United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTERS FOR MEDICARE AND MEDICAID SERVICES BALTIMORE, MARYLAND and LOCAL 1923, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 02 FSIP 167

DECISION AND ORDER

The Department of Health and Human Services, Centers for Medicare and Medicaid Services, Baltimore, Maryland (Employer, Agency, or CMS) 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 Local 1923, American Federation of Government Employees (AFGE), AFL-CIO (Union).

Following an investigation of the Employer's request for assistance, which arose from bargaining over a successor Master Labor Agreement (MLA), the Panel directed the parties to resume negotiations on a concentrated schedule during a 45-day period over all remaining articles, with the assistance of the Federal Mediation and Conciliation Service (FMCS). If a complete settlement of the articles was not reached by the end of the 45-day period, the parties' final offers on all outstanding issues were to be forwarded to the Panel by the FMCS. Thereafter, the Panel would resolve any issues that remained at impasse by selecting between the parties' final offers on an article-by-article basis, to the extent they otherwise appear to be lawful, using whatever additional procedures it deemed appropriate.

During the 45-day period of resumed negotiations the parties failed to reach agreement on most of the articles in

dispute, and the FMCS forwarded the parties' final offers to the Panel. The Panel then directed the parties to submit written statements of position with supporting evidence and arguments on each article that remained in dispute, not to exceed one page per article, excluding attachments. They were notified that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the parties' impasse, which could include the issuance of a Decision and Order. The parties were urged to meet as frequently as necessary to narrow the issues in dispute before the deadline established for the receipt of their submissions. In addition, the Panel reconfirmed that it would be limited to selecting between the parties' final offers on an article-by-article basis, to the extent they otherwise appear to be lawful, if it had to impose a final decision in the dispute.

Prior to the deadline that was established in the Panel's determination letter, the Union requested, and was granted, an extension of time to prepare its supporting statements. The Panel also convened a teleconference during which the parties agreed to meet over a 3-day period to continue voluntary efforts to resolve their impasse prior to the newly-established deadline for receipt of their supporting statements. The parties' voluntary efforts prior to the deadline again failed to result in agreements on any of the articles at impasse. In accordance with the newly-established deadline, the parties submitted their statements of position.[1/] The Panel has now considered the entire record.

BACKGROUND

CMS is responsible for overseeing the Medicare and Medicaid programs - two national health care programs that benefit about 75 million Americans. In addition, with the Health Resources and Services Administration (HRSA), CMS oversees the State Children's Health Insurance Program, which is expected to cover many of the approximately 20 million uninsured children in the U.S. The Union represents approximately 3,800 bargaining-unit employees in a nationwide, consolidated unit of professionals and non-professionals who work at the headquarters office in Baltimore, and 10 regional offices around the country. Among other job classifications, unit employees work as Health Insurance Specialists, Accountants, Computer Specialists, Social Science Research Analysts, Management Analysts, Budget Analysts,

1/ The Union's submission also included revised final offers on Articles 3, 11, 14, 23, 25, 26, and 35.

Medical Officers, Personnel Management Specialists, Public Affairs Specialists, and Secretaries, in grades ranging from GS-2 through 15. The parties' MLA was due to expire on March 8, 2001, but contains a provision requiring all of its terms to continue until a successor MLA is executed.

ISSUES AT IMPASSE

The parties disagree over parts or all of the following articles: (1) Article 1 - Governing Laws, Regulations and Definitions; (2) Article 3 - Employee Rights; (3) Article 4 - Negotiations During the Term of the Agreement; (4) Article 6 - Dues Withholding; (5) Article 7 - Duration of Agreement; (6) Article 9 - Health and Safety; (7) Article 10 - Hours of Work; (8) Article 11 - Use of Official Facilities/Union Use of Agency Facilities and Services;[2/] (9) Article 12 - Communications; (10) Article 13 - Parking and Transportation; (11) Article 14 - Reduction in Force and Transfer of Function; (12) Article 15 - Contracting Out; (13) Article 16 - Training and Career Development; (14) Article 17 - Awards; (15) Article 18 - Equal Employment Opportunity; (16) Article 21 - Employee Performance System; (17) Article 22 - Within Grade Increases; (18) Article 23 - Disciplinary and Adverse Actions; (19) Article 24 - Grievance Procedure; (20) Article 25 - Arbitration; (21) Article 26 - Merit Promotion and Article 27 - Details and Temporary Assignments/Article 26/27 - Promotions, Reassignments and Details;[3/] (22) Article 29 - Work-At-Home Programs/Flexiplace;[4/] (23) Article 30 - Official Time/Official Time for Union Representatives;[5/] (24) Article 31 - Time and Leave; (25) Article

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2/ The Union prefers that the title of the article remain "Use of Official Facilities," while the Employer prefers "Union Use of Agency Facilities & Services."

3/ The Union proposes that these topics continue to be addressed in separate articles. The Employer proposes one article, Article 26, to cover topics that are the subject of two different articles in the current MLA (Articles 26 and 27). In this Decision and Order, both topics are addressed under one heading.

4/ The Union proposes that "Work-At-Home Programs" be the title of the article; the Employer proposes "Flexiplace."

5/ The Union proposes that "Official Time" be the title of the article; the Employer proposes "Official Time for Union Representatives."

35 - Computer Security/Computer Security and Personal Use of Agency Equipment and Resources;[6/] and (26) Article 36 - Recycling.

POSITIONS OF THE PARTIES

1. Article 1 - Governing Laws, Regulations and Definitions

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Its final offer on this article "is clear and concise," and essentially maintains the wording in the current MLA, except for the removal of a reference to Executive Order 12871, which is no longer in effect. The Employer's final offer, on the other hand, would permit it "to unilaterally void all agreements" and then argue that it has no duty to bargain because the subject matter contained in the voided agreement is covered by the contract. Moreover, since Section 3 of its proposal would permit only the Employer to initiate bargaining on a past practice, "it would effectively cause the Union to waive its right to initiate mid-term bargaining." The only reason the Employer has given for changing the current contract wording is its inability to keep track of the various agreements it has reached with the Union. Its "lack of organizational ability" provides insufficient justification for changing the *status quo*.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Its proposal would consolidate all of the parties' existing written agreements into one document. This is necessary because the Agency's regional office employees were represented by a different union until 1996, when they were consolidated into a nationwide unit. At that time, numerous separate agreements were in existence governing a variety of working conditions, and over 100 additional written agreements have been executed by the parties during the term of the existing MLA. As a result,

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6/ The Union proposes that "Computer Security" be the title of the article; the Employer proposes "Computer Security and Personal Use of Agency Equipment and Resources."

management "has found it increasingly difficult to maintain the consistent application of working conditions" throughout the Agency. Given the "tremendous amount of time, money, and resources" that have gone into the current negotiations, "it would be foolish for the parties to execute a new MLA with so many inconsistent and outdated written agreements still in existence." During the negotiations, the Union was provided with copies of all the written agreements known to the Agency so those that needed to be retained could be included in the parties' proposals. The Employer also attempted to meet one of the interests the Union expressed by changing its final offer to reflect that agreements not "covered by" the successor MLA would become past practices, and that any such practices would have to be bargained with the Union "to the extent required by law."

The Union "has repeatedly expressed a desire to continue bargaining the subjects covered in the new MLA throughout its term." For this reason, the Employer interprets Section 2 of the Union's final offer "as a waiver of the Agency's 'covered by defense'," a permissive subject of bargaining over which it has not elected to negotiate. In addition, given the parties' exhaustive negotiations over such a comprehensive successor MLA, continuing to negotiate over the same subjects during the term of the new agreement would not be "cost effective." Finally, Section 4 of its final offer clarifies the meaning of terms that previously have been the subject disagreements between the parties.

CONCLUSION

Having considered the parties' positions on this article, we conclude that the Employer's final offer should be adopted to resolve their dispute. In our view, it is disingenuous for the Union to complain that the Employer's proposal would allow it to "unilaterally void" all of the parties' previous agreements when it had ample opportunity to incorporate those that it wanted to continue into its proposals for the successor MLA. Its contention that Section 3 could be interpreted to grant only the Employer the right to initiate mid-term changes in past practices does merit clarifying language in the Employer's final offer preserving the Union's statutory rights in this regard.

2. **Article 3 - Employee Rights**

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The "reasonable care" standard it proposes in Section 3 is contained in Article 8, Section 4, of the current MLA, and "management has presented no rationale for refusing to address this existing provision." Its proposed wording in Section 4.A. would ensure the confidentiality of employee SSNs, and is consistent with a memorandum of one of the Employer's Regional Administrators. Section 4.F. is a "due process protection" that addresses a "once severe problem" where discipline would be proposed up to 1 year after the incident. Its proposal on the purging of supervisory work files merely continues current contract wording, and is clearer than the Employer's, which "is open to interpretation and ill-defined." The newly-proposed wording in Section 7.B. "offers needed clarity and fairness in those situations where the supervisor knows that discipline is an issue." Moreover, the clause "has worked very well in other contracts in similar agencies." Its proposals on Last Chance Agreements would "bring some sanity and fairness to a practice that is regularly abused," while Section 10.I. "simply defers bargaining" over the Federal Student Loan Repayment Program to mid-term negotiations. The Union's wording on timely and proper compensation "is the current contract language," and is superior to the Employer's, which is "vague." Finally, Section 15 on proper attire is "completely unnecessary," but arose as a counter-offer to management's proposed dress code. In this regard, the Employer "wishes to require suits and ties Monday through Thursday and then grant exceptions, thus burdening all employees with an extreme requirement because of an alleged few abuses."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Its final offer attempts to address the "numerous problems" management has faced in interpreting and applying the current article, which covers a myriad of issues, "many of which do not conform to the current state of law and regulation." In this regard, a number of the Union's proposals are outside the duty to bargain. The Employer's proposals in Sections 3, 4, and 5,

were modified after listening to the Union's concerns, and reflect a "clear, consistent, and lawful structure" permitting the Agency to maintain appropriate documentation on employees while providing them with adequate safeguards regarding disclosure. The Union, on the other hand, has proposed new restrictions on management, such as the requirement to deliver leave and earnings statements in sealed, white envelopes. The Employer's proposed Section 7, concerning investigative examinations and employees' *Weingarten* rights, is consistent with 5 U.S.C. § 7114(a)(2)(B), and the Union has not articulated a need to change the current practice of informing employees annually of such rights. On the issue of attire, "visual observation" and "feedback from outside vendors and contractors" have made it apparent that "guidelines regarding appropriate attire would assist the Agency in maintaining its professional image." For this reason, it has proposed a dress code reflective of the Agency's mission and high-graded workforce that "is not overly restrictive."

CONCLUSION

After careful and thorough consideration of the arguments and evidence presented by both sides, on balance we believe that the Employer's final offer would provide the better resolution of their impasse. Among other things, in our view the record fails to support: (1) a need for more than an annual refresher regarding employees' *Weingarten* rights, or (2) that the Employer's current practices insufficiently safeguard the confidentiality of employees' SSNs. We are also persuaded that the Employer's proposed dress code is a legitimate response to perceptions concerning the image currently projected by some of the Agency's employees. For these reasons, we shall order the adoption of the Employer's final offer on this article.

3. Article 4 - Negotiations During the Term of the Agreement

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Some of its proposed wording in Section 1 restates "the relationship between the parties developed over many years," and recognizes that the MLA "does not and could not" include provisions covering the myriad of unforeseeable changes that have "continuously occurred in this ever-changing Agency." Section 2 of the final offer retains current language, first

implemented in 1991, requiring Agency notice of changes in conditions of employment to include information that would permit the Union to determine bargaining unit impact. Prior to 1991, the inadequacy of the Agency's notices "led to time-consuming information requests." The Employer's proposal in this section also "negates the Union's right to initiate mid-term bargaining." The Union's proposed Section 3 wording reduces the number of Union negotiators bargaining over National Level mid-term changes from four to three, while the Employer's proposal reduces the minimum number to "as few as one." This would not permit the Union to have representatives from both parts of the Agency (*i.e.*, the Central Office and the regional offices) on issues where the scope is Agency-wide.

The Employer's final offer would require the Union to pay for travel when face-to-face bargaining is necessary, and permit management to select the bargaining site. This "would place an uncontrollable financial burden upon the Union," and is particularly unfair given that the issues to be negotiated are management-initiated changes in working conditions. Finally, by limiting the Union's official time to time actually spent at the bargaining table, the Employer's proposed wording in Section 4 should be rejected because it precludes "even a minimal amount of preparation."

b. <u>The Employer's Position</u>

See Attachment B for the text of the Employer's final offer on this article.

Overall, the Employer's final offer is intended to make the mid-term bargaining process "more cost effective, orderly, and efficient." The need for the changes it is proposing is demonstrated by the fact that the parties have negotiated over 100 written agreements under the current MLA. During its term, the Union has consistently submitted "boilerplate" requests to bargain "with no bargaining proposals, and a lengthy bargaining process ensued." In many cases the "negotiations continued for months - sometimes years - with no proposals ever being submitted by the Union," delaying the Agency's attempts to implement critical mission-related changes. While the Employer's proposals simply attempt to institute an orderly process that preserves the Union's right to negotiate, and is consistent with wording at another agency within HHS, HRSA, that most closely resembles the nature of work and the workforce of CMS, the Union's impose no obligations or responsibilities on either party after the initial requirement that the Union submit

a request to bargain. In addition, the Union's Section 2.A.2.c. wording would require the Employer to explain why a proposed mid-term change is necessary, whereas the Employer's proposal "reflects what is required by law."

The Employer interprets Section 1 of the Union's final offer as a waiver of management's right to assert that a matter is "covered by" the MLA. The Union has never refuted this interpretation, and the Agency has "repeatedly stated" that it is not electing to negotiate over this permissive subject of bargaining. Conversely, the Union has proposed a subsection entitled "Union-initiated Changes" (even though all the negotiations during the MLA's current term were initiated by management) which fails to include the nature and scope of this right. The Employer has proposed the elimination of the "multi-regional level" of bargaining because, when it proposes changes that affect more than one regional office, "such changes usually have far-reaching implications." With regard to some of its other proposed changes, utilizing its videoconferencing capabilities in lieu of face-to-face bargaining would reduce travel costs, and paying the travel and per diem expenses of one Union negotiator when face-to-face negotiations occur at the National Level would not adversely affect the Union. This is because, historically, the Union designates officers located in Baltimore in most mid-term negotiations that take place at the Central Office. Finally, it is unnecessary to provide the Union with a "caucus room" for mid-term negotiations, as it currently has almost 1,700 square feet of office space in Baltimore which may be used for this purpose.

CONCLUSION

Having carefully reviewed the parties' positions on their mid-term bargaining article, we conclude that the Employer's proposal should be adopted to resolve the dispute. Overall, the changes the Employer proposes to current practices, which include a reduction in the number of levels of mid-term bargaining from three to two, the use of videoconferencing, and restrictions in the number of Union representatives for which it would pay travel and per diem expenses, appear to be justified by the record. To clarify that it is not the intent of the MLA to waive the Union's statutory right to initiate mid-term bargaining, we shall notate that both parties' rights, in this regard, are preserved.

4. Article 6 - Dues Withholding

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union proposes to change wording in Sections 4 and 5 of the article. Currently, when an employee is separated from the Agency, or moves outside the unit of recognition, except in the case of "details and non-competitive temporary promotions," dues withholding is terminated "beginning the first full pay period after computer acceptance of information." Under the Union's proposed change to Section 4, there would be no reference to exceptions in the case of details and non-competitive temporary promotions, the effective date for termination of dues withholding when an employee is separated or moves outside the unit of recognition would still begin "the first full pay period after computer acceptance of information," but with the following proviso:

> Absent employee objection, Union dues will be automatically considered as voluntary allotments. If the employee objects for any reason to the voluntary allotment, Union dues will terminate beginning the first full pay period of such notification. Union dues will be withheld beginning the first full pay period that the employee returns to the bargaining unit.

With respect to Section 5, concerning the procedure to be used when there is a dispute over whether a position continues to be eligible for dues withholding, the Union proposes to add the following highlighted wording to the existing provision:

> When the Agency believes a position subject to dues withholding is no longer eligible for such deduction, the Union will be notified in writing **prior to the revocation of an employee's dues**. When a dispute arises concerning the bargaining unit status of that position's dues withholding, dues withholding will continue until the matter is resolved.

The parties' conflict over Section 4 concerns the Employer's proposal to terminate dues withholding when employees are temporarily reassigned out of the bargaining unit, which occurs frequently. Its refusal to maintain the Union membership of

such employees, or to reinstate dues withholding after they return to the unit, "is an attack upon union security." In conjunction with the Employer's proposal on Section 5, "it sets the stage for unfettered abuse." With regard to the latter, the Employer's wording would allow the Agency to "frivolously terminate dues without liability" until the FLRA upholds an employee's continued bargaining unit status through a clarification of unit petition. The Union's proposed Section 4 change, on the other hand, "reflects the current practice but provides an open process consistent with other appropriate arrangements made in other contracts regarding the issue." Moreover, by considering dues withholding as a voluntary allotment in situations where members temporarily move out of the unit, certain adverse consequences, such as the termination of Union dental coverage, which is included in the dues withholding, would be avoided. The Union's proposal on Section 5, which is essentially the *status quo*, should be adopted because it "has served the parties well for many years."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer proposes to maintain the wording in the current contract with the exception of Sections 4. and 5. Revisions to these sections are necessary to ensure that they comport with law. The current requirement of Section 4, that dues withholding would terminate due to separation or movement outside the unit of recognition except in the case of details and non-competitive promotions, and of Section 5, that when a dispute arises concerning the bargaining unit status of an employee on dues withholding, "dues withholding will continue until the matter is resolved," are both inconsistent with 5 U.S.C. § 7115(b)(1).[7/] When the Employer informed the Union of this during bargaining, the Union responded by revising the current wording in Section 4 so that the Agency would be

7/ 5 U.S.C. § 7115(b)(1) states that an allotment "for the deduction of dues with respect to any employee shall terminate when the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee." The Employer also cites FLRA decisions in Department of the Army, Aberdeen Proving Ground, Maryland, 25 FLRA 194 (1987) and U.S. Department of the Army, Letterkenny Army Depot, Chambersburg, Pennsylvania, 44 FLRA 723 (1992) to support its legal conclusion.

required to withhold dues not only for employees "temporarily detailed to management positions but also employees *permanently* promoted or reassigned to management positions." The Union also proposed changes to the current wording in Section 5, but both revisions are "still inconsistent with the Statute."

CONCLUSION

Having considered the arguments presented, we shall order the parties to adopt the Employer's final offer to resolve their dispute over Article 6. FLRA case law appears to substantiate the Employer's contention that those portions of the Union's proposals which would require the continuation of dues withholding, even though the MLA no longer applies to an employee, are inconsistent with 5 U.S.C. § 7115(b)(1). In addition, there is no basis for us to conclude that the implementation of the Employer's proposed revisions would lead to the "unfettered abuse" that the Union alleges. We note in this regard that there are mechanisms available to the Union to obtain redress should such abuse occur.

5. Article 7 - Duration of Agreement

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Its Section 1 wording "is clear and accurately reflects statutory provisions," while the Employer's "is ambiguous" because it does not depict "accurately enough" the sequence of events. While both parties propose limitations in Section 3.B. on the length of ground rules negotiations prior to the expiration of the MLA, 45 days is a "more realistic time frame" to ensure that bargaining over a successor MLA begins on time. Finally, under the Employer's proposal in Section 3.D., if either party requests to renegotiate the MLA, its terms would continue for no more than 60 days after the expiration date. A 60-day period is "unrealistic" because, in practice, if a party terminates a provision of the existing contract, "a change in working conditions would occur and require bargaining anyway." The Union's proposal in Section 3.C. to keep the existing contract in effect until it is replaced "is the better course," as it would "avoid bifurcated bargaining and maintain some sense of stability" in the Agency and between the parties.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The primary differences between the parties' final offers can be found in Section 3, where the Union: (1) proposes a continuation of current wording that would automatically extend the terms of the MLA until negotiations over a successor are completed; (2) does not specifically exclude Article 4 provisions as applicable to Article 7; and (3) fails to indicate that the ground rules should include procedures governing specific topics, and be reduced to writing. The Employer has repeatedly stated to the Union that it would not agree to any provision waiving its right "to terminate permissive subjects of bargaining indefinitely," so the Union's proposed Section 3.C. should be rejected for that reason. Given the "significant disagreement and confusion" that arose during bargaining over the ground rules prior to the renegotiation of the current MLA concerning the relationship between Article 4 and Article 7, the Employer is justified in proposing wording that specifically excludes anything in Article 4 from applying to Article 7. Finally, the absence of a contractually-imposed obligation to negotiate ground rules has resulted in a "lengthy (2-year), ineffective, costly and inefficient process" which would be rectified through the imposition of the Employer's proposed wording in Section 3.C.

CONCLUSION

After carefully scrutinizing the parties' positions on this article, we conclude that the Employer's final offer would provide the better basis for resolving their impasse. The parties appear to agree that the issue of whether the terms of the MLA should continue to apply until a successor MLA is implemented concerns a permissive subject of bargaining. Third parties do not have the authority to impose terms involving such subjects without the consent of both sides. In this case, the Employer has proposed that existing MLA provisions automatically be extended for no more than 60 days after the MLA expires, which we believe would permit either side unilaterally to terminate provisions involving permissive subjects without bargaining at such time.[8/] In our view, the Employer's proposal

8/ In this regard, to the extent the Union believes that the Employer is statutorily required to negotiate over the termination of permissive subjects when the MLA expires, it

is reasonable, given that it could have proposed to terminate permissive subjects immediately upon the expiration of the MLA. In addition, we are persuaded by the record of negotiations that led to the instant impasse that specifically excluding Article 4 provisions as applicable to Article 7, and requiring written ground rules that, at a minimum, include procedures governing the submission of written proposals, scheduling and caucuses, are warranted. Accordingly, we shall order the adoption of the Employer's final offer.

6. **Article 9 - Health and Safety**

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The structure provided by the current article has enabled the parties "to meet many serious challenges." The events of 9/11 "clearly established that health and safety conditions at the work place could change at any time," and the need "for greater flexibility in the structure as well as implementation of the provisions of this article." For this reason, the Union has proposed modifications to the MLA which would strengthen the requirements and format of facility inspections, address violence in the workplace, and provide it with better and more timely information regarding accidents and incidents. The Employer's final offer, however, contains a number of "rollbacks" which are unsupported by "any information demonstrating need or showing administrative burden." In the area of smoking policy, for example, its proposal for a complete ban on smoking at the Central Office campus "is unrealistic and unnecessary," while the Union's "seeks to balance the rights between the non-smoker and the smoker." In this regard, the Agency has established smoking areas directly in front of certain major entrances which the Union would move "at least 50 feet from the entrances." The Union's proposal would continue a "successful incremental approach" by addressing the concerns of non-smokers passing through smoking areas as they enter the building.

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is mistaken. See, for example, U.S. Border Patrol Livermore Sector, Dublin, California, 58 FLRA 231 (2002), where the FLRA reconfirmed that, in contrast to mandatory subjects of bargaining, permissive subjects may be unilaterally terminated by either party once a contract expires.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer is committed to providing a safe and healthy environment for employees, and values their involvement in the operation of the health and safety program, so it has retained the Health and Safety Committees. It has proposed changes to the functions of the committees, however, "to better reflect the way the committees have actually operated," and which eliminate certain tasks that are "more realistic and appropriate functions of management." The Union proposes to expand the committee's functions into areas such as the development of procedures for bomb threats and shootings which are management internal security functions.

The Employer's final offer deletes three provisions concerning the VDT Program which have been rendered "antiquated and unnecessary" as the result of advances in the technology of computer monitors. It also would maintain the *status quo* with respect to smoking policy everywhere but at its headquarters facility in Baltimore. Given CMS's "unique position in the health care industry," and its location in a state that has been at the forefront of anti-smoking efforts, it proposes to prohibit smoking entirely on its headquarters premises. This also would address the consistent complaints of second-hand smoke it receives from employees, contractors, and visitors entering and exiting the building. Furthermore, its final offer incorporates the Agency's drug-testing policy into the MLA. The Union "expressed no objection" to this during the negotiations, and its inclusion is warranted because the only written agreement on this subject is a 1991 MOA which the Employer believes is no longer in effect.

The Union proposes to continue a clause requiring management to provide employees who participate in rideshare programs with transportation home, or to a medical facility, due to family illness or incapacitation, or to grant a co-worker administrative leave to provide the transportation. Such wording is outside the duty to bargain for various reasons. It also proposes to add new sections entitled: (1) "Training," which would establish training requirements for Union committee members that interfere with management's right to assign work; and (2) "Protective Assistance," "Onsite Security," and "Leases," for which it has failed to demonstrate any need. The

section on "Onsite Security" also "excessively interferes with management's right to determine internal security."

CONCLUSION

Having considered the evidence and arguments presented by the parties on this article, we are persuaded that the Employer's final offer would provide the more reasonable resolution of the issues. In this connection, the Union has provided little support for expanding the existing article in the numerous areas it proposes. The Employer, on the other hand, has substantiated a need for many of the changes included in its final offer, such as the elimination of provisions which are now outdated or of questionable legality, and the inclusion of wording regarding its drug testing policy. On the key issue of whether smoking should continue to be permitted in Baltimore at the outdoor areas currently designated for this purpose, both sides appear to agree that there is an ongoing problem concerning the exposure of non-smokers to second-hand smoke as they enter and exit the headquarters facility. Our review of the parties' final offers on this matter reveals that only the Employer has attempted to address this concern. In this regard, contrary to the contention made by the Union in its written statement, we find no wording in its final offer which would move current outdoor areas "at least 50 feet from the entrances." Accordingly, the parties shall be ordered to adopt the Employer's final offer.

7. Article 10 - Hours of Work

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The two main points of conflict between the parties on this article concern the limitations the Employer proposes on: (1) current employee options in the area of flexiplace, and (2) concurrent participation by employees in "alternative work schedules (AWS), credit hours, flexiplace, etc." With respect to the former, the Union has worked with management since 1998 on a variety of concerns, including the suspension of flexiplace for work reasons, call back procedures, training, and the "quick removal of employees from flexiplace for non-adherence or non-performance." As a result, the Employer did not invoke its right to suspend flexiplace, adjust coverage requirements, or remove employees from flexiplace during the term of the current

MLA. In addition, both HHS and OPM strongly support telework, which is particularly appropriate for employees at CMS, who work with great independence "under the broad direction of the manager." The Employer also has offered "no valid reason" to limit the concurrent use of benefits such as AWS, flexiplace, and credit hours. In this regard, the new contract between NTEU and the Food and Drug Administration (another activity within HHS) also permits employees to work up to 4 days per week at the ADS and "other flexible arrangements to be used in concert," unlike the Employer's proposal.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer would merge the flexiplace provisions in the current MLA with Article 29 (currently titled "Work-at-Home Programs") into a single flexiplace article. Thus, its final offer on Article 10 only addresses hours-of-work issues. It proposes to retain "all of the work options available in the current contract," but provides management with the flexibility to "set, adjust and suspend work options when needed" to meet "its critical mission," and to respond to "beneficiaries, Congress, contractors, and external partners." The Union's final offer, on the other hand, fails to balance family-friendly work options with the needs and mission of the Agency. In this regard, it "sets rigid core days, precludes managers from setting work schedules and provides all employees with the ability to concurrently participate in all work options." The Union's proposal also "would eliminate the need for management approval to earn credit hours up to 2 hours per day," which is indicative of its failure to recognize that managers need to have "some semblance of involvement over employee work schedules" to accomplish the Agency's work. In addition, various portions of its final offer are inconsistent either with 5 U.S.C. § 6126, the OPM Handbook (which is a Government-wide regulation within the meaning of 5 U.S.C. § 7117), or management's right to assign work.

CONCLUSION

After thoroughly reviewing the positions of the parties on this article of major significance, we conclude that the Employer's final offer should be adopted to resolve the dispute. In our view, it would ensure that managers retain the flexibility they need to accomplish the Agency's mission while

permitting unit employees to continue to participate in a variety of family-friendly scheduling options. The Union, on the other hand, provides little support for expanding employee prerogatives beyond those found in the current MLA. Although the Panel understands the Union's concern as to whether managers will exercise their newly-found flexibility in a fair and judicious manner, the Employer's proposal provides the Panel with the only reasonable choice under the final-offer process.

8. Article 11 - Use of Official Facilities/Union Use of Agency Facilities & Services

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The parties' main difference in Section 3 concerns the Employer's proposal to eliminate the Union's access to Picturetel or comparable satellite technology. The Union's use of this system has avoided travel for conferences, and the Employer "has not cited any reasons" for dropping this wording from the article. In Section 4.D., the Employer seeks to eliminate the Union's use of conference rooms for internal meetings, such as representational drives. The parties' previous contracts have established this right, which is consistent with Article 48, Section 8, of the agreement between the Department of Veterans Affairs and AFGE, and "standard procedure in the Federal sector." Since the Employer permits other organizations access to CMS's facilities, depriving the Union of similar access "could even contravene the Statute." Finally, on Section 5, the Union proposes to maintain the *status quo* with respect to mailing privileges. A continuation of the current level of support it receives in this regard is justified because of its statutory obligation to represent all of the employees in the unit, regardless of Union membership. Moreover, "Congress has long recognized" that agencies must provide labor organizations the "reasonable use of facilities" so they can "provide an acceptable level of representation."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Its final offer "continues the same level of facilities and space available to the Union while expanding the Agency's

obligation regarding computer equipment." At the Agency's headquarters, the Union occupies "almost 17,000 square feet of space" at an annual cost of "almost $50,000," and has exclusive office space in the 10 regional offices at a total annual cost of "almost $60,000." The Agency also supplies the Union's offices with standard computer software, unlimited Internet access, telephone service, office furnishings, supplies, and the use of photocopiers. Moreover, Local 1923 "is the largest local in the Federal government," and received dues of over $2.2 million in FY 2001. In view of the Union's resources and what the Agency already provides, the Employer's proposal to modify the current article is justified. In particular, its wording in Section 4, while not diminishing its obligations regarding space, computers, and furnishings, is more precise than the Union's. Its final offer also provides the Union with the use of Agency conference rooms and/or technology, but only to the extent they are "available and not used to conduct internal Union business." This is necessary because various provisions in the current article and the Union's final offer "provide preferential status for the Union."

CONCLUSION

Upon careful consideration of the evidence and arguments provided by the parties on this article, we are persuaded that the Employer's final offer should be adopted to resolve the impasse. The record establishes that, in the past, the Employer has provided the Union with ample facilities and services so that it can perform its representational duties. In our view, its final offer essentially would maintain that level of support for legitimate representational functions throughout the term of the successor MLA. It also would remove contractual guarantees regarding the use of Agency facilities for membership drives and other internal Union matters. While it may be true that the use of agency facilities for organizing drives is a standard practice in the Federal sector, it is one thing for parties to mutually agree to such provisions, but another thing entirely for a third party to impose that requirement on a reluctant employer. Accordingly, we shall order the parties to adopt the Employer's final offer on this article.

9. Article 12 - Communications

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union has amended its proposals in Sections 1.B. and 2.A. "to adopt the Agency language" on the standards that would be used in posting material on bulletin boards and distributing official publications, even though its inclusion "is somewhat insulting" because it would never malign an individual. In addition, the Union "asks for an upgrade" in Section 2 to "reflect current practice" regarding when and where it may distribute Union material. The Employer's attempt to require it to pass out approved material only before 6 a.m. or after 6 p.m., while permitting "a myriad of other groups" access similar to what the Union proposes, illustrates that "disruption is not the issue, but union animus is." The Union has never "disrupt[ed] a work site," nor would it. The Employer's proposal is "not grounded in any reasonable concern but simply an attempt to discourage Union communications with the bargaining unit." Finally, the Union's wording in Section 5 would allow it to deliver its orientation message to new employees "directly preceding the lunch period." It is the practice of Local 1923 to provide a welcoming lunch to new employees on behalf of its members at all of the agencies where it has representational rights. Scheduling the Union's presentation prior to lunch "has no impact on the Agency orientation and is an easily accommodated courtesy."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

While its final offer is "substantively the same" as the current article, because it has been the subject of 15 grievances, the Employer has proposed "substantive changes" to provide "clarity regarding the parties' rights and responsibilities with respect to union communications." Accordingly, its proposed wording in Section 1.A. addresses the Union's propensity for sending mass e-mails during peak times, even though the Agency's servers are "beyond capacity" and management instituted specific procedures prohibiting this. Section 1.B. regarding the standards that would apply to the Union's communications with employees "is not a new concept," but there has been confusion over whether it applied to the entire article or only certain sections. The Agency has moved the wording to the beginning "to ensure that its application was to the Article in its entirety." Its proposal in Section 3, which changes the current title from "Distribution of Literature" to "Distribution of Paper and Hard Copy Materials," would prevent the Union from arguing, as it has in many of the

aforementioned grievances, that its communications to employees "did not constitute 'literature'." The Union's final offer would modify the existing section by permitting Union representatives to distribute literature on official time, but it has failed to articulate a reason for such a change.

The Employer's proposal in Section 6 addresses the Union's practice of conducting internal business at new employee orientations. This matter was the subject of an Employer-filed unfair labor practice charge which the Union settled by agreeing to stop the practice. Subsequently, the Union violated the terms of the settlement agreement by soliciting membership at these sessions through offers of cash rebates. The Union's proposed solution to the problem is to continue its solicitations, but that its portion of these sessions "be held immediately prior to lunch." This is "an unacceptable violation of the Statute." Finally, the Union's proposal that the Agency provide its representatives with training on various aspects of the use of the Intranet "excessively interferes with management's right to assign work."

CONCLUSION

Having considered the record presented by the parties on this article, we shall order the adoption of the Employer's final offer to settle the matter. In our view, in most cases the Employer has supported its proposals to change the *status quo* on the basis of problems encountered during the term of the current MLA, whereas the Union's final offer either maintains or expands current provisions which have been the source of differing interpretations and unconstructive disagreements.

10. Article 13 - Parking and Transportation

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The transportation subsidy "is the only issue left open in this Article." Such subsidies are intended to encourage the use of public transportation "to support an ongoing major environmental initiative, particularly in urban settings." The Agency's regional offices are all located in center city environments where the current subsidy is $40 per month. The Union's proposal to raise the subsidy to $65 per month is an incremental approach "well justified by current costs." Many

other Federal agencies in the same locations authorize up to $100 per month, and even HHS employees in the same cities receive up to $65 per month. The Union's proposal simply provides benefits comparable to those received by Federal employees in other agencies, is consistent with law, "and reflects increases in public transportation costs since the last contract."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The parties have agreed to all issues covered by this article except for Section 3.A., B., and C. Despite initialing those sections where agreement has been reached, however, the Union has submitted an Article 13 final offer that "does not seem to reflect such an agreement and contains slight variations from the signed Article." On the only substantive disagreement that remains, the Union's proposal to provide a public transportation subsidy of up to $65 per month for employees whose official duty station is other than Washington, D.C., would cost approximately $1,060,000 per year. The Employer's proposal to allow a maximum benefit of $40 per month, on the other hand, would cost about $700,000 per year, an increase in $200,000 over what the Agency currently has agreed to authorize and fund. The Union "has not articulated or demonstrated a need for such a dramatic increase in the expenditure of Agency funds for this subsidy."

CONCLUSION

After carefully reviewing the evidence and arguments presented by the parties on the public transportation subsidy issue, we are persuaded that the Union's final offer balances the equities involved better than the Employer's. In this regard, the comparability data provided by the Union demonstrate that many similarly-situated employees outside the Washington, D.C., area are eligible to receive higher monthly amounts than CMS employees. In addition, because the Employer's cost estimates assume that employees will receive the maximum allowable benefit, they appear somewhat inflated. Even if they prove to be accurate, however, they do not provide sufficient justification for denying CMS employees subsidies adequate to meet the goals of the legislation authorizing such programs.

For these reasons, we shall order the parties to adopt the Union's final offer on this article.[9/]

11. Article 14 - Reduction in Force and Transfer of Function

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Its proposed Section 2.E. "would ensure that the Union receives notification if the Agency modifies its current competitive area and is able to bargain to the full extent of the law." Although management is entitled to change its competitive areas consistent with law and Government-wide regulations, under section 7106(b)(2) and (3) of the Statute, the Union may negotiate over the procedures that management will observe with respect to, and appropriate arrangements for employees adversely affected by, the exercise of that right. Section 22, on the other hand, "applies to RIFs in general," and would make clear that the Union has not waived any of its rights to negotiate on changes in working conditions, including its rights to bargain "based on the 'covered by' doctrine." Its proposals are justified because of the serious potentially harmful consequences that RIF actions can have on "innocent employees."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

9/ The Employer's contention that the parties have already reached agreement on all matters in this article except for the wording in Section 3.A.,B., and C., appears to be supported by the record, as well as the Union's written submission. It is unclear why there are discrepancies between the final offer the Union presented to the Panel on the other sections of the article, and the initialed sections submitted by the Employer as evidence that an agreement over them was reached during negotiations. In any event, by ordering the adoption of the Union's final offer, it is not our intention to supercede any agreements that were reached on sections other than Section 3.A., B., and C. This will be reflected in the Order at the end of this decision.

The Employer has no counter-offers regarding the Union's proposals for Sections 2.E. and 22. On Section 19, Transfer of Function, its proposal only differs from the Union's by specifying, in the first sentence, that "the Agency **may** permit other employees in the competitive area losing the function to volunteer for transfer with the function in place of employees identified by the Agency for transfer," rather than **will**. This would provide more flexibility for management to move employees as necessary to accomplish its mission, and is consistent with 5 C.F.R. § 351.303(e)(1), which uses "may." As to the Union's proposed Section 22, by including the phrase "comprehensively covered by," it would operate as a waiver of the Agency's "covered by defense," which is a permissive subject of bargaining. The Employer has repeatedly indicated to the Union that it is not electing to negotiate over such subjects, or to waive its right to assert the covered by defense. Moreover, it is unclear why the Union inserts this provision into "such a comprehensive article."

CONCLUSION

Upon review of the matters raised in this article, we shall order the adoption of the Employer's final offer to resolve the parties' dispute.

12. Article 15 - Contracting Out

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Its final offer, which "mirrors" a current agreement between NTEU and the Food and Drug Administration (like CMS, an activity within HHS), "shows a business-like approach to the lawful inclusion of the Union" in Commercial Activities (CA) studies. The agreement was "touted" and "circulated" at an HHS Labor-Management Committee meeting "as a model." The Employer's final offer, in contrast, "is woefully inadequate to address this serious and complicated issue." In this regard, no Union involvement at all is required until after the CA study is completed and the decision to contract out is made. As CA studies almost always require the participation of unit employees, shutting their exclusive representative completely out of the process "is contradictory and non-productive."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Its final offer "is substantially the same as the current contract Article." With the exception of another provision that neither party proposes to retain, the only other thing the Employer deletes is wording which would subject the Agency's compliance with OMB Circular A-76 to the grievance procedure, which the FLRA has consistently found nonnegotiable. In comparison with other organizations within HHS, the current article is similar to the one in the MLA between AFGE and the SSA. The collective bargaining agreement at the HRSA has no article on contracting out.

Unlike its final offer, the Union's "is dramatically different than the current contract and sets forth a lengthy process that is difficult to understand." It was presented by the Union for the first time 2 years after the negotiations began, without an explanation of how the process would work, or why it is needed. Like the current contract, it would impermissibly subject disputes over compliance with OMB Circular A-76 to the negotiated grievance procedure. Finally, because the process it sets out is so lengthy, it would "negatively impact the Agency's ability to comply with the President's Management Agenda Initiative concerning contracting out."

CONCLUSION

Having considered the positions presented by the parties on this article, we find the Employer's to be more reasonable. While its final offer contains a significant change from the *status quo* (*i.e.*, it eliminates the current requirement that the Employer meet and confer with the Union prior to inviting contractors to submit bids), the Union's bears no resemblance whatsoever to the current article. The fact that similar wording was agreed to at another activity within HHS is inadequate to justify such a radical departure from the manner in which contracting out historically has been handled between CMS and Local 1923. Thus, given the parties' failure to bridge the huge gap between their positions through bilateral negotiations, and the Panel's use of the final-offer selection procedure, we shall order the adoption of the Employer's final offer to resolve their dispute over this article.

13. Article 16 - Training and Career Development

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Imposition of the Employer's final offer would deny "lawful Union participation in selection for training and career development programs," and its refusal to bargain over any selection procedures could be construed as an unfair labor practice. Such opportunities could lead to promotion and other advantages for "favored employees," so the Union would be abrogating its representational obligations if it does not maintain "at least a watch dog role in training selections." While the FDA/NTEU contract calls for a solicitation of volunteers and a seniority selection procedure, the Union proposes to "deal with selection and criteria cooperatively to customize appropriate and fair procedures for training opportunities."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer would retain the current contract article, with the exception of Section 3.A., the last sentence of Subsection 4.A.3., and Subsection 4.F.1., which should be deleted. The former two provisions preclude the Agency from establishing training nomination and selection criteria, and criteria for participation in career development programs, respectively, absent the Union's concurrence. As such, they excessively interfere with management's right to assign work, under section 7106(a)(2)(B) of the Statute. Section 4.F.1. of the Union's final offer conflicts with 5 C.F.R. § 536.105(a)(3), which does not extend saved pay entitlement to employees who are reduced in grade or pay at their own request. The Union's proposed wording, however, would apply such an entitlement regardless of whether an employee voluntarily selected to enter a career ladder at a reduced grade.

CONCLUSION

After reviewing the arguments and evidence provided by the parties on this article, we shall order the adoption of the Employer's final offer.

14. **Article 17 - Awards**

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union essentially proposes the continuation of the Awards Article in the current MLA. Prior to the implementation of the current MLA provisions "management totally controlled awards." Employees were critical of the system because it was perceived as only rewarding "favorite" employees or only those working on the most visible issues, and some managers "simply did not take the time or effort to provide awards to their employees" due to workload or for philosophical reasons. The current system, which is based on a joint management/employee panel process, reflects "the diverse environments and cultures in which employees work." While management contends that the current system has caused the majority of employees to receive awards of lesser dollar amounts, "this is not a result of the joint panel process." Moreover, managers maintain "several points of control in this system," such as the discretion to grant OTS, QSI, and ES awards, and the ability to comment on all nominations of their employees prior to panel review. Managers are equally represented on awards panels, "so their voice is well heard." The Union has even proposed to eliminate the current Agency Award Board, which adjudicates non-monetary Agency and HHS awards, "thus allowing management full discretion over these awards."

The Employer's final offer "has several drawbacks," among them, a minimal reporting requirement which would not ensure that some employees are not "disadvantaged unduly," and Union representation on panels with limited jurisdiction that would not provide knowledge of the wide range of work employees perform, or allow for the geographical differences to be found in the regions. Most significantly, it would raise all the employee concerns that the current process sought to eliminate.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Union's final offer, which essentially mirrors the current awards process, should be rejected because it "allows Union representatives to award employees, to deny awards to

employees and to reject a manager's awards nomination of his or her own employee." During the 8 years it has been in use, the process has been inefficient and ineffective. It requires 22 awards panels, composed of six to eight people each, including Union representatives, to meet each year to accept awards nominations and make determinations of which employees are worthy of awards. These panels also determine the percentage of awards money that managers receive for direct distribution to employees. As a result: (1) Union representatives control how much money and time-off managers receive for direct distribution; (2) managers are generally restricted to granting "lower end" OTS awards of up to $250 or up to 1 day off; (3) the panels, "which usually have no direct knowledge of an employee's performance," can grant or reject awards "regardless of the manager's recommendation;" (4) it costs approximately $.25 for every dollar of award money distributed to operate the panel process; (5) awards are often distributed many months after the performance actually occurred; and (6) awards are "not meaningful" because 8 out of every 10 employees receives one, an average of two per year are given to each recipient, and the average amount is less than $400.

To alleviate these problems, the Employer proposes an awards structure that allows managers "to directly provide employees with awards that are meaningful and timely," *i.e.*, SA awards of up to $2,000 per occurrence and TO awards up to 80 hours per year. Agency managers, rather than Union representatives, are in the best position to evaluate the quality of employees' performance for purposes of awards, and this "management tool" is critical to a manager's ability to motivate employees "to accomplish the work for which the manager is being held responsible." Its final offer also retains certain aspects of the current system by keeping the concept of peer nominations, two panels that would address very large awards and cross-component projects, and a mechanism by which the Union can monitor the process.

CONCLUSION

Having carefully considered the evidence and arguments presented by the parties, we are persuaded that the Employer's final offer provides the better basis for resolving the impasse. As stated in previous decisions where the same fundamental issue has been raised, the Panel believes that limitations upon the discretion to distribute performance and incentive awards should not be unilaterally imposed upon management. While employers and unions are free to reach agreements through collective

bargaining which cede some or all of management's discretion in this area, the Panel is reluctant to impose restrictions on an employer's prerogatives where it has not chosen to do so voluntarily. The soundness of this belief is buttressed by the record in this case. In our view, the Employer has demonstrated a need to change the awards process that was voluntarily agreed to 8 years ago because it has limited management's ability to reward excellent performance and to enhance the likelihood that those employees most deserving of recognition will continue to serve the Government. The Employer's final offer would ensure that management can provide meaningful performance-based incentives to the appropriate employees. Although we are mindful of the Union's contention that its adoption could lead to abuses, the Employer's commitment to administer the program using objective, mission-related criteria provides the Union with a means to challenge management's awards determinations under the negotiated grievance procedure.

15. Article 18 - Equal Employment Opportunity

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union essentially would retain the wording in the parties' current MLA regarding this article. The changes the Employer is proposing to this important article would "end the participation of employees and their Union in preparation and monitoring" of the AEP, a contractual right first established in 1984 which also is found in National agreements between AFGE and both the SSA and the Department of Veterans Affairs. Its attempt to force the Union to waive its lawful bargaining rights on this subject "is reason enough for the [Panel] to reject" the proposal. The Employer also would change "the statutory reasonable time standard" for employees and their representatives to an 8-hour official time allowance, regardless of case complexity. Imposing such a restriction is "a veiled attempt to discourage complaints." Finally, Section 8 of management's proposed article regarding reasonable accommodations establishes procedures that "shut the Union out" of this representational area. In this regard, Union representatives at CMS historically have demonstrated a "superior record" in assisting employees with disabilities in securing reasonable accommodations. The current contract provision has proved to be informative and accurate, and is "present in other National contracts."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Its proposed changes are intended to "update and make clearer" the EEO article. While the Employer "recognizes its bargaining obligations with respect to affirmative employment," to the extent that the lengthy process called for in the current MLA for negotiating an AEP covers only bargaining unit employees, it may conflict with 29 C.F.R. § 1608.[10/] As for Section 5.D., the current provision only recognizes a Union right of discovery in EEO grievances, and "precludes the right of discovery for the Agency." Rather than create a complicated discovery process for both parties, its proposal addresses this inequity by deleting the discovery provision altogether. It would not, however, prevent the Union from exercising its right to information in accordance with 5 U.S.C. § 7114(b)(4).

With respect to the amount of official time employees and their representatives should receive to prepare EEO cases, there has been confusion over the matter under the current provision, with "many employees" believing "an unlimited amount of time" was available. For this reason, the Employer has proposed specific guidelines so that all of those concerned "will be aware of the rules and parameters." Based on its experience in EEO cases, its final offer provides "more than adequate amounts of official time for employees to use in the various stages of the EEO process." Turning to the parties' dispute over Section 8, during the bargaining process the Union expressed no major objections to management's proposed policy, titled "CMS Procedures for Providing Reasonable Accommodations to Bargaining Unit Employees." The reasonable accommodations policy, which is attached to the Employer's final offer, is "comprehensive" and "favorable to employees." Instead of including the policy in its final offer, however, the Union has proposed to maintain the wording in the current article, and the Employer is "unclear why the Union has omitted such an important policy from its final offer."

10/ Generally, the EEOC states that 29 C.F.R. § 1608 was promulgated "to clarify and harmonize the principles of title VII in order to achieve [] Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of title VII" (*see* 29 C.F.R. § 1608.1).

CONCLUSION

After fully examining the parties' positions on this article, we shall order the adoption of the Employer's final offer to resolve the impasse. Because a party cannot be forced to waive its statutory bargaining rights, in adopting the Employer's final offer we also shall order appropriate wording in Section 2 to clarify that this does not waive the statutory bargaining rights of either party.

16. Article 21 - Employee Performance System

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union basically would retain the provisions in the current article. The Union recognizes that it cannot negotiate over the substance of performance standards, which the Employer last changed in 1994 when it implemented a two-level performance evaluation system. Nevertheless, the law "also calls for employee input," particularly regarding new standards, which traditionally has been provided through the Union. Under the Employer's final offer, however, the last sentence of **Section 3. Communications, B.5.** would be deleted.[11/] The Employer "waives none of [its] rights" by providing the Union with advance copies of new standards if it decides to change the current system. Maintaining the current wording also would provide a "timely and expeditious process by which the Union could identify potential negotiable and implementation issues." With respect to **Section 6. Performance Assistance Plan (PAP)** and Section 7, while the Union "agreed to shorten time periods" that employees under a PEP would be given to achieve successful performance, the Employer proposes to remove Union involvement even though an employee in a performance improvement situation "may have very good reason to believe an adverse action imminent." Finally, the Union accepts management's proposed **Section 8. Performance-Based Actions (under 5 U.S.C. § 4303 and 5 C.F.R. § 432)** with

11/ The last sentence of Section 3.B.5. states that "prior to implementation of new/revised performance standards, the Agency will provide advance notification to the Union and the Parties will proceed in accordance with Article 4."

the exception of subsection E.[12/] In this regard, the current contract moves performance-based actions directly to arbitration, given the procedures that take place prior to the Agency's written decision, while the Employer's proposed subsection E. would require the filing of a grievance at Step 2. The problem with this approach is that the Union "does not know who the Agency will designate as the Step Two (2) Official."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

5 C.F.R. § 432.104 provides that, when addressing unacceptable performance, an agency shall afford the employee a "reasonable opportunity" to demonstrate acceptable performance. The current article, which requires the Employer to use a two-step process for handling such matters, defines a "reasonable opportunity" as a total of 135 calendar days. This is more liberal than what is contained in "most collective bargaining agreements," where the period is usually defined as 90 days. In contrast, the HRSA CBA provides employees with only 45 to 60 days to demonstrate acceptable performance. For this reason, although the current two-step process would be maintained, the Employer proposes an aggregate period of 90 calendar days for this purpose. It also proposes to eliminate an employee's right to Union representation during the counseling sessions required under the two-step process, while retaining that right in formal, performance-based actions. Such counseling is intended "to provide employees feedback in an informal, non-adversarial setting," and is unlikely to achieve its purpose with the Union present. The Employer proposes to delete Section 6.C. and D. from the current MLA "because these two provisions have been interpreted by the Union to preclude the Agency from gathering and using documentation in support of subsequent actions."

References in the current article to "reassignment" as an option for the Agency when taking a performance-based action must be removed because they are inconsistent with 5 C.F.R. § 432.102, which covers only "reduction in grade and removal of employees based on unacceptable performance." Similarly, it has modified or eliminated four other provisions in the Union's final offer, as they are outside management's duty to bargain.

12/ We note that the Union's final offer in Section 8 is inconsistent, in some respects, with its statement of position.

In this regard, Section 2, which requires the Employee Performance System "in its entirety and application" to be fair, equitable, and solely related to the job, interferes with its right to appraise employees, to the extent that the phrase "in its entirety" refers to the content of performance standards. Section 3.B.5. excessively interferes with management's right to assign work by mandating that the Union receive notice and an opportunity to bargain "changes to performance standards." Section 5.B. precludes management from taking a performance-based action because it prevents employees from being held accountable for factors that affect performance beyond their control. The FLRA previously has found negotiable only provisions which require management to "take into consideration" factors beyond the control of employees. Finally, under section 7121 of the Statute an employee's election of an appeals procedure occurs when a timely grievance is filed. The Union's proposed Section 8.E.[13/] is inconsistent with the requirements of section 7121, however, as it ties the election to the invocation of arbitration.

CONCLUSION

Having carefully considered the evidence and arguments presented by the parties on this article, we are persuaded that the Employer's final offer should be adopted to resolve their impasse. Although they disagree on a number of issues, foremost among them are: (1) the length of time an employee should have to demonstrate satisfactory performance, (2) Union involvement in the counseling phases of the parties' two-step process, and (3) the collection and use of documentation when an employee is under a PAP. On all of these key issues we find the Employer has offered the more reasonable approach. In this regard, its proposal under the two-step process provides employees with a total of 90 calendar days to improve their performance to an acceptable level, which appears to represent the norm in the Federal government. The Union's presence during counseling seems to be inconsistent with the fundamental purpose of such sessions. Moreover, if management decides to proceed with an adverse action after the performance improvement phase has been completed, the Employer's final offer preserves the Union's legitimate interest in defending employees against unfair treatment. Furthermore, management's need to document an

13/ The Union's final offer mistakenly contains two sections identified as 8.D. For purposes of this decision, we have identified the second of these sections as Section 8.E.

employee's progress during the performance improvement period is a well-established aspect of the process.

Finally, the parties' differing interpretations of the meaning of the last sentence of Section 3.B.5. raises a question concerning the Union's statutory bargaining rights. Our adoption of the Employer's final offer should not be read as an endorsement of its view that the existing wording (which the Union proposes to retain) provides the Union with a contractual right to negotiate over the content of new or revised performance standards, or as a waiver of the Union's statutory right to negotiate over the impact of new or revised standards on unit employees. Accordingly, a sentence shall be added to this subsection of the Employer's final offer stating that the Panel's decision does not waive either parties' statutory bargaining rights concerning this subject.

17. **Article 22 - Within Grade Increases**

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The parties' dispute over Section 3.C. arises from the Employer's "misreading" of the current provision. The wording dates back to 1991, and arose from situations where the supervisor is aware that a WIGI determination is due but "allows the due date to pass." It prevents deserving employees from suffering monetary loss by making the WIGI effective on its original due date in circumstances of administrative error. While the "timeliness of determination[s] has greatly improved" since the provision originally went into effect, it still serves the purpose of protecting employees whose "performance unquestionably merits a WIGI" from incurring a monetary loss.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Union has interpreted subsections in the current article "as precluding management from withholding a WIGI to an employee who is not performing at an acceptable level of competence" unless 60 days' notice is provided. This would result in employees who are not performing at an acceptable level of competence "inappropriately receiving a WIGI." The

Employer's proposal addresses this concern by changing Section 3.B. to permit management to deny a WIGI to an employee who is not performing at an acceptable level of competence if notice is provided before the end of the statutory waiting period for eligibility for a WIGI. The wording in Section 3.C. of the Union's final offer (and the current article) regarding "retroactive WIGIs" has been removed from the Employer's proposal because it conflicts with 5 C.F.R. § 531.412(b).[14/]

CONCLUSION

Upon thorough examination of the parties' impasse over the subsections in question, we are convinced that the Employer's final offer should be adopted. Preliminarily, there is no evidence in the record concerning the number of deserving employees who have been denied WIGIs because of administrative error. The Union does admit, however, that the circumstances which these contract provisions were originally intended to address have changed, and that the "timeliness of determinations has greatly improved over the years." Thus, it appears that there would be only marginal benefit to employees in continuing these provisions. In addition, the Union's contention that the Employer has misread their meaning is unsurprising. Neither subsection clearly states that they are intended to address administrative errors, and their meaning remains unclear to us even after repeated readings. The Employer's corresponding proposals do not present such difficulties and, accordingly, we shall order the adoption of its final offer.

18. Article 23 - Disciplinary and Adverse Actions

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Its final offer reflects both "current case law and Federal sector practices." The Union's proposed wording in Section 1.B. would give weight to the MLA by ensuring that all disciplinary

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14/ 5 C.F.R. § 531.412(b) states that:

> (b) When an acceptable level of competence is achieved at some time after a negative determination, the effective date is the first day of the first pay period after the acceptable determination has been made.

actions are taken consistent with the entire agreement, while the Employer's final offer attempts to limit application of the agreement in relation to discipline only to this article. In Section 1.D., the Union would ensure due process by requiring management to provide to the employee, or his or her designated representative, all information relied on to effectuate discipline, including any witness statements. Its proposal in Section 1.E., which lists a specific sequence of steps to serve as guidance when adverse or disciplinary actions are being considered, follows "the tenants of progressive discipline," and is "largely unchanged from previous contracts." The Employer's counter-offer on this subsection, on the other hand, "alludes to progressive discipline," but is "vague" and "subject to interpretation."

The parties' main difference in Section 2 concerns the length of time that evidence of counseling should remain in the Agency's records. The Union proposes a 6-month limit. The Employer's position not to establish a limit is inconsistent with the purpose of counseling, which is designed to put employees on notice that if the conduct continues, it may result in discipline. In Section 3, the Union proposes to apply the same process to both reprimands and short-term suspensions, whereby the employee would be given the opportunity to respond prior to either of these types of disciplinary action becoming final. This is consistent with the "long-standing practice of trying to resolve issues at the lowest possible level," and "recognizes the seriousness of any disciplinary action." The Union also considers its proposal to be a trade-off for the "major concessions" it made by eliminating a step of the grievance procedure in Article 24. Finally, the only substantive difference between the parties on Section 4 is whether employees who choose to appeal through the grievance procedure, rather than MSPB, should have 20 workdays to file, as it proposes, or 10 workdays, as proposed by the Employer. Twenty workdays "amounts to approximately 30 calendar days which is consistent with the time frame afforded by the MSPB for appealing the action."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer's offer in Section 1.F. refers to the purging of records of disciplinary or adverse actions in the "supervisory working folder," while the Union's offer refers to

the employee's Official Personnel Folder. Only its proposal is consistent with OPM guidelines. In Section 2, the Union has proposed new provisions which: (1) establish its right to be present in "run-of-the mill" informal counseling sessions, and (2) require all records of counseling to be expunged within 6 months. The former would create an "adversarial situation where none exists," while the latter provides management with no discretion or flexibility in counseling, documenting such counseling, and attempting to mentor employees. On the question of whether managers should be required to propose reprimands before they are issued, the Employer's position is "more consistent with the purpose for lower level discipline," and more comparable to other CBAs. Giving management the latitude to issue reprimands without a prior proposal phase resolves the matter quickly while preserving the employee's right of appeal through the grievance procedure.

Sections 3.C. and 4.A. of the Union's final offer should be rejected because they would grant the Union with the right to be present at all oral replies. Oral replies under Article 23 are not formal discussions, and to the extent that the Union would be permitted to be present when not requested by the employee, it "violates the Privacy Act." The Union's proposals in Sections 3.D. and 4.B. interfere with management's right to assign work by designating specific officials to issue proposed disciplinary actions. In addition, by proposing that an employee be permitted to file a grievance after receiving a final agency decision, the Union would change the current number of review steps from three to four. The Union "has provided no reason or even articulated a desire" to increase the number of steps. Finally, in Section 3.E. the Union proposes to expand the stay provisions in the current contract by requiring all suspensions of 14 days or less to be held in abeyance if arbitration is invoked in a timely manner. Arbitration could take months, if not years, to complete, and the Union has cited no instances during the term of the MLA where the existing "stay provision was used and the suspension action overturned." This demonstrates that the parties do not need a stay provision at all, let alone a new one that "requires a stay in *every* short-term suspension case."

CONCLUSION

After a full analysis of the parties' positions on the areas of dispute in this article, we conclude that the Employer's final offer would provide the better basis for their resolution and shall order its adoption. Among other things,

the Union has failed to address the need for its proposal to hold suspensions of 14 days or less in abeyance where the Employer's decision is appealed to arbitration. In the absence of evidence that management at CMS previously has meted out discipline unfairly, the Panel is unwilling to impose a provision that could undermine its effectiveness and encourage frivolous appeals. Other portions of its final offer that lack sufficient justification, in our view, would establish the Union's right to be present at informal counseling sessions, increase the number of steps that must be followed after a final agency decision on discipline, and grant affected employees 20 workdays if they elect to grieve the final decision. The Employer's final offer, on the other hand, appears to strike an appropriate balance between management's need to act timely and decisively in taking disciplinary and adverse actions, and the Union's interest in protecting employees against unjust treatment. For these reasons, we shall order its adoption.

19. Article 24 - Grievance Procedure

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Section 4 of its final offer would continue existing contract wording which permits a grievant one opportunity to "reconstitute" a grievance to correct procedural deficiencies if management raises a non-grievability or non-arbitrability allegation. This allows the parties "to address the merits without the added cost of additional litigation on procedural matters," and "has served the parties well." The Union's proposal on Section 6 would provide both sides with an incentive to process grievances in a timely manner, and penalizes each fairly if time frames are missed. Under the Employer's final offer on this issue the Union is penalized twice, once by having the grievance terminated if it misses a time frame, and a second time when management misses a time frame "because the process must be repeated without having obtained a decision."

In Section 8, the Union again is proposing the continuation of existing "non-problematic" contract wording concerning potential EEO cases which can be found in two other CBAs that Local 1923 has negotiated with other agencies. The Employer's final offer, on the other hand, would "effectively preclude" an employee from grieving an action and "force the employee to either drop the matter or file a formal complaint with the EEOC

at a greater cost to the taxpayer" if informal resolution is attempted first. By proposing that Union/Management grievances (Section 9) be filed within 30 workdays, rather than 20, the parties would have time "to informally resolve the grievance." In that same section, the Union also proposes the "current non-problematic contract" wording permitting it to file a grievance on a continuing violation at any time. Finally, its final offer on Section 10 merely restates the law that the Union "does not have to represent employees on statutory violations."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Unlike the Union's Section 3 proposal, which provides that an employee will be deemed to have exercised his option to 5 U.S.C. § 7121 when the Union "invokes arbitration timely," the Employer's states that the election occurs "when a *timely grievance is filed*." Only the Employer's proposal "conforms to the requirements of the Statute." Its proposed wording on Section 5 is an attempt to alleviate the "significant confusion" the parties have had regarding grievance processing procedures, particularly threshold disputes concerning the timeliness of grievances. By proposing the "commonly accepted standard" that a grievance must be filed within 20 working days of the date the employee "became aware or should have become aware" of the incident, the Employer's final offer "provides clarity surrounding this time requirement." In addition, the Union's Section 5 proposal eliminates the current contract obligation "to identify as the basis for the grievance the specific Article and *section* of the MLA," which would only intensify the problems managers currently experience in determining what provisions employees allege to have been violated. Its wording requiring the step 1 official "to ask the grievant if a step 2 review is requested" also "does not mirror the current practice between the parties." With respect to the Union's attempt in Section 5 to make deciding officials address the merits of grievances regardless of whether they have the authority to grant the requested relief, imposing such a requirement "simply does not make sense" because "it is a waste of time and resources."

The Employer's section regarding time frames (Section 5.C.) is superior to the Union's corresponding proposal (Union Section 6.) because "it provides more clarity." In this regard, the Union's ambiguous wording calls for the waiving of time frames if the Agency fails to respond to a grievance. To the extent

the Union seeks the waiver of all time frames "the remedy is much more broad than the violation." Section 8 of the Union's final offer "outlines a different process for EEO grievances" than the regular grievance process. By identifying the step 1 official, it interferes with management's right to assign work. It also refers to a step 3 official, which is problematic because "there is no step 3." Once again, the Employer's corresponding counteroffer in Section 7 should be adopted because it provides "clarity and consistency" with the regular grievance process set out in Section 5. Finally, the Employer's proposal regarding Union/Management grievances (Employer Section 8) includes the same "should have become aware" wording contained in Section 5 referred to above, and provides the same 20 workday time frame for filing as for an employee grievance. This would prevent the parties from using one type of grievance to "circumvent the time frames for the other." Moreover, the Union has never identified why 30 workdays for filing Union/Management grievances are necessary.

CONCLUSION

Having carefully considered the parties' final offers on this article, overall, we conclude that the Employer's is clearer and would be easier to administer during the term of the successor MLA. In particular, portions of Section 8 of the Union's final offer are inconsistent with Section 5, while portions of Sections 5 and 9, and Sections 10 and 11, appear to be unnecessary. Further, the Union's justification for giving grievants the chance to correct procedural deficiencies fails to persuade us to continue such an extraordinary provision. Its supporting statement neglects to address its proposal to delete the current requirement that specific sections of the MLA be identified as the basis for a grievance. Moreover, contrary to the Unions allegation, Section 7 of the Employer's final offer does not appear to preclude the filing of a grievance, or force the employee to either drop the matter or file a formal complaint with the EEOC, simply because attempts to resolve the matter informally are undertaken first. For these reasons, we shall order the adoption of the Employer's final offer on this article.

20. Article 25 - Arbitration

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Section 5 of its final offer essentially would continue existing contract wording regarding a "supplemental" arbitration procedure. The revisions that it proposes are intended to address the concern expressed by the Employer during bargaining that the existing procedure is "too broad." In this regard, Section 5.A. of its proposal "limits the supplemental procedure to primarily non-disciplinary actions," *i.e.*, the only disciplinary actions that could be raised are reprimands and suspensions of 3 days or less. Supplemental arbitration procedures, which are also referred to as "expedited" arbitration, "are a staple in the Federal sector." Its proposed procedure eliminates the need for transcripts and briefs, limits hearings generally to 4 just hours, uses a panel of arbitrators that permits the parties to schedule cases quickly, and urges arbitrators to issue bench decisions. As a result, its continuation would save time and money for the Union, the Agency, and taxpayers. While the Employer "seemed adamantly opposed to any sort of a supplemental procedure" during the negotiations, and fails to even address it in its final offer, there is not one *bona fide* reason for not utilizing a supplemental procedure that was cited by the Agency."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Due to its "clarity and consistency with other articles," the Employer's final offer on Section 1 is a better approach than the Union's. In this regard, it reflects the changes that both parties have made to Articles 23 and 24, which specify that only an Article 24 grievance can proceed to arbitration, and it sets out specific time frames for referral to arbitration for both employee grievances and Union/Management grievances. The Union's proposal on Section 1, on the other hand, erroneously states that actions processed under Article 23 can be referred to arbitration, and establishes no time frames for invoking arbitration on Union/Management grievances. The latter is particularly troublesome "in light of the problems the parties have had in determining time frames" for the arbitration of such grievances. On the issue of transcripts (Section 4.C.), the Union would continue a practice whereby it receives a transcript for free whenever the Employer requests one. The Employer's proposal to share the costs of transcripts equally is fairer, and "consistent with the way that the parties divide other costs associated with arbitration." In addition, Section 4.J., which clarifies that "there is no right of discovery for either party

during arbitration," is consistent with its final offer and supporting arguments in connection with Article 18, where it proposed to remove the "one-sided discovery provision" from the current MLA.

Regarding the "Supplemental Arbitration Procedure," which is the "biggest substantive difference" between the parties on this article, the Employer proposes to eliminate it from the successor MLA. This "expedited" procedure has produced "the exact opposite result" from what was intended when it was implemented. In this regard, many of the hearings on the issues for which the Union proposes to continue to use the procedure have taken more than 1 day to complete; it "has not been uncommon" for the parties to contact one of the arbitrators on the "supplemental panel" and be told that "the next available arbitration date" was 2 or 3 months away; and most, "if not all," of the decisions rendered under the procedure have been issued 6 to 8 weeks after the hearing, despite the contractual mandate of a 2-day turnaround, a length of time which is greater than the contractually-imposed time limit for "major arbitration." While an expedited arbitration process "may be a good idea in theory," at CMS it has become, in practice, "another major arbitration process." This is substantiated by the length of the section in the current article compared to that of the major arbitration section.

CONCLUSION

After full and careful review of the parties' arguments and evidence on the issues dividing them in this article, in our view, the Employer's final offer provides the more reasonable basis for resolving their impasse. For example, its wording on Section 1, unlike the Union's, is consistent with the parties' proposals in other articles, and it addresses time frames for invoking arbitration in Union/Management grievances, a previous area of conflict on which the Union's final offer is silent. Perhaps more importantly, however, we are persuaded that the revised supplemental arbitration procedure the Union proposes is unlikely to improve on past performance and ensure that the process is cheaper and faster than standard arbitration. Accordingly, we shall order the adoption of the Employer's final offer.

21. Article 26/27 - Promotions, Reassignments and Details or Article 26 - Merit Promotion and Article 27 - Details and Temporary Assignments

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union's Article 26 proposal to replace the selection panels found in the current MLA with more traditional assessment panels (Section 9) is a "major concession." Variations of this type of panel "have been used by many agencies" to rank candidates for promotion and establish best-qualified lists. Similarly, its proposal to continue to require management to consider internal candidates for 10 workdays prior to considering applicants from outside the unit (Section 7.A.3.) is contained in "all other HHS contracts as well as SSA, VA, etc.," and grants CMS unit employees the same advance consideration enjoyed by other bargaining units in HHS. In addition, a longer period to audit selection decisions (Section 14.D.) than what is currently provided is necessary to investigate employee complaints of "patterns of discrimination or impropriety."

The Employer's final offer is a "radical departure" from the current merit promotion process which "attempts to roll back safeguards to the days when promotions depended on who you knew, not how well you perform." For example, it proposes to enable management to reduce the area of consideration to a size that would "yield a sufficient number of high quality candidates." Given the nature of the jobs at CMS, this would leave out other equally qualified candidates from consideration, thereby causing "utter disillusionment among employees." The Employer also rejects the "long held tenet" involving merit system competition between candidates on a best-qualified list of "interview one, interview all," and "blurs the Agency's obligation" to pay employees at the grade level of the work assigned and performed. Regarding the latter, "arbitrators have consistently held CMS liable for back pay to employees ordered to perform higher graded work without being provided a temporary promotion."

The Employer would eliminate the current article on details and temporary assignments in its entirety, and instead incorporate "significantly reduced" sections addressing these matters into Article 26. This is inconsistent with the practices at other agencies that maintain separate contract articles on these issues. More specifically, Section 4 of the

current MLA, which requires management to solicit volunteers and apply a seniority selection procedure when offering non-competitive details to both classified and unclassified positions, "was awarded by the FSIP in 1991." The Union nevertheless has responded to the concerns the Employer expressed during bargaining by substantially reducing the area to be canvassed for volunteers, and the time required for both the canvassing and employee responses. Its proposal meets the Employer's interest in "rapid, targeted action," as well as the Union's in ensuring that management is not violating the principles of merit promotion by non-competitively detailing employees. In the past, non-competitive details had been the "prime vehicle" for pre-selection for promotion. Moreover, the abbreviated process gives employees an opportunity to volunteer for assignments that may enhance their career development.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Its final offer reflects the "dynamic nature" of the Agency's work, which requires it to promote and re-deploy its employees quickly to areas where they are needed most. A single article merging current Articles 26 and 27 is justified because both relate to "internal employee movement." The Union's final offer to maintain separate articles continues "the same rigid, inefficient and laborious processes" which currently exist. For example, on the issue of merit promotion, the Union's proposal mandates the use of "Assessment Panels," which include two Union representatives, for all competitive actions. The panels' functions are extensive, including the exclusive gathering of information on candidates and the selection of applicants if there is an initial declination. The Union's decision to change the name of the panels does not alter the fact that they "contribute significant delay in filling key vacancies," are "not cost effective," and "interfere with management's right to hire" because of the role played by the Union's representatives. In contrast, the Employer's final offer on this matter provides management with the flexibility to use one of three evaluation processes and leaves the selection solely to the selecting official. In addition to being legal, cost efficient, and comparable to the process contained in the HRSA CBA, it "preserves the Merit System Principles."

The Union's Article 26 final offer also contains other provisions which are outside the duty to bargain, such as a

requirement for Assessment Panel concurrence in expanding or reducing the area of consideration, and a "blanket disclosure of evaluation/crediting plans on vacancy announcements." Nor has it "articulated a need" for its newly-proposed first consideration procedure (Section 7.A.3.), or justified maintaining the "problematic *bona fide* standard" concerning priority consideration, rather than using the word "genuine," particularly where the parties already have agreed to a similar change in Article 33.

In Article 27, the Union essentially proposes to retain "one of the most problematic provisions" contained in the current MLA concerning non-competitive details and reassignments. The existing process is "inflexible" and poses "a substantial obstacle" to the accomplishment of the Agency's mission by severely limiting its ability to respond quickly to unforeseen events. The Union has argued that the Agency's unilateral movement of personnel in the past has provided certain employees with unfair advantages. However, "by its very definition" a non-competitive action does not provide substantive advantages to employees, which is "why it is exempt from the requirements of the competitive process." In addition, it has been the Agency's past experience that the use of seniority as the exclusive criterion for selection to non-competitive details and reassignments does not meet its needs "as it fails to account for many other relevant business-related factors that should be considered." The ineffectiveness of the current process has caused management to resort to posting vacancies using the competitive process, or requesting waivers from the Union which "many times" have been delayed or denied, or "leveraged" by the Union for concessions on other unrelated matters. To remedy these difficulties, the Employer has proposed a process permitting management to simply exercise its discretion in filling non-competitive assignments to meet the needs of the Agency.

CONCLUSION

Having carefully considered the parties' positions on the procedures that should govern their relationship concerning promotions, details, reassignments and the like, we conclude that, on balance, the Employer has set forth the more reasonable approach. Preliminarily, it makes a persuasive case for combining the two currently separate articles because both involve the internal movement of employees within CMS. Further, the Union's final offer on the Merit Promotion article makes a number of references to details and reassignments, and both of

its proposed articles contain identical provisions regarding "assignments of duties for medical reasons," undercutting the need to separate them. On the more substantive aspects of the parties' dispute, which involves disagreements on issues far too numerous to mention here, we highlight only two. Without having to address the Employer's contention that the Assessment Panels proposed by the Union interfere with its management rights, it is clear that such a monolithic approach to competitive actions has produced inefficiencies that far outweigh any of the benefits the Union musters in support of its continuation. In our view, the same can be said regarding the rotation procedure for non-competitive details currently in place, which the Union has basically proposed to retain in the successor MLA. For the reasons stated above, we shall order the adoption of the Employer's final offer.

22. Article 29 - Work-At-Home Programs/Flexiplace

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article. Other than reflecting the Agency's recent name change to "CMS," the Union's final offer is identical to the article in the current MLA, which is titled "Work-At-Home Programs." The Employer seeks to eliminate an employee's option of working at home for a specified period in the event of serious injury or illness of a family member. The existing program, which the Union proposes to retain, enables employees to care for an affected family member while remaining productive employees. It allows them to avoid the cost of hiring trained medical care providers and/or exhausting their leave in an effort to provide coverage. In this regard, according to the National Family Caregivers Association, 26.6 percent of the U.S. population "has provided care to a family member in the past year." Those who participate in the program "are held to the same criteria and procedures as those who perform work at home due to their own individualized medical needs." If an employee's ability to process their workload is not affected by providing medical assistance to a family member "there exists no plausible rationale for disposing of the provision."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer proposes to merge all of its flexiplace programs into one article, and change their names "to more accurately describe" each one. The Employer recognizes the value of all three of its existing flexiplace programs, but its experience in administering them has prompted the need for changes in the eligibility criteria, and the ability of managers to "adjust and suspend" the programs to meet the Agency's work requirements. By limiting employees to working at an ADS no more than once per week on a regularly scheduled basis, its final offer "more appropriately balances" the parties' interests, and ensures that employees "are in the office to be responsive to beneficiaries, Congress, contractors, and external partners." Its proposal does not preclude employees from working EFP on additional days, but does address the fact that many employees' flexiplace arrangements have been "grandfathered" from a previous agreement with another union. To provide consistent flexiplace arrangements for all of its employees, it has included wording that terminates any that do not comply with the MLA on its effective date.

The Union's final offer on flexiplace, which is found primarily in Article 10, retains the current MLA's minimal substantive criteria for evaluating an employee's suitability to participate in the program. This has "resulted, in some cases, in every employee in a work unit being out of the office on the same day." The Agency's experience in "practical application and grievances" suggests that "more meaningful work-related criteria" are necessary. Hence, it has proposed that an employee's work assignments must be portable, that the employee does not require close supervision, feedback, or face-to-face contact, and that the employee is not in a position that requires the use of sensitive, Privacy Act, or proprietary information. While the Employer's final offer permits the temporary suspension of scheduled flexiplace in certain circumstances with at least one-pay period notice, the Union's requires bargaining to suspend scheduled flexiplace beyond one pay period. The Union's proposal also provides minimal substantive criteria regarding the removal of employees from flexiplace, and prevents employees from being called back to their official duty stations unless there are "emergency operational exigencies," illustrating once again its rigidity in permitting management to meet legitimate work requirements.

On the issue of MFP, the Employer proposes that employees continue to be permitted to request to work at home for a specified period of time to care for themselves. Unlike the Union's approach, however, MFP would not be available to care

for family members. CMS employees are already provided with up to 12 weeks of family-friendly leave annually for such purposes. Finally, the Union sets out an unnecessarily lengthy internal approval process which, by designating specific management positions to perform duties, interferes with management's right to assign work. In contrast, the Employer has proposed that "employees simply submit a written request to their manager."

CONCLUSION

After carefully examining the parties' positions on flexiplace, consistent with our previous decision regarding Article 10, we shall order the adoption of the Employer's final offer to resolve the dispute. In our view, it is more appropriate to create a separate article encompassing all of CMS's flexiplace programs than to continue the practice under the current contract, which attempts to distinguish between flexiplace and work-at-home programs, and identifies flexiplace as a subsection under the Hours of Work Article. Conceptually, flexiplace concerns the location **where** work is performed, and not the hours of the workday **when** it is performed. Therefore, scheduled, episodic, and medical flexiplace logically belong together under a different heading than hours of work. More significant than the architecture of the MLA, however, is our belief that the Employer generally has demonstrated the need for new wording which provides managers greater ability to control employees' participation in the various flexiplace programs so the efficient accomplishment of the Agency's mission is ensured. In tandem with this is the need for consistency throughout the Agency in employees' flexiplace arrangements. Unlike the Union's final offer, the Employer's addresses this issue by abolishing past practices that do not comply with the flexiplace programs and procedures established in the article. Finally, concerning the parties' impasse over whether employees should continue to be eligible to use the MFP program to care for family members, it is unclear from the record when or why the Employer voluntarily agreed to such a provision. Nevertheless, we are persuaded that it is unnecessary to retain this employee option within the medical flexiplace program given that Congress appears to have adequately addressed such circumstances when it enacted the Family and Medical Leave Act of 1993.

23. Article 30 - Official Time/ Official Time for Union Representatives

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The Union's officers have been afforded reasonable time since 1981, which "translated into virtually full time due to the high volume and wide range of labor relations activity." All other Union representatives use reasonable time for statutory proceedings and Agency-initiated activities, and a separate "bank of hours" is used by Union representatives for "contract enforcement activities." With respect to the bank of hours, the Union has reduced its final offer from 18,000 hours to 13,000; overall, its amended proposal on official time represents a 50-percent reduction from the current MLA. The other sections of its final offer "represent sound labor-management practices evident in other Federal contracts and present in the generations of HCFA/AFGE contracts."

By comparison, the Employer proposes an annual official time bank of 9,000 hours to cover all labor-management activities, and the imposition of a 50 percent cap per Union representative. Not only would this place an "impossible burden" on the Union to fulfill its legitimate representational responsibilities, but its final offer "contravenes the Statute" by requiring that official time granted under 5 U.S.C. § 7131(a) and (c) be drawn from the bank of hours. In this regard, under the Employer's approach, once the bank is exhausted "no employee would be granted any official time" in accordance with § 7131(a) and (c). In addition, any Union representative who has received a 50-percent allotment would not be granted any official time, "thus losing their experience and historical knowledge related to ongoing issues." The statistics the Agency uses to support its proposed bank of 9,000 hours distort the true picture. They include a 6-month time period at the end of 2002 when four full-time Union representatives retired and, "like most Federal employees" prior to retirement, were using an unusually high amount of leave. Finally, the Employer is not alleging abuse of official time "but rather that the Union representatives are too effective in their representational activities." The reduction in official time that it proposes "would not permit the Union to function effectively," and "wrecking what has been for years the most sophisticated and responsible labor-management relationship

in the Federal sector" is not in the best interest of the Agency's employees or its managers.

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Union's interpretation of the current contract has resulted in 16 grievances, one of which is pending arbitration, and a pending unfair labor practice charge. The parties' disagreements concern the administration of official time, accountability for the use of official time, the activities for which official time is available, and the amount of official time available for individual Union representatives. Regarding the latter, while the Union's final offer does not specify the amount of official time available for individual representatives, it interprets the current MLA to require seven of its officers to be on 100-percent official time (*i.e.*, "they do no Agency work"). The Union also has proposed an increase in the amount of annual bank hours from the 12,000 permitted under the current article to 18,000, with the potential carry over of such time to the next year. This is exclusive of any "reasonable time" used for "Agency-initiated activities." Its proposals are "unacceptable in light of diminished Agency resources, increased workload and OPM's directives." They are also inconsistent with the amount of official time the Union has reported it has used on its own monthly accounting forms. The forms show that, with the exception of official time for these successor MLA negotiations, the Union only used a total of approximately 8,000 hours in 2002.

The Agency's final offer is an attempt to clarify the current article for employees engaged in representational duties, and to comply with OPM's directive that "labor and management are equally accountable to the taxpayer and have a mutual duty to ensure that official time is authorized and used appropriately." To achieve these ends, among other things, it has proposed that no representative be permitted to spend more than 50 percent of his or her regular working hours for the calendar year (1,040 hours) on official time, and that Union representatives share an annual bank of 9,000 hours. In addition to its desire to see that all employees perform some amount of Agency work, the reasonableness of its proposals is demonstrated by figures which show that in 2002 the average amount of official time used by a single Union representative was approximately 15 percent of his or her regular working

hours. The Employer recognizes, however, that neither of the two official time limitations it proposes "can be used to deny Union representatives official time authorized by the Statute." Finally, the Employer also has set forth general requirements in Section 2 to address issues over which the parties have disagreed, such as whether Union representatives can be rewarded for activities performed in that capacity, and a clear set of accountability requirements in Section 5 that will enable it to comply with OPM's mandate.

CONCLUSION

Upon careful examination of the record established by the parties regarding this article, we conclude that the Employer's final offer should be adopted to resolve their impasse. In our view, the Union's final offer does nothing to address the parties' ongoing disagreements over official time, and would only serve to perpetuate conflict. In addition, the Union's statement in its supporting submission that it has reduced its previous proposal regarding the annual bank of hours to 13,000 is inconsistent with the text of its final offer, which indicates that its proposed bank of hours remains at 18,000. Even assuming that the Employer's statistical analysis of official time use in 2002 is unreliable for the reason given by the Union, it has provided no justification for such a huge increase over the *status quo*. While it is impossible to know in advance whether the limitations on official time proposed by the Employer will have the dire consequences the Union predicts, given that the Panel must select one of the parties' final offers, we are persuaded that the Employer's is clearly the more reasonable choice.

On this article, the Union is not alone in providing a supporting submission which is difficult to reconcile with the text of its final offer. Although the Employer claims to recognize that the limitations it proposes cannot be used to deny Union representatives official time authorized by the Statute, its final offer states that the 9,000 hours to be granted to the Union for all official time activities in a calendar year "includes official time authorized pursuant to 5 U.S.C. § 7131(a), (c) and (d)." To ensure that the wording imposed by the Panel is consistent with the Union's statutory rights and the Employer's stated intent, the language of the Employer's final offer will be clarified by adding wording to Section 4. which specifies that, if the bank of 9,000 hours is exhausted prior to the end of a calendar year, the Employer shall grant the Union's representatives whatever additional

official time is necessary to meet the requirements of § 7131(a) and (c) of the Statute.

24. Article 31 - Time and Leave

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

The basic wording in this article, which the Union essentially proposes be maintained, "has been agreed to over four generations of contract," and its "terms and procedures are well known to both employees and managers." Many of the changes the Employer insists on are non-substantive, some will leave employees "befuddled," while others will result in problems the existing wording has effectively addressed. In this regard, the Employer's wording in Section 2 is unclear as to whether an employee will need to talk to both the manager and the leave approving official where leave has not been approved in advance, and eliminates a provision that has "worked well which permits involved employees to resolve scheduling conflicts among themselves." In Section 3, the Employer would require an employee to obtain a written medical certificate from a doctor instead of permitting the doctor to certify the employee's incapacitation by signing the OPM 71 form. This will "bring back the same problem that using the physician signed OPM 71 cured," *i.e.*, in the past employees had to return to the doctor's office "with their C.F.R." and teach the physician how to write an acceptable medical certificate. The Employer's proposed sick leave restrictions in Section 5 introduces the concept of tardiness, which is out of place in this context, and implies that leave use is "leave abuse." The Union's existing contract wording "provides the supervisor with the tools to correct leave abuse." Finally, the Employer's pared-down version of Section 8, which concerns official closings due to inclement weather and emergencies, "ignores established provisions covering important situations that routinely occur." The current wording developed from "real circumstances that needed common sense solutions."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

Overall, the Employer's final offer is intended to address the "numerous problems" that have been experienced in applying the current provisions, and to conform the article to "the current state of law and regulation." In Section 2, the Union has interpreted the "operational exigency" standard that it proposes be retained in a manner that makes it "almost impossible for the Agency to deny a leave request." The Employer's proposal, on the other hand, moves away from the "emergency implications of an exigency standard." While its sick leave provisions "are entirely consistent with the governing regulations," the Union's wording in Section 3 is not, and its proposal on Section 5 "*requires* 'administrative leave'" for purposes of bereavement. The latter "interferes with management's right to assign work," and was "struck by an arbitrator in October 2002." The Employer's section on leave restriction gives managers more flexibility and options to address employees with leave problems than the Union's. Concerning advance annual and sick leave, the Employer's proposal attempts to provide management with discretion to deny requests for these benefits in appropriate circumstances, while the Union's "suggests that these are entitlements." On the subject of official closing because of inclement weather or emergency, the Employer's proposals provide management with the flexibility that is necessary to deal with these situations. The Union's wording is "rigid," and "requires further negotiation" if the Agency wants to make changes to the procedures, some of which "implicate internal security." The Union's section on LWOP requires that employee requests be granted, which once again violates management's right to assign work. Finally, even though HHS has mandated that all of its agencies use ITAS, and the Union has "expressed no major objections," inexplicably it did not include the issue in its final offer.

CONCLUSION

Having carefully considered the evidence and arguments provided by the parties concerning this article, we find that, as in the previous article, the Union's final offer fails to address the legitimate interests that have been raised by the Employer. Although the Union may be right in pointing out that some of the existing provisions over the years have effectively solved previous problems in the area of leave administration, others appear to deny managers the ability to correct situations of leave abuse, or are otherwise inconsistent with existing regulations and management's rights under the Statute. On balance, therefore, we are persuaded that the Employer's final

offer represents the more reasonable approach, and shall order its adoption.

25. Article 35 - Computer Security/Computer Security and Personal Use of Agency Equipment and Resources

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article.

Its final offer protects the sensitive information contained in the Agency's computer systems "while balancing an individual's right to a modicum of privacy in their personal conversations whether on the telephone or through e-mail." The proposed wording is the same that exists in the current MLA, except that Section 12 of Article 3 is moved to Section 5 of Article 35. This "assures that employees are notified" prior to monitoring, and that they "can have reasonable use of office equipment." The Employer's final offer, by contrast, is "overreaching" and "excessive," and "greatly broaden[s] and expand[s] the length and breadth of prohibitive computer usage." The "inordinate degree" of management oversight that it proposes "would seriously impede an employee's ability to effectively process their workload," and "deprive[s] an employee of any expectation of privacy while not adding any additional security."

b. The Employer's Position

See Attachment B for the text of the Employer's final offer on this article.

The Employer's offer essentially eliminates existing contract wording that interferes with management's right to determine internal security, which the Union proposes to retain, and adds a policy on the personal use of Agency-owned or leased equipment and resources. The Union's Section 3.B., for example, references an attached form that the Agency is required to use to grant access to its internal computer systems. The Agency, however, "is constantly reevaluating its internal security procedures" in light of recent heightened security concerns, and the Union's proposed (as well as the existing) wording "precludes the Agency from changing the form used to grant access to its computer technology." Thus, by specifying the manner in which computer systems will be reviewed, it interferes with a reserved management right.

As to the Employer's proposed "personal use" policy, during the term of the current MLA, HHS advised its agencies to develop and negotiate such policies. The Union insisted that the negotiations occur as part of the bargaining over the successor MLA, but its final offer "remains silent" on the issue. The policy set forth within management's final offer, on the other hand, is "comprehensive" and "favorable to employees." For instance, it establishes limited rights of employees to use Agency equipment for personal use during non-work hours when certain conditions are met, which is "a change from the current policy of no personal use." It also would eliminate the confusion employees have expressed in the area of privacy regarding "what is allowed and what is not allowed when they are using Agency-owned or leased equipment" by providing them with "clear and consistent notice and guidelines." The Union requested this during the term of the current MLA, but its final offer fails to address the topic.

CONCLUSION

After carefully considering the parties' positions on the issues covered by this article, we shall order the adoption of the Employer's final offer to resolve their dispute. In our view, it provides a better approach to ensuring the security of Government information systems. In addition, the portion of the Union's proposal addressing the personal use of the Agency's information technology appears too general to be helpful to employees faced with specific questions regarding these matters, particularly when contrasted with the Employer's detailed provisions on the subject. Finally, given the length of time during which the parties negotiated prior to reaching their current impasse, we are not persuaded that the Union has substantiated the need for additional bargaining over the issue of employee monitoring during the term of the successor MLA.

26. Article 36 - Recycling

a. The Union's Position

See Attachment A for the text of the Union's final offer on this article. The Union proposes that the MLA contain a new article on recycling. The Union does not address the proposed article in its supporting statement of position.

b. The Employer's Position

The Employer has no counter-offer because it believed that the Union's proposal had been withdrawn. In any case, a new article addressing this subject is unnecessary. Among other things, the Agency already has an extensive program in place at its headquarters complex for recycling white paper, mixed paper, newspaper, cardboard, and aluminum cans. Moreover, with respect to the portion of the Union's proposal stating that any "revenue generated from recycling will be used in accordance with the Statute," the Employer "is unclear as to the specific Statute to which the Union is referring." Finally, the parties already have agreed in Article 2 of the successor MLA to a new Labor-Management Cooperation Committee (LMCC), and to prohibit its use as a substitute forum for bargaining. The Employer is concerned that the Union's final offer, which proposes that the LMCC "deal with" the issue of recycling, is an attempt to promote further negotiations over this topic at the LMCC, which would be inconsistent with the parties' previous agreement.

CONCLUSION

Given its failure to address this article in its supporting submission, we conclude that the Union has abandoned its interest in this matter. Accordingly, we shall order the Union to withdraw its final offer on the article.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under 5 C.F.R. § 2471.11(a) of its regulations, hereby orders the following:

1. Article 1 - Governing Laws, Regulations and Definitions

The parties shall adopt the Employer's final offer, to include the following sentence at the end of Section 3 for clarification to ensure the Union's right to initiate mid-term bargaining:

> Nothing in this MLA shall affect the Union's right to initiate mid-term bargaining, in accordance with its entitlements under the Statute.

2. Article 3 - Employee Rights

The parties shall adopt the Employer's final offer.

3. Article 4 - Negotiations During the Term of the Agreement

The parties shall adopt the Employer's final offer, with the following clarifying sentence preserving both parties' statutory rights:

> Nothing in this Agreement shall be deemed to waive either party's statutory rights including, without limitation, the Employer's right to assert the covered-by doctrine, and the Union's right to initiate mid-term bargaining on matters that are not contained in or covered by the Agreement.

4. Article 6 - Dues Withholding

The parties shall adopt the Employer's final offer.

5. Article 7 - Duration of Agreement

The parties shall adopt the Employer's final offer.

6. Article 9 - Health and Safety

The parties shall adopt the Employer's final offer.

7. Article 10 - Hours of Work

The parties shall adopt the Employer's final offer.

8. Article 11 - Use of Official Facilities

The parties shall adopt the Employer's final offer.

9. Article 12 - Communications

The parties shall adopt the Employer's final offer.

10. Article 13 - Parking and Transportation

The parties shall adopt the Union's final offer consistent with any agreements that were reached during their negotiations.

11. Article 14 - Reduction in Force and Transfer of Function

The parties shall adopt the Employer's final offer.

12. Article 15 - Contracting Out

The parties shall adopt the Employer's final offer.

13. Article 16 - Training and Career Development

The parties shall adopt the Employer's final offer.

14. Article 17 - Awards

The parties shall adopt the Employer's final offer.

15. Article 18 - Equal Employment Opportunity

The parties shall adopt the Employer's final offer including the following clarifying sentence:

> This agreement does not waive either parties' statutory bargaining rights concerning this subject.

16. Article 21 - Employee Performance System

The parties shall adopt the Employer's final offer including the following clarifying sentence:

> This agreement does not waive either parties' statutory bargaining rights concerning this subject.

17. Article 22 - Within Grade Increases

The parties shall adopt the Employer's final offer.

18. Article 23 - Disciplinary and Adverse Actions

The parties shall adopt the Employer's final offer.

19. Article 24 - Grievance Procedure

The parties shall adopt the Employer's final offer.

20. Article 25 - Arbitration

The parties shall adopt the Employer's final offer.

21. Article 26 - Merit Promotion and Article 27 - Details and Temporary Assignments/Article 26/27 - Promotions, Reassignments and Details

The parties shall adopt the Employer's final offer.

22. Article 29 - Work-At-Home Programs/Flexiplace

The parties shall adopt the Employer's final offer.

23. Article 30 - Official Time/Official Time for Union Representatives

The parties shall adopt the Employer's final offer with the following clarifying wording in Section 4:

> The Union will be provided 9,000 hours for all official time activities in a calendar year. This includes official time authorized pursuant to 5 U.S.C. § 7131(a), (c) and (d), with the following exception: if the bank of 9,000 hours is exhausted prior to the end of a calendar year, the Union shall receive whatever additional hours are required to fulfill its entitlements under § 7131(a) and (c) of the Statute.

24. Article 31 - Time and Leave

The parties shall adopt the Employer's final offer.

25. Article 35 - Computer Security/Computer Security and Personal Use of Agency Equipment and Resources

The parties shall adopt the Employer's final offer.

26. Article 36 - Recycling

The parties shall adopt the Employer's final offer.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

May 10, 2004
Washington, D.C.