

In the Matter of

DEPARTMENT OF HEALTH AND HUMAN
SERVICES
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 16 FSIP 113

ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (Union or NTEU) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Health and Human Services, Washington, D.C. (Employer or Agency).

Following an investigation of the request for assistance, arising from a dispute over ground rules for negotiating a successor master collective bargaining agreement (MCBA or CBA), the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned. The parties were informed that, if a complete settlement of the issues at impasse was not reached during mediation, a binding decision would be issued to resolve them.

Consistent with the Panel's procedural determination, on November 30, 2016, a mediation-arbitration proceeding was conducted at the Panel's headquarters in Washington, D.C. Although the parties discussed ideas for settlement during the mediation phase, they were unable to find agreement on the issues. Thus, I am required to issue a final decision imposing terms for the disputed issues in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record in this matter, including the parties' post-mediation statements of position and Last Best Offers (LBOs).

BACKGROUND

The Employer's mission is to enhance and protect the health and well-being of Americans by providing effective health and human services and fostering advances in medicine, public health and social services. The Union represents a nationwide bargaining unit consisting of approximately 14,000 professional and non-professional employees who work in component offices, such as, the Centers for Disease Control and Prevention, the Food and Drug Administration, Administration for Children and Families, Indian Health Service, and the Substance Abuse and Mental Health Services Administration. The parties are covered by an MCBA that was to expire on September 30, 2016, but continues until a successor agreement is implemented.

The parties began negotiations over the subject ground rules in 2015 and were able to reach agreement on numerous issues. The Union filed a request for assistance with the Panel in February 2016, but withdrew it after the parties agreed to return to mediation.^{1/} After receiving assistance from the Federal Mediation and Conciliation Service, the Union returned to the Panel, in July 2016, with its request for assistance.

ISSUES

The parties stipulated their disagreement over two (2) ground rule proposals: (1) the bargaining schedule for term negotiations; and (2) travel and *per diem* for Union bargaining team members and alternates.^{2/}

1/ See 16 FSIP 54 (2016).

2/ Although the parties indicated that they reached agreement on all of the other ground rule provisions not submitted to impasse, there are discrepancies in the language submitted in each party's last best offer regarding a number of the other ground rule provisions. Neither party submitted argument in support of their respective positions on the differing language in those provisions, or submitted an explanation for the discrepancies. Accordingly, to facilitate closure of the parties' entire ground rule dispute, this decision addresses the differing language in the other ground rule provisions.

1. Bargaining Schedule

The parties agreed to limit the number of articles that could be reopened in the successor MCBA negotiations to twenty (20) per side, and agreed that each side could introduce two (2) new articles. Both sides acknowledged that some of the articles each party elects to reopen may overlap. Therefore, the parties agree that a minimum of twenty-two (22) articles and a maximum of forty-four (44) articles could be subject to negotiation.

a. The Union's Position

The Union proposes:

A. If the total number of articles that will be negotiated is thirty-four (34) or fewer (inclusive of new articles), the parties will conduct eight (8) weeks of bargaining during the following weeks in 2017: February 13; February 27; March 13; March 27; April 10; April 24; May 8; and May 22. If the parties have not fully addressed all of the issues by May 26, 2017, either party may unilaterally extend bargaining for one (1) additional week, which will be conducted during the week of June 5-9, 2017. The parties may mutually agree to schedule additional bargaining sessions beyond the week of June 5, 2017.

B. If the total number of articles that will be negotiated is thirty-five (35) or greater (inclusive of new articles), the parties will conduct ten (10) weeks of bargaining during the following weeks in 2017: February 13; February 27; March 13; March 27; April 10; April 24; May 8; May 22; June 5; and June 19. If the parties have not fully addressed all of the issues by June 23, 2017, either party may unilaterally extend bargaining for one (1) additional week, which will be conducted during the week of July 10-14, 2017. The parties may mutually agree to schedule additional bargaining sessions beyond the week of July 10, 2017.

C. Daily negotiating sessions will begin at 9:00 a.m. and end at 4:30 p.m., except that on Monday negotiations will be conducted from 1:00 p.m. to 5:00 p.m. and on Friday from 9:00 a.m. to 12 Noon. The parties may agree to expand these time frames based upon the need to facilitate resolution of issues

through the collective bargaining process to include weekends and holidays.

D. Dates and times may be changed by mutual agreement of the parties.

The Union argues that its proposal promotes expeditious and efficient negotiations. It asserts that, without a fixed bargaining schedule, the Employer will prolong bargaining, and notes that the subject negotiations over ground rules have taken more than a year.^{3/} According to the Union, prior Panel decisions,^{4/} the parties' previous ground rules agreements, and the Union's experience with bargaining at other agencies support adoption of the finite bargaining schedule it proposes. In particular, the Union asserts that the parties previously executed a ground rules agreement providing for two (2) weeks of bargaining for seven (7) articles. Moreover, the Union maintains that it bargained over fifty (50) articles in four (4) months with another agency, so the time frame it proposes is feasible.

b. The Employer's Position

The Employer proposes the following:

Bargaining will be conducted in alternating weeks and at alternating locations unless otherwise scheduled by mutual agreement. Bargaining sessions will be held on the following scheduled days and hours:

Mondays: 1:00 p.m. to 5:00 p.m.

Tuesdays, Wednesdays and Thursdays: 9:00 am to 4:30 p.m.

Fridays: 9:00 am to 1:00 p.m.

^{3/} I note that the typical position of parties in contract negotiations is reversed in that, here, the Union seeks a shorter bargaining schedule and the Employer advocates for an open-ended schedule.

^{4/} The Union cites *Dep't of Labor and Local 12, AFGE*, 03 FSIP 59 (2003) and *Dep't of the Army Headquarters, U.S. Army Garrison Fort Sam Houston and Fort Sam Houston Commissary, Fort Sam Houston, Texas*, 91 FSIP 131 (1991).

The parties may agree to additional weeks of bargaining. The parties may agree to expand the time frames based upon the need to facilitate resolution.

The Employer opposes any fixed bargaining schedule, and intends that the parties bargain until "all voluntary efforts are exhausted." It suggests that a period of one (1) week to two (2) weeks of bargaining on each article would be reasonable. The Employer asserts that the Union's proposal has "no logical nexus between the period and the number of [a]rticles" that the parties will bargain. The Employer estimates that a mid-range of thirty-four (34) articles (assuming a minimum of twenty-four (24) articles and a maximum of forty-four (44) articles) would take fifty-one (51) weeks or approximately one (1) year.

c. Opinion

The parties were tasked with providing LBOs presenting a clear bargaining schedule, a set time for a unilateral extension, and an extension by mutual agreement. The Union's offer complies with that directive, but the Employer's does not. Rather, the Employer proposes an unspecified open-ended period for bargaining.

In its pre-mediation-arbitration submissions, the Employer provided prior ground rule proposals in which it proposed a specific bargaining schedule. The prior proposal stated that "[i]t is expected that bargaining will conclude one (1) year from the date of commencement." The Employer's LBO, therefore, in addition to failing to comply with my direction, represents a step backward from its earlier position that the bargaining could be concluded in one (1) year. In contrast, the Union's LBO provides for a varying length of bargaining, tied to the number of articles, and demonstrates movement from its earlier proposal of seven (7) weeks to bargain all opened articles.

I conclude that the Union's proposal logically ties the number of weeks of bargaining to the number of articles opened for negotiation. However, despite the Employer's backtracking on the time frame, I do not ignore its interest in having sufficient time to devote to each article. Consequently, I find it appropriate to modify the Union's final offer so that fourteen (14) weeks of bargaining will occur if thirty (30) or less articles are opened, and eighteen (18) weeks of bargaining will occur if thirty-one (31) or more articles are opened. Rather than impose specific dates for bargaining, I defer to the parties' agreed upon language indicating that bargaining will be

conducted on alternate weeks in either party's Washington, D.C. offices. In addition, focusing on the parties' agreement to exchange bargaining proposals on the thirtieth (30th) day following receipt of this decision, I order the parties to commence bargaining no later than thirty (30) days after they exchange proposals.

Moreover, I note that the parties have a minor disagreement over the ending times for Friday bargaining sessions. In its LBO, the Union proposes that Friday sessions end at noon, while the Employer proposes 1:00 p.m. Both parties expressed the desire that Friday be a productive bargaining day, with the day's session ending early enough to allow the traveling members of each team to be able to return home that day. In consideration of the Employer's extraordinary interest in having sufficient time to bargain, I find it appropriate to accept the Employer's proposed approach. Thus, I will impose its language that Friday bargaining sessions will end at 1:00 p.m.

2. Travel and Per Diem for Union Bargaining Team Members

a. The Union's Position

The Union proposes the following:

The negotiations will be conducted on an alternating basis at HHS or NTEU office space in Washington, D.C. The parties shall provide a site for term bargaining on an alternating basis. Either party requesting a caucus will be provided a suitable site. The Agency will pay reasonable travel and *per diem* costs for three (3) employees on the Union negotiating team, who must travel from outside of the Washington, D.C. commuting area, for the entire negotiations process, including all third-party proceedings. NTEU will pay the reasonable travel and *per diem* costs of one (1) employee on the Union negotiating team whose costs are neither the most nor least expensive of the four (4) who must travel, and will notify the Agency of that team member prior to the first bargaining session. All travel and *per diem* costs will be administered in accordance with the current CBA Articles and governing regulations.

Furthermore, the Union proposes that:

Official time will be authorized for six (6) bargaining unit employees representing NTEU during negotiations, and for travel to and from the negotiations during the time the employee would otherwise be in a duty status. There will be a limit of two (2) NTEU national staff on NTEU's bargaining team. Each party is authorized to designate an alternate who will stand in for and have the same authority as a team member during a period in which that team member is absent. That party has an obligation to notify the other party, not less than seven (7) calendar days in advance, where practicable, that an alternate will replace a permanent team member for that bargaining session. The Union's alternate team member will be granted travel and *per diem* and official time to attend and participate in bargaining provided she/he would otherwise be in duty status during the time frame of the bargaining. Where the travel costs of the alternate are greater than the member for whom she/he is being substituted, the Employer will be obligated to pay for such travel for only two (2) bargaining sessions. If a permanent team member becomes unable to serve in that capacity for the remainder of the bargaining sessions, HHS (or NTEU) will pay the alternate's costs of travel consistent with paragraph 7 above.

The Union contends that its proposal is reasonable because it only requires the Employer to pay for three of the Union's six team members, consistent with the parties' prior agreements in which the Employer agreed to pay travel costs for up to three Union representatives. The Union asserts that its proposal is less onerous than the Union's agreements with other agencies, which require that those agencies bear 100 percent of the travel and *per diem* costs for Union bargaining team members. Further, the Union argues that the Employer's budget is "exponentially larger" than the Union's and, therefore, it should bear more of the cost.

b. The Employer's Position

The Employer proposes the following:

The negotiations will be conducted at HHS or NTEU office space in Washington DC. The parties will provide an adequate site for bargaining and caucuses.

The Agency will pay fifty percent (50%) of government authorized travel costs and *per diem* for up to six employee members on the Union negotiating team for the entire negotiations process, including third party proceedings. All travel and *per diem* will be administered in accordance with current CBA Articles and Federal Regulations.

The Employer proposes further that:

Official time will be authorized for six (6) bargaining unit employee members representing NTEU during negotiations and for travel to and from the negotiations during the time the employees would otherwise be in a duty status. There will be a limit of two (2) NTEU national staff or national elected officials on NTEU bargaining team. Each party is authorized to designate an alternate who will stand in for and have the same authority as a team member during a period in which that team member is absent. That party has an obligation to notify the other party not less than seven (7) calendar days in advance where practicable, that an alternate will replace a permanent team member. The alternate team member will be granted travel and *per diem* and official time to attend and participate in bargaining provided that they would otherwise be in duty status, during the time frames of bargaining in accordance with Item #8 above. Each employee member will be afforded forty (40) hours of official time to prepare for negotiations, regardless of the location at which such preparation is performed. Additional official time will be granted as necessary to prepare for, participate in and travel to and from any third-party proceedings.

The Employer asserts that its proposal is the "most reasonable and equitable methodology possible" to share the travel costs for Union representatives traveling from outside the Washington, D.C. commuting area. It maintains that its proposal is consistent with the parties' current MCBA which provides that the Employer pay fifty percent (50%) of the travel and *per diem* for Union representatives^{5/} as well as the parties'

^{5/} The Employer cites Article 3, Section 6B, which states "[i]n national bargaining . . . the Employer will pay all reasonable travel and *per diem* for two (2) employee

practice in prior negotiations.^{6/} The Employer contends that, because it has "no control" over who the Union selects as representatives, its proposal incentivizes the Union to reduce costs by selecting local representatives and "press[ing] negotiations forward to resolution." Further, the Employer argues that the Union's proposal invites conflict, while its proposal leaves no room for disputes over which employees were in attendance and who is responsible for which employee.

c. Opinion

In support of their positions, both parties confirm that the Employer has paid travel and *per diem* costs for half of the Union bargaining team in prior negotiations. In light of this past practice, I find it incongruous that the Employer asserts its intent is to incentivize the Union to decrease costs, yet it is opposed to any bargaining schedule limitation that, in fact, would reduce the costs associated with bargaining. In support of the parties' past practice and their interest in reducing the costs associated with bargaining, I adopt a modified version of the Union's final offer requiring the Employer to pay the travel and *per diem* for three (3) of the Union bargaining team members who must travel to attend the bargaining sessions (half of the bargaining team). Inasmuch as four (4) of the Union's six (6) member bargaining team must travel to attend the negotiations, the Union must pay for the fourth Union bargaining team member who must travel to attend the negotiations. In an effort to share the travel and *per diem* costs associated with the negotiations, the Union must pay for the bargaining team member whose travel is the most expensive. The determination of the Union team member whose travel is the most expensive must be made before bargaining begins. In addition to meeting the parties' interest in reducing negotiation costs, I find that

representatives, or if greater the number equal to one-half . . ." and Article 10, Section 10B, which states that "[w]here not otherwise covered by this Agreement the Employer will pay . . . 50% of all reasonable travel and *per diem*[]" *Id.*

^{6/} The Employer states that in the parties' ground rules agreement for midterm bargaining in 2012, the Employer agreed to pay the travel costs for three (3) of the six (6) Union representatives and, during negotiations in 2006, the Employer paid the travel costs for half the employees on the Union's bargaining team.

this resolution addresses the Employer's concerns about equitable sharing of the cost and potential disputes over travel and *per diem* payments.

As noted above (*see* footnote no. 2), a number of discrepancies in the language of allegedly agreed upon articles appear to have escaped scrutiny by both parties, as neither addressed them in their briefs. In all but one instance, the language in the Union's LBO for these articles matches the language marked as agreed upon in the Employer's November 4, 2016 pre-mediation-arbitration submissions. As to the procedure for confirming agreement on articles during negotiations (paragraph 15 in the Union's LBO), the Union's LBO notes that the language therein was agreed to on June 24, 2016. In addition, the language is initialed by the Employer's Chief Negotiator in Exhibit 4 of the Employer's pre-mediation-arbitration submissions and the Employer did not offer a rebuttal in its post-mediation-arbitration statement of position. Therefore, I find it appropriate to impose the language in the Union's LBO.

DECISION

Having carefully considered the parties' proposals and positions, I conclude that the impasse shall be resolved on the basis of the following solution:^{7/}

1. Pursuant to the provisions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.*, this agreement serves as the procedural ground rules governing term bargaining between the Department of Health and Human Services (HHS or Agency) and the National Treasury Employees Union (NTEU or Union) over a reopener agreement to the October 1, 2010 Consolidated Collective Bargaining Agreement.
2. The parties agree to exchange written proposals at 5:00 p.m. (Eastern Time) on the thirtieth (30th) day following receipt of the Panel's arbitration decision. If that date falls on a Saturday, Sunday or Federal Holiday, the parties' proposals will be exchanged at 5:00 p.m. (Eastern Time) on the next work day.

^{7/} For provisions not identified as issues at impasse, the MOU incorporates those provisions from the Union's LBO which match those provisions marked as agreed upon in the Employer's Exhibits 1 and 4, in its November 4, 2016 pre-mediation-arbitration submissions.

3. Bargaining will begin no later than the thirtieth (30th) day following the exchange of written proposals in number 2, above, and will be conducted in alternating weeks and at alternating locations unless otherwise scheduled by mutual agreement. Bargaining sessions will be held on the following scheduled days and hours:

Mondays: 1:00 p.m. to 5:00 p.m.

Tuesdays, Wednesdays, and Thursdays: 9:00 a.m. to 4:30 p.m.

Fridays: 9:00 a.m. to 1:00 p.m.

The parties may agree to expand these time frames based upon the need to facilitate resolution of issues through the collective bargaining process to include weekends, and holidays.

4. In the interest of expediency, the parties agree to restrict the number of articles to be reopened and negotiated to twenty (20) articles and two (2) new Articles, per party. Where the parties propose to reopen the same articles, those articles will count towards the maximum of twenty per party. To the extent that neither party opens an article, *i.e.*, seeks to change, modify or delete any provision thereof, in the existing CBA, the unopened article will be included without change in the successor CBA.
5. Proposals may be amended or modified during bargaining. Unless otherwise agreed, neither party will submit proposals nor modify existing proposals that raise issues that are outside the scope of the matters that have been opened.
6. A. If the total number of articles that will be negotiated is thirty (30) or fewer (inclusive of new articles), the parties will conduct fourteen (14) weeks of bargaining. If the parties have not fully addressed all of the issues after fourteen (14) weeks of bargaining, either party may unilaterally extend bargaining for two (2) additional weeks, which will begin on the alternate week immediately following the fourteenth (14th) week of bargaining. The parties may mutually agree to schedule additional bargaining sessions beyond the unilateral two (2) weeks of extended bargaining.
B. If the total number of articles that will be negotiated is thirty-one (31) or greater (inclusive of new articles), the parties will conduct eighteen (18) weeks of bargaining. If the parties have not fully addressed all of the issues after eighteen (18) weeks of bargaining, either party may

unilaterally extend bargaining for two (2) additional weeks, which will begin on the alternate week immediately following the eighteenth (18th) week of bargaining. The parties may mutually agree to schedule additional bargaining sessions beyond the unilateral two (2) weeks of extended bargaining.

C. Dates and times may be changed by mutual agreement of the parties.

7. If needed, either party may solicit mediation assistance from the Federal Mediation and Conciliation Service at any time during the negotiations.
8. The negotiations will be conducted on an alternating basis in the office space of HHS or NTEU in Washington, D.C. The parties shall provide adequate space for bargaining and caucuses. The Agency will pay reasonable travel and *per diem* costs for three (3) employees on the Union negotiating team, who must travel from outside of the Washington, D.C. commuting area, for the entire negotiations process, including all third-party proceedings. NTEU will pay the reasonable travel and *per diem* costs of one (1) employee on the Union negotiating team whose costs are the most expensive of the four (4) who must travel, and will notify the Agency of that team member prior to the first bargaining session. All travel and *per diem* costs will be administered in accordance with the current CBA Articles and governing regulations.
9. By mutual agreement and to expedite bargaining and facilitate the resolution of issues, the parties may conduct simultaneous bargaining at certain times and places to be jointly agreed upon during any portion of the bargaining. Bargaining may also include the use of mini-bargaining teams.
10. Official time will be authorized for six (6) bargaining unit employees representing NTEU during negotiations, and for travel to and from the negotiations during the time the employee would otherwise be in a duty status. There will be a limit of two (2) NTEU national staff on NTEU's bargaining team. Each party is authorized to designate an alternate who will stand in for and have the same authority as a team member during a period in which that team member is absent. That party has an obligation to notify the other party, not less than seven (7) calendar days in advance, where practicable, that an alternate will replace a permanent team member for that bargaining session. Consistent with paragraph 8 above, the Union's alternate team member will be

granted travel and *per diem* and official time to attend and participate in bargaining provided she/he would otherwise be in duty status during the time frame of the bargaining. If a permanent team member becomes unable to serve in that capacity for the remainder of the bargaining sessions, HHS (or NTEU) will pay the alternate's costs of travel consistent with paragraph 8 above. Each bargaining unit employee team member will be afforded up to forty (40) hours of official time to prepare for the negotiations, regardless of the location at which such preparation is performed. Additional official time will be granted, as necessary, to prepare for, participate in, and travel to and from, any third-party proceedings.

11. Prior to the beginning of bargaining, the parties will identify the names of the members of their respective bargaining teams. Bargaining team members must be identified in time to permit the issuance of travel orders.
12. In addition to the bargaining team, each party may have legal counsel during negotiations and impasse procedures. The parties also agree that each may have observers and consultants present during negotiations, mediation and arbitration, in addition to the bargaining team. As a matter of professional courtesy, observers and consultants will be identified at the beginning of each bargaining session.
13. Either party may designate up to two (2) observers for each negotiating session. Observers may attend sessions on duty time or using approved leave. Credit hours, comp time and overtime will not be authorized. Observers must obtain supervisory approval in advance in order to attend and observe bargaining sessions. The Agency is not obligated to pay travel, *per diem* or any other expenses for observers.
14. The parties may use Subject Matter Experts, as needed. Subject Matter Experts will be granted sufficient official or duty time, as appropriate, while in a duty status to prepare for and participate in bargaining sessions, to include travel time, if the employee is stationed within a fifty (50) mile radius of Washington D.C. If the Subject Matter Expert is stationed outside of a fifty (50) mile radius of Washington, D.C., he or she will participate via teleconference or videoconference. The Agency will not be obligated to pay travel and *per diem* expenses for Subject Matter Experts.
15. Each party shall be represented at the negotiations at all times by only one duly authorized Chief Negotiator who is

prepared and authorized to discuss and negotiate on matters subject to negotiations and to sign-off on agreements for their respective party. The Chief Negotiator may designate an alternate for unforeseen circumstances. Said alternate shall have full authority to act and sign on behalf of the Chief Negotiator.

16. Any and all agreements on articles shall be committed to writing and initialed by each party's Chief Negotiator. The Chief Negotiator for each party shall initial two (2) copies of the agreed upon language. The Chief Negotiator for each party will retain one (1) copy and provide the second to his/her counterpart. Once articles are initialed by both parties, they will be considered closed and may only be reopened by mutual agreement of the Chief Negotiators. During the course of negotiations and in order to keep negotiations moving, Chief Negotiators may tentatively agree on any language discussed during bargaining but such language will not be considered final until the article is initialed by each party's Chief Negotiator.
17. The parties agree to make every reasonable effort to reach resolution and to avoid impasse. However, any specific provisions of the articles which remain in dispute will be resolved pursuant to 5 U.S.C. § 7119 or other appropriate provisions of 5 U.S.C. § 7101, *et seq.*
18. Implementation will follow ratification by NTEU according to its by-laws and the approval of the agreement by the Agency pursuant to 5 U.S.C. § 7114. Ratification will occur within sixty (60) days of the date final agreement is reached. NTEU will notify the Agency of the results within five (5) calendar days. The parties will execute the agreement within three (3) workdays of the Union's notice of ratification. The thirty (30) day period for Agency Head review will commence on the date the agreement is executed. If the agreement is not ratified, the parties will resume bargaining within 15 calendar days of the Union's notice.
19. If, after Agency Head review, any provision or article is deemed not in accordance with government-wide rule, regulation, or law, the parties will return to the bargaining table within thirty (30) days to negotiate over the provision(s) or article(s) at issue and any provision(s) or article(s) impacted by those at issue. The parties will bargain for two (2) contiguous weeks and these ground rules will govern the negotiations. By mutual agreement, the parties may extend the time frames.

20. The Union will be notified in writing by the Agency if any provisions are declared non-negotiable by the Department of HHS, pursuant to procedures of the Federal Labor Relations Authority.
21. The parties agree that publicity can have a detrimental impact on the bargaining process. The parties shall conduct themselves in a manner to avoid the same.
22. No official minutes of the proceedings of the negotiating sessions shall be made. However, each party is allowed to prepare unofficial minutes for its own use. Neither party will be permitted to record the proceedings.

A handwritten signature in black ink, appearing to read 'M. E. Johnson', with a long horizontal flourish extending to the right.

Marvin E. Johnson
Arbitrator

December 31, 2016
Silver Spring, Maryland