at the Panel's offices in Washington, D.C. When the parties were unable to resolve their dispute during the course of the meeting, they were asked to submit their final offers. The Employer complied with the

Panel Members' request,[1/] but the Union declined to submit a final offer, repeating arguments it made during the initial investigation of the case that the Panel lacked the authority to resolve the dispute.[2/] The parties submitted statements in support of their respective positions on the issues.[3/] The Panel has now considered the entire record, including the parties' pre- and post-conference statements addressing jurisdictional issues.

BACKGROUND

The IRS's mission is to fairly enforce tax laws, respect taxpayer rights, collect taxes and help educate the taxpayer. The NTEU represents a bargaining unit consisting of approximately 90,000 professional and nonprofessional employees stationed nationwide at IRS's headquarters offices, service centers, and regional and field offices. The parties' NA went into effect on July 1, 2002, for a 4-year term that ended on June 30, 2006.[4/]

1/ The Employer's final offer contains 23 provisions, including a number of revisions to those that were initially submitted in its request for assistance.

2/ The Union also continued to point out that it had filed two national grievances against the Employer alleging violations of various statutory and contractual provisions, including the duty to bargain in good faith, in connection with the parties' negotiations over the ground rules, and that the parties were awaiting an arbitration award following an arbitration hearing that had been conducted on March 5, 2007.

3/ We note for the record the Union's position that its appearance at the informal conference, its decision to not submit a "last best offer," and the submission of its supporting statement were done "under protest," and should not be construed as a concession that the Panel has properly and lawfully asserted jurisdiction over the dispute.

4/ On that date, among other things, the IRS informed NTEU that on July 1, 2006, it would "continue to honor as practices the mandatory procedures and arrangements found in the expired [NA]," but would withdraw from certain permissive subjects of bargaining, such as any "partnering-

ISSUES

The parties disagree over whether the Panel has the authority to impose ground rules governing their successor NA negotiations, and on the merits of the Employer's final offer on issues such as: (1) a specified date for the exchange of proposals; (2) a specified date for the commencement of bargaining; (3) the bargaining schedule; (4) impasse resolution procedures; (5) the payment of travel and *per diem* expenses; (6) the procedures to be followed if the Union's membership fails to ratify an agreement reached by the negotiators; (7) the procedures to be followed if proposals previously declared to be nonnegotiable are subsequently found negotiable; and (8) the effective date and duration of the parties' ground rules agreement.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer proposes that the parties' successor NA negotiations be governed by the following ground rules provisions:

> 1. This agreement is entered into pursuant to the provisions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.*, and serves as the procedural ground rules governing term bargaining between the Internal Revenue Service (IRS or Employer) and the National Treasury Employees Union (NTEU or Union) over a successor agreement to the National Agreement.
>
> 2. Either party proposing to make changes to the provisions in the National Agreement must provide notice of those changes in a proposal format, to the other party, within thirty (30) days following agency head approval of this ground rules agreement.
>
> 3. Proposals may include amendments to any current articles or new articles proposed by the parties.
>
> 4. The IRS and NTEU will be available during the sixty (60) day period immediately following the

---

type provisions," and contract provisions that violate law or regulation.

submission of proposals to explain and clarify the proposals.

5. Proposals may be amended or modified during bargaining. Absent mutual agreement otherwise, no new proposals may be submitted by either party after the first day of bargaining unless circumstances beyond the control of the parties exist (e.g., changes required by law, changes to Government-wide regulation).

6. Bargaining will begin on the first Monday of the month following the conclusion of the sixty (60) day time period in paragraph 4. If that Monday is a Federal holiday, bargaining will begin the next day.

7. Twelve (12) weeks of bargaining will occur over a five (5) month period as follows:

- Two weeks of bargaining
- One week break
- Two weeks of bargaining
- Two week break
- Two weeks of bargaining
- One week break
- Two weeks of bargaining
- Two week break
- Two weeks of bargaining
- One week break
- Two weeks of bargaining

If the bargaining schedule above is completed without either party seeking mediation assistance, the parties may continue to bargain or either party is free to seek mediation assistance at that time. The parties may mutually agree to modify the times and dates for bargaining. However, the Employer will only pay

travel and *per diem* expenses for twelve weeks of bargaining.

8. Either party is free to request the assistance of the Federal Mediation and Conciliation Service (FMCS). By mutual agreement, the parties may utilize the services of a private neutral in lieu of FMCS. However, the neutral will not issue a Factfinder's report. For mediation, the Employer will pay travel and *per diem* for a maximum of four (4) weeks.

9. Either party is free to request assistance from the Federal Service Impasses Panel (FSIP) pursuant to 5 U.S.C. § 7119 to resolve any remaining impasses. No mutual agreement that the parties are at impasse is required for a party to request assistance.

10. Normally, bargaining will be conducted from 12:30 PM to 4:30 PM on the first day of each session, 9:00 AM to Noon on the last day of each session and 9:00 AM to 4:30 PM all other days. Federal holidays will be observed.

11. The negotiations will be conducted in space located in the Washington, D.C. metropolitan area at a suitable location to be determined or in IRS and/or NTEU office space in Washington, D.C. If hotel space is used and if practical, the hotel space will be the same, or in close proximity to the hotels housing the IRS and NTEU bargaining teams. Also, if hotel space is used and if practical, the hotel(s) will be in close proximity to a METRO subway station. The cost of meeting rooms used jointly by the parties (if any), will be paid by the IRS.

12. By mutual agreement and to expedite bargaining and facilitate the resolution of issues, the parties may conduct simultaneous bargaining at certain times and places to be agreed upon during any portion of the bargaining. Bargaining may also include the use of mini-bargaining teams.

13. Official time will be authorized for a maximum of seven (7) bargaining unit employees representing NTEU during the unassisted bargaining schedule in paragraph 7 above, during any bargaining conducted before FMCS or a private neutral, to participate in proceedings

before FSIP negotiations and for authorized travel to and from the listed activities during the time the employee would otherwise be in a duty status.

14. Each party may have legal counsel during negotiations and impasse procedures. If the parties mutually agree, observers and consultants may be present during negotiations, mediation and impasse procedures. As a matter of professional courtesy, observers and consultants will be identified at the beginning of each bargaining session. There is no limit on the number of NTEU national staff or national elected officials on NTEU's bargaining team.

15. Generally, the parties will bear the costs of their own travel and *per diem* except that the Employer will pay for travel and *per diem* for up to seven (7) bargaining unit employees consistent with this agreement to participate in negotiations during the unassisted bargaining schedule in paragraph 7 above, during any bargaining conducted before FMCS or a private neutral and to participate in proceedings before FSIP. If FSIP declines to accept jurisdiction of any request for assistance based on its determination that the parties are not at impasse, the Employer will not be responsible for paying the travel and *per diem* for any further bargaining, assisted or unassisted.

16. Travel and *per diem* (which includes lodging, meals and incidentals) will be reimbursed in accordance with the Federal Travel Regulations.

17. If a party relies upon documentary evidence to support a proposal, copies of such documentation will be timely provided to the other party upon request.

18. No later than fourteen (14) days prior to the beginning of bargaining, the parties will identify the names of the members of their respective bargaining teams.

19. All agreements reached on individual issues are tentative. Such agreement on issues must be committed to writing and initialed by each party's chairperson. There will be no final agreement on the issues as a whole until all issues are agreed. Thereafter,

implementation will follow ratification by NTEU according to its bylaws and the approval of the agreement by the Department of the Treasury pursuant to 5 U.S.C. § 7114.

20. If the Union membership fails to ratify the agreement, then any subsequent bargaining must commence within thirty (30) days under the following schedule:

- Two weeks of bargaining
- One week break
- Two weeks of bargaining

If the bargaining schedule above is completed without resolution to any remaining issues, the parties may continue to bargain or either party may proceed under the provisions of 5 U.S.C. § 7119. The parties may mutually agree to modify the times and dates for bargaining. While a maximum of seven (7) bargaining unit employees will be authorized official time to represent NTEU during these resumed negotiations, the Employer will not be responsible for paying the travel and *per diem* costs of those employees.

21. The ratification process will not negate any term lawfully imposed during the impasse resolution process unless otherwise agreed to by the parties.

22. Proposals declared non-negotiable and subsequently found negotiable will be timely negotiated, if requested by either party. Any subsequent bargaining must commence within thirty (30) days of the negotiability decision under the following schedule:

- Two weeks of bargaining
- One week break
- Two weeks of bargaining

If the bargaining schedule above is completed without resolution to any remaining issues, the parties may continue to bargain or either party may proceed under

> the provisions of 5 U.S.C. § 7119. The parties may mutually agree to modify the times and dates for bargaining. While a maximum of seven (7) bargaining unit employees will be authorized official time to represent NTEU during these resumed negotiations, the Employer will not be responsible for paying the travel and *per diem* costs of those employees.
>
> 23. This agreement shall become effective thirty-one (31) calendar days from execution or agency head approval, whichever occurs first and will expire upon the effective date of the successor National Agreement.

As a preliminary matter, the Employer states that the Union's numerous jurisdictional arguments "are without merit and provide no basis for the Panel to decline [to retain] jurisdiction over this impasse." Among other things, it contends that the Union's argument that there can be no impasse in the face of a negotiability dispute is unfounded. The Union has failed to cite any "relevant, legal authority to support its novel argument" that, because it alleges that it has no obligation to negotiate over certain provisions, there can be no impasse over the matter as a whole. The Employer contends that the two court cases the Union cites in support of this proposition are inapposite, and its argument is further refuted by the fact that the Panel has taken jurisdiction of a number of disputes between the parties despite the fact that there have been allegations of nonnegotiability. The mere uttering of the word "nonnegotiable" without "any support whatsoever" does not require the Panel to relinquish jurisdiction. Rather, such allegations require the Panel to assess whether they "are of such a magnitude that it would be more prudent to decline jurisdiction while the parties pursue a resolution of their negotiability disputes."

The Employer argues that all of the nonnegotiability allegations the Union raises concerning specific Employer ground rules proposals are "completely lacking in merit" and "not of the magnitude to cause the Panel to decline [to retain] jurisdiction." Overall, Federal Labor Relations Authority (FLRA) case law and court decisions establish that ground rules concern conditions of employment and are mandatory subjects of bargaining.[5/] The key factors with respect to the negotiability

---

5/ The Employer's responses to the Union's nonnegotiability allegations regarding specific proposals are not restated here.

of ground rules proposals are whether they are offered in good faith and designed to further the bargaining process, in accordance with sections 7103(a)(12) and 7114(b)(1) and (b)(3) of the Statute.[6/] The Employer argues that the Union's contention that it has no obligation to negotiate over a majority of the Employer's proposals "is antithetical to the very purpose of ground rules negotiations—*i.e.*, to create a framework for bargaining which furthers the bargaining process and to avoid unnecessary delays." The Union also appears to be arguing that since there is no case law on point which squarely addresses the Union's negotiability arguments, the Panel must relinquish its jurisdiction until the FLRA decides the negotiability of its proposals. The Employer writes that this is flawed because the Panel itself has said that it does not lose jurisdiction just because a union alleges that it has no duty to bargain over a matter.[7/] In addition, there is no procedure that permits an employer to file a negotiability appeal in response to a union's assertion that a matter is negotiable only at its election. The Employer would have to challenge the Union's position in the unfair labor practice (ULP) or grievance forums, or the Union would have to raise its allegations in these forums claiming that the Employer forced it to go to impasse over permissive matters. Either process would be lengthy, and:

> [I]t would be contrary to the purposes of the Statute, which is to promote an effective and efficient Government, to conclude that the Panel must abdicate its jurisdiction in light of an unsupported allegation of permissive negotiability until the matter is resolved through a protracted ULP or grievance-arbitration proceeding.

6/ The Employer cites the FLRA's decisions in AFGE, Local 12 and DOL, 61 FLRA 209 (2005); AFGE, Local 12 and DOL, 60 FLRA 533 (2004), and Department of the Air Force, Headquarters, Air Force Logistics Space Command and AFGE, 36 FLRA 524 (1990), to support these contentions.

7/ In this connection, it cites the Opinion and Decision of Member Carter in Department of Transportation, Federal Aviation Administration, Washington, D.C. and Professional Airways Systems Specialists, MEBA, AFL-CIO, Case Nos. 05 FSIP 140 and 142 (January 3, 2006).

The Union's argument that the Panel lacks the authority to resolve the merits of the dispute because the Employer submitted "new proposals" when it filed its request for assistance should also be rejected. In support of its position, the Union cites Patent Office Professional Association v. Federal Labor Relations Authority, 26 F.3d 1148 (D.C. Cir. 1994)(POPA v. FLRA). In POPA v. FLRA, the court found that before an interest arbitrator or the Panel can employ their powers, "there must first be an impasse." In the specific circumstances of that case, the court concluded that the parties had never bargained over several "new proposals" that were submitted to an interest arbitrator by the union in a revised package of offers and, accordingly, held that the arbitrator had no authority to award them. Unlike the situation in POPA v. FLRA, however, the Employer argues that here it did not submit new proposals when it filed its request for Panel assistance. Rather, the "better approach" in this case is to determine "whether the subject matter or topic of the proposal was within the scope of the issues being negotiated and discussed between the parties and whether the parties' disagreement over those matters precipitated the impasse." Viewed from this perspective, "it is clear" that the subject matters/topics being discussed between the parties are the very same matters that precipitated the current impasse and which were brought before the Panel for resolution. Therefore, "POPA v. FLRA does not operate to deprive the Panel of jurisdiction over the impasse." Moreover, the POPA v. FLRA court held that the interest arbitrator lacked jurisdiction only over the "new proposals," but not over the entire impasse.

As to the merits of the Employer's ground rules proposals, many are identical or similar to wording that has been included in the parties' numerous past ground rules agreements. Proposal 1 is a preamble that is "non-controversial" and has been included in the parties' last three term ground rules agreements. Proposal 2 requires either party wishing to make a change to the current NA to provide notice of the change, in a "proposal format," within 30 days following agency head approval of the ground rules agreement. It would permit each side to know the full scope of the subsequent negotiations. The need to submit changes in a proposal format stems from the Employer's experience during term bargaining in 2001, where the parties' decision to permit "interest statements" to be offered in lieu of proposals "slowed the bargaining process and the resolution of disputes." Proposal 3 also has been included in the parties' last three term ground rules agreements, does not compel either party to offer new proposals, and does not prevent the Union from offering proposals during mid-term bargaining "so long as

the matter was not 'covered by' the term agreement or some other mid-term agreement."

Proposal 4 merely reflects "the practicalities of bargaining" by giving the parties an opportunity to meet before formal bargaining begins to ask questions and clarify interests. Proposal 5 prohibits the parties from presenting "brand new subject matters," absent mutual agreement, after the parties have identified the topics to be negotiated during the initial exchange of proposals required under Proposal 2, because "it would be unfair for one party to reach agreement on a matter" only to have the other side propose something additional at a later date. The only exception concerns circumstances beyond the control of the parties, such as changes required by law. The Employer modified its previous proposal on this ground rule to include the exception in response to what it understood to be the Union's objection. Proposals 6 and 7, which establish the date when bargaining would commence and a subsequent 12-week bargaining schedule, are necessary so the parties can procure bargaining space and control their bargaining and travel budgets. In response to the Union's concerns, the Employer modified its previous proposals by eliminating a terminal date for unassisted bargaining and increasing the initial bargaining period from 8 to 12 weeks. The Employer argues that twelve weeks should be sufficient given the extensive bargaining that has occurred between the parties over the past 25 years during which they "already have worked out many of the issues and problems facing them." They also typically have agreed to shorter time frames for unassisted bargaining, and "there is no reason to believe that 12 weeks will not be sufficient this time."

Proposal 8 "reflects the rights of either party" under section 7119(a) of the Statute to request the assistance of the Federal Mediation and Conciliation Service (FMCS) "at any time they believe appropriate." Once again, the Employer modified its previous proposal establishing starting and ending dates for mediation assistance to accommodate the Union's concerns. To provide "an incentive to the Union to utilize mediation in good faith and avoid dilatory tactics," however, it proposes to pay for the travel and *per diem* expenses of the bargaining-unit negotiators for a maximum of 4 weeks during the mediation process. The proposal also permits the parties to utilize a private mediator in lieu of FMCS, but only with mutual consent, because they "have had some success in the past using private mediators to pare down issues in dispute." Proposal 9 also "reflects the rights of either party," under section 7119(b), to request the assistance of the Panel; it too was modified to

eliminate any deadlines for requesting Panel assistance, in deference to the Union's concerns. Proposal 10 "acknowledges that the parties should know on a daily basis when bargaining will begin and end," and is consistent with the parties' last three term ground rules agreements.

Proposals 11 and 12 also are consistent with the parties' past ground rules agreements, with the exception that the Employer proposes to pay for meeting rooms jointly used by the parties, the cost of which has been shared in the past. The selection of hotel space in which to conduct negotiations traditionally has been non-controversial, and permitting the parties to mutually agree to break their bargaining teams into smaller sub-groups may expedite bargaining. Proposal 13, which requires the Employer to grant official time to up to seven bargaining-unit employees to represent the Union during term bargaining, is consistent with the parties' last three term ground rules agreements, and the Union has never stated that it needs more than seven representatives. Proposal 14, which also is consistent with the parties' last three term ground rules agreements, recognizes the parties' right to have legal counsel during bargaining and impasse. The legal representatives are not included within the seven representatives authorized official time under Proposal 13. The proposal also permits the Union to bring as many of its national staff or elected officials to the table as it desires and, by mutual agreement, it allows observers and consultants to be present during negotiations, mediation and impasse procedures.

Proposal 15 commits the Employer to pay for the travel and *per diem* expenses of up to seven bargaining-unit employees, but only for 12 weeks of unassisted bargaining, 4 weeks of mediation, and during any Panel proceedings. Moreover, if the Panel refuses to accept jurisdiction over the term impasse, the Employer would discontinue paying the Union's travel and *per diem* expenses while the parties engage in further bargaining. Its proposal "represents a fair compromise between its desire to encourage the Union to engage in term bargaining and reach agreement with its need to deter any dilatory tactics which the Union may employ." The proposal would cost the IRS about $224,000 in travel and *per diem* expenses, not including impasse proceedings. The Union's latest financial disclosure report confirms that it "can afford to cover the costs of its team for any additional bargaining." Proposal 16 merely ensures that travel and *per diem* expenses will be paid pursuant to the Federal Travel Regulations. Proposal 17, regarding documentary evidence that either party may use to support a proposal, "is a

matter of courtesy and efficiency and is consistent with the parties' past ground rules agreement." Proposal 18, which would require the parties to identify their bargaining teams no later than 14 days prior to the start of bargaining, would give the Employer sufficient time to issue travel authorizations to the Union's bargaining team members and is also consistent with the parties' past ground rules agreement.

Proposal 19 is consistent with the parties' past term ground rules agreements, and is intended to recognize the "vagaries of bargaining" and the fact that it is sometimes necessary to revise a "tentative agreement" on one article because of compromises reached later on a different article. The Union's suggestion that the proposal would permit and encourage management to engage in bad faith bargaining by "tentatively agreeing" to an article, knowing that it will later "unagree" to it, is unsupported by the Employer's conduct during past term negotiations. In any event, if such behavior occurs, the Union should seek relief through the ULP forum. Proposal 20 establishes a procedure for bargaining if the Union's membership fails to ratify the agreement. It would not require the Employer to pay for the travel and *per diem* expenses of the bargaining-unit employees on the Union's team. While a similar provision has not been included in the parties' three previous ground rules agreements, it is necessary given the fact that "the Union has intimated that it has the ability to 'play games' with the ratification process."

Proposal 21 acknowledges the legal prohibition against Union members refusing to ratify provisions imposed by the Panel and is consistent with the last three term ground rules agreements. Proposal 22 establishes an initial framework for the resumption of negotiations where proposals declared nonnegotiable are subsequently found negotiable by the FLRA. It also provides that the Union will pay for its own travel and *per diem* expenses during any resumed negotiations. The parties previously have resolved issues involving provisions that have been disapproved on agency head review without resort to bargaining teams. While the proposal acknowledges the Union's right to negotiate, and the Employer's obligation to grant official time to the Union's representatives, "it also refuses to fund what has proven in the past to be unnecessary." Finally, Proposal 23 simply reiterates the provisions of 7114(c) of the Statute that collective bargaining agreements become effective and binding either upon agency-head approval or on the 31st day following execution absent agency head approval.

2. The Union's Position

The Union contends that "the Panel is acting outside its statutory authority if it resolves this dispute with an order imposing substantive ground rules." First, the Panel has no authority to act in the face of a pending ULP charge. In this regard, "overwhelming Panel precedent, through every Administration since President Carter, supports the Panel's relinquishing of jurisdiction where one party has alleged there is no duty to bargain and related 'bad faith' bargaining violations."[8/] Second, the Panel "has no authority to act in the face of allegedly non-negotiable proposals that the FLRA has not yet addressed. In Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988)(Carswell AFB), the FLRA "made it very clear" that the Panel can only address allegations of non-negotiability where it can apply existing FLRA precedent. In this case, the Union has alleged that a number of the Employer's proposals fall outside its obligation to bargain and, hence, are nonnegotiable.[9/] Moreover, "these proposals involve issues on

8/ The Union cites six Panel decisions in support of its position on this point. In addition, at the time it submitted its post-conference supporting statement, the Union was awaiting a decision from a grievance arbitrator concerning its national grievance alleging the IRS committed a ULP in the manner in which it conducted negotiations over the instant ground rules dispute. On July 18, 2007, the grievance arbitrator issued an award that, for the most part, sustained the Union's grievance. The parties have filed exceptions to the grievance arbitrator's decision which are pending before the FLRA.

9/ In a pre-jurisdictional statement to the Panel addressing the 24 ground rules proposals initially submitted with the Employer's request for assistance, the Union claimed for various reasons that the following Employer proposals were nonnegotiable: Proposals 2, 5, 6, 7, 8, 9, 11, 12, 14, 15, 18, 19, 20, 22, 23, and 24. In its post-conference statement, it alleges that the following portions of the Employer's June 7, 2007, final offer are nonnegotiable: Employer Proposals 18, 19, 20, and 23. It also states that "to the extent the Employer's June [7th] offer [Proposal] 7 can be read to establish a limit on the bargaining schedule because the time frames set forth therein may only be extended by mutual agreement, it is permissively negotiable on the part of the Union."

which there is *no [FLRA] precedent* for the Panel to apply." Thus, in accordance with Carswell AFB, the Panel has no ability to resolve this dispute until there is adequate case law to apply or until the Employer withdraws the contested proposals.

The Union argues that the Panel "has no authority to act in the absence of legitimate mediation of the dispute by the FMCS or alternate neutral." In accordance with the definition of the term in 5 C.F.R. § 2470.2(e) of its regulations,[10/] there is no "impasse" for the Panel to resolve. Among other things, the parties have not exhausted voluntary efforts to reach an agreement, "have never received mediation assistance as required by the law,"[11/] and the matter is otherwise rife with duty-to-bargain questions. In addition to the lack of meaningful mediation assistance, the ground rules proposals submitted in connection with the Employer's request for assistance, as well as its June 7, 2007, final offer, contain proposals "some of which had never been negotiated." Consequently, "this dispute is no different than," and should be governed by, the decision the court reached in POPA v. FLRA, where it which found that an interest arbitrator had no authority to impose proposals as part of a contract where "the parties had never negotiated over them, let alone reached an impasse." Any contention that POPA v. FLRA may be interpreted to mean that the parties can be found to have reached impasse if they negotiated over the "subject" in dispute, rather than specifically negotiated over each of the proposals, is not supported by the court's decision.

Finally, "management's last best offer is a flawed, unworkable proposal." Given the Panel's notice to the parties that it would select only from either parties' last best offer,

---

10/ 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.

11/ In this regard, the Union cites the testimony of one of the Employer's representatives during the March 5, 2007, ULP grievance-arbitration hearing. According to the Union, he "essentially admitted that the parties had never received substantive mediation over the ground rules proposals."

and the lack of any offer from the Union, "that leaves the Panel no choice should it decide to go forward but to order management's last offer—unless that is an unworkable one." The Union argues that the Employer's final offer is unworkable, for example, because it provides that the parties will continue to find a location to bargain. Since it does not specify the location or give ether party the right to unilaterally select a site, "the parties will undoubtedly have to enter another stage of bargaining or dispute resolution to settle on the location." Similarly, Proposal 5 states that the "proposals may be amended or modified," but in the very next sentence states that "no new proposal may be submitted." Given the ambiguity in these statements, "the language is a litigation morass." The Employer would have been far better off leaving the issue silent "and let the negotiations be controlled by case law."

CONCLUSIONS

After carefully considering the parties' positions on the jurisdictional issues raised by the Union, we shall relinquish jurisdiction over Employer Proposals 2, 5, 6, 7, 8, 9, 11, 12, 14, 15, 18, 19, 20, 22, and 23. The record reveals that the Union consistently has refused to participate in bargaining and mediation over these ground rules proposals because, for a variety of different reasons, it believes they are nonnegotiable. Regardless of whether the Union's nonnegotiability arguments are valid, the Panel only has authority to consider the merits of a proposal where parties have reached a negotiation impasse. Accordingly, the underlying threshold questions raised by the Union must be resolved in an appropriate forum, and an impasse reached, before the Panel may consider the merits of these Employer proposals.

The same cannot be said with respect to Employer Proposals 1, 3, 4, 10, 13, 16, 17, and 21. In this regard, the Union never raised questions concerning its obligation to bargain over them, and they have been on the bargaining table throughout the parties' bilateral negotiations and mediation sessions. With respect to the Union's contention that the Panel has no authority to act in the face of a pending ULP charge, it has failed to cite any statutory basis for this claim. In addition, while it may be true that the Panel has no authority to act in the absence of "legitimate" mediation of a dispute by FMCS or an alternate neutral, the Union's allegation that such mediation never occurred regarding Employer Proposals 1, 3, 4, 10, 13, 16, 17, and 21 constitutes mere disagreement with the factual findings the Panel made when it decided to assert jurisdiction

over the dispute. It is also inconsistent with the fact that FMCS referred the matter to the Panel, signaling it had completed its efforts to assist the parties. As the Panel is the administrative body with the statutory authority to make such determinations, the Union's allegation is hereby rejected.

Turning to the merits of the proposals that remain within the Panel's jurisdiction, consistent with our procedural determination letter to the parties, we shall impose the Employer's final offer on a package basis. It appears to contain standard provisions for governing the parties' successor NA negotiations that have been included in their previous term ground rules agreements.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby: (1) declines to retain jurisdiction over Employer Proposals 2, 5, 6, 7, 8, 9, 11, 12, 14, 15, 18, 19, 20, 22, and 23[12/]; and (2) orders the parties to adopt Employer Proposals 1, 3, 4, 10, 13, 16, 17, and 21.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

June 16, 2008
Washington, D.C.

12/ Our determination to decline to retain jurisdiction is made without prejudice to the right of either party to file another request for assistance once the Union's bargaining obligations have been established and an impasse has been reached over the matter.