

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

PENSION BENEFIT GUARANTY CORPORATION

And

INDEPENDENT UNION OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE

Case No. 19 FSIP 038

DECISION AND ORDER

This case, filed by the Pension Benefit Guaranty Corporation (Management, Agency, OR PBGC) on April 26, 2019, concerns a dispute between it and the Independent Union of Pension Employees for Democracy and Justice (IUPEDJ or Union) over the Agency's impending relocation from 1200 K. St., N.W., Washington, D.C. to 445 12th Street, S.W., Washington, D.C. (Portals). This dispute was filed pursuant to §7119 of the Federal Service Labor-Management Relations Statute (the Statute). On August 6, 2019, the Panel asserted jurisdiction over most issues in dispute and directed that they be resolved in the manner described below.

BARGAINING AND PROCEDURAL HISTORY

Created by the Employee Retirement Income Security Act of 1974 (ERISA), the PBGC is a Federal agency that oversees defined-benefit pension plans that have been taken over by the Federal government and guarantees the payment of benefits to individuals entitled to them. The Agency's mission is to protect the retirement incomes of more than 40 million American workers in nearly 24,000 private-sector defined benefit pension plans. PBGC is a self-financing, wholly-owned government corporation. As such, it does not receive appropriated funds. In November 2011, the Independent Union of Pension Employees for Democracy and Justice was certified as the exclusive representative of approximately 600 bargaining unit employees who work in a variety of financial positions such as, among others, ERISA Attorney, Auditor, Actuary, Accountant, and Financial Analyst. Prior to the certification of IUPEDJ, employees were represented by the Union of Pension Employees (UPE), and the parties were covered by a collective bargaining agreement (CBA) that became effective May 3, 2011. The CBA continued to cover the IUPEDJ bargaining when they took over in 2011. The CBA expired in 2015, but the record is unclear as to whether it continues to bind the parties via rollover. The parties are currently in negotiations over a new successor CBA.

The Agency provided "courtesy briefings" to the Union in 2016 and 2017 of its intention to relocate its Headquarters to a then-undetermined location. During this time, the Union made

several requests to negotiate, but the Agency declined because it had not secured a lease. In its search for a new location, the Agency was guided by multiple authorities. Externally, the Executive Branch, through promulgated direction and guidance, has directed all Federal agencies to reduce their physical footprint.¹ Internally, the Agency analyzed its needs and workforce to create an “Executive Summary” concerning its goals for the relocation. Among other items, the Agency stressed the importance of providing privacy to employees while reducing its overall space utilization. Management also expressed a desire to increase collaboration in the workforce, which could be accomplished through an increase in meeting and conference rooms.

In early 2018, the Agency provided the Union with formal notice and an opportunity to negotiate because the General Services Administration (GSA) had secured a lease with the owner of the 12th Street building. Under this arrangement, GSA would be the lessee, the building owner would be the lessor, and the Agency/Union would be tenants. The Agency would be housed on several floors but lose over 28,000 square feet.

Negotiations began in April 2018 when the Union submitted 75 proposals to Management. The parties exchanged proposals for several months and eventually utilized the assistance of the Federal Mediation and Conciliation Services (FMCS) beginning on October 24, 2018 in Case No. 20191177010. Negotiation continued, albeit with Management’s representation that GSA established several “key dates” that needed to be satisfied independent of these negotiations. Notably, the Agency alleges that it informed the Union that a proposed floor plan needed to be submitted to GSA by April 2019. The parties dispute what occurred with respect to proposed floor plans. The Agency avers that it requested proposed floor plans from the Union for several months, but the Union delayed until it finally provided something on April 2, 2019. However, even then, the proposed floor plan was for only one floor. The Union claims it tried to work with Management in an attempt to collaborate on designing a mutually satisfactory floor plan, but Management refused to provide any assistance, access to its design software, or otherwise engage the Union.

In any event, the Mediator released the parties from mediation on April 3, 2019. Management provided its final offer to the Union on April 8, alleging that the 10 proposals in its offer were all ones that the Mediator “certified” were at impasse. Management then filed its request for Panel assistance on April 26, 2019. In its filing, Management alleged only those 10 proposals remained for resolution as all other proposals were agreed to, withdrawn, or outside of Management’s duty to bargain. On May 21, the Union subsequently provided the Panel and the Agency its copy of additional proposals it believed remained at impasse. On August 6, 2019, the Panel voted to assert jurisdiction over this dispute and directed the parties to resolve this dispute through an Informal Conference with Panel Member Karen Czarnecki.

¹ See Executive Order 13,514, “Federal Leadership in Environmental, Energy and Economic Performance,” (October 5, 2009); “Executive Mandate, National Strategy for Real Property and Reduce the Footprint,” (March 21, 2015) (published by the Office of Management and Budget, available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/m-15.01Reduce-the-Footprint-Policy.pdf>). Both of these authorities remain in effect.

On September 19, 2019, Member Czarnecki conducted an Informal Conference in Washington, D.C. The parties reached agreement on 5 proposals, and the Union agreed to merge 2 of its other proposals into a single proposal. Thus, the hearing ended with 9 proposals still remaining in dispute. The parties were granted an opportunity to submit post-hearing briefs and did so on October 2, 2019.

REMAINING ISSUES

1. Proposal 4(a): Workstations

Union Proposal 4(a): Workstations assigned to bargaining unit employees will include panel heights of 65 to 72 inches (seated privately). Workstations assigned to bargaining unit employees will have doorways.

Agency Proposal 4(a): All bargaining unit (BU) workstations will be accessed through a single opening and will have a total panel height of 64 inches on all sides with a minimum 50-inch solid fabric panel and a filmed glass stacker on top of the solid panel.

A. Union Argument

The Union's proposal focuses on maximizing employee privacy, an item that is critical to the ability of employees to effectively complete their tasks. Management has admitted that it needs to reduce its overall footprint and will also install various "huddle spaces" and meeting areas on all floors. These factors combined, in the Union's opinion, will increase noise while decreasing privacy. Doors and higher walls, therefore, are a necessity. The Panel has recognized the importance of privacy in other office-relocation disputes.²

B. Agency Argument

The Agency anticipates that approximately 590 contractors and 73 Federal employees will occupy the workstations to be used (based upon its Proposal 6 that all GS-11 and below non-professional employees will be seated within them). Management's proposed height accomplishes two goals: granting employees privacy and maximizing the ability of light to flow throughout the floors. At the Informal Conference, the Agency representative who was the Program Manager for the lease program testified that most existing panel heights are 45 inches high. Management's proposed height of 64 inches, therefore, will provide greater benefit to employees.

The Agency also based its proposal upon its discussions with vendors who will provide the furniture associated with workstations. For a panel height of 61-64 inches, the Agency estimates the cost would be \$288,187. By contrast, the Union's proposed height of 65-72

² Citing *EPA, Region 7 and AFGE, Local 907*, 12 FSIP 130 (Aug. 3, 2012); *DHHS, Denver, Colorado and NTEU*, 14 FSIP 64 (June 30, 2014).

inches would amount to \$399,750. Management's proposal, therefore, amounts to a cost savings of \$111,383.

C. Conclusion

The Panel will impose Management's proposal. The parties agree that a sense of privacy is important to the workforce as is the ability to effectively complete one's duties. They disagree, however, over the best method for meeting these goals. But, it is also important to remember the goal of accomplishing this office relocation in an effective and efficient manner. The Agency provided cost-data analysis comparing its proposal versus the one put forward by the Union. The difference could result in an expenditure of millions of dollars. The Union did not rebut this data; indeed, it offered no financial data whatsoever. The Agency's proposal still satisfies the interests of employees by providing them a degree of privacy but also balances taxpayer funds in a reasonable manner. Accordingly, the Agency's proposal is appropriate for imposition.

2. Proposal 5: Office Selection and the CBA

The Union offered a version of its Proposal 5 while the parties were still in negotiations prior to the Agency filing this request for assistance. After the Agency filed its request, however, Management formally alleged Proposal 5 was outside the duty to bargain. In response, the Union provided an unsolicited alteration to its proposal (revised language in bold below). The Agency has offered no counterproposal.

Pre-Filing Union Proposal 5: The selection for and size of the offices are covered by Article 32 of the CBA.

Panel Investigation Union Proposal 5: The selection for and size of the offices are covered by Article 32 of the CBA, **for the bargaining unit.**

A. Union Argument

The Union believes that Article 32 of the CBA already covers this matter. The article provides, in relevant part:

Section 1: Selection of Offices

A. Within each department and within each division level unit in COCD, CPRD, FASD, FOD, HRD, and IOD, employees will select offices by (1) category of office type and size to which they are entitled, and (2) within each category, by total length of service at PBGC.

Section 3: Procedures for Selection

A. These procedures apply to all employees, whether or not in the bargaining unit.

B. Subject to any other Agreements by the Parties regarding office sizes, the following categories apply for purposes of office selection:

1. At least two hundred (200) square feet, private office for GS-15 employees;
2. At least one hundred and fifty (150) square feet, private office, for GS-14 employees and GS-12/13 supervisors;
3. At least one hundred and twenty (120) square feet, private office, for GS-13 employees;
4. At least one hundred (100) square feet, private offices, for GS-5/7/9/11/12 professional employees and GS-8/9/11 supervisors;
5. At least sixty-four (64) square feet workstation, for GS-5/6/7/8/9 technical employees and GS-7/8 secretaries;
6. At least forty-eight (48) square feet workstation, for GS-3/4/5/6 clerical and secretarial employees; and
7. At least thirty-six (36) square feet workstation, for GS-2/3 stay-in school employees.

According to the Union, the above language establishes clear parameters for the layouts of offices as established by contract. The Union notes that under the “covered-by doctrine,” the FLRA examines whether a matter is expressly covered by a contract or is otherwise inseparably bound up by it.³ If a matter falls into either category, the contract controls the outcome of the dispute. The plain language of Article 32 does indeed state that it applies to “all employees, whether or not in the bargaining unit.” But, the Union has altered its proposal to focus *solely* on bargaining-unit employees. As such, any issues with the foregoing language have been cured.

Furthermore, the Agency prepared “Program of Requirements” (POR) for each division as it related to office layouts as part of the relocation. Those POR’s tracked the requirements of the CBA. Additionally, the Agency’s own expert witness testified at the Informal Conference that the floor plan Management ultimately chose did not track the POR’s.

B. Agency Argument

Management argues that Article 32 no longer applies because the CBA has expired. Under well-established precedent, a party may walk away from a contract provision in an expired agreement if that provision covers a permissive topic of bargaining and a party provides notice that it no longer wishes to be bound by that provision.⁴ Article 32, Section 3.A states its “procedures apply to all employees, *whether or not in the bargaining unit.*” (emphasis added). Bargaining over non-bargaining unit employees’ conditions of employment is outside the duty to bargain. Management provided notice to the Union within the context of these negotiations

³ See, e.g., *U.S. Dep’t of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993).

⁴ Citing *U.S. Dep’t of the Treasury, IRS, Cincinnati, Oh. and NTEU*, 37 FLRA 1423, 1431 (1990).

that it no longer intended to follow Article 32 within the expired CBA. Thus, the Agency is not bound to follow Article 32. The Union's attempt to "cure" the foregoing issues must meet with failure. There is no current "one size" office for employees at the current location and current offices do not track Article 32. Finally, the Agency notes that Executive Order 13,386, "Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining" prohibits negotiations over permissive topics of bargaining.⁵

Even if the Agency wanted to follow Article 32 at the Portals location, it could not do so. Article 32 was entered into with the size and layout of the current location in mind. The Portals location will see a reduction in 30,000 square feet. Yet, Article 32 envisions four different office types. This variety cannot be accommodated by the new arrangements, and it would contradict the above-discussed mandate for all agencies to reduce their footprint.

C. Conclusion

The Panel will order the parties to withdraw their proposals. As can be seen by the arguments above, the parties are entrenched in a combative dispute over their rights under the contract. Their respective positions, however, raise a number of concerns that make this issue inappropriate for resolution by the Panel.

For the Union, it concedes that the plain language of Article 32 states that it applies to "all" employees, regardless of their bargaining-unit status. And, it has not challenged Management's claim that it cannot bargain over the conditions of employment of non-bargaining unit employees. The Union has attempted to circumvent this pratfall by focusing the scope of its proposal solely on bargaining-unit employees. But, it still maintains that Article 32 applies. The Union did not provide any authority applying the FLRA's covered-by doctrine that would allow a party to simultaneously rely upon the language of a contract provision while also attempting to alter its plain wording.

The Agency's position is not without its problems as well. Management is correct to note that contract provisions which cover permissive topics of bargaining may be terminated once the contract expires. But, the Agency provided muddled evidence that the CBA expired. The CBA is in the record and it contains language concerning contract duration. Article 56 states that the agreement has a duration of 4 years from the date of agreement, which appears to be May 3, 2011. Article 56, Section 3 then states:

Either Party may request to renegotiate the Agreement by submitting written notice not more than one hundred and twenty (120) days and not less than sixty (60) days prior to the expiration of the Agreement. In the event that the Parties elect to renegotiate the Agreement, the current terms of the Agreement will remain in effect until superseded by a new Agreement. In the event that neither

⁵ Section 6 states that agencies and their subordinates "may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code." This language is clear that it applies solely to the topics listed under 5 U.S.C. §7106(b)(1) rather than *all* permissive topics of bargaining as the Agency insinuates.

Party submits notice to renegotiate, the Agreement will automatically renew for one (1) year periods, except for any provisions that are in conflict with law or government-wide regulation.

The above contract language establishes a framework concerning the ongoing status of the CBA. The contract is to renew for periods of 1 year if neither party elects to negotiate, save for illegal provisions. But, if the parties do negotiate, the terms of the agreement are to remain in effect. The Agency provided little in the way of information surrounding the circumstances of the agreement's current status. Indeed, at the Informal Conference, multiple Agency witnesses acknowledged that the parties are currently bargaining a new contract. The only proof that Management offered concerning the status of the CBA is language in its counter proposal to Union Proposal 5 during these negotiations that it no longer intended to adhere to Article 32. Whether that language is sufficient to satisfy Article 56 or other law is unclear.

The above problems with the parties' respective positions demonstrate the danger of adopting the Union's proposal. Doing so, in the Panel's opinion, would invite only further discord in the parties' already contentious bargaining relationship. However, it is not clear that the Panel actually needs to adopt a position on the Union's proposal. The Union has not claimed that it cannot enforce its alleged contractual rights in other forums were the Panel to reject its claim on the merits. Indeed, at the Informal Conference, the Union admitted it raised this contract issue *only* after Management deemed several of the Union's proposals outside of its duty to bargain because they were allegedly covered by the CBA. Accordingly, the Panel will simply order the parties to withdraw their proposals for Proposal 5.

3. Proposal 6: Office Location

Union Proposal 6: GS-13, GS-14, and GS-15 bargaining unit employees who have window offices at 1200 K. Street, N.W., as of 04/02/2019, will have private window offices at 445 Twelfth Street, S.W., when the Agency moves to the building at such address; Bargaining unit employees at the GS-12 level and below will be located in the interior private offices at 445 Twelfth Street, S.W. when the Agency moves to such new address.

Agency Proposal 6: Bargaining unit employee in professional positions and bargaining unit employees in nonprofessional employees that are GS-12 or higher, will occupy interior offices, that are approximately 120 sq. ft. Bargaining unit employees in nonprofessional positions that are GS-11 and below and whose career ladder does not exceed GS-11, will occupy 6x8 workstations. Employees in the same work unit will typically be assigned work space in close proximity to each other. However, Management may make exceptions based on availability of space or for reasons of efficiency. Management will make all seating allocations for supervisors and non-bargaining unit employees first. From the remaining offices, bargaining unit employees within their designated work units, will select in accordance with the following: (1) Section/Branch (2) Division (3) Grade Level (4) PBGC seniority (5) Federal service seniority. The Agency reserves the right to make and/or realign seating assignments for operational reasons at Management's discretion.

A. Union Argument

The Union's proposal emphasizes the importance of privacy, a fact that Union witnesses testified to at the Informal Conference and a fact that has been recognized in Panel decisions.⁶ The Agency has essentially conceded to its importance by agreeing to a proposal during the Informal Conference allowing employees to retain their individual offices after the relocation. Union witnesses also testified about the value of receiving direct sunlight.

At the Informal Conference, the Union stated that it had offered "concepts" of floor plans for floors 3 through 6, rather than proposals, that were designed by an Architect (Union Architect) it had hired for purposes of these negotiations.⁷ The Union instructed the Union Architect to design "concepts" that would emphasize the placement of certain bargaining-unit employees along windows. However, to accomplish this, the Union admitted that it instructed the Union Architect to ignore certain aspects of the Agency's design because bargaining-unit employees had concluded that they were not interested in those aspects. In this regard, those employees expressed that they did not want "huddle spaces" or "collaboration spaces." Removing those areas, the Union claimed, would permit for a greater possibility that the Union's proposed employees could be closer to windows.

As part of its post-Informal Conference submission, however, the Union submitted a revised "concept" for the sixth floor. This floor plan included "requisite print/copy areas, break areas, pantries, huddle spaces and conference room space[s]." And, of course, employees were placed along windows. The Union's floor plan demonstrates that its plan is feasible and that the only dispute here is one of design preference as opposed to anything to do with cost savings. Indeed, the Agency's current floor plans have some window offices. This fact undercuts the Agency's claims.

The Union also argues that the record calls into question the credibility of many of the Agency's arguments. The Agency initially provided POR's to the Union with the understanding that they would serve as the blueprint for the new office buildout. However, even the Agency's designer admitted that the Agency's floor plans do not satisfy the requirements of the POR's or the CBA. In this regard, the Union claims that the Agency's design plans do not use the square footage for offices that are set forth under the foregoing sets of documents. These errors, the Union maintains, would prohibit the Panel from imposing Management's language.

B. Agency Argument

⁶ *EPA, Region 7, Kansas City, Kansas and AFGE, Local 907*, 12 FSIP 130 (Aug. 3, 2012).

⁷ The "concepts" were dated January 2019, but the Union did not provide them to the Agency until September 11, 2019, as part of its pre-Informal Conference submissions. The Union explained that it chose this tactic because it was concerned that the Agency would critique the "concepts" without engaging the Union in a dialogue.

The Agency is opposed to the Union's proposal because it is not logistically feasible. The Union proposes an "outboarding" plan in which several groups of bargaining-unit employees would have offices at or near windows. The Agency initially explored this option but ultimately rejected it. At the Informal Conference, the Agency's architect/design expert witness (designer) testified that this approach was not workable because placing offices along windows would "block air flow, add significant mechanical, utilities, and soundproofing costs, and raise concerns of serviceability, constructability, aesthetics, and cooling." Moreover, when the Agency provided an initial design to the new building's landlord with offices along windows, the Agency was informed that the office placement would disrupt "window mullions" (essentially vertical spacing between windows). Indeed, the new building's current tenants have interior offices – or an "inboarding" design – in part due to the mullion issue.

Management's plan accomplishes several key objectives. Common spaces would be located at similar locations on each floor, making it easier for employees to locate them. The floorplan would also place noisier areas – such as kitchens – away from office and workstation spaces. And, Management's design would allow workgroups to remain together.

The Union did not offer sufficient justification for its proposal during the Informal Conference. Indeed, the Union admitted its floor plans were mere "representations" of what could be accomplished. Additionally, the Agency maintains the Union's reliance upon Article 32 is flawed for reasons already discussed. Moreover, Article 32 is silent on the topic of window spaces.

C. Conclusion

For reasons that follow, the Panel will order the imposition of a modified version of the Agency's proposal. That modification will deal with the Agency's obligation to bargain in certain circumstances.

Without question, Proposal 6 is at the very heart of this dispute. Unsurprisingly, then, much of the Informal Conference was devoted to the parties' disagreement over their respective visions for how office floors at the Portals location should be laid out and whether either is feasible. The Agency's focus is on providing a cost-efficient office layout that takes into account various limitations in place at the new building but also acknowledges the importance of employee workspace. As to the latter point, under Management's floorplan, most bargaining-unit employees will still have private offices or workstations. They would indeed be located throughout the interior of various floors. But, the majority of employees *and* supervisors would be subject to this arrangement. The Agency explained this concept to be an "egalitarian" one in which most employees are treated on equal footing within the context of office space.

The Agency's vision is also subject to various truths that must be accounted for. To begin with, and as discussed in the background section of this Decision and Order, Executive guidance has directed all Federal agencies to reduce their footprint and maximize workspace. Thus, any imposed layout must account for this framework. As it pertains to the Portals location in particular, the Agency offered credible testimony at the Informal Conference that its

design layout addresses several challenges present at this location. Notably, they credibly demonstrated that placing offices along windows could create issues with window spacing which, in turn, could require further costly construction. Placing offices along windows could lead to other increased costs as well, such as for heating/cooling and wiring. These factors should not be ignored.

The Agency's proposal provides a balance between the needs of the Agency, the desires of employees for privacy, and the realities of the environment the parties will find themselves in. To be sure, it is an imperfect balance. Employees will find themselves in darker environs and, from the Informal Conference, it does not appear that the Agency has done an adequate job of shedding light on that reality to its workforce. But, imperfect as it may be, the Agency's proposal provides balance all the same.

The Union explained at the Informal Conference that its primary interests are privacy and access to natural lighting from the windows. Indeed, it was clear throughout much of these negotiations and Panel proceedings that the Union placed significant priority on the desires of its employees. To this end, the Union conceded at the Informal Conference that it instructed its Architect to ignore certain aspects of the Agency's proposed floor plan, e.g., huddle spaces, etc. The Union attempted to remedy this omission 2 weeks *after* the Informal Conference by including a conceptual floor plan for the 6th floor at Portals that included items the Agency sought as part of its design. The Union correctly noted that the parties were encouraged to submit new information in support of their respective positions as part of their post-Informal Conference submissions, but no representation was made that the Panel would automatically credit those submissions. In these circumstances, it is difficult to gauge the credibility of the Union's late-filed submission given that it has not been subject to discussion or analysis by the parties and their respective experts within the presence of Panel representatives. And, the Union's submission is not so clear on its face that it provides clear answers to whether the Union's position is a viable one. Moreover, the Union's design still places offices along the windows, which raises the issues of window proximity discussed above. Finally, the Union's submission addresses solely one floor. Even if it were a credible design, it is difficult to say that it appropriately addresses the remaining floors and their particulars.

The Union attempted to downplay the opinions offered by the Agency's designer because it believes her views are inconsistent with Article 32 of the CBA and the POR's in the record. As to the Article 32, the Panel has already rejected relying upon Article 32. So, the Union's continued reliance upon it is misplaced.

Regarding the Agency's reliance on POR's, the record does reveal that the Agency took a fluid approach concerning their application to the office relocation. In this regard, they underwent several revisions due to information the Agency received throughout the design process. But, the Union's reliance on the initial POR represents an implied assumption that the Agency is frozen in time from the moment they first provided information to the Union. As the Agency's designer testified to at the Informal Conference, the Agency initially attempted to explore certain options, but those options became unworkable as more information came into view. The Panel is unaware of any authority that would require the Panel, the Agency, or the new landlord to be bound to the POR's as they originated.

Based on all of the above, it is appropriate to adopt most of Management’s language. However, the final sentence that allows Management to “reserve the right” to make seating changes needs to be addressed. To be certain, there may be circumstances in which the Agency has this right. But, that may not always be the case. And, even if it were, there may be circumstances where the Union has its own bargaining rights should Management chose to exercise its rights. Accordingly, the Panel adds the final sentence to Management’s proposal: **“If the Agency chooses to rely upon the foregoing right, it must satisfy all of its bargaining obligations in accordance with applicable law.”**

4. Proposal 7: Floorplans

Union Proposal: The Parties will meet to determine how best to fit window and interior offices on the floorplans to accommodate the requirements of Article [32] of the UPE CBA for Office size, as well as to accommodate Proposal 6 above. Any disagreement will be determined by the FSIP.

Agency Proposal: The Agency’s inboarding floorplans offer the best use of the space at the new HQ building, achieving maintenance of functional grouping while providing employees with equitable access to light, air circulation, common areas.

A. Agency Argument

Citing a *Panel* decision, the Agency argues that the *FLRA* has concluded that proposals that permit for open-ended negotiations at a later date are not appropriate arrangements.⁸ Additionally, adopting the Union’s proposal could cause a 1-year delay amounting to \$45 million. Management once again also disputes the idea that the Article 32 of the CBA applies to the context of this proposal.

B. Union Argument

The Union’s language indicates that Proposal 7 is contingent upon the outcome of Proposal 6, discussed above. Management’s own POR is inconsistent with Article 32 in the CBA. Thus, whatever decision the Panel imposes will require further negotiations consistent with the parties’ agreement. Indeed, the Union maintains that Management has never indicated that bargaining-unit employees may not have access to window seating. Thus, the parties would still need to bargain over which employees have such seating.

C. Conclusion

The Panel will order the parties to withdraw their proposals. The Union’s proposal appears to be contingent upon adoption of its Proposal 6. But, the Panel has adopted Management’s language for Proposal 6. As such, it logically follows that Proposal 7 cannot be adopted. And, even were the Union’s proposal independent of the outcome of Proposal 6, the

⁸ Citing *Portsmouth Naval Shipyard, N.H. and IFPTE, Local 4*, Case Nos. 15 FSIP 114 and 16 FSIP 05 (2016).

Panel cannot condone an approach that would permit additional bargaining over the office layouts when that issue was squarely presented as part of this dispute. Contrary to the Union's claim, the evidence did not demonstrate that bargaining over office layouts needed to be postponed following further developments.

The Agency's proposal is essentially a recitation that its floorplan is appropriate to accept, which the Panel has already done in its resolution of Proposal 6. That is, there appears to be no actual need for this proposal. Indeed, this proposal did not even appear until the Agency's post-Informal Conference submission. It, therefore, does not appear necessary. Both parties' proposals should be withdrawn.

5. Proposal 15(b): Conference Rooms

Agency Proposal 15(b): Most of the conference rooms will be placed in the interior space. However, a number of the conference rooms will be placed along the perimeter of the building (window wall).

Union Proposal 15(b): There will be multiple conference rooms located in the interior of the office space on each floor to allow for window offices for bargaining unit employees.

A. Union Argument

The Union's proposal focuses on maximizing sunlight and privacy. The parties agree that the "majority" of conference rooms will be in the interior of office space. Yet, a review of Management's plans demonstrates that 49% of their proposed conference rooms will be along windows. The Union's testimony at the Informal Conference demonstrated that conference space can be relocated to interior areas to accommodate employees. Moreover, employees spend significantly less time in conference rooms.

B. Agency Argument

Management rejects the Union's proposals and maintains that it would be inappropriate to outboard employee offices. The Agency does not deny that conference rooms will be along window space. Having this arrangement will allow employees the ability to enjoy sunlight during meetings. And, the size of conference rooms versus the size of offices means that there will not be architectural issues as identified by the landlord of the building. But, contrary to what the Union maintains, there will be more interior conference rooms than conference rooms along the window line.

C. Conclusion

The Panel will impose Management's proposal. The plain language of the Union's proposal calls for the placement of conference rooms in certain locations in order to accommodate the Union's request for proximity to window space. Implied within this language is an understanding that the Union's other proposals concerning office space and location would

be accepted. They, of course, have not been. As Union Proposal 15(b) is implicitly premised upon the adoption of proposals that have been rejected, the Panel believes it is appropriate to reject Union Proposal 15(b). Management's proposal appears to be reasonable and consistent with the goals stated in the POR. As such, the Panel believes this language should be adopted.

6. Proposal 22: Office Doors and Walls

Union Proposal 22: Office doors to bargaining unit offices shall be made of at least 85% frosted glass, if glass is chosen for the doors while the four walls shall be made of 85% sheet rock with 15% glass at the top.

Agency Proposal 22: Bargaining unit employee's office doors will be part of a glass front made of up to 62% filmed glass. Three of the four walls will be made of 100% sheet rock and the fourth wall (which includes the door) shall be made of glass with 62% film coverage.⁹

A. Union Argument

The Union's proposal reflects the desire of bargaining-unit employees to maximize privacy. It also facilitates access to natural sunlight. Additionally, employees often work with sensitive materials that should not be viewed by other individuals. Having a door is, therefore, crucial to maintaining that sensitivity. The Union concedes that Management's proposed frosted-glass arrangement will provide "some privacy," but the Union's proposal will provide greater "obfuscation." The glass at the top of walls will also allow for greater light flow. The Union maintains that the Agency did not provide any cost-benefit analysis that outweighs the benefit of privacy that would accrue to employees under its proposal.

B. Agency Argument

Management maintains that its proposal provides employees with a modicum of privacy and is also more cost feasible. Addressing first the Union's request for glass on the top of walls, or "clerestory windows," the Agency examined the Union's proposed floorplan for the sixth floor. Examining the 142 offices that were in this plan, the Agency estimated that adopting the Union's proposal would result in a cost of \$1,167,240.¹⁰ Management's proposal, however, would cost \$938,595. The difference for *one floor alone*, then, would be \$228,645. Additionally, even if Management were to employ only 50% filmed glass, a significant portion of an employee's workplace would still be obscured as demonstrated by a mock-up illustration provided by the Agency as part of the Informal Conference process.

⁹ Prior to the Informal Conference, Management proposed 50% filmed-glass coverage. The Agency modified its proposal to 60% at the hearing, and then modified it further to 62% after concluding that the 60% coverage, as a practical matter, resulted in 62% coverage.

¹⁰ As noted above, the Union submitted a new floor plan for the 6th floor as part of its post-Informal Conference submission. The Agency's calculations were based upon data received prior to the receipt of the Union's new plan. This revised plan, however, appears to have a similar number of offices.

As part of its cost analysis, the Agency also researched “films” for the glass fronts installed as part of offices. The vendor Management researched has standard rolls of 36, 60, and 72 inches. Installing the 60-inch roll -- which would result in 62% coverage as Management proposes -- costs \$523,952 to install. A 72-inch roll would cost \$617,153, which again, results in more costs to the Agency and the taxpayer. The Agency was unable to locate any data on a vendor that could provide a film roll comparable to the 85% coverage requested by the Union. But, as the glass front is only 96 inches, the Agency believes its proposed coverage of 62% is sufficient for privacy and still permits for natural light.

C. Conclusion

The Panel will impose Management’s proposal. As with the workstation issue in Proposal 4, the parties agree that privacy is important to an employee’s ability to conduct their work. And, as with Proposal 4, the Agency has provided copious data concerning the cost feasibility of its proposal in comparison to the one put forward by the Union. The information in the record, and the testimony provided at the Informal Conference, demonstrates that the Agency’s proposal represents an effort to meet the privacy needs of its employees with the Agency’s responsibility to act as a vanguard to the interests of the taxpayer. Indeed, even the Union concedes that the Agency’s former proposal, which amounted to *less* coverage, provided a degree of privacy. The Union also claimed that the work of many bargaining-unit employees is so sensitive that the availability of a closed door is a necessity. But, were that the case, Management surely would have accounted for that fact in its designs. On overall balance, then, the Agency’s proposal makes the most sense for purposes of adoption.

7. Proposal 28: Parking

At the Informal Conference, the Union modified its language on this proposal. It now reads as follows:

The [E]mployer will provide two parking spaces which are subsidized consistent with the carpooling provisions of Article 33 of the CBA.

Although the Agency disputes the negotiability of the Union’s proposal, it provides the following counter language:

The Agency will continue to provide parking spaces for bargaining-unit employees as outlined in the [existing] CBA Article 33.

A. Agency Argument

The Agency believes that this proposal is nonnegotiable because it does not concern a change in condition of employment as, although the location of parking will change, the circumstances surrounding parking will not. Moreover, the Union’s proposal is intended to benefit solely the Union. The Agency is also opposed to the Union’s proposal due to cost issues. In this regard, a daily pass will cost \$15-\$20, and a monthly pass will be \$270-\$295 per month. These costs are comparable to current parking costs. Further, under Article 33 of the CBA, the Agency provides subsidized parking to several groups of employees, none of which

include the Union. And, Management will not be altering the conditions of employment under this contract language.

B. Union Argument

The Union claims Article 33 of the CBA provides discounted or subsidized parking under certain circumstances. The Union wishes to continue the foregoing, and is not seeking an expansion.

C. Conclusion

The Panel will order the parties to withdraw their proposals. Throughout negotiations, the Union sought a guarantee of a set amount of subsidized parking spaces for use by the Union. The Union has attempted to compromise its position by reducing the number of spaces it is seeking, but it has not dropped its request for a guaranteed number of spots. However, a change arose at the Informal Conference in that the Union altered its language to claim, for what appears to be the first time, that parking spaces should be made available “consistent” with Article 33 of the CBA, “Parking.” Implied within the language of this proposal is the Union’s belief that Article 33 establishes parameters for parking consistent with what the Union seeks. Given these hypothetical parameters, however, it is unclear why the Union needs to reference Article 33 within the context of this space-relocation MOU. That is, it is not clear why Article 33 cannot act independently. As the Union has not identified a need for reference to Article 33, the Panel believes it is appropriate to simply order the parties to withdraw their proposals. Either party may rely upon Article 33 if it so chooses in the future.

8. Proposal 58: Gym Access

Union Proposal 58: The Employer will ensure that there is a Fitness Center at the location for the use of bargaining unit employees, and will continue to subsidize the gym facilities at the new location, as they have done at 1200 K. Street, so that current bargaining unit employees/members of the gym will pay the same rate of \$6 per pay period to be members of the gym at the new location.

Agency Proposal 58: Once the on-site fitness center at the new HQ building is constructed, the Agency will recommend to GSA and the Landlord to explore offering fitness classes at the on-site fitness center. If the Landlord at any time decides to use the space for the building fitness center for some other purpose, the Agency will explore alternatives, including but not limited to discounted memberships at nearby gyms.

A. Union Argument

The Agency conceded at the Informal Conference that a gym facility will be made available at no cost to employees. The parties further “acknowledged” that a “line item for gym usage and/or fitness center existed in the current operational budget.” This line item, the Union contends, includes a current \$6 contribution from bargaining-unit employees. There was no

evidence provided that the Agency could not simply bargain with other vendors to provide fitness classes at the new facility. The Union's proposal should be adopted.

B. Agency Argument

Space at the Portals location has been designated for a new fitness center, and that designation has been enshrined within the lease. The new building's landlord informed the Agency that the center will be free to all Agency employees. By contrast, and as discussed above, Agency employees currently pay a \$6 deduction per pay period for gym access. The Union's proposal to subsidize any cost above \$6 per pay period is problematic because the Agency has no contractual relationship with the landlord or any future gym leadership. Consequently, all the Agency may do is provide recommendations.¹¹ But, even providing a recommendation can be problematic because the Agency has no way of knowing what a future gym will offer in term of classes (or lack thereof). Moreover, the Union's proposal could call for Management to subsidize membership for all individuals within the building, even if they are not an Agency employee. The Agency cannot legally do that. The Union's proposal simply calls for the Panel to rule upon a series of assumptions.

C. Conclusion

The Panel will impose a modified version of the Agency's language to resolve this dispute. At the Informal Conference, the Union made much of the Agency's *existing* gym arrangement at 1200 K. St. In this regard, the Union noted that bargaining-unit members are paying a monthly subsidy of \$6 so that employees can participate in group exercise classes. And, it is the continuation of these classes that is of primary concern to the Union. The Agency, for its part, conceded that gym costs come out of an annual portion of the Agency's budget that is set aside for operating expenses, but it otherwise disagreed with the Union's characterization of a specific arrangement concerning subsidies.

In any event, the designated Panel representative attempted to explain to the Union during the Informal Conference that the dispositive issue turns on arrangements at the *future* Agency headquarters at Portals. And, during the Informal Conference, the Agency explained that it is unlikely to have any sort of contractual relationship with the building owner or any hypothetical gym contained therein. Were there evidence in the record to establish some sort of contractual relationship between the Agency and the gym facilities, the Panel could conceivably explore options akin to what the Union is seeking. But, that is not the case from the record before the Panel. To the contrary, what was presented supported the Agency's claim that it will have no direct relationship with any entity responsible for the gym. Thus, as the Agency accurately notes, its ability within this context is limited to providing recommendations. Consequently, it is appropriate to accept the Agency's first sentence in full.

However, the Agency's second sentence envisions a hypothetical in which the new building ownership does not provide a gym facility. In that scenario, the Agency would explore other arrangements. Management's language, unintentionally or not, provides it broad

¹¹ Citing *Library of Congress v. FLRA*, 699 F.2nd 1280, 1289 (D.C. Cir. 1983).

discretion to address those arrangements unilaterally. Because different situations could create different bargaining obligations, however, the Panel believes it is appropriate to add a third sentence to address potential future negotiations. Management's language should be modified as follows (new language in bold):

Once the on-site fitness center at the new HQ building is constructed, the Agency will recommend to GSA and the Landlord to explore offering fitness classes at the on-site fitness center. If the Landlord at any time decides to use the space for the building fitness center for some other purpose, the Agency will explore alternatives, including but not limited to discounted memberships at nearby gyms. **In the latter scenario, the Agency will ensure all its bargaining obligations under applicable law are satisfied.**

9. Proposal 69 /70

Union Proposal 69/70: Management will consider duty time reserved for the move in assigning work and setting deadlines. Employees who require additional time or flexibility to complete assignments may request such time from management. Upon request, management will consider appropriate adjustments, including maximizing workplace flexibilities.

Agency Proposal 69: Bargaining unit employees shall receive sufficient duty time to prepare and carry out the move to the new location. Upon employees' request, management will consider making appropriate adjustments, including maximizing workplace flexibilities.

A. Union Argument

The Union argues that it is merely seeking to establish a process in which employees may seek assistance when there is a possibility the relocation could hinder their ability to perform their duties. The proposal does not unreasonably interfere with management rights, and it appropriately balances the need of employees and supervisors. This Panel has imposed similar language in other relocation-related manners.¹²

B. Agency Argument

The Agency maintains that its proposal provides what the Union requests in its proposal. Moreover, the Union's proposal is "problematic" because it presumes that certain duty time may be reserved in a "vacuum." Forcing a manager to alter a deadline in advance could run afoul of the statutory right to assign work under 5 U.S.C. §7106(a)(2)(B).¹³

C. Conclusion

¹² Citing *DoDEA and Nat'l Education Ass'n-Stateside Region*, 18 FSIP 073 (Dec. 2018).

¹³ Citing *AFGE, Council 220 and SSA, Baltimore, Md.*, 65 FLRA 726 (2011).

The Panel will impose Management's language to resolve this dispute. The parties competing proposals focus on duty time for the relocation and adjustments to an employee's duty time. Of particular concern for the Union is the impact of the move upon work assignments and, relatedly, work deadlines. The Union proposes that Management "will consider" duty time in dealing with the foregoing items. This language, then, places a mandate upon the Agency to consider relocation-related duty time for work purposes. Although the Union's proposed language requires only consideration, it still places a required duty upon the Agency to undertake that consideration. Further still, the Union's proposed language is broad enough to require such an undertaking for *every* work assignment. Such a scenario would not benefit the Agency's operations. As such, the Agency's language is a more reasonable option and, therefore, should be adopted.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.



Mark A. Carter
FSIP Chairman

November 14, 2019
Washington, D.C.

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