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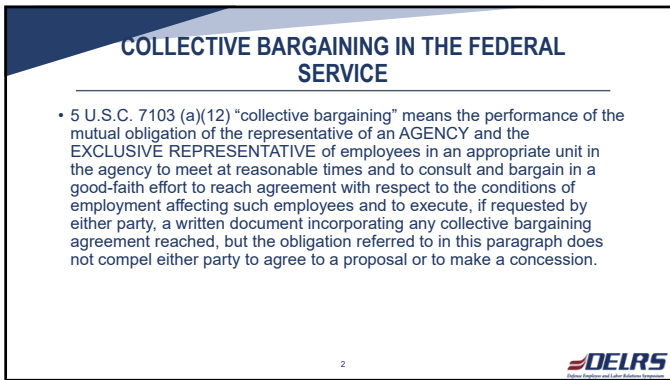
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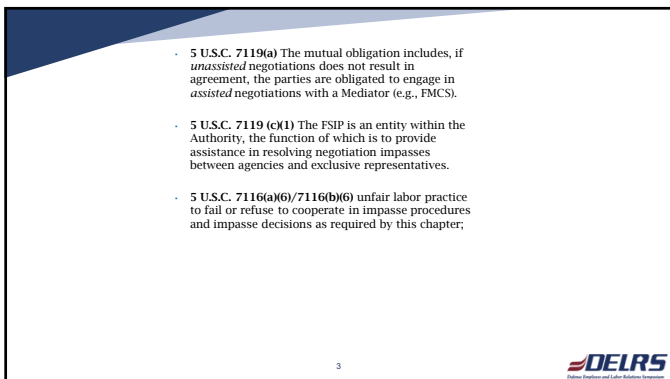
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**WHY THE NEED FOR THIS UNIQUE PANEL IN THE FEDERAL SERVICE?**

- 5 U.S.C. 7311 - Loyalty and striking
- An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—
- (3) participates in a **strike**, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

• No Strike = Right to resolve through Impasse Process



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**FSIP IS THE END OF THE BARGAINING PROCESS**

- 5 U.S.C. 7119
  - Bring closure to collective bargaining impasses
  - 5 C.F.R. 2470.2 (e) - Definition of **impasse** - that point in the negotiations at which the parties are unable to reach agreement, notwithstanding their efforts to do so by **direct negotiations** and by the use of **mediation** services or other voluntary arrangements for settlement.
  - Approval of binding arbitration (i.e., other voluntary arrangement)
- 5 U.S.C. 6120 - Federal Employees Flexible and Compressed Work Schedules Act:
  - Agency determines to not establish CWS; or
  - Agency terminates CWS.



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**WHO IS FSIP?**

- Appointed by POTUS, no Senate confirmation:
  - Martin H. Malin, FSIP Chairman
  - Edward Hartfield
  - Marvin Johnson
  - Jeanne Charles
  - Mark Pearce
  - Howard Friedman
  - Pamela Schwartz
  - Tamiko Watkins
  - Joseph Slater
  - Wynter Allen
- Executive Director - Kimberly Moseley
- 2 Staff Attorneys - Dan Duran and Victoria Gillen
- Office Manager - Yvonne Waller



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### BEFORE COMING TO FSIP

- You must go to mediation- FMCS is most common but not exclusive
- FMCS Commissioner must release you and give you a case number to provide to FSIP
- New FMCS Federal Sector Cohort Process



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### WHEN CASES COME TO THE PANEL


Parties at impasse in negotiation AND parties have engaged the services of a Mediator (e.g., FMCS)

- One or both parties may file a request for assistance

Staff attorneys conduct an initial investigation

- Contact with the parties
- Gather information re: Panel's jurisdiction consideration
- Seek opportunities for settlement

Panel's 1<sup>st</sup> review: Jurisdiction consideration, process to resolve the impasse



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### JURISDICTION CONSIDERATIONS

Panel asserts jurisdiction ONLY if:

- Negotiations and voluntary efforts have been exhausted (i.e., at impasse)
- Filing requirements have been met; and
- Neither party has raised a bona fide jurisdictional issue or there is not good cause for declining jurisdiction.
  - Permissive bargaining, with no obligation to continue
  - "Covered by", SSA, 47 FLRA 1004 (1993)
  - Intertwined/piecemeal bargaining
  - Not at impasse, POBA, 26 F.3d 1148 (1994)



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Panel does NOT resolve:

- Duty to bargain questions (Authority)
- Negotiability - *Carswell*, 31 FLRA 620 (1988)
- Contract interpretation disputes (Grievance Arbitrator)
- Violations of the Statute or Executive Order 14003, *FCC*, 73 FLRA 101 (2022)



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### MOST COMMON PANEL PROCEDURES

- Resumption of Negotiations
- Mediation-Arbitration
- Arbitration with a Panel Member
- Private Arbitration
- Informal Conference
- Written Submissions
- Order to Show Cause
- Private Fact-Finding - Mediation



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### BUT WE CAN GET CREATIVE

Department of Homeland Security, Bureau of customs and Border Protection  
and National Treasury Employees Union, 10 FSIP 10  
U.S. Merit Systems Protection Board and Merit Systems Protection Board Professional Association, 24 FSIP 033



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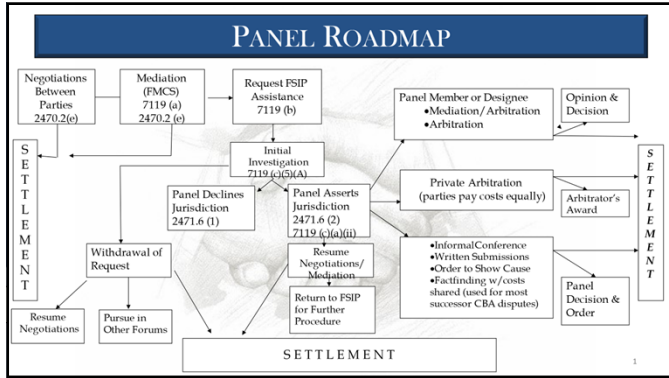
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### TWO VIEWS OF THIRD PARTY'S ROLE

- I Third Party (e.g. FSIP) is there to adjudicate the parties' dispute. Parties have been unable to reach agreement on their own and with mediation assistance. They have come to the end of the line and the neutral third party is there to adjudicate the dispute for them. E.G. National Union of Hospital and Health Care Employees v. Board of Regents, University of New Mexico, 245 P.3d 51 (N.M.App. 2010).
- II Third Party process is a continuation of the parties' collective bargaining process

**DELRS**  
Division of Labor Relations Services

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### A COMPARISON OF TWO PANELS

- Panel Appointed by President Trump and Chaired by Mark Carter
  - Averaged 6 new cases/month; 54% Agency initiated
  - Used written submissions 71% of the time
  - Settlement rate 15%
- Panel Appointed by President Biden and Chaired by Martin Malin
  - Averaged 7 new cases/month; 60% Union initiated, 18% jointly filed, 21% Agency initiated
  - Used written submissions 5% of the time
  - Used med-arb 75% of the time; 81% settlement rate

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### IMPACT OF THE PANDEMIC

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- I. On Agency Processes
  - FSIP went 100% remote in 2020. It remained 100% remote when the Biden appointees took office in late summer/early fall 2021. Initially, we used WebEx but the FLRA switched to Microsoft Teams
  - Conducting med-arb remotely poses many challenges but we've adapted pretty well.
  - Still operating mostly remotely. Panel member assigned to med-arb has discretion to conduct it in-person or remotely. But most med-arbs will still be done remotely because of very limited travel funds.



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### II. On Issues Coming Before the Panel

January 1, 2023 – April 15, 2024 Panel Issued 11 Decisions

1. Dept of Army, Ft. Leonard Wood and IAFF 24 FSIP 018 – firefighter duty trades
2. VA Black Hills Health System and AFGE Locals 1539 & 2342, 24 FSIP 025 – schedule for nurses working remotely
3. VA Black Hills Health System and AFGE Local 1539 & 2342, 24 FSIP 026 – firefighter 72 hour workweek schedule
4. VA New Jersey Healthcare System and NFFE Local 1431, 23 FSIP 066 – official time
5. Navy, Naval Undersea Warfare Center (Newport, RI) and NAGE Local R-144, 22 FSIP 058 – changes to Flexitour schedule policies
6. Dept of Energy and NTEU, 22 FSIP 041 – hoteling; how many days must employee work on site to have own workstation?
7. FEC and NTEU, 22 FSIP 037 – telework and AWS
8. Dept of Army, Ft. Campbell and AFGE Local 2022, 22 FSIP 089, - ground rules
9. Dept of Army, Communications-Electronic Command, Aberdeen Proving Ground and AFGE Local 1894 and NFFE Local 476, 22 FSIP 039 and 042 – telework
10. Federal Bureau of Prisons, FCS Sandstone (MN) and AFGE Local 683, 22 FSIP 23 – CWS
11. SEC and NTEU, 23 FSIP 003 - telework



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### FLEXIBLE AND COMPRESSED WORK SCHEDULES

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**Federal Employees Flexible and Compressed Work Schedule Act (5 USC 6120) (the Act):**

- Agency may establish FWS and CWS (Otherwise, Straight 8).
- Where there is an exclusive representative (e.g., a union), any flexible or compressed work schedule, and the establishment and termination of any such schedule, shall be subject to collective bargaining. (Sec 6130) (Exception to Management Rights)
- The bargaining unit employees shall not be included in any such schedules unless they are provided for under a CBA. (Sec 6130)



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**AGENCY REFUSES TO BARGAIN CWS/AWS**

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Whether the Agency's determination that the proposed schedule would cause (or has caused) an **adverse agency impact** (as defined by 5 USC 6131) is supported by evidence as defined under the CWS Act. If so, no duty to bargain. If NOT, the parties are ordered to bargain.

Adverse Agency Impact is defined as:

- Reduction of Productivity;
- Diminished level of service to the public; and/or
- Increase in cost in agency operations



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**TERMINATION OF AWS**

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- Agency has right to ask Panel to terminate an existing CWS, but parties must first at least negotiate (no mediation required).
- If Agency goes down this road it **MUST** provide a statement from the Agency Head or someone delegated with authority to make decisions about whether a schedule is creating an "adverse impact." See 5 U.S.C. 6131.
- An Agency can show "adverse impact" if it demonstrates the CWS is creating: (1) increased costs; (2) reduction in productivity; or (3) diminished level of services to the public. Agency must rely **ONLY** on these criteria.
- Agency has burden of proof. The Panel will rule **ONLY** on issue of adverse impact; it will not impose a different schedule. Panel has deadline of 60 days to resolve.



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**"Impasse"** under the Act is defined in 5 C.F.R. 2472.2 (k)

- There is no requirement to go to FMCS prior to filing with the Panel under the Act

For impasses under the Act, the sole issue before the Panel is whether an agency has met its burden of demonstrating adverse agency impact would likely exist (in establishment case) or exists (termination case)

If impasse is reached while bargaining, the parties can come back to the Panel via 5 U.S.C. 7119 (mediation is required)



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### BARGAINING AN AWS

- An Agency can bargain under 7119, but refuse to agree to a CWS, without raising a claim of adverse impact (although some of the arguments may be the same e.g., schedule would cost too much).
- The Panel will treat those types of cases like regular impasses under 7119; thus, parties **MUST** use mediation before coming to the Panel.
- If the Panel issues a decision, it has the authority to impose an actual CWS schedule.
  - Note - management rights **DO NOT** apply to bargaining over CW

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### FINALITY OF PANEL DECISIONS AND ARBITRATION AWARDS

Panel Order & Arbitration Awards under 5 U.S.C. 7119(b)(1)

- Subject to Agency Head's Review
- NOT subject to filing exceptions w/FLRA

Parties Agreed to Binding Arbitration under 5 U.S.C. 7119(b)(2)

- **NOT** subject to Agency Head's Review (waived by Agency)
- Subject to filing exceptions w/ FLRA
- See 852 F.2nd 779, 783-85 (D.C. Cir. 1988).

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## ANY QUESTIONS

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