

DELRS | 2024
Forging the DoD Workforce of the Future

Winning At Impasse
 Robert Anthony Rodriguez
 Department of the Air Force
 Labor Management Programs
 AFPC DP3/FS

Nicholas Chalupa
 Department of the Navy

1

AGENDA

- Impasses under the Federal Service Labor-Management Relations Statute
 - Collective Bargaining in the Federal Service
 - Who is the Federal Service Impasses Panel?
 - Panel Process
 - Panel Jurisdiction
- Impasses under the Federal Employee Flexible and Compressed Work Schedules (CWS) Act
 - The Act
 - Establish CWS
 - Terminate CWS
- Finality of Panel Decisions
- Question & Answer Session

2

2

COLLECTIVE BARGAINING IN THE FEDERAL SECTOR


- **5 U.S.C. § 7103 (a)(12)**
 - "Collective bargaining" means the performance of the mutual obligation of the representative of an AGENCY and the EXCLUSIVE REPRESENTATIVE [defined at 5 U.S.C. § 7103 (a)(16)] of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession
- **5 U.S.C. § 7119(a)**
 - The mutual obligation includes, if *unassisted* negotiations does not result in agreement, the parties are obligated to engage in *assisted* negotiations with a Mediator (e.g., Federal Mediation and Conciliation Service (FMCS))

3

3

COLLECTIVE BARGAINING IN THE FEDERAL SECTOR (cont.)


- **5 U.S.C. § 7119 (c)(1)**
 - The Federal Service Impasses Panel (the Panel or FSIP), is an entity within the Federal Labor Relations Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives
- **5 U.S.C. § 7116(a)(6) and § 7116(b)(6)**
 - It is an unfair labor practice to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter



4

WHAT DOES THE FEDERAL SERVICE IMPASSES PANEL DO?

- Pursuant to 5 U.S.C. § 7119, the FSIP has authority to decide and take whatever action necessary, consistent with 5 U.S.C. § 7119(c)(5)(B)(iii), on impasses between federal agencies and unions representing federal employees resulting from negotiations on matters under:
 - Federal Service Labor-Management Relations Statute
 - Federal Employees Flexible and Compressed Work Schedules Act.
- FSIP's Guiding Philosophy – Voluntary settlements of bargaining impasses are in the best interest of the parties and the public.




5

WHY THE NEED FOR FSIP?

- **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—
 - 1) advocates the overthrow of our constitutional form of government;
 - 2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;
 - 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
 - 4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia


Inability to Strike = Right to Resolve through Impasse Process



6

STRUCTURE OF FSIP


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



7

NEGOTIATIONS BETWEEN THE PARTIES

- It all begins when parties are negotiating matters of conditions of employment and the parties are unable to reach agreement following good faith bargaining
 - *DoD, Dept. of Navy, Naval Ordnance Station, Louisville and IAM Lodge 830, 17 FLRA 896, 897 (1985)*
- Before seeking assistance from the FMCS, the parties can try the following techniques:
 - Take a break
 - Temporarily set aside tough issues
 - Share more information
 - Ask questions and telescope
 - Make small concessions
 - Reality-checking method
 - If all fails, seek assistance from the FMCS




8

FEDERAL MEDIATION AND CONCILIATION SERVICE

- § 7119(a)
 - FMCS shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. FMCS shall determine under what circumstances and in what manner it shall provide services and assistance
- § 7119(b)
 - If voluntary arrangements, including the services of FMCS or any other third-party mediation, fail to resolve a negotiation impasse*:
 - either party may request FSIP to consider the matter; or
 - the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by FSIP


*Note: FMCS is not a requirement for flexible and compressed work schedules (5 U.S.C. § 6120)



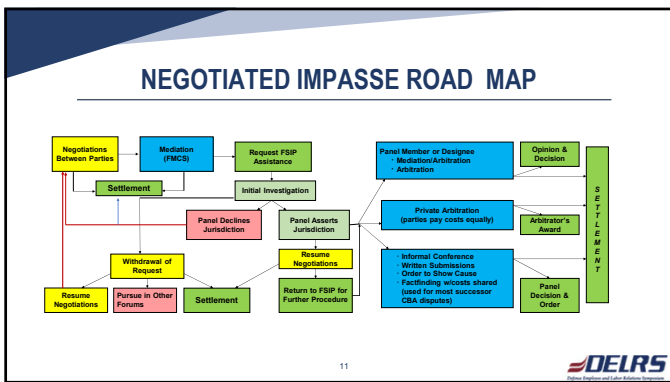
9

FSIP IS THE END OF THE BARGAINING PROCESS

- **5 U.S.C. § 7119 – Negotiation impasses; FSIP**
 - Works to bring closure to collective bargaining impasses
 - **5 CFR 2470.2 (e) – Impasse**
 - Defined as the “point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by **direct negotiations** and by the use of **mediation** or other voluntary arrangements for settlement”
 - Approval of binding arbitration (i.e., other voluntary arrangement)
- **5 U.S.C. § 61, Subchapter II – Federal Employees Flexible and Compressed Work Schedules**
 - Agency determines to not establish CWS or Alternate Work Schedules (AWS); or
 - Agency terminates CWS or AWS

10 


10



11

BEFORE REQUESTING ASSISTANCE FROM FSIP


- You can expect, once the request for assistance to FSIP is received, for the process towards investigating the matter to move quickly. The next slides will describe the actions FSIP takes, and the procedures under their authority to resolve the dispute. Therefore, you must ensure that the Agency file is prepared. In preparation for your request to FSIP, it is recommended you engage in these two areas:
 - Organizing the negotiation file (the bargaining history of the dispute)
 - Side-by-Side Comparison

12 

12

ORGANIZING THE NEGOTIATION FILE


- FSIP is not only going to inquire about the nature of the dispute, but they are also interested in the negotiations between the Parties. While release from mediation is positive indicator of the parties mutually engaging in negotiation, FSIP will be interested to know the substance of negotiation sessions prior to mediation. Either Before or immediately after requesting FSIP's assistance, prepare the following:
 - Copies of the original notice to the union to bargain or copies of the demand to bargain from the union;
 - Copies of any proposals that were discussed to include those that were rejected by either Party;
 - Copies of any proposals that were tentatively agreed to by the Parties; and
 - Copies of any emails exchanged between the Parties
 - The FLRA and FSIP consider email exchanges of the positions of the Parties on the proposal/subject as documentation of the Parties efforts to bargain

 13

13

SIDE-BY-SIDE COMPARISON


- The Side-by-Side (SBS) comparison is a breakdown of each Parties' specific proposal on the area/topic of bargaining/negotiation. The SBS allows FSIP to compare the language of both the Agency and the Union to determine similarities and focus on areas of difference. The SBS consists to three columns:
 - 1) Agency Proposal
 - 2) Union Proposal
 - 3) Differences
- Both the Agency's Proposal and the Union's Proposal column should contain the exact proposals as stated in the Final Best Offer (FBO) during the very last bargaining session, which was most likely during mediation
 - **Avoid alternating, amending, modifying or changing Agency Proposal in the SBS, as this would constitute a counter proposal to any rejected FBO**
- The Differences column should summarize where the two proposals differ, and touch upon how these proposals will function, from the plain language of the proposals

 14

14

SIDE-BY-SIDE COMPARISON (cont.)


Agency's Proposal	Union's Proposal	Differences
<ul style="list-style-type: none"> • State Agency's Proposal in its entirety • Continuation of Agency Proposal 	<ul style="list-style-type: none"> • State Union's Proposal in its entirety • Continuation of Union's Proposal 	<ul style="list-style-type: none"> • Difference: Agency Proposal A differs from Union Proposal A • Difference: Agency Proposal B differs from Union Proposal B

 15

15

WHEN CASES ARRIVE TO FSIP


- 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
 - FSIP prefers cases be e-Filed through FLRA's website
- FSIP Staff attorneys conduct an initial investigation
 - Contact with the parties
 - Gather information about the dispute; report to the Panel
 - Goals are to ensure that only genuine impasses reach the Panel and assist the parties in reaching voluntary settlement
 - Seek opportunities for settlement
- The Panel reviews, discusses jurisdiction, and Alternate Dispute Resolution (ADR) processes available, and decides how to move forward
 - Panel's 1st review: Jurisdiction consideration, process to resolve the impasse
- The Panel often selects procedures that will permit the entire Panel to weigh in on a decision should one be necessary



16

JURISDICTION CONSIDERATIONS

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




17

PANEL DECLINES JURISDICTION

The Panel or an Interest arbitrator, in general, does not resolve:


- Negotiability disputes
 - If an agency raises a negotiability concern, the Panel will seek input from the parties as to whether a disputed proposal is within the duty to bargain. The Panel will decline jurisdiction if it determines that a valid negotiability dispute exists
 - If the Panel determines, based on FLRA case law, that a proposal is within the duty to bargain, the Panel is authorized to rule on the negotiability of a proposal. If the Panel determines a proposal is negotiable under current FLRA case law, it may accept jurisdiction over the dispute and move ahead with efforts to resolve it (See *Carswell Air Force Base and AFGE Local 1364*, 31 FLRA 620 (1988))
- Bargaining Obligation disputes
 - An interest arbitrator appointed pursuant to FSIP direction is also empowered to determine whether a matter is within the duty to bargain, if the interest arbitrator is able to do so based on current FLRA case law. An Interest Arbitrator, like FSIP, is not authorized to independently assess the negotiability of proposals. However, where an Interest Arbitrator merely applies existing FLRA precedent to resolve an impasse, the FLRA will sustain the award if the precedent is correctly applied (See *Social Security Administration and National Council of SSA Field Operations Locals*, AFGE, 25 FLRA 238 (1987))
 - When the matter is contained in or covered by an existing agreement between the parties, there is no duty to bargain; management can refuse to bargain. When an agency argues that the Panel should not assert jurisdiction because the matter is already contained in or covered by the parties' collective bargaining agreement, the Panel will apply the "covered by" test enunciated by the FLRA. Upon applying the test, if there is a duty to bargain, the Panel will assert jurisdiction. If there is no duty to bargain, the Panel will not assert jurisdiction (See *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, National Council of SSA Field Office Locals*, Council 220, 47 FLRA 1004 (1993))
- Questions concerning Representation
- Grievances
- Undiscussed or new proposals



18

DISPUTE RESOLUTION PROCEDURES FSIP USES

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




19

RESUMING NEGOTIATIONS

- The Panel may direct the Parties to engage in further bargaining. The Panel will send the Parties back to resume bargaining for one or more of these areas:
 - To narrow the issue(s) submitted for resolution to the Panel for which the matters are not sufficiently defined
 - Panel asserts further bargaining between the Parties may resolve the dispute
 - The Panel will be restricted on ordering bargaining on the Parties final offers on either an issue or article basis
- Negotiations occur on a concentrated schedule, normally over a 15-, 30-, or 45-day period with the Parties submitting a status report at the conclusion of bargaining
 - Assistance from FMCS or arrange scheduled bargaining with FMCS at a prescribed hours of negotiation


20



20

MEDIATION/ARBITRATION (MED-ARB)


- Panel Member may work with parties as mediator to help achieve voluntary agreement
- Parties are expected to support proposals with documentary evidence and witnesses appropriate to the issues
- If full agreement not reached, Panel Member will act as arbitrator to order language for unresolved issue(s)
- Med-arb proceeding is typically informal and without a transcript
- Parties often provide post-hearing submissions (Arbitrator's discretion)
- Panel Member (as Arbitrator) writes a final and binding Opinion and Decision



21

PRIVATE ARBITRATION


- When a joint request is made by the involved parties, the Panel may order the parties to resolve by private arbitrator and close the case with no further panel action
- Typically, parties are directed to share the fees/expenses of the private neutral



22

INFORMAL CONFERENCE


- Panel Member/senior staff meets with parties to attempt voluntary resolution. Proceeds like Med-Arb, except that merits decision is reserved to the full Panel if no resolution
- Panel considers findings and recommendations and issues a written decision resolving outstanding issues



23

WRITTEN SUBMISSIONS


- The Panel uses this procedure frequently when issues are clear-cut, no likelihood of mediated resolution, and no need for proceeding to develop factual record
- Parties are usually given an opportunity to submit rebuttal statements
- No hearing is held under this proceeding. Thus, no direct contact between parties and the Panel
- The Panel appointed under the Trump administration used this procedure more than any other resolution procedure



24

ORDER TO SHOW CAUSE


- As a matter of production, the Panel does not issue a large number of decisions; therefore, if the dispute involves a matter previously considered and addressed in previous Decisions and Orders (D&O), the Panel may issue an *Order to Show Cause* directing the Parties to respond as to why specific wording or other solutions previously imposed by the Panel should not be applied to resolve the dispute in the case at hand, especially when issues are substantively similar to those addressed in previous Panel decisions
- The key to this process is to:
 - Re-direct the parties' focus on the unique or special fact circumstances of their dispute; and
 - Submit to the Panel how their case differs from those that the Panel has previously considered and addressed in previous D&Os
- Agencies should submit any supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes, and the parties' final offers, in any response to an *Order to Show Cause*. The Panel will consider this evidence and take final action, normally the issuance of a D&O, to resolve the impasse

 (25)

25

FACTFINDING BY A NEUTRAL PARTY


- Procedure usually used when large number of outstanding issues exists
- Considered the most formal of the Panel's Procedures
- When authorized by the Panel, private neutral will engage parties in mediation
- Private Neutral conducts factfinding on any issues not resolved during mediation and prepares findings and recommendations on unresolved issues
- Parties inform Panel whether they accept/reject recommendations and rationale
- Panel considers Factfinding Report, parties' responses and makes a procedural determination on next step (typically an issuance of a D&O)

 (26)

26

FLEXIBLE AND COMPRESSED WORK SCHEDULES


- 5 U.S.C. § 6120 - *Federal Employees Flexible and Compressed Work Schedule Act* ("the Act")
 - Agency may establish FWS and CWS (otherwise, Straight 8-hour schedule)
- 5 U.S.C. § 6130
 - Where employees in a unit are represented by an exclusive representative (e.g., a union), any FWS or CWS, and the establishment and termination of any such schedule, shall be subject to collective bargaining (Exception to Management Rights)
 - Bargaining unit employees shall not be included in any such schedules, unless they are provided for under a CBA

 (27)

27

ADVERSE AGENCY IMPACT


- Adverse Agency Impact is defined in 5 U.S.C. § 6131 as:
 - Reduction of Productivity;
 - Diminished level of service to the public; and/or
 - Increase in cost in agency operations
- If an agency believes creating the proposed AWS would likely have an adverse agency impact, it can make such a claim under "the Act"
- Whether the Agency's determination that the proposed schedule would cause (or has caused) an adverse agency impact is supported by evidence, as defined under the Act
 - If so, no duty to bargain
 - If NOT, the parties are ordered to bargain



28

FLEXIBLE AND COMPRESSED WORK SCHEDULES (cont.)


- **Impasse** under "the Act" is defined in 5 CFR § 2472.2 (k)
 - There is no requirement to go to FMCS prior to filing with the Panel under "the Act"
 - No mediation required before seeking Panel's assistance
- 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). Claims must be based on same criteria discussed above
- If Panel issues decision in Agency's favor, it is not required to bargain over CWS. If Panel rules against Agency, then it will only order the parties to return to the table to negotiate over the establishment of a CWS



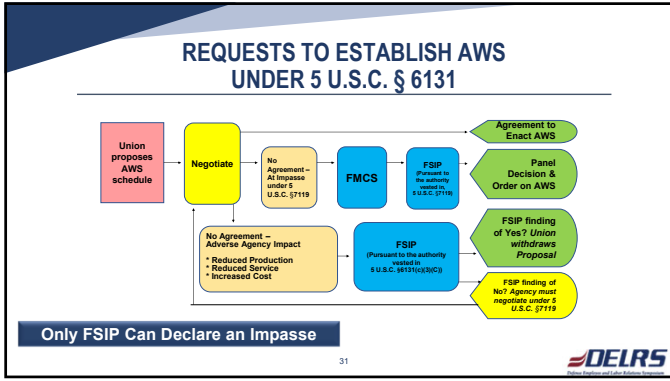
29

BARGAINING THE ESTABLISHMENT OF CWS UNDER THE STATUTE

- An Agency can bargain under 5 U.S.C. § 7119, but refuse to agree to a CWS, without raising a claim of adverse agency 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 5 U.S.C. § 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
 - Management rights **DO NOT** apply to bargaining over CWS



30



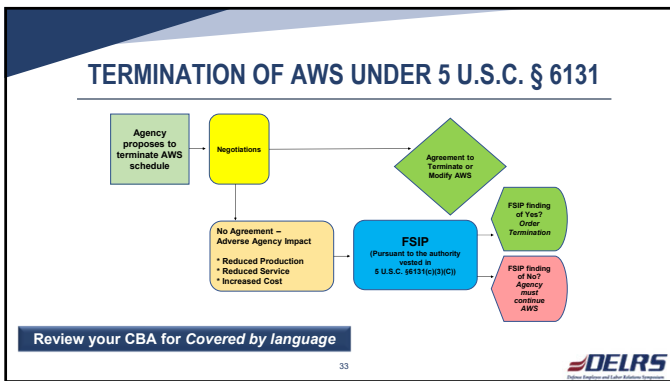
31

TERMINATION OF AWS UNDER 5 U.S.C. § 6131

- 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 agency impact" (See 5 U.S.C. § 6131)
- An Agency can show "adverse agency impact" if it demonstrates the CWS is creating:
 - 1) Increased costs;
 - 2) Reduction in productivity; or
 - 3) Decreased efficiency in Agency operation
 * An Agency must *only* rely on these three criteria
- Agency has burden of proof. The Panel will rule **ONLY** on issue of adverse agency impact; it will not impose a different schedule. The Panel has deadline of 60 days to resolve

DELRS
Division of Labor Relations and Employee Relations


32



33

FILING REQUIREMENTS UNDER THE ACT


- **5 C.F.R. § 2472.4 – Content of request**
 - (a) A request from a party or parties to the Panel for consideration of an impasse arising from an agency determination not to establish or to terminate a flexible or compressed work schedule under 5 U.S.C. § 6131 (c)(2) or (c)(3) of the Act must be in writing and shall include the following information:
 - (6) A copy of the agency's written determination and the finding on which the determination is based, including, in a case where the finding is made by a duly authorized delegate, evidence of a specific delegation of authority to make such a finding
- **5 C.F.R. § 2472.6 – Filing and service**
 - (f) An impasse arising pursuant to section 5 U.S.C. § 6131 (c) (2) or (3) of "the Act" will not be considered filed, and no Panel action will be taken, until the party initiating the request has complied with 5 C.F.R. § 2472.4, § 2472.5, and § 2472.6



34

FINALITY OF PANEL ACTION


- A Panel's decision, or the decision of an Interest Arbitrator directed by the Panel under 5 U.S.C. § 7119 (b)(1), must be consistent with the Statute, including not being in violation of law, rule, or regulation
- Pursuant to 5 U.S.C. § 7114 (c), agency heads are empowered to review all provisions of a collective bargaining agreement, even a provision directed by the Panel, to ensure conformity with the provisions of the Statute, applicable law, rules and regulations
- A union wishing to challenge the agency head's determination could obtain review by the Authority of the determination through negotiability proceedings or the ULP proceedings



35

FINALITY OF PANEL DECISIONS, ORDERS, AND ARBITRATION AWARDS


- **5 U.S.C. § 7119(b)(1) – Panel Order & Arbitration Awards**
 - Subject to Agency Head Review (5 U.S.C. § 7114(c))
 - **NOT** subject to filing exceptions w/FLRA (5 U.S.C. § 7122(a))
- In *Department of Defense, Office of Dependents Schools v. FLRA*, 879 F.2d 1220 (4th Cir. 1989) (Office of Dependents Schools), the court held:
 - That the decision of a private arbitrator, to whom the parties had been directed to use by the Panel under 5 U.S.C. § 7119(b)(1), was subject to 5 U.S.C. § 7114(c) review. *id.* at 1224
 - The court also stated that it is only when parties voluntarily agree to binding arbitration that the agency should not be permitted to review the terms imposed by the arbitrator



36

FINALITY OF PANEL DECISIONS, ORDERS, AND ARBITRATION AWARDS (cont.)


- **5 U.S.C. § 7119 (b)(2)** – Parties Agree to Binding Arbitration
 - NOT subject to Agency Head Review (waived by Agency)
 - Subject to filing exceptions w/FLRA
 - See 852 F.2nd 779, 783-85 (D.C. Cir. 1988)
- Case Law:
 - United States Courts of Appeals for the Fifth and the Ninth Circuits have taken the same position as the Fourth Circuit concerning 5 U.S.C. § 7114(c) review. In *Panama Canal Commission v. FLRA*, 867 F.2d 905 (5th Cir. 1989) (*Panama Canal Commission*), the court found that where both parties agree to binding interest arbitration under 5 U.S.C. § 7119(b)(2), the interest arbitration award is reviewable under 5 U.S.C. § 7122 but is not subject to agency head review (Id. at 908)
 - On the other hand, the court held that where an impasse is referred to the Panel under 5 U.S.C. § 7119(b)(1), the agency head does not waive the right to review under 5 U.S.C. § 7114(c). The court's decision was adopted by the Authority in *International Organization of Masters, Mates and Pilots and Panama Canal Commission*, 36 FLRA 555 (1990)



37

WHEN AN AGENCY FAILS TO ADOPT A D&O OF FSIP


- The Union may file a ULP, since a refusal to adopt a D&O of the Panel may constitute a ULP
- Or the Union may file a grievance, claiming that the refusal to adopt the proposal is a violation of the parties' agreement and/or a ULP
- The FLRA Regional Director or the grievance arbitrator may have to determine if the adopted provision is substantively identical to a proposal already found negotiable by the FLRA to resolve whether the agency committed a ULP in refusing to adopt the provision or a violation of the Contract and/or ULP in refusing to adopt the provision
- See *NTEU and Department of Homeland Security, Customs and Border Protection, Washington, D.C.*, 64 FLRA 443 (2010)



38

HOW TO BE SUCCESSFUL BEFORE FSIP


- **Practical Issues to Avoid**
 - Avoid incomplete filings with the Panel
 - Make sure all mediation efforts have been exhausted
 - Avoid bona fide jurisdictional issues (e.g., Duty to Bargain)
 - Avoid bringing contract violations to the Panel
 - Avoid mistakes under the Panel's role in administering decisions for AWS/CWS changes and terminations
- **Formulate Clear and Coherent Proposals**
 - Ambiguity or vagueness is a disadvantage
 - Panel is reluctant to do the parties work for them
 - Avoid bringing large numbers of issues to the Panel, since it may utilize procedural determinations that significantly limits the parties' flexibility
 - The Party proposing to change the status quo bears the initial burden to demonstrate substantive reason(s) for the change



39

HOW TO BE SUCCESSFUL BEFORE FSIP (cont.)


- **Research**
 - Research the Panel's D&Os on similar issues
 - Begin research prior to negotiations, not just before filing with the Panel
 - Preparation and research maximizes the chance for voluntary settlement and could eliminate the need for the Panel's assistance or reduce the number of issues at impasse
 - If the Panel has not adopted your proposal in a previous D&O, clearly explain and provide evidence as to why your situation is distinguishable from the previous case
 - The Party with the best evidence normally wins
- **Present any jurisdictional arguments during the initial investigation**
 - The Panel does not like last-minute surprises
 - The Panel should be presented with *real* choices when deciding cases rather than being forced to adopt one parties' proposal because the other side's proposal appears to be illegal

(40) 

40

HOW TO BE SUCCESSFUL BEFORE FSIP (cont.)


- **Fresh Perspective**
 - The Panel's primary goal is voluntary settlement of impasses, not legal or contractual disputes
 - Focus should be on the issues at impasse, not problems and issues between the parties – *Keep the extraneous disputes out of impasse proceedings*
 - Don't allow relationship issues to lead to inflexible positions during informal conferences and med-arb hearings
 - The more reasonable party makes the better impression to the Panel
 - Flexibility is an intangible benefit that the Panel views positively
- **In review of a Panel's D&O, be aware that:**
 - The respective Union and Employer proposal sections are written strictly from the perspective of the parties
 - The conclusion sections are written from the Panel's perspective often quoting one or both parties
 - Panel decisions sometimes appear as having no doubts as to the winning proposal, but cases often involve extremely close calls. As noted, make sure you have strong supporting evidence for your proposal

(41) 

41

TAKEAWAYS


- Concentrate on options or proposals that are likely to lead to settlement, rather than on winning in arbitration.
 - Any agreement between the parties is infinitely superior to an award from an arbitrator.
- Invest time in new proposals or options for settlement
 - "If you always do what you have always done, then you will always get what you have always gotten"
- Don't withhold information from the mediator
 - The mediator is an ally to both parties' efforts to get an agreement
- Consider preparing for mediation by assigning half of your team to assume the role of your counterparts and ask, "*If we were them, what would be important to us?*"
- Before you make an intellectual commitment to going to arbitration, you might consider asking the Panel member in caucus to give you a reading of your case

(42) 

42

TAKEWAYS (cont.)

- The Panel process is a part of the collective bargaining process; there is a mutual obligation to engage
- While the Panel is prepared to assist with bringing closure to the collective bargaining process, voluntary settlements, with or without the Panel's assistance, are in the best interest of the parties and the public (approx. 90% settlement rate)
- The Panel has also ordered the resumption of concentrated mediation (i.e., resumption of negotiations, with the assistance of a mediator) as it helps parties to resolve/clarify issues at impasse
- Also, the Panel often orders Med-Arb, as it has proven to be an effective means for assisting the parties in reaching settlement of the issue(s) at impasse



43




ANY QUESTIONS



44

REFERENCES

- **5 U.S.C § 6120**
 - Title 5 – Government Organization and Employees, Part III – Employees, Subpart E – Attendance and Leave, Chapter 61 – Hours of Work, Subchapter II – Flexible and Compressed Work Schedules
- **5 U.S.C § 71**
 - Title 5 – Government Organization and Employees, Part III – Employees, Subpart F – Labor-Management and Employee Relations
- **5 CFR § 2470**
 - Title 5 – Administrative Personnel, Chapter XIV – Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel, Subchapter D – Federal Services Impasses Panel, Part 2470 – General
- **The Federal Service Impasses Panel (FSIP)**
 - <https://www.fira.gov/components-offices/components/federal-service-impasses-panel-fsip-or-panel>
- **Defense Civilian Personnel Advisory Service (DCPAS)**
 - <https://www.dcpas.osd.mil/>



45



46