RE: Non-Binding Recommendations on All Outstanding Issues Regarding NTEU-HHS Consolidated Contract Negotiations

Submissions

For the Agency:

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For the Union:

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BACKGROUND

In March of 2006, the National Treasury Employees Union (NTEU or Union) and the U.S. Department of Health and Human Services (HHS, Employer or Agency) petitioned the Federal Labor Relations Authority (FLRA or Authority) to consolidate seven bargaining units in the Agency represented by the Union. During the same month, the parties signed a Memorandum of Understanding Regarding the Conduct of Negotiations Over a Consolidated Term Collective Bargaining Agreement (Ground Rules, Memorandum of Understanding, or MOU). The Ground Rules directed the parties to “secure a mediator/arbitrator to assist in resolving any issues on which the parties have reached a true impasse at the close of face to face negotiations.” On April 28, 2006, the parties contacted the undersigned neutral to assist them with their unresolved contract issues and on May 5, 2006, confirmed the selection.

Mediation Procedures

The parties began bargaining in May 2006. In accordance with the Ground Rules, the parties scheduled five days of mediation with the undersigned Mediator/Arbitrator during the week of July 31, 2006. In response to the Mediator/Arbitrator’s inquiry as to the status of the negotiations, the parties postponed the July 31- August 4, 2006 mediation sessions noting the need for further “unassisted bargaining sessions.” The mediation sessions were rescheduled for the week of October 16-20, 2006. On October 13, 2006, the Agency submitted 20 proposed Articles for consideration during the mediation (while the 20 Articles contained more issues than could be addressed during the mediation, they contained less than half of the outstanding issues yet to be addressed by the parties). Although a reasonable number of issues were resolved during the five days of mediation, the parties were unable to address all of the outstanding issues contained in the 20 Articles submitted for consideration. On the fifth day of mediation, the parties agreed to hold additional meetings without the Mediator/Arbitrator. The purpose of holding the
meetings was to narrow the number of outstanding issues in dispute (including those unresolved issues that were not submitted during the week of mediation) and agree on a process for resolving them. The Mediator/Arbitrator provided additional dates for the purpose of continuing the mediation in December and the parties scheduled a November 20, 2006 status call with the Mediator/Arbitrator. On November 6, 2006, the Mediator/Arbitrator provided the parties with additional mediation dates in January, February and March 2007.

During the November 20 conference call, the parties indicated they were still attempting to narrow the unresolved issues and agreed to keep the Mediator/Arbitrator informed of the progress. On December 5, 2006, the parties informed the Mediator/Arbitrator that “[n]othing is scheduled yet and no processes have been agreed to.” The parties met and exchanged proposals in December 2006 and January 2007.

On February 1, 2007, the Agency filed a request for service with the Federal Mediation and Conciliation Service (FMCS). On March 5, 2007, after three months of discussion over how to reduce or manage the number of outstanding issues to be resolved in mediation, the Union filed a Motion with the Mediator/Arbitrator requesting an ex parte Issuance of a Non-binding Recommendation On All Outstanding Issues Between NTEU and HHS. On March 16, 2007, the Agency objected to the Union’s Motion contending, in effect, that the Mediator/Arbitrator had no further jurisdiction over the subject matter. On April 6, 2007, the Union filed a response to the Agency’s submission to correct “both the factual and legal record.” After a number of telephonic caucus discussions with the Mediator/Arbitrator, the parties agreed to a May 16, 2007 conference call. During the call, the parties agreed on a process/time-line to reduce the number of outstanding issues and allow them to return to the mediation/arbitration process. After a June 12, 2007 conference call, the process was finalized and sent to the parties on June 13, 2007.

The process required the parties to resolve categories of issues without the
assistance of the Mediator/Arbitrator. The parties were to meet with the Mediator/Arbitrator on July 24 and 25, and August 16 and 17, 2007 to resolve the remaining outstanding issues. During a July 20, 2007 conference call, the Agency cancelled the July 24 and 25 mediation sessions due to lack of preparation. With the assistance of the Mediator/Arbitrator, the parties revised the mediation/arbitration timeline including adding August 30 and 31 mediation sessions to replace the cancelled July sessions.

After the parties engaged in mediation on August 16, 17, 30 and 31, there were still a significant number of outstanding issues. The parties agreed to continue mediation on September 24 and 25, 2007. During the September 24 and 25 mediation, the parties agreed to another day of mediation on September 28. At the conclusion of the September 28, 2007 session, the parties agreed to a time-line for submitting the remaining outstanding issues to the Mediator/Arbitrator for a recommendation. During a conference call on November 15, 2007, the parties and the Mediator/Arbitrator revised the process for concluding the mediation/arbitration proceedings. The revised process required the parties to submit their arguments in support of their proposals on January 22, 2008. The recommendations were to be issued on February 6, 2008.

On January 18, 2008, the Union filed a Motion for a February 8 extension to file arguments supporting their proposals and on the same day the Agency filed an objection to the Union’s Motion. By Order dated January 18, 2008, an extension of time was granted until January 28, 2008.

On January 29, 2008, the Agency notified the Mediator/Arbitrator of its intent to file a Motion to Strike certain of the Union’s submissions seeing that they “exceeded the one-page requirement” for supporting arguments and because the Union “modified twenty-four (24) of its proposals.” A conference call was held on February 3, 2008 to address the issues raised by the Agency. During the conference call, the Agency questioned the timeliness of the Union’s submissions supporting Article 42. The Union
maintained that the arguments supporting Article 42 were inadvertently omitted from the Union’s January 28 submission (the Union’s Article 42 submission was received on January 29). A time-line for the parties to document, support, submit and review their positions on the issues raised during the conference call was established. By Order dated February 18, 2008, the Agency’s objections were denied (however, the Agency’s modified proposals in response to the Union’s Article 42 submission were accepted) and a target date of April 11, 2008 was set for the promulgation of the recommendations of the unresolved issues.

On February 20, 2008, the Agency requested that the recommendations be issued by mid-March due to its “keen interest in resolving some of the issues that impact employees sooner rather than later.” On February 24, 2008, the Agency was informed that the parties’ extension and conference call requests, their objections and their voluminous submissions effected the time reserved for reviewing the documents and issuing a recommendation. On April 9, 2008, the parties informed the Mediator/Arbitrator that they had reached agreement on Article 27. In addition, they asked that consideration be delayed on Articles 45 and 46 as it looked as if those Articles would be settled.

In light of lost documents due to a computer malfunction, on April 9, 2008, the Mediator/Arbitrator scheduled a conference call for April 15, 2008. Prior to the call the parties were sent an assessment of the submissions regarding the disputed proposals, a list of the remaining disputed articles and a list of articles with an uncertain status. During the call, the parties confirmed that an agreement had been reached on Articles 27, 45 and 46. They indicated that they were working on settling Article 47. The Agency confirmed and clarified their submissions and verified the Articles that were still in dispute. After the call, the Union emailed its confirmation and clarification of its submissions and verified the Articles that were still in dispute. On April 22, 2008, in response to an inquiry by the Mediator/Arbitrator, the Agency indicated that the parties did not reach an
agreement on Article 47. On April 23, 2008, the parties were informed that the subject recommendations did not include Article 47 and that the recommendations for Article 47 would be issued separately with a target date of April 28, 2008.

RECOMMENDATIONS, DISPUTED ISSUES, AND PARTIES’ POSITIONS

Article 3, Section 3A15

Union Proposal

Negotiations over midterm changes shall commence at a mutually-agreeable date following the parties’ exchange of proposals. The parties shall attempt to schedule the first day of bargaining within fifteen (15) workdays after the exchange of proposals.

Management Proposal

Negotiations over midterm changes shall commence no later than five (5) workdays after the parties’ exchange of proposals.

Union Argument

The Union’s proposal simultaneously provides flexibility to accommodate scheduling conflicts and recognizes that timely scheduling is the parties’ shared goal. It accomplishes several goals: 1) it captures the working status quo; 2) it incorporates the Agency’s interest in a timeframe; 3) it accommodates scheduling conflicts.

Union Interest Statement

The Union has an interest in letting the parties decide what works for them on a case-by-case basis and at the relevant time, rather than attempt to predict now that the parties will - without exception - be able to sit down five workdays after they exchange proposals. The Union seeks to take into account real life - other priorities, job exigencies, personal conflicts, vacations, and the myriad of other factors that must be considered in trying to schedule bargaining.

Management Argument

There is a need for a structure which will move the bargaining process forward, rather than hindering management’s ability to implement changes. The Agency’s more structured process ensures that it can implement necessary changes, while at the same time preserving the Union’s right to bargain.
Management Interest Statement

The Agency's proposal will enable the parties to move mid-term negotiations forward, thereby ensuring timely implementation of proposed changes.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

Unless the parties agree otherwise, negotiations over mid-term changes shall commence no later than fifteen (15) workdays after the parties’ exchange of proposals.

The modified proposal meets both parties’ stated interests because it provides a framework to move mid-term negotiations forward and allows the parties to change the time-lines on a case-by-case basis.

Article 3, Section 6

Union Proposal

If one party seeks to terminate an MOU (either local or national) or a past practice (either local or national and including those past practices that arose from an expired agreement), the party must, consistent with Statute and this Article, provide specific notice to the other party of its intention to terminate the practice or agreement and bargain in accordance with law, rule and regulation. All agreements and past practices remain in effect until bargaining is completed, including impasse procedures. This provision notwithstanding, if an MOU or past practice is inconsistent with this Agreement, this Agreement shall govern. Further, this provision shall not apply to any agreement or practice that has been specifically incorporated into this Agreement.

Management Proposal

Past practices are extinguished upon the effective date of this agreement.

Union Argument

The Union’s proposal properly preserves its right to receive specific notice of any changes in the conditions of employment, but still permits termination of past practices once the Agency meets its statutory obligations. The Statute requires that notice must be sufficiently specific and definitive to provide the union with a reasonable opportunity to request bargaining. The Agency erroneously takes the position that it has satisfied its statutory obligation “during the course of these negotiations, putting the Union on notice if its intent to extinguish past practices.” This “notice” is not what the Statute contemplates and fails to meet the requirements of specificity and definitiveness. The Agency has, rather than identify specific practices that it intends to eliminate, simply indicated “all of them.” This “notice” has not properly apprised the Union of
the scope and nature of the change, the planned timing of any change or what would be lost if the Union did not bargain. The consolidation of the seven units is new, but the relationship that has existed between these parties and between the employees and managers for – in some cases – over a decade is not new. Further, to the extent that the Agency is concerned over agreements and practices that conflict with the CBA, the Union’s proposal directly addresses this concern by providing that the CBA shall govern over any MOU or past practice that conflicts.

Union Interest Statement

The Union has an interest in protecting its absolute right to bargain over the impact and implementation of any change in working conditions and to receive specific notice of such changes. Further, the Union has an interest in protecting the status quo and minimizing disruption with the implementation of this new agreement. The Employer's proposal would cause significant problems among employees and supervisors who currently follow these agreements in their daily interactions.

Management Argument

This is a consolidated agreement, which covers a completely new bargaining unit. Continuation of OPDIV specific MOUs and past practices would create continuous conflict and make it difficult to impossible to administer the new CBA uniformly. The Agency has already met this obligation during the course of these negotiations, putting the Union on notice of its intent to extinguish existing past practices and inviting the Union to propose and negotiate practices and elements of MOUs for continuation. With the negotiation of a new consolidated CBA, any such issues would be deemed to be addressed during the negotiations of the language of the new agreement, rendering the need for these MOUs irrelevant.

Management Interest Statement

This consolidated agreement, which covers a completely new bargaining unit, and continuation of OPDIV-specific MOUs and past practices would create continuous conflict and make the CBA difficult to impossible to administer uniformly. As for the notice and bargaining provisions insisted upon by the Union, the Agency has already met this obligation during the course of these negotiations, putting the Union on notice of its intent to extinguish existing past practices and inviting the Union to propose and negotiate specific practices and MOUs for continuation.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

If one party seeks to terminate an MOU (either local or national) or a past practice (either local or national and including those past practices that arose from an expired agreement), that is not inconsistent with this agreement, the party must, consistent with the Statute and this Article, provide specific notice to the other party of its intention to
terminate the practice or agreement and bargain in accordance with law, rule and regulation. All agreements and past practices remain in effect until bargaining is completed, including impasse procedures. This provision notwithstanding, MOU’s and past practices that are inconsistent with this Agreement are extinguished upon the effective date of this Agreement.

The parties did not bargain over all past practices during negotiations. The Agency’s proposal provides no explicit language defining specifically the past practices to be nullified. It can be assumed that the parties intended to extinguish past practices that are inconsistent with the provisions of the new Agreement. The modified proposal extinguishes those past practices that are contrary to the provisions negotiated in their new Agreement.

**Article 5, Section 2E**

Union Proposal

Union representatives who must travel to perform representational duties associated with investigatory interviews will be reimbursed for all travel when there is no regular Union representative assigned to the location of the interview.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s modified proposal permits it to hold the interview where there is already a Union representative to avoid any travel costs. This proposal will, therefore, not result in any expense unless the Agency selects a location where there is no Union representative. If an employee is denied representation because the Agency held the interview in a location without an on-site Union Representative, the employee could claim that s/he was effectively denied representation. The Agency incorrectly states that the Union’s proposal is addressed in Article 10. That section addresses reimbursement for bargaining and expressly recognizes that other parts of the Agreement may cover travel expenses.

Union Interest Statement

The Union is interested in guaranteeing that employees will have Union representation, upon request, at an investigatory interview regardless of any concern over travel expenses. The Union would like to see equal treatment. The fact that one chapter may have just incurred significant expense because of an arbitration should not negatively affect whether an employee will have representation at these types of interviews. These examinations can often result in discipline or termination, and it is essential that an employee has Union representation upon request. The Union is also interested in contract consistency - in other articles involving possible adverse
action (Article 31, Unacceptable Performance and Article 43, Adverse Actions), the Employer has agreed to pay for one Union representative's travel expenses.

Management Argument

The Union’s proposal has already been addressed by the parties under Article 10, Section 11(b) (Official Time) and, as the proposal relates to Union – not employee – rights, it is not appropriate to include it in this Article. Further, including the Union’s language here simply invites perceived conflicts between Article 5 and Article 10, leading to inconsistent interpretation and enforcement of the Agreement.

Management Interest Statement

The Union's proposal has already been addressed by the parties under Article 10, Section 11(b) (Official Time) and, as the proposal relates to Union - not employee - rights, it is not appropriate to include it in this Article.

Recommendation

Inasmuch as Article 10, Section 11(b) provides that the Employer will pay 50% of all reasonable travel and per diem expenses for one employee representative per Chapter for representational matters other than bargaining, I do not recommend adoption of the Union’s proposal.

Article 5, Section 3A

Union Proposal

An employee being interviewed by a representative of the Employer in connection with either a criminal or non-criminal matter has certain entitlement/rights when any representative of the agency, e.g., Inspector General, contractor, etc., is conducting the interview. This section sets forth those rights as well as the procedures that must be followed by the Employer representative conducting the interview.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

It is important to articulate specifically in the parties’ CBA that the negotiated rights in Article 5 must be followed by all Employer representatives, not just front-line managers. The Union’s proposal simply outlines what the United States Supreme Court has already recognized, namely, that certain employee rights attach regardless of who which representative conducts the employee interview.
Union Interest Statement

The Union has an interest in ensuring that all relevant parties - the Employer, representatives of the Employer, employees, and the Union - understand that these enumerated rights attach regardless of who is conducting interviews. It is imperative that employees and their representatives (as well as the Employer) have their rights and obligations spelled out to minimize improper procedures.

Management Argument

The second sentence of the Union’s language should be deleted as it references various forms relating to internal security practices, which are, in actuality, non-negotiable.

Management Interest Statement

The Agency has no objection to the first sentence of this section, although we submit it is surplusage. The Agency's interest with respect to the second sentence of this section is to eliminate reference to various forms which are, in actuality, non-negotiable.

Recommendation

I recommend adopting the Union’s proposal modified as follows:

An employee being interviewed by a representative of the Employer in connection with either a criminal or non-criminal matter has certain entitlement/rights when any representative of the agency, e.g., Inspector General, contractor, etc., is conducting the interview. This section sets forth those rights as well as the procedures that, unless precluded by law, must be followed by the Employer representative conducting the interview.

The modified proposal meets the Union’s interest that employee rights be contained in the CBA. The Agency’s interest is met as neither the original nor the modified proposal mentions forms and the modified proposal allows for flexibility where required by law.

Article 5, Section 3B

Union Proposal

(General) When an employee is interviewed by the Employer, and the employee is the subject of an investigation, the employee will be informed of the general nature of the matter (i.e., criminal or administrative misconduct) being investigated and be informed whether or not the interview is related to possible criminal misconduct by the employee. This notice shall be on a form (see Appendix 5-1), which the employee will initial and date at the outset of the interview.
Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposal assures that employees understand the scope of the interview prior to questioning. The Agency must identify how the proposed notice form directly interferes with a management right. This it cannot do. Given that the Agency tacitly concedes the negotiability of verbal notice (no objection to first sentence), the Union is at an absolute loss as to understand how memorializing that same notice in writing somehow then makes the proposal non-negotiable. Further, the FLRA has repeatedly found that forms that simply provide notice regarding rights during investigative interviews and investigations constitute negotiable procedures under § 7106(b)(2) to ensure that an employee who is about to be interrogated is notified of the circumstances under which questioning will occur.

Union Interest Statement

This proposal is merely aimed at notification to the employee. The Union believes that it is important that employees are generally informed of the nature of an interview prior to its commencement.

Management Argument

The second sentence of this section, which specifies forms to be utilized in conducting an investigation excessively interferes with the conduct of Agency security practices and is non-negotiable.

Management Interest Statement

The Agency has no objection to the first sentence of this section. The Agency's interest with respect to the second sentence of this section is to eliminate reference to various forms which are non-negotiable.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

(General) When an employee is interviewed by the Employer, and the employee is the subject of an investigation, the employee will be informed of the general nature of the matter (i.e., criminal or administrative misconduct) being investigated and be informed whether or not the interview is related to possible criminal misconduct by the employee. This information shall be on a form (see Appendix 5-1), which, unless precluded by law, the employee will initial and date at the outset of the interview.
The modified proposal meets the Union’s interest to provide notice to employees and meets the Agency’s interest by allowing for the use of other methods where required by law.

**Article 5, Section 3C**

**Union Proposal**

(Weingarten Rights). When the Employer conducts an interview of an employee and the employee is a potential recipient of any form of discipline or adverse action, the Employer should advise the employee of his right to union representation prior to the commencement of questioning. This notice shall be on a form (see Appendix 5-2) that the employee signs at the beginning of the interview and is witnessed by the investigating agent.

**Management Proposal**

NO PROPOSAL GIVEN

**Union Argument**

The Union’s proposal is of vital importance to employees. It is designed to supplement and provide a mechanism for fairly implementing, the union representation rights mandated by 5 U.S.C. § 7114(a)(2)(B), also known as Weingarten rights. Because the statutory right to union representation is triggered only when an employee affirmatively requests a representative, one of the primary purposes of the proposal is to inform employees of their rights at the very moment – immediately prior to the commencement of questioning – when employees are most in need of notice so that they may knowledgeably exercise those rights.

**Union Interest Statement**

While employees have a statutory right to Union representation, upon request, if they reasonably fear discipline or adverse action, the Union's interest here is to give meaning to this right. A right to union representation means little if an employee is unaware of such right. The Union would like employees to be advised (or reminded) of this statutory right and to affirmatively acknowledge that notice. During investigatory interviews, employees are often very anxious and may not remember that they have a right to representation. The Union would like to defuse this situation and ensure that employees are making well-informed decisions and/or knowing waivers.

**Management Argument**

The Agency has already agreed to give notice to employees twice annually (i.e., more frequently than required by law) of their Weingarten rights. The Union’s proposal would render the purpose of the twice-annual notice redundant. Further, since Weingarten rights only kick in
when the employee reasonably believes that an interview may result in discipline, the Union’s proposal requires the Agency to make an assumption on the employee’s behalf.

Management Interest Statement

The Agency has already agreed to give notice to employees twice annually (i.e., more frequently than required by law) of their Weingarten rights. The Union's proposal would render the purpose of the twice-annual notice redundant. Further, since Weingarten only kicks in when the employee reasonably believes that an interview may result in discipline; the Union's proposal requires the Agency to make an assumption on the employee's behalf. The Agency has met its notification responsibilities; the employee and the Union bear some responsibility to be aware of those rights and to properly invoke them.

Recommendation

The serious repercussions that can result from such investigatory interviews require that employees be aware of their rights notwithstanding bi-annual notification. Accordingly, I recommend the Union’s proposal be adopted.

Article 5, Section 3D

Union Proposal

(Third Party Witness Interviews) Prior to beginning interviews with employees who are being interviewed as third party witnesses, the Employer will provide employees with a form (Appendix 5-3), which shall be signed and dated by the employee at the outset of the interview.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposal seeks to notify an employee that s/he is being interviewed as a third-party witness. By signing a form at the outset of an interview, the employee is informed of the nature of the interview. Employees should be reasonably informed about the nature of such interviews by authorities and are more likely to be calm and more cooperative if they understand why they are being interviewed, and, more specifically, that they themselves are not the focus of the interview. The Agency’s argument that this proposal is non-negotiable because it interferes with its right to determine internal security practices is contrary to FLRA authority which recognizes, as negotiable, procedures that require management to notify employees of certain rights – both orally and in writing.
Union Interest Statement

This proposal seeks to notify an employee that s/he is simply being interviewed as a third-party witness. It serves to inform the employee, which is important during investigatory interviews.

Management Argument

The right to determine internal security practices through the content and form in which these rights will be explained to employees is a non-negotiable management right. Further, the form used is a method and means by which the Agency’s investigators perform their duties, and the Union’s proposals would excessively interfere with those methods and means and, therefore, are non-negotiable. Further, incorporating these forms into the agreement (through the appendix) would memorialize the wording of these legal rights even were the law to change.

Management Interest Statement

The Agency's interest is to preserve its non-negotiable management right to determine internal security practices through the content and form in which these rights will be explained to employees. Further, the form used is a method and means by which the Agency's investigators perform their duties, and is therefore non-negotiable. So long as the forms used by the Agency's investigators comply with legal requirements, this issue is non-negotiable.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

(Third Party Witness Interviews) Prior to beginning interviews with employees who are being interviewed as third-party witnesses, the Employer, unless precluded by law, will provide employees with a form (such as Appendix 5-3), which shall be signed and dated by the employee at the outset of the interview.

The modified proposal meets the Union’s interest to provide notice to employees and meets the Agency’s interest by allowing for the use of other methods where required by law.

Article 5, Section 3E

Union Proposal

(Miranda Rights) When an employee who is the subject of a criminal investigation in custody by the Employer, s/he shall be given a statement of his/her Constitutional rights in writing on a form (Appendix 5-4) prior to commencement of questioning.
Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

Employees who are subjected to criminal investigations while in custody of the employer must be made aware of their constitutional rights. An employee should not rely on the Union representative when they are the subject of a criminal investigation interview because Union representatives are not criminal attorneys and should not be relied on as such when the employee has potential legal exposure. Notification to an employee of his constitutional rights ensures that all parties are aware of the nature of the interview and the proper role of the representative.

Union Interest Statement

The Union's interest behind this proposal is to protect both the employee and the Union. If an employee is the subject of a criminal investigation, the employee should not be relying on his/her Union representative. Union representatives are not criminal attorneys and should not be seen or relied on as such. This proposal ensures that everyone involved understands the nature of the interview and the proper role of the Union representative. It protects the Union representative in that s/he will advise the employee to seek the advice and counsel of a criminal attorney and, in turn, protects the employee.

Management Argument

The right to determine internal security practices through the content and form in which these rights will be explained to employees is a non-negotiable management right. Further, the form used is a method and means by which the Agency’s investigators perform their duties, and the Union’s proposals would excessively interfere with those methods and means and, therefore, are non-negotiable. Further, incorporating these forms into the agreement (through the appendix) would memorialize the wording of these legal rights even were the law to change.

Management Interest Statement

The Agency's interest is to preserve its non-negotiable management right to determine internal security practices through the content and form in which these rights will be explained to employees. Further, the form used is a method and means by which the Agency's investigators perform their duties, and is therefore non-negotiable. So long as the forms used by the Agency's investigators comply with legal requirements, this issue is non-negotiable.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:
(Miranda Rights) When an employee who is the subject of a criminal investigation in custody by the Employer, s/he shall be informed of his/her Constitutional rights. Unless precluded by law, the Employer will give the statement in writing on a form (such as Appendix 5-4) to secure the employee’s signature prior to commencement of questioning.

The modified proposal meets the Union’s interest to provide notice to employees and meets the Agency’s interest by allowing for the use of other methods where required by law.

**Article 5, Section 3F**

**Union Proposal**

(Beckwith Rights). In a non-custodial interview involving possible criminal matters, an employee will be advised in writing of his/her rights and the consequences of refusing to answer the questions posed to him/her on the grounds that the answers may tend to incriminate him. The notice shall be on a form (Appendix 5-5) that the employee signs prior to the commencement of questioning.

**Management Proposal**

**NO PROPOSAL SUBMITTED**

**Union Argument**

The Union’s proposal is necessary to ensure that employees who are subjected to non-custodial investigations for possible criminal acts by the Employer are aware of their rights. The Authority has held that a proposal informing employees of their rights and the consequences of refusing to answer questions neither infringes on internal agency security practices, nor does it interfere with management determinations to interview employees. Under the Agency’s proposal, such investigations could occur without the employee being notified of his or her rights, which is anathema to the principles underpinning criminal law. Furthermore, the rights behind this proposal are rights afforded under the Constitution, thus raising larger issues than just the employer-employee relationship.

**Union Interest Statement**

The Union is looking to inform employees of the nature of the investigatory interview. This type of notice protects the Employer, the employee and the Union representative.

**Management Argument**

The right to determine internal security practices through the content and form in which these rights will be explained to employees is a non-negotiable management right. Further, the form
used is a method and means by which the Agency’s investigators perform their duties, and the
Union’s proposals would excessively interfere with those methods and means and, therefore, are
non-negotiable. Further, incorporating these forms into the agreement (through the appendix)
would memorialize the wording of these legal rights even were the law to change.

Management Interest Statement

The Agency's interest is to preserve its non-negotiable management right to determine internal
security practices through the content and form in which these rights will be explained to
employees. Further, the form used is a method and means by which the Agency's investigators
perform their duties, and is therefore non-negotiable. So long as the forms used by the Agency's
investigators comply with legal requirements, this issue is non-negotiable.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

(Beckwith Rights). In a non-custodial interview involving possible criminal matters, an
employee will be advised of his/her rights and the consequences of refusing to answer the
questions posed to him/her on the grounds that the answers may tend to incriminate him.
The information shall be on a form (Appendix 5-5), and unless precluded by law, the
Employer will provide the statement in writing for the employee to sign prior to the
commencement of questioning.

The modified proposal meets the Union’s interest to provide notice to employees and meets the
Agency’s interest by allowing for the use of other methods where required by law.

Article 5, Section 3G

Union Proposal

(Kalkines Rights). In an interview involving possible criminal matters, where prosecution has
been declined by appropriate authority, an employee will be required to answer questions only
after the Employer representative has provided the employee with the appropriate assurances.
Prior to requiring an employee to answer under such circumstances, the Employer representative
shall inform the employee that his/her statements concerning the allegations during the interview
cannot and will not be used against him in a subsequent criminal proceeding, except for possible
perjury charges for any false answers given during the interview. This notice shall be on a form
(Appendix 5-6) which shall be signed and dated by the employee at the outset of the interview.

Management Proposal

NO PROPOSAL SUBMITTED
Union Argument

The Union’s proposal protects an employee’s Kalkines rights, which ensures that employees understand that declining to answer questions in criminal investigations where prosecution has been declined and in non-criminal investigations may result in discipline, including termination. This in no way interferes with management’s right to determine the internal security practices of the Agency – it merely informs employees in such circumstances of their legal rights, and does not impair such questioning by Agency officials.

Union Interest Statement

The Union's interest here is the same as the other provisions above - protecting the employee. Employees must be advised that they will not be prosecuted before being required to answer questions involving possible criminal matters and this proposal ensures that the proper procedure is followed. Further, a similar Kalkines’ advisement is currently required under all of the existing contracts, and the Union is interested in preserving status quo.

Management Argument

The right to determine internal security practices through the content and form in which these rights will be explained to employees is a non-negotiable management right. Further, the form used is a method and means by which the Agency’s investigators perform their duties, and the Union’s proposals would excessively interfere with those methods and means and, therefore, are non-negotiable. Further, incorporating these forms into the agreement (through the appendix) would memorialize the wording of these legal rights even were the law to change.

Management Interest Statement

The Agency's interest is to preserve its non-negotiable management right to determine internal security practices through the content and form in which these rights will be explained to employees. Further, the form used is a method and means by which the Agency's investigators perform their duties, and is therefore non-negotiable. So long as the forms used by the Agency's investigators comply with legal requirements, this issue is non-negotiable.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

(Kalkines Rights). In an interview involving possible criminal matters, where prosecution has been declined by appropriate authority, an employee will be required to answer questions only after the Employer representative has provided the employee with the appropriate assurances. Prior to requiring an employee to answer under such circumstances, the Employer representative shall inform the employee that his/her statements concerning the allegations during the interview cannot and will not be used
against him in a subsequent criminal proceeding, except for possible perjury charges for any false answers given during the interview. This information shall be on a form (such as Appendix 5-6) which, unless precluded by law, shall be signed and dated by the employee at the outset of the interview.

The modified proposal meets the Union’s interest to provide notice to employees and meets the Agency’s interest by allowing for the use of other methods where required by law.

**Article 5, Section 3H**

**Union Proposal**

The Attachments referenced in this Article shall be the only forms distributed to employees during any interview governed by this Article.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

The Union would like to ensure that the proper, negotiated forms are used during investigations. There is little to benefit to a system of forms if the Agency is free to ignore it and use its own unilaterally developed forms. Unless the Agency is obligated by contract to use only the negotiated forms, there is a huge risk that the Agency will develop biased forms that do not fully disclose an employee’s and the Union’s rights.

**Union Interest Statement**

The Union's interest is consistency in forms and the ability to review the forms in advance. A single set of forms that are appended to the parties' agreement allows both the Union representative and the employee to review the form fully prior to the interview in a much less stressful environment. Advance review ensures that the employee and the Union representative understand the process. It also reduces the anxiety associated with the interview and lends itself to a more orderly, transparent, productive process.

**Management Argument**

The right to determine internal security practices through the content and form in which these rights will be explained to employees is a non-negotiable management right. Further, the form used is a method and means by which the Agency’s investigators perform their duties, and the Union’s proposals would excessively interfere with those methods and means and, therefore, are non-negotiable. Further, incorporating these forms into the agreement (through the appendix) would memorialize the wording of these legal rights even were the law to change.
Management Interest Statement

The Agency's interest is to preserve its non-negotiable management right to determine internal security practices through the content and form in which these rights will be explained to employees. Further, the form used is a method and means by which the Agency's investigators perform their duties, and is therefore non-negotiable. So long as the forms used by the Agency's investigators comply with legal requirements, this issue is non-negotiable.

Recommendation

In order to allow for flexibility and possible changes in the law as noted in prior modified recommendations in this Article, I do not recommend adoption of the Union’s proposal.

Article 5, Section 3I

Union Proposal

During investigatory interviews involving criminal conduct, an employee’s refusal to respond to questions based on a proper invocation of the privilege against self-incrimination may not be used as the sole basis for disciplinary or adverse action, except as provided in Section 3G above.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposal does not directly relate to the use of forms. Rather, the proposal outlines the law and employee rights thereunder. If an employee invokes the Fifth Amendment privilege to remain silent, that refusal to answer questions may not provide the sole basis for disciplinary or adverse action, unless the Employer has already notified the employee that his/her statements will not be used in a criminal prosecution, i.e., Kalkines’ warning (as outlined in Article 5, § 3G).

The proposal simply makes this exception to the general rule clear for employees. The Agency’s objection is unfounded and has no foundation in law.

Union Interest Statement

The Union is interested in ensuring that employees understand that they have an absolute right to invoke the privilege against self-incrimination without fear of reprisal. Further, a similar advisement is currently required under five of the existing contracts (FDA, SAMHSA, HRSA, OS, and NCHS). The Union is interested in preserving status quo.
Management Argument

The Agency can agree with 3I, provided that the reference to 3G above is deleted.

Management Interest Statement

The Agency can agree with 3I with the deletion of any reference to 3G above. Therefore striking "…except as provided in Section 3G above."

Recommendation

Inasmuch as the recommended modified provisions above meet the Agency’s interest concerning flexibility and changes in the law, I recommend adopting the Union’s proposal.

Article 5, Union Section 9/Agency Section 8

Union Proposal

An employee cannot be required to tell a supervisor the specific circumstances surrounding his/her need to contact a Union representative. When an employee wishes to request permission to leave the work site to contact a Union representative, he/she must inform his/her supervisor only of the general nature of the visit and the estimated time of return as mutually agreed. The employee must receive prior approval from the supervisor to leave the work site and, where possible, s/he must give the supervisor a telephone number at which s/he may be reached while absent in case of urgent work-related need. The amount of time spent will be reasonable. The employee's request will be granted and may only be delayed if the employee's absence would substantially hinder accomplishment of essential workload requirements. Examples of substantial hindrance include an inability to complete specific or previously assigned work projects timely or when the employee’s absence will adversely affect needed physical office coverage and cannot be otherwise accommodated. If permission is not granted, the supervisor will identify the time period when the employee may meet his/her Union representative. Only under compelling circumstances will the supervisor require the delay to exceed one (1) workday.

Management Proposal

When an employee wishes to request permission to leave the worksite to contact a Union representative, s/he must inform her/his supervisor of the general nature of the visit and the estimated time of return as mutually agreed. An employee cannot be required to tell a supervisor the specific circumstances surrounding his/her need to contact a Union representative. The employee must receive prior approval of the supervisor to leave the work area, and, where possible, s/he must give the supervisor a telephone number at which s/he may be reached while absent in case of urgent work-related need. The amount of time spent will be reasonable. The employee's request to speak with a Union representative will be granted but the timing of the contact may be delayed if the employee's absence will create a workload problem. Examples of
workload problems are an inability to complete a specific or previously-assigned work project timely if work is interrupted by the Union contact at the time requested, or when an employee's absence would impair office coverage. If permission is not granted for the time period requested, the supervisor will identify another time period when the employee may meet with her or his Union representative. Only under compelling circumstances will the supervisor require the delay to exceed one (1) workday.

Union Argument

The parties have already agreed to this standard in Article 10 for the release of stewards. The same managers approving the release of stewards will be responsible for approving the release of employees, and it makes little sense to adopt two different standards. The Agency argues that “the responsibilities of the employee are different” with regard to official time and the release from work. This argument is without merit. It is not the type of work or responsibility that should govern release from work – it should simply be whether the work needs to be done during the timeframe in question.

Union Interest Statement

Under Article 10 (Official Time), the parties agreed that a Union representative is entitled to release so long as the absence does not substantially hinder accomplishment of essential workload requirements. Here, the Union's interest is simple: contract consistency. For ease of contract administration, the same standard should apply to those situations where an employee requests to meet with a Union representative. Further, the Union is interested in ensuring that the Employer considers those employees on Flexiplace as office coverage, where actual physical presence is not required. Lastly, the Union would like to protect the timeliness of any possible claims and therefore seeks to have any time tolled if the Employer denies an employee's request to meet with a representative.

Management Argument

The Agency’s proposal balances its need to accomplish its mission, through the timely completion of workload and through sufficient office coverage, with the employee’s right to meet with Union representatives. The Union’s “substantial hindrance” language is taken from language agreed to by the parties in connection with a Union steward taking official time, where the responsibilities of the employee are different.

Management Interest Statement

The Agency's interest is to balance its need to accomplish its mission through timely completion of workload and through sufficient office coverage, with the employee's right to meet with Union representatives. The Union's "substantial hindrance" language is taken from language agreed to by the parties in connection with official time, where the responsibilities of the employee are different. Further, the Union's language is unduly restrictive as to what causes a "substantial
hindrance." There is also no need to grant an extension of filing deadlines, as the Union representative may make a filing on the employee's behalf to meet the deadline, and then supplement it with further information as needed.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows (only the disputed language is provided):

The employee's request will be granted and may be delayed if the employee's absence would hinder the accomplishment of essential workload requirements. Examples of hinder include an inability to complete specific or previously assigned work projects timely or when the employee’s absence will adversely affect needed physical office coverage and cannot be otherwise accommodated.

While the Union’s standard (substantial hindrance) may be too restrictive, as claimed by the Agency, the standard proposed by the Agency (problem) is too broad. The modified proposal provides a more reasonable standard.

Article 5, Section 17

Union Proposal

When the Employer exercises its legal right to search an employee’s possessions at the worksite in a non-criminal matter, the employee will be allowed to be present during the search if the employee is otherwise present at the worksite. The employee shall, upon request, be given an opportunity to be represented by the Union during the search, provided that the supplying of such representation by the Union shall not unduly delay the search or impede the purpose for which the search is conducted. If advance notification is not possible, the Employer will timely send a follow-up email to the employee notifying him/her that the Employer went through his/her non-electronic material and identify any files or materials that were removed.

Management Proposal

The Employer has a legitimate work-related basis for monitoring employees' use of Government property and equipment, and employees have no right to privacy when using such property and equipment.

This section applies to such things as:

   employees' calls, messages, and other communications, whether by telephone, facsimile, e-mail, or any other media; and
   employees' desks, computers, files, furniture, and work spaces.
The Employer has the right to look in and through an employee's work area for official business purposes, such as looking for needed files or assignments when an employee is not in the office.

**Union Argument**

The Union’s proposal does not impede the Agency’s legal right to conduct searches; rather, it merely ensures that the employee is appropriately apprised that an investigation or search has been initiated. The FLRA has repeatedly approved of this type of proposal. The Union seeks to protect those employees who were not otherwise present for the search by ensuring that they are notified of any materials that the Employer removed during that search. The existence of such a “paper trail” benefits the employee, the manager, and all other parties involved who may require access to the removed items. The Union’s proposal ensures that searches will be handled in a fair and consistent manner and that employees will not be subjected to unwarranted intrusions or removal of personal items. The proposal merely conveys to employees that the Agency should allow them to be present during the search.

**Union Interest Statement**

The Union is interested in protecting all parties when the Employer conducts a search of non-electronic material. While the Union recognizes that employees do not enjoy a right to privacy at work, the Union has an interest in ensuring that personal property and work-related items are not removed during one of these searches without the knowledge of the employee.

**Management Argument**

The Agency clearly has the right to conduct inspections of its own property and equipment. The Agency’s proposal (unlike that of the Union) is designed to ensure that employees are not misinformed about their “rights” – i.e., alleged privacy rights that have no basis in law.

**Management Interest Statement**

The Agency's interest is to maintain its right to conduct inspections of its own property and equipment and to ensure that employees are not misinformed about their "rights" - i.e., alleged privacy rights that have no basis in law.

**Recommendation**

I recommend the parties adopt the following modified proposal:

The Employer has a legitimate work-related basis for monitoring employees' use of Government property and equipment, and employees have no right to privacy when using such property and equipment.

This section applies to such things as:
employees' calls, messages, and other communications, whether by telephone, facsimile, e-mail, or any other media; and employees' desks, computers, files, furniture, and work spaces.

The Employer has the right to look in and through an employee's work area for official business purposes, such as looking for needed files or assignments when an employee is not in the office.

When the Employer exercises its right to search an employee’s possessions at the work site in a non-criminal matter, the employee will be allowed to be present during the search if the employee is otherwise present at the work site. The employee shall, upon request, be given an opportunity to be represented by the Union during the search, provided that the supplying of such representation by the Union shall not unduly delay the search or impede the purpose for which the search is conducted. If advance notification is not possible, the Employer will timely send a follow-up email to the employee notifying him/her that the Employer went through his/her non-electronic material and identify any files or materials that were removed.

The modified proposal meets the Union’s interest for notice and representation and preserves the Agency’s interest to conduct inspections at the worksite.

**Article 9, Section 6C**

**Union Proposal**

The local chapter may negotiate, however, at its sole option, for additional space if the local chapter does not have an office at every location where there are more than forty (40) bargaining unit employees represented by the chapter. Additionally, Section 6A above notwithstanding, if there is a relocation, the Union may, among all other negotiable issues, bargain for additional offices space.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

The Union’s proposal is necessary to ensure that the privacy rights of employees and the Union are protected throughout the entire unit. Every chapter must be free to conduct meetings with employees regarding potential grievances and other sensitive matters and to engage in appropriate union activity in private areas. A requirement that Union representatives request use of conference room space every time they need to engage in protected activity opens the door to abuse in that the Agency can readily deny such requests. This requirement also eliminates any modicum of a potential grievant’s anonymity if the Union must request the use of space on a
case-by-case basis rather than allowing employees to stop by a Union office on their break or lunch. Further, any files or documents related to these activities should similarly be stored in a private, secure area rather than at a Union representative’s cubicle.

The Agency wrongly argues that a proposal that simply preserves status quo fails to address isolated space issues that the Union believes are inadequate. The Agency has never asserted a rent reduction or “space crunch” reason for its refusal to adopt the Union’s proposal. It has simply stated that it believes that current space is adequate. Further, the last part of the Union’s proposal is designed to protect against any argument that the Union has waived its right to bargain for additional or different Union space if there is a relocation.

Union Interest Statement

The Union is protecting the privacy rights of employees and the Union. Each chapter has ongoing grievances, ULPs and other sensitive matters - the files for which should be stored in a private, secure area or office rather than at a Union representative's cubicle. Further, the Union should be able to speak with potential grievants and other employees in a private area without fear of managers overhearing these conversations. While the parties had agreed to status quo as it relates to existing offices, that proposal fails to cover any chapters that do not currently have an office. Further, the last part of the Union's proposal is designed to protect against any argument that the Union has waived its right to bargain for additional or different Union space if there is a relocation. The issue of bargaining over office moves was highly contentious during negotiations, so the Union has a strong interest in having a clear record as to what the parties agreed to bargain over.

Management Argument

The language to which the parties have already agreed allows the Union to keep its current offices and to use Agency conference rooms and other space as needed. The Union’s proposal simply seeks the unilateral right to negotiate for additional space, when Agreement already allows for the adequate use of space. The Union has failed to demonstrate the need for additional space. The Union’s argument should not be confused with its right to negotiate over similar space should a relocation occur.

Management Interest Statement

The language to which the parties have already agreed allows the Union to keep its current offices (Section 6A) and to use Agency conference rooms and other space, as needed (Section 6F). The Union's proposal simply seeks the unilateral right to negotiate for additional space.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:
The local chapter may negotiate, however, at its sole option, for additional space if the local chapter does not have an office at every location where there are more than Sixty (60) bargaining unit employees represented by the chapter. Additionally, Section 6A above notwithstanding, if there is a relocation, the Union may, among all other negotiable issues, bargain for additional offices space.

The modified proposal recognizes, if there is growth in the unit, the potential for more representational activity increases as does the need for space and privacy. In addition, a relocation, can provide a unique opportunity to bargain for needed additional space.

**Article 10, Section 2C**

**Union Proposal**

The Union has the right to appoint stewards from any Operating Division represented by the Chapter. Stewards are authorized to perform any representation functions on behalf of the Chapter or any bargaining unit employee within that Chapter's jurisdiction. Additionally, past practices regarding representation in the across Chapters remain in effect. Subject to Section 3 below, the Union has the right to make changes to its appointments of stewards at its sole discretion.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

For the past decade, the Union and FDA have had a past practice (which was upheld in arbitration, See NTEU, Chapter 254 and FDA (Fogelberg, Arb.)(Oct. 17, 2005)) that permitted cross-chapter representation in Chapters 212 and Chapter 254 because those chapters share geographic boundaries in the FDA’s Southwest Region. The Union simply seeks to maintain this practice. The Agency has not articulated any reason to eliminate it other than invoking its mantra that all past practices should not continue. The final portion of the proposal attempts to capture an issue that arose with the implementation of the most recent CBA – the ACF/NTEU agreement. When this agreement went into effect, the Agency refused to allow the Union to designate stewards at its sole discretion. The Agency’s argument that the Union’s proposal “effectively deals with internal Union organization” is inaccurate. To the extent that the absence of such language permits the Agency to deny the use of official time for cross-chapter representation, for cross-OPDIV representation or for stewards designated by the Union, the proposal does not simply address internal union organization

**Union Interest Statement**

The Union's interest is to ensure that all Union representatives are entitled to conduct
cross-OPDIV official time duties and to ensure that all managers/LR personnel understand how
the new contract will be administered. Cross-OPDIV official time has been an issue for officials
in chapters that have multiple OPDVIS. The Union's interest is to make sure that everyone is on
the same page with regard to the new rules that will apply under this contract for cross-OPDIV
official time.

The Union is interested in preserving the status quo with regard to cross-Chapter representation
for FDA employees. Several FDA-employee union representatives (located in only 2 chapters)
are currently entitled to represent employees in another chapter. Given that this has been the
practice for the past 9 years, the Union has an interest in continuing that practice. The Union's
interest to avoid excessive management interference with the designation of stewards which
became a major problem with implementation of the ACF contract. The Union is trying to
correct that situation with an affirmative statement reserving the right for the Union to designate
stewards at its sole discretion, within the parameters of the parties' agreement.

Management Argument

The Agency’s proposal should be adopted. The parties have already agreed upon a generous
allocation (1:40) of stewards designed to meet representational needs at various locations.
Historically, the Union has not been able to fill the slots that have been allocated. Until the
Union is able to fully designate its allocated steward slots, they have offered little support for
further accommodation by the Agency. Further, this language seems specifically tailored to
allow Mike Roberts, President, NTEU Chapter 212 (FDA Pacific Region) to continue to
represent employees in the FDA’s Southwest Region. The FDA’s Southwest Region is currently
comprised of 515 bargaining unit employees which allows NTEU Chapter 254 13 stewards
under the 1:40 formula. The Union should first be required to make a case as to why 13
stewards are inadequate before this past practice – that in effect increases Chapter 254 steward
allocation to 14 stewards – should be allowed to continue. Finally, this language does not serve
the needs of any of the other Chapters covered under this agreement. The remainder of the
Union’s proposal effectively deals with internal Union organization, which should not be
addressed in this agreement.

Management Interest Statement

The parties have already agreed upon an allocation of standards designed to meet
representational needs at various locations. To the extent the Union's proposal seeks to continue
existing past practice, the Agency has already stated its interest in extinguishing said practices.
The remainder of the Union's proposal effectively deals with internal Union organization, which
should not be addressed in this agreement.

Recommendation

The Agency submitted no proposal and yet argues that its proposal should be adopted. In light
of the practice of cross Chapter representation, the related arbitration decision and the
undisputed argument that the Agency precluded the Union from designating stewards, I recommend the adoption of the Union’s proposal.

**Article 10, Section 2D**

**Union Proposal**

Union officials may perform Union duties at any location.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

The Union’s proposal is designed to ensure that employee representatives are not restricted in where they perform their union duties and is consistent with the Telecommuting Act, which mandated for the first time that all federal agencies “establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished performance.” It is obvious that in passing the Act, Congress intended to expand the use of telecommuting by federal employees beyond the agencies where it was already in use. Further, there is nothing in the language or legislative history of the Telecommuting Act to suggest that union representatives who were participating in “an arrangement” in which they would “regularly perform assigned duties at home” or another flexiplace location, would be prohibited from also performing their representational functions, on official time, at the same location.

The Agency erroneously cites AFGE, National Council of HUD Locals 222 v. HUD, 60 FLRA 311 (2004) for the proposition that union work may not be performed at a flexiplace location. The Authority in HUD implicitly recognizes that a CBA may provide a flexiplace right for union officials. Here, unlike the union in HUD, NTEU is not seeking to derive any statutory right from § 359 that would authorize employees to perform representational functions at appropriate locations of their choosing, including their flexiplace locations. Further, an arbitrator recently rejected an argument that HUD universally prevented union representatives from working at flexiplace locations while performing union duties. See NTEU v. IRS, 107 FLRR-2-14 (Abrams, Arb.)(2006).

**Union Interest Statement**

The Union has an interest in ensuring that its representatives are entitled to flexiplace arrangements in the same manner as other employees.
**Management Argument**

The Union’s proposal is contrary to FLRA authority relating to what work may be performed in flexiplace situation. See 60 FLRA 311 (2004).

**Management Interest Statement**

The Union's proposal is contrary to FLRA authority relating to what work may be performed in flexiplace situation. See AFGE National Council of HUD Locals 222 v. Department of Housing and Urban Development, 60 FLRA 311 (2004).

**Recommendation**

Inasmuch as there is a past practice, I recommend Article 10 remain silent on this issue and the parties continue to follow the established past practice.

**Article 10, Section 5C**

**Union Proposal**

NO PROPOSAL SUBMITTED

**Management Proposal**

As necessary, supervisors may ask for information in addition to that contained on the official time request form (Attachment __) for the purpose of making initial judgments as to whether amounts of time requested are reasonable. However, supervisors may not require representatives to provide information that would violate their representational responsibilities (e.g., the identity of potential grievant(s)).

**Union Argument**

The official time request form proposed by the Union provides sufficient information needed by the Agency to determine whether a request is reasonable. The form provides a written record of the amount of time requested, the date needed, the general reason for the request (among about 20 choices), and the specific times that the official is proposing to use the time. There is no other information needed to determine the reasonableness of the request. Rather, the only conceivable reason for reserving the right to ask for additional information is to harass employee representatives and make approval of official time requests more burdensome. These potential abuses contravene 5 U.S.C. § 7102, in that they excessively interfere with, restrain, and coerce employees in the exercise of their right to participate in union representational activities.

If the Agency believes that more information is necessary, it should propose that specific information be included in the form. The risk of union harassment strongly outweighs the
Agency’s vague need for additional non-specific information outside the negotiated form.

Union Interest Statement

The Union has an interest in preventing excessive interference with requesting official time and in preventing against disclosure of sensitive information. The information contained in an official time request form is sufficient for supervisors to make judgments as to whether amounts of time requested are reasonable.

Management Argument

This provision is to ensure that a supervisor has sufficient information to approve, deny, or modify a request for official time. Depriving the Agency of this right will lead to either inappropriate denials of official time requests, or approval of vague or unreasonable requests. The information contained in an official time request form is not always sufficient for management to make a decision.

Management Interest Statement

The Agency's interest in this provision is to ensure that a supervisor has sufficient information to approve, deny, or modify a request for official time. Depriving the Agency of this right will lead to either inappropriate denials of official time requests, or approval of vague or unreasonable requests. The Agency’s proposal also balances the conflict between the Agency’s need for this information and the Union’s representational obligations.

Recommendation

The Agency provided no examples or specifics details concerning the additional information it is seeking. Absent such information, I do not recommend adoption of the Agency’s proposal.

Article 10, Section 6A/4B

Union Proposal

1. Not withstanding any other provision of this Article, the parties agree to grandfather current positions in which union representatives use 100% official time. Those positions include: Chapter Presidents for chapter 212, 254 and 282; Vice President for Chapter 282; and Chief Steward for Chapter 254.

2. Subject to Section 1 above, Chapter Presidents and Vice Presidents or Chief Stewards will generally not exceed, on an annual basis, official time in excess of fifty (50) percent of their available duty time.
3. All other representatives will generally not exceed, on an annual basis, official time in excess of 33 1/3% of their available duty time.

4. By mutual agreement, the parties may increase this “caps.”

Management Proposal

For the purpose of this article, a reasonable amount of time means an amount that is consistent with the amount a reasonably competent, prudent and diligent representative would require for the performance of the representational activity in question. Additionally, the parties have agreed as follows with regard to the meaning of reasonable time:

1. For the following designated Union representatives (Chapter President and Vice President), the reasonableness of amounts of time requested will be assessed based on all of the facts and circumstances. However, notwithstanding other considerations, time requested by these representatives shall not constitute a reasonable amount of time if it exceeds fifty-percent (50%) of their available duty time in any given pay period. Management may waive the fifty percent (50%) limitation for a limited period of time (e.g., the duration of midterm negotiations), but the overall annual usage may not exceed fifty percent (50%).

2. For all other representatives, the reasonableness of amounts of time requested will be assessed based on all of the facts and circumstances. Notwithstanding other considerations, time requested by representatives other than those listed in paragraph 1 above does not constitute a reasonable amount if it exceeds 25% of their available duty time in any given pay period. Management may waive the 25% limitation for a limited period of time (e.g., the duration of midterm negotiations), but the overall annual usage may not exceed 25%.

Union Argument

The Union now proposes that the 50% cap apply to Presidents, Vice Presidents and Chief Stewards, except for a small subset of representatives. With regard to the grandfather clause, it specifically applies to only five FDA positions within the entire 9000+ person bargaining unit. The Union’s proposal is reasonable and represents a marked decrease in the amount of time it had originally been seeking (100% for all 22 Chapter Presidents and all Vice Presidents). The proposal would simply protect the status quo and the Agency had not articulated any need to change the near-decade old practice. To the contrary, the Agency expressed interest in a grandfather clause during bargaining, but the parties never finalized that approach. With regard to the annual cycle versus pay period basis, the Union’s proposal is the more workable and manageable process. The Agency’s proposal would preclude that official form representing the employee toward the end of the second week of the pay period if the official has exhausted his/her 50% allotment. This situation does not promote efficiency and has the potential of harming those employees whose representation is comprised by the Agency’s proposal. With
regard to Chief Stewards, the Union now proposes that the chapter be able to choose whether Chief Stewards or Vice Presidents can be designated as 50% official time. This proposal accounts for the differences between the structures of the chapters. So long as the chapter chooses one of the two positions, there is no harm to the Agency in permitting the chapter to designate a Chief Steward as the other position that will receive 50% official time.

The second part of the Union’s proposal (section 3), permits all other representatives to receive 33% of their available duty time as official time. Once again, the Union’s proposal represents a significant concession. Indeed, as acknowledged by the Agency, the use of official time at HHS is far below the average use in the federal sector. With regard to the final section (section 4), the Union simply seeks to recognize that the parties may increase these caps if the supervisor and the representative are able to reach a mutually workable solution.

**Union Interest Statement**

The Union has an interest in granting CPs and VPs of larger, more geographically disperse chapters more official time. Chapters with over 350 BUEs (of which there are only 9 out of 22) require significant amounts of time to be expended by CPs and VPs such that allocating 50% is simply unworkable. Several CPs and VPs currently are doing full time representational duty and to scale that back now would cause significant problems in those chapters. The Union therefore also has an interest in preserving the status quo with regard to full-time representatives.

With regard to stewards, the Union's interest is in preserving the status quo. The Union believes that 33 1/3% appropriately characterizes the maximum amount of official time claimed by any steward, with the exception of certain chief stewards. To that end, the Union is interested in preserving status quo with regard to the Chief Stewards.

The Union also has an interest in efficient, productive use of official time, which is accomplished better through allowing union officials to allocate their official time according to available duty rather than on a biweekly basis. The Union's proposal would allow representative's to perform official time without fear that on the day that a grievance is due or on the day an employee requests representation at an investigatory interview, s/he has reached the cap for the week. The Union's proposal allows for more flexibility - but still takes into account reasonable limits on official time.

Lastly, the Union has an interest in allowing flexibility for certain situations. If a representative and his/her supervisor are able to work out a different arrangement that works for them, then they should be allowed to do so.

**Management Argument**

The Agency’s proposal establishes a reasonable limitation on the use of official time, balancing the Employer’s right to have employees perform their regularly assigned job duties with the Union’s right to reasonable official time. In language to which the parties have already agreed
(1:40 ratio), the Union has been allocated sufficient steward slots to meet its representational duties consistent with these caps. The records of official time clearly demonstrate that official time is not being used efficiently, but is instead being concentrated among a small group of Union officers. This concentration of official time in a few individuals, deprives the Agency of its right to utilize these employees to perform their regularly assigned job duties.

Management Interest Statement

The Agency's interest is to set a reasonable limitation on the use of official time, balancing the Employer's right to have employees perform their regularly assigned job duties. In the agreed-upon language, the Union has been allocated sufficient steward slots to meet its representational duties consistent with these caps.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

1. After the effective date of this Agreement, notwithstanding any other provision of this Article, the parties agree that the positions in which union representatives currently use 100% official time (those positions are Chapter Presidents for Chapter 212, 254 and 282; Vice President for Chapter 282; and Chief Steward for Chapter 254) will be granted official time as follows: 100% official time the first year; 90% official time the second year; and 80% the remaining years.

2. Subject to Section 1 above, Chapter Presidents and Vice Presidents or Chief Stewards will generally not exceed, on an annual basis, official time in excess of fifty (50) percent of their available duty time.

3. All other representative will generally not exceed, on an annual basis, official time in excess of 33% of their available duty time.

4. By mutual agreement, the parties may change these “caps.”

The modified proposal provides a reasonable balance between the Agency’s right to have its employees perform their regularly assigned duties and the Union’s statutory representational obligations.

Article 10, Section 6C

Union Proposal

Time spent attending formal meetings, labor-management committees/councils, and other Agency established teams or workgroups (such as PWS or MEO team) will not be counted toward the representative’s annual cap.
Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s modified proposal represents a standard exclusion from official time caps, where they exist in a CBA. Specifically, the Union has proposed that attendance at formal meetings or labor-management committees/councils and participation in agency-established teams (such as an MEO or PWS) should not be counted toward an employee representative’s maximum amount of official time. Formal meetings, for instance, occur with relative frequency and are often attended by union representatives that would otherwise attend because they are affected by the issues covered in the formal meeting. It would make little sense under these circumstances to have that same employee count that time against his cap, when he would be attending the meeting regardless. With regard to the teams and councils, employee representatives should not be placed in the position of having to choose between a council to improve and build on the labor-management relationship and representing an employee. Further, the Agency determines the amount of time taken up by each of these activities, not the union representatives.

Union Interest Statement

The Union has an interest in ensuring that the caps are only used for representational functions. Labor-Management meetings do not involve direct representational duties and should therefore not be counted against a representative's annual cap.

Management Argument

The Agency’s proposal in Agency Section 4B supra sets reasonable caps on the use of official time, and these caps should actually mean something. The Union’s exceptions – particularly with respect to formal meetings – would effectively swallow the rule. The Union’s interest on this point is inherently disingenuous; during both labor-management meetings and other formal meetings, the Union is representing the interest of bargaining unit employees; thus, this function is clearly “representational.”

To the extent the Union’s proposal is an exception to the cap stated in Agency’s Section 4B, such exceptions should have reasonable limits – both per individual and overall – to prevent abuse. The Agency’s proposal sets such limits. As long as a reasonable limitation/cap is set, the Agency is flexible on the number of hours. The Union’s modified proposal excluding time spent on a MEO or PWS (in the A-76 process) team is inapplicable to this Article. Such employees are serving as subject matter experts and therefore within the scope of their normal duties.

Management Interest Statement

The Agency's interest is to ensure that the caps set forth actually mean something. The Union's exceptions - particularly with respect to formal meetings - would effectively swallow the rule.
Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

Time spent attending formal meetings or Agency established teams or workgroups that cover the union representative’s official Agency duties will not be counted toward the representative’s annual cap. Time spent attending labor-management committees or councils will count 20% toward the representative’s annual cap (e.g., a one hour meeting will count 12 minutes against the cap). The parties may waive or reduce the percentage.

The modified proposal eliminates charges to the cap where union representatives would attend meetings as an employee and charges a fixed percentage toward the cap for attending labor-management committee meetings, therefore, it meets both parties’ needs.

**Article 10, Unnumbered Section**

**Union Proposal**

Attendance at and participation in Union events, e.g., National or local training and conventions, where the agenda has been reviewed in advance by the Employer and the amount of time has been approved will not be counted toward a representative's maximum official time "cap." The time authorized for this purpose shall generally not exceed on an annual basis: 60 hours per representative for national training that requires travel; 48 hours per representative for national training that does not require travel; and 20 hours of local training.

**Management Proposal**

The Employer will allow a maximum of 300 hours for the purposes of attending training relative to Labor-Management Relations. The Employer must be notified and provided with an agenda and a course description two (2) weeks in advance. The time authorized for this purpose shall not exceed 40 hours per representative in the first year of the agreement and 32 hours per year thereafter.

**Union Argument**

The Union’s proposal is another attempt to meet the Agency’s interest. It appears that the Agency has agreed that any time spent in training will be above and beyond the official time cap.

As for the second part of the Union’s modified proposal, the Union has attempted to work with the Agency’s concept of time per representative. The Union’s proposal, however, more appropriately represents time needed for these events. The Union has proposed a cap of either 48 hours or 60 hours per representative for national trainings/conferences. Sixty hours represents the following events: 24 hours for Spring Training; 24 hours for Legislative Conference; and 12 hours of possible travel time. Forty-eight hours excludes the 12 hours of
travel time and is intended to apply to those representatives who do not need to travel to attend. The Union has also proposed a cap of 20 hours per representative for local training. It is not unusual for the local chapters to conduct periodic training throughout the year for its stewards and 20 hours represents a reasonable amount of time to permit such training. The Agency’s proposal would eliminate mutually beneficial trainings and conferences. Further, there is no need to reduce the time in the subsequent years of the contract as the Union’s training cycle remains constant and local chapters work more efficiently and better if their stewards are properly trained.

The Agency’s proposal of 300 hours total across the entire 7 OPDIV, 22 chapter unit is insulting. That would mean that no more than 12 union officials total could attend both Spring training and the Union’s annual Legislative Conference (typically 24-hour events), not even one representative per chapter. This is unmanageable and smacks of anti-union animus. There are currently no caps on the amount of time allowed for training and the Agency has never articulated any reason to depart so dramatically from this process. While the Union is willing to work with caps per representative, the Agency’s proposal is a non-starter.

**Union Interest Statement**

The Union has an interest in ensuring that the caps are only used for representational functions. Union-sponsored trainings do not involve direct representational duties and should therefore not be counted against a representative's annual cap. The Union has an interest in making sure that its representatives are appropriately trained so that the contract can be effectively and properly administered. The Union's figure of 80 hours reflects 24 hours for spring training, 24 hours for the legislative conference, 2 hours per month for local chapter training, and 8 hours of any other local chapter sponsored training events.

**Management Argument**

**NO ARGUMENT SUBMITTED**

**Management Interest Statement**

The Agency’s interest is that this proposal is an exception to the caps stated above. Any such exception, however, should have reasonable limits - both per individual and overall - to prevent abuse. The Agency's proposal sets such limits.

**Recommendation**

I recommend the parties adopt the following modified proposal:

Attendance at and participation in Union events, e.g., National or local training and conventions, where the agenda has been reviewed in advance by the Employer and the amount of time has been approved will not be counted toward a representative's maximum official time "cap." The time authorized for this purpose shall not exceed 60
hours per representative in the first year of the agreement and 48 hours per year thereafter.

The modified proposal meets the parties’ interests as it does not count labor-management training against the caps and has reasonable limits.

**Article 15, Section 2B**

**Union Proposal**

The use of annual leave is a right of the employee, subject to the approval of the Employer. An employee's request for annual leave will be approved unless the employee's absence would substantially hinder accomplishment of essential workload requirements, such as an inability to complete a specific or previously assigned work project that must be completed during the time period in question or when the employee’s absence would adversely affect needed physical office coverage and cannot be otherwise accommodated. A substantial hindrance is more than a staffing or administrative inconvenience.

**Management Proposal**

The use of annual leave is a right of the employee subject to the approval of the Employer. Leave-approving officials (LAO) may, consistent with operational demands, workload and with consideration of staffing levels, determine when annual leave may be taken, refuse to grant annual leave, or revoke annual leave that has been granted, which may require recalling an employee to duty.

**Union Argument**

The parties have already agreed to the “substantial hindrance” standard in Article 10 for the release of stewards. The same managers approving the release of stewards will be responsible for approving leave requests, and it makes little sense to adopt different standards throughout the parties’ CBA. The Union’s modified proposal meets the Agency’s stated interest to have flexibility in approving or denying annual leave requests. It properly takes into consideration work that needs to be completed and office coverage. The Agency’s proposal is too vague for practical application. Indeed, it is no standard at all. Given the incredibly amorphous standard of “consistent with operational demands” and in “consideration of staffing level,” there are no circumstances under which the Agency could not defend a refusal to grant annual leave.

**Union Interest Statement**

The Union's interest here is contract consistency and ease of contract administration. The parties have agreed to the substantially hinder standard in Article 10 for release of duty to perform official time duties and there is no reason that this standard should not govern all leaves from duty, including annual leave. Adoption of one standard will facilitate leave requests - whether
they are for official time or annual leave.

Management Argument

The Agency’s proposal ensures that management has the necessary flexibility to balance annual leave requests with the accomplishment of the Agency’s mission, goals and obligation. The Union’s proposal would unnecessarily restrict management’s ability to balance these competing interests. The Union’s proposal would constitute an excessive infringement on managements' rights to assign work and to approve leave, and is arguably non-negotiable. Further, the Union’s interest in “contractual consistency” is inapplicable. The interest in releasing union representatives for official time absent “substantial hindrance” is to facilitate efficient labor management relations. This interest is absent in this section, and therefore cannot even be validly weighed against management right to assign work.

Management Interest Statement

The Agency's interest is to ensure that management has the necessary flexibility to balance annual leave requests with the accomplishment of the Agency's mission, goals and obligations. The Union's proposal would unnecessarily restrict management's ability to balance these competing interests.

Recommendation

I recommend the parties adopt the Agency’s proposal as it provides the appropriate flexibility to manage work schedules and assign work.

Article 15, Section 2E/2F

Union Proposal

If leave is denied, upon the employee's request, the Employer will provide reasons for denial in writing to the employee, which may be by email. Any denials of annual leave are subject to expedited arbitration.

Management Proposal

If leave is denied, upon the employee's request, the Employer will provide reasons for the denial in writing to the employee, which may be by email.

Union Argument

NO ARGUMENT SUBMITTED
**Union Interest Statement**

The Union has an interest in having annual leave denial grievances processed quickly. Leave requests are often time sensitive and, if denied, would not be adequately resolved by a protracted arbitration schedule that may extend well beyond the requested leave time.

**Management Argument**

The Union’s proposal is flawed. It assumes that all denials of annual leave should be subject to arbitration, expedited or not. The approval/disapproval of annual leave is an Agency right, subject to the provisions that are agreed within this consolidated CBA. It is not proper to avail all denials of annual leave to arbitration, as the Union’s language allows, but rather only those denials of annual leave that the Union alleges are not in compliance with the agreed upon provisions of the CBA. Additionally, the Agency has set forth its opposition to unilateral or mandatory invocation of expedited arbitration in its arguments relating to Article 47. Those same arguments would apply here. The Agency’s proposal should be adopted.

**Management Interest Statement**

The Agency's interest is the same as that stated for Article 47, infra.

**Recommendation**

Inasmuch as the Union withdrew its proposal, I recommend the parties adopt the Agency’s proposal.

**Article 15, Section 3/2D**

**Union Proposal**

The Employer shall not deny the use of annual leave as a disciplinary measure. Leave will not be denied for arbitrary or capricious reasons.

**Management Proposal**

The Employer shall not deny the use of annual leave as a punitive measure. Leave will not be denied for arbitrary reasons.

**Union Argument**

The Union seeks to preserve the status quo with regard to denials of annual leave. Currently, four of the CBAs have identical language and the Agency has failed to articulate any reason to depart from the status quo.
Union Interest Statement

The Union's interest is in preserving the status quo. The Union's proposed language is in four of the contracts (SAMHSA, HRSA, ACF and NCHS).

Management Argument

The Agency clearly has the right to correct leave-related infractions. Usually the most appropriate tool for doing so is placing the employee on leave restriction – i.e., allowing management to restrict the entitlement to take leave absent authorization given under specified procedures in the restriction. Although leave restriction is not specifically termed as a “disciplinary” tool, the Union’s proposal is sufficiently confusing that it could be misinterpreted to preclude the Agency from denying leave to an employee pursuant to leave restriction (and, by extension, from imposing further discipline in denying leave for violation of a leave restriction). This type of confusing language should be avoided in this CBA, regardless of the Union’s contention that similar language exists in other agreements.

Management Interest Statement

The Agency's interest is to retain its right to deny leave as discipline for leave-related infractions (e.g., leave restriction). The Union's use of the term "disciplinary" would effectively remove this right.

Recommendation

In light of the parties’ past practice, I recommend the parties adopt the Union’s proposal with the understanding that the use of “leave restriction” for leave related infractions is not discipline.

Article 15, Section 4A (Union), Section 3A (Management)

Union Proposal

Employees are encouraged to submit requests for annual leave as far in advance as possible. Any request for annual leave for periods of five (5) or more consecutive workdays and/or days off immediately preceding or following a holiday should be submitted in advance. Such requests for annual leave will be approved or denied by the date the leave is needed, but no later than ten (10) workdays after receipt of the request.

Management Proposal

Employees are encouraged to submit requests for annual leave as far in advance as possible. Leave requests that are submitted several months ahead of time may not be acted upon until such time as the LAO can properly assess the workload needs for the requested period. The Employer may, during period of high leave use or operational needs, require that extended leave requests
(i.e., those for periods in excess of five (5) consecutive workdays) and/or requests for days off immediately preceding or following a holiday be submitted by a specific date (e.g., September 1 for end-of-year holiday and use-or-lose period). Such leave requests should be submitted to the appropriate leave-approving official. The Employer will approve or deny all annual leave requests prior to the date the leave is to be used.

**Union Argument**

The Union’s modified proposal seeks to ensure that employees can properly plan for use of annual leave by requiring supervisors to act timely on leave requests. It is unfair to expect employees to put their vacation plans on hold while the supervisor claims an inability to assess workload needs. The CBA must contain a definitive process for employees to receive responses to their annual leave requests. By its very terms, the ten (10) workday turn-around time only applies to those leave requests that are for five (5) workdays or more or for days off immediately preceding or following a holiday. It does not apply to all leave requests. The Union’s proposal is workable and strikes an appropriate balance between the employee’s right to plan and the supervisor’s need to assess staffing issues.

**Union Interest Statement**

The Union has an interest in ensuring that employees can plan their annual leave. Employees who submit leave requests well in advance of the requested leave should not be disadvantaged by the fact that the Employer has not yet assessed the "proper workload" for a given period, particularly when such workloads are generally the same from year to year. It is a simple requirement to submit leave requests of certain duration in advance to allow management sufficient time to approve, but allowing such requests to languish and potentially be denied in favor of another request submitted much later is not a proper process.

**Management Argument**

The Agency’s proposal gives management the necessary flexibility to consider leave requests and to approve them consistent with operational demands specific to that office or division. The Union’s proposal is unduly restrictive as it would create a “one size fits all” procedure, regardless of whether those procedures are feasible given operational demands.

**Management Interest Statement**

The Agency's interest is to give management the necessary flexibility to consider leave requests and to approve them consistent with operational demands. The Union's proposal is unduly restrictive.

**Recommendation**

I recommend the parties adopt the following modified proposal:
Employees are encouraged to submit requests for annual leave as far in advance as possible. Extended leave requests (any request for annual leave for periods of five (5) or more consecutive workdays and/or days off immediately preceding or following a holiday) should be submitted in advance. Such requests for annual leave will be approved or denied prior to the date the leave is needed, but, unless the workload can be properly assessed for the requested period, no later than ten (10) workdays after receipt of the request. During period of high leave use or operational needs, the Employer may require that extended leave requests be submitted by a specific date.

The modified proposal provides some certainty for receiving a response to a request for annual leave and allows for flexibility in managing the workflow and work schedules.

**Article 15, Section 4C (Union), Section 3B (Management)**

**Union Proposal**

When an employee's request for extended annual leave conflicts with the request(s) of other employee(s) for the same date(s), the employees affected who are equally-qualified and capable of performing the needed work during that period will first try to resolve the conflict in requests informally. If resolution is not possible, the Employer will approve or disapprove any conflicting leave requests as follows:

1. Leave requests will be submitted no later than January 1 of each year for leave during the period of May through November and no later than July 1 for leave during the period of December through April. Once January 1 and July 1 have passed, the Employer will identify who may take leave on the requested dates by giving the employee with the most seniority preference over others. However, an employee may exercise his or her seniority to break a conflict only one (1) time during either of these periods. Once the seniority right is exercised during a period, the person would then be at the bottom of the list to receive leave for another requested date(s). If all who request leave for a particular date have already used their seniority right once during that period, the seniority will once again be used to break that conflict.

2. Those who do not submit leave requests by these dates will be accommodated only after those who do request it by the due dates.

**Management Proposal**

When an employee's request for extended annual leave conflicts with the request(s) of other employee(s) for the same date(s), the employees affected who are equally-qualified and capable of performing the needed work during that period will first try to resolve the conflict in requests informally. If resolution is not possible, the determination will be made by the supervisor, considering such factors as the dates on which the conflicting requests were submitted, seniority (based upon service computation date), prior leave approved for that period if close to a holiday,
operational demands, etc.

**Union Argument**

The Agency’s proposal would authorize supervisors to determine which employees are granted the desired leave dates arbitrarily. Some factors the supervisor may consider are listed, but none are required, and the inclusion of “etc.” to end the proposal indicates the supervisor may fill in whatever reasoning he or she deems appropriate. Such language is ambiguous and could be used to disadvantage certain employees. It also allows for disparity in the manner in which leave requests are granted. The Union’s proposal creates a definitive and transparent process for resolving conflicts in leave requests. The detailed process and clear set of criteria minimize ambiguity and potential for abuse and instill trust in the employees that the supervisor did not base the decision on favoritism or other improper reason. Moreover, the Union’s proposal allows for employees to understand when they have been granted leave, as well as whether they are likely to be granted leave, substantially ahead of time. Further, the Union’s proposal is a combination of several provisions already contained in five of the existing contracts, demonstrating the language is eminently workable, and continuing the practice would ensure seamless contract administration.

**Union Interest Statement**

The Union has an interest in a definitive and transparent process for resolving conflicts in leave requests. Its proposal provides a detailed process and minimizes ambiguity and potential for abuse. Under the Union’s proposal, there would be transparency as to how a supervisor arrived at a decision to approve or deny leave based on a clear set of criteria and would instill trust in the employees that the decision was not based on favoritism or other improper motives. Further, the Union's proposal is a combination of several provisions already contained in five of the existing contracts and the Union has an interest in maintaining the status quo for ease of contract administration purposes.

**Management Argument**

The Agency’s proposal effectively accomplishes what the Union’s seeks to do, but is far less intricate and convoluted. Contrary to the Union’s assertion, its proposal does not maintain the “status quo,” but instead it takes language from three different agreements and combines them.

**Management Interest Statement**

The Agency's proposal effectively accomplishes what the Union's seeks to do, but is far less intricate and convoluted.

**Recommendation**

I recommend the parties adopt the Agency’s proposal modified as follows:
When an employee's request for extended annual leave conflicts with the request(s) of other employee(s) for the same date(s), the employees affected who are equally-qualified and capable of performing the needed work during that period will first try to resolve the conflict in requests informally. If resolution is not possible, the determination will be made by the supervisor, based on the dates on which the conflicting requests were submitted, seniority (based upon service computation date), prior leave approved for that period if close to a holiday and operational demands.

The Agency’s proposal is less complex than the Union’s proposal and the modification removes the open-ended aspect as to factors considered.

**Article 20, Section 4C/4B**

**Union Proposal**

If hazardous weather or other emergency conditions occur during the workday and an administrative order to close the workplace has not been issued, the Employer will grant excused absence for all or part of the workday if the employee provides the supervisor with acceptable written justification that a reasonable effort was made to get to work, but severe weather or other emergency conditions prevented him or her from doing so. If the employee has a disability, his or her disability must be taken into account in determining what constitutes a reasonable effort. If the supervisor denies a written request for excused absence, upon request, the denial will be in writing.

**Management Proposal**

If hazardous weather or other emergency conditions occur during the workday and an administrative order to close the workplace has not been issued, the Employer may grant excused absence for all or part of the workday if the employee provides the supervisor with acceptable written justification that a reasonable effort was made to get to work, but severe weather or other emergency conditions prevented him or her from doing so. If the employee has a disability, his or her disability must be taken into account in determining what constitutes a reasonable effort. If the supervisor denies a written request for excused absence, upon request, the denial will be in writing.

**Union Argument**

The Union’s proposal is contained in three of the existing CBA’s, which demonstrates that the parties are fully capable of implementing this provision without the Agency’s fear of its discretion being turned into an employee entitlement.

The Agency’s use of the word “may” injects a second review of the employee’s information. Under the Agency’s proposal, an employee could submit a reasonable justification, but the supervisor could nonetheless choose to deny the excused absence. The Union seeks to protect
against such decisions and to ensure a fair and equitable approach for all employees.

**Union Interest Statement**

The Union has an interest in ensuring that there is certainty as to the excused absence policy in cases of hazardous weather or similar conditions. The Union seeks to protect against differing supervisory decisions and to ensure a fair and equal approach for all affected employees. Further, the Union's proposed language is present in three of the existing agreements (FDA, HRSA and ACF) and the Union therefore has an interest in maintaining the status quo.

**Management Argument**

The Agency’s proposal preserves management’s discretion to grant leave in emergency situations, or to excuse infrequent tardiness, rather than turning such leave or excused tardiness into an employee entitlement (as the Union’s proposal would do). Creating such an entitlement excessively infringes on management’s right to approve leave, and is non-negotiable. The entire point of granting emergency leave or excusing infrequent tardiness is that it be a discretionary decision by management, made on a case-by-case basis where appropriate.

**Management Interest Statement**

The Agency's interest is to prevent management's discretion to grant leave in emergency leave from being turned into an employee entitlement.

**Recommendation**

I recommend the parties adopt the Agency’s proposal modified as follows:

If hazardous weather or other emergency conditions occur during the workday and an administrative order to close the workplace has not been issued, the Employer may grant excused absence for all or part of the workday if the employee provides the supervisor with acceptable written justification that a reasonable effort was made to get to work, but severe weather or other emergency conditions prevented him or her from doing so. The Employer’s decision will be fair and equitable. If the employee has a disability, his or her disability must be taken into account in determining what constitutes a reasonable effort. If the supervisor denies a written request for excused absence, upon request, the denial will be in writing.

The modified proposal meets both parties’ interests. It affords management the discretion to consider the substance of the request and use the standard utilized in one of the parties’ prior contracts.
Article 20, Section 7

Union Proposal

Employees have the responsibility to arrive at work on time. However, infrequent tardiness of less than one (1) hour beyond the employee's start time or the start of core hours will be excused without charge to leave when the employee provides a reasonable explanation acceptable to the Employer as to why s/he is tardy.

Management Proposal

Employees have the responsibility to arrive at work on time. However, infrequent tardiness of less than one (1) hour beyond the employee's start time or the start of core hours may be excused without charge to leave, when the employee provides a reasonable explanation acceptable to the Employer as to why s/he is tardy.

Union Argument

The Union’s proposal is contained in four of the existing CBA’s, which demonstrates that the parties are fully capable of implementing this provision without the Agency’s fear of its discretion being turned into an employee entitlement. The employee must provide the supervisor with a reasonable written justification and only upon this showing is the employee’s request approved. If the Agency is concerned about losing its approval authority, it misunderstands its role in assessing the written justification. If the submitted justification is unreasonable, the employee has not met the terms of the section and his/her excused absence will not be granted.

The Agency’s use of the word “may” injects a second review of the employee’s information. Under the Agency’s proposal, an employee could submit a reasonable justification, but the supervisor could nonetheless choose to deny the excused absence. The Union seeks to protect against such decisions and to ensure a fair and equitable approach for all employees.

Union Interest Statement

The Union has an interest in ensuring that there is certainty as to the infrequent tardiness policy. The Union seeks to protect against differing supervisory decisions and to ensure a fair and equal approach for all affected employees. Further, the Union's proposed language is present in four of the existing agreements (FDA, NCHS, OS and ACF) and the Union therefore has an interest in maintaining the status quo.

Management Argument

The Agency’s proposal preserves management’s discretion to grant leave in emergency situations, or to excuse infrequent tardiness, rather than turning such leave or excused tardiness into an employee entitlement (as the Union’s proposal would do). Creating such an entitlement
excessively infringes on management’s right to approve leave, and is non-negotiable. The entire point of granting emergency leave or excusing infrequent tardiness is that it be a discretionary decision by management, made on a case-by-case basis where appropriate.

Management Interest Statement

The Agency's interest is to prevent management's discretion to grant leave in emergency leave from being turned into an employee entitlement.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

Employees have the responsibility to arrive at work on time. However, infrequent tardiness of less than one (1) hour beyond the employee's start time or the start of core hours may be excused without charge to leave, when the employee provides a reasonable explanation acceptable to the Employer as to why s/he is tardy. The Employer’s decision will be fair and equitable.

The modified proposal meets both parties’ interests. It affords management the discretion to consider the substance of the explanation and use the standard utilized in one of the parties’ prior contracts.

**Article 22, Section 3A1**

**Union Proposal**

Consistent with the procedures set forth below, overtime will be distributed equitably and fairly among all employees determined by management to be qualified to perform the work necessary to be completed. When overtime work becomes available, the Agency will notify the local chapter.

**Management Proposal**

Consistent with the procedures set forth below, overtime will be distributed equitably and fairly among all employees determined by the Employer to be qualified to perform the work necessary to be completed.

**Union Argument**

The Union’s proposal provides a clear and routine method of assuring that the Agency complies with the terms of Article 22. Without notice of the overtime work, the local chapter cannot timely determine that the Agency has equitably and fairly distributed overtime among qualified employees. If the Agency does not notify the local impacted chapter, the Union must either trust that the Agency has indeed complied or rely on employees to monitor the Agency’s actions. A
better approach is to adopt a systematic process. The Union could submit a § 7114 request at any time requesting overtime information. Rather than employ this ad hoc approach, which the Agency cannot plan for, the Union maintains that this minimally burdensome, formalized approach is more manageable for both parties.

Union Interest Statement

The Union has an interest in ensuring that overtime is, in fact, distributed equitably and fairly, as the parties have agreed. By notifying the Union of overtime work, the local chapter can monitor the assignments and ensure that the Employer complies with the parties' agreement. The Union also has an interest in developing a systematic, routine method for the Employer to provide this information and eliminate the ad hoc approach of an information request that could be filed at any time. Under the Union's proposal, the Employer knows precisely when to provide the information and the Union knows when to expect it.

Management Argument

The Agency sees no constructive reason to notify the local chapter of available overtime, as it is bound to distribute overtime equitably and fairly and otherwise obey the provisions of the Article. The CBA should sufficiently cover the assignment and distribution of annual leave, which would render the Union’s provision useless.

Management Interest Statement

The Agency sees no constructive reason to notify the local chapter of available overtime, as it is bound to distribute overtime equitably and fairly and otherwise obey the provisions of the Article.

Recommendation

I recommend the parties adopt the Agency’s proposal as the Union will normally be informed by its members if the Agency does not distribute overtime equitably and fairly.

Article 22, Section 3C

Union Proposal

For overtime assignments where the pool of appropriately qualified employees includes employees hired after April 12, 2001 and under vacancy announcements that included notice of weekend work or shift work assignments, the Employer will follow steps B1, B2, B3, and B4 above. For all involuntary assignments, however, the Employer will assign the work to the least senior qualified employee hired after April 12, 2001 on a rotational basis. Employees hired before this date, however, are never part of the rotation for involuntary assignments.
Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

Effective April 21, 2001, the FDA changed the vacancy announcement for certain positions within the Office of Regulatory Affairs (ORA) and affirmatively notified all prospective hires that the position required regular overtime weekend work and shift work assignments. Prior to this time, the FDA neither included such notification on vacancy announcements nor routinely required these employees to perform such assignments. The Union’s proposal ensures that qualified employees who accepted positions knowing that they were subject to such overtime assignments comprise the group of employees who are involuntarily assigned overtime. Those employees who did not knowingly accept such employment should be excluded from involuntary overtime.

The Agency is correct to understand that the Union’s proposal exempts a pool of employees from involuntary overtime assignments, although this pool is not increasing and the proposal does not prevent these same employees from volunteering for overtime assignments. While an agency enjoys the statutory right to assign work, a union can properly negotiate procedures on how to assign work to qualified employees.

Union Interest Statement

The Union is interested in protecting a certain subset of FDA employees who were hired under a different type of vacancy announcement than more recent hires when the Employer makes involuntary assignments. The Union's interest is a matter of fairness and due notice. Certain FDA employees hired after April 12, 2001, were on notice (via the vacancy announcement) that the position would require weekend work and shift assignments. These employees knowingly took the positions. The Union's interest here is in protecting those pre-April 11, 2001 hires that were not on similar notice. Further, the process outlined in this proposal is the status quo for involuntary overtime assignments for certain FDA positions, so the Union is also interested in maintaining status quo.

Management Argument

The Agency has the right to assign work and to determine which personnel are qualified to perform particular assignments. The Union’s proposal would excessively interfere with management’s right to make such a determination and to assign work by closing off an entire pool of potentially qualified employees. Further, the circumstance which gave rise to the negotiation of weekend work LOU is no longer present. Under the LOU, for FDA Saturday was a non-workday; therefore FDA was obligated to pay employees overtime. Under this agreement, Saturday’s are a part of the normal workweek or workday (see Article 25, Section 4), and no such obligation to pay overtime can be assumed. In addition, the LOU was negotiated to deal with
import work. However, since its negotiation, the needs of the Agency to assign weekend work have increased to support Customs and International Mail Facility. The Union’s proposal should be rejected in that it excessively interferes with the Agency’s right to assign work.

Management Interest Statement

The Agency's interest is to ensure management's ability to assign qualified employees to overtime assignments, whereas the Union's proposal would close off an entire pool of potentially qualified employees.

Recommendation

I recommend this Article remain silent on this issue. The Union has noted elsewhere that there was no problem staffing such assignments with volunteers.

Article 22, Section 9

Union Proposal

The parties hereby incorporate by reference the weekend work LOU into this Article. It is attached as Article ____.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposal maintains the status quo with regard to FDA employees assigned to perform regular weekend work as part of their normal tour of duty. In the absence of some other negotiated process, the parties are better served following the procedures and processes that they were negotiated and implemented years ago. The Union’s FDA representatives all unanimously agreed, however, that the process was effective at staffing the assignments with volunteers. The Weekend Work LOU has nothing to do with overtime assignments. Rather, it outlines a process to cover regular weekend work assignments by providing incentives to employees.

Union Interest Statement

The Union is interested in maintaining status quo as it relates to weekend work for strictly FDA employees. Several years ago, the parties bargained a comprehensive agreement to cover weekend work assignments - including how those assignments would be made and various incentives for encouraging volunteers. In the absence of some other proposed process, the Union has an interest in preserving the current processes.
Management Argument

The Agency has the right to assign work and to determine which personnel are qualified to perform particular assignments. The Union’s proposal would excessively interfere with management’s right to make such a determination and to assign work by closing off an entire pool of potentially qualified employees. Further, the circumstance which gave rise to the negotiation of weekend work LOU is no longer present. Under the LOU, for FDA, Saturday was a non-workday; therefore FDA was obligated to pay employees overtime. Under this agreement, Saturday’s are a part of the normal workweek or workday (see Article 25, Section 4), and no such obligation to pay overtime can be assumed. In addition, the LOU was negotiated to deal with import work. However, since its negotiation, the needs of the Agency to assign weekend work have increased to support Customs and International Mail Facility. The Union’s proposal should be rejected in that it excessively interferes with the Agency’s right to assign work.

Management Interest Statement

The same interest as that expressed in response to Union 3C.

Recommendation

In accordance with the recommendation in Section 3C, I recommend this Article remain silent on this issue.

Article 22, Section 11B/10B

Union Proposal

For purposes of compensatory time for travel, the official duty station is defined as the forty mile radius around the post-of-duty.

Management Proposal

For purposes of compensatory time for travel, the official duty station is defined as the fifty (50) mile radius around the post-of-duty.

Union Argument

Given the congestion and traffic patterns that have developed over the past decade or so in large, metropolitan areas, even relatively short distances can require significant travel time. In these days of increasing commuting times, employees should be entitled to compensatory time for travel if they are required to travel more than 40 miles from their POD. The Agency’s proposal is out-of-date with today’s traffic patterns and imposes an unreasonable hardship on employees by requiring them to spend a significant amount of time in travel status before becoming eligible for compensatory time for travel.
Union Interest Statement

The Union has an interest in protecting those employees that live in metropolitan areas and bringing the radius more consistent with today's traffic congestion in major cities.

Management Argument

The Agency’s proposal would maintain a reasonable radius for official duty stations, particularly given the size of large metropolitan areas. The Agency’s 50 mile radius is reasonable considering that travel costs – such as lodging and per diem – could be incurred. The 50 mile radius is a commonly accepted criterion for Federal Agencies and the rest of the Department, and should be retained in this CBA.

Management Interest Statement

The Agency's interest is to maintain a reasonable radius for official duty stations, particularly given the size of large metropolitan areas.

Recommendation

I recommend the parties adopt the following modified proposal:

For purposes of compensatory time for travel, the official duty station is defined as the forty-five (45) mile radius around the post-of-duty.

The modified proposal reflects a reasonable radius for official duty stations.

Article 25, Section 5C

Union Proposal

Maxiflex Schedule - this schedule allows employees to earn credit hours and vary their daily arrival times within the established flexible bands. A maxiflex schedule may contain core hours on fewer than 10 workdays in the biweekly period. The basic work requirement is eighty hours per biweekly pay period. Employees may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization. Employees specify, with supervisory approval, which day(s) they will work and the number of hours per workday.

Management Proposal

Maxiflex Schedule - this schedule allows employees to earn credit hours and vary their daily arrival times within the established flexible bands. The basic work requirement is eighty hours
per biweekly pay period. Employees specify, with supervisory approval, which day(s) they will work and the number of hours per workday.

**Union Argument**

Under a Maxiflex program, employees may not work every day of the pay period or may work only four (4) hours on a particular day. Under both of these circumstances, core hours do not apply. The Union’s proposal clarifies these situation and makes it clear that a maxiflex schedule may contain core hours on fewer than ten (10) workdays in a biweekly period. The first part of the Union’s proposal simply defines the maxiflex more precisely. Because this program is new to the vast majority of the units consolidated under this CBA, the parties should err on the side of defining what may seem like self-evident terms. The second part of the Union’s proposal simply informs employees and supervisors that employees under a maxiflex schedule are permitted to vary the number of hours worked per day and per week, within the established limits. In other words, an employee, provided s/he has supervisory approval, is not required to work the same days and the same hours from week to week under a maxiflex schedule. To suggest otherwise is to misunderstand the purpose of a maxiflex schedule. A maxiflex schedule is designed to create maximum flexibility. Under the Agency’s proposal, it is not clear that employees can vary their work hours and days from week to week, with supervisory approval.

**Union Interest Statement**

The Union is simply attempting to clarify the definition of maxiflex schedule. The term is new to most of the employees covered by this agreement and the Union has an interest in making sure they understand how the new type of schedule works. The Union's proposal is simply a more thoroughly outlined definition of maxiflex.

**Management Argument**

The Agency’s proposal is consistent with the already agreed-upon language in this section. The Union’s proposal would limit applicability to maxiflex based on OPM’s (non-regulatory) definition – contrary to the intent of the agreed-upon language – which was intended to address both those employees working less than ten days in a pay period (e.g., certain FDA employees), and those working ten days in a pay period (e.g., certain CDC/NCHS employees). The Union’s proposal would make administering maxiflex unduly confusing because the definition conflicts with the remainder of the Article.

**Management Interest Statement**

The Agency's interest is to keep consistent with the agreed-upon language in this section - i.e., the key reason "credit hours" are referenced is to address overtime concerns in those situations in which an employee's schedule is over 10 workdays. The Union's proposal would limit availability based on OPM's definition, contrary to the intent of the agreed-upon language.
Recommendation

I recommend the parties adopt the Union’s proposal as it has a more specific definition of the maxiflex schedule.

Article 25, Section 8B

Union Proposal

In approving or denying AWS requests, the Employer will consider interference with the ability of the organization to meet effectively its workload and programmatic objectives. The Employer will also consider whether the employee’s absence will adversely affect needed physical office coverage and cannot be otherwise accommodated.

Management Proposal

In approving or denying AWS requests, the Employer will consider interference with the ability of the organization to meet effectively its workload, programmatic objectives and office coverage.

Union Argument

The Union acknowledges that where physical presence is necessary, office coverage should be a proper factor in whether and when the employee’s request for AWS can be approved. The Agency’s proposal in this regard is too vague – considering only interference with “office coverage.” It is arguable that any absence due to AWS interferes with office coverage. Accordingly, the Agency’s proposal is not a standard at all, but serves to provide managers with a constant reason to deny employee AWS requests. The Union’s proposal strikes an appropriate balance between the Agency’s stated interest in accounting for office coverage and the Union’s need for a meaningful standard.

Union Interest Statement

The Union has an interest in assuring proper administration of the AWS program and its proposal accurately captures all relevant considerations. Office coverage is certainly contemplated by workload and programmatic objectives and to include it as another consideration runs the risk of improper denials.

Management Argument

The Agency’s proposal balances its need to accomplish its mission, through the timely completion of workload and through sufficient office coverage, with the employee’s proposed AWS schedule. The Union fails to explain how consideration of office coverage would “run the risk of improper denials” when it implicitly admits that office coverage is a proper criteria under the guise of workload and programmatic objectives.
Management Interest Statement

The Agency's interest is to ensure the employer can maintain adequate office coverage.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

In approving or denying AWS requests, the Employer will consider interference with the ability of the organization to meet effectively its workload, programmatic objectives and physical office coverage.

The modified proposal sufficiently captures both parties’ interests concerning the administration of the AWS program including office coverage.

Article 25, Section 9C

Union Proposal

In the event of an emergency or workload problem, which interferes with an organization's ability to meet its workload or programmatic objectives or an employee’s AWS adversely affects needed physical office coverage and cannot be otherwise accommodated, the Employer may temporarily change, for a specified period of time, an employee's AWS (e.g., require an employee to come off a compressed schedule, change starting and ending times of workdays for an employee, etc.) The Employer will limit this change to as short a time as necessary and notify impacted employees and the local chapter of the expected expiration date at least five (5) workdays in advance of the change, where possible.

Management Proposal

In the event of an emergency or workload problem, which interferes with an organization's ability to meet its workload or programmatic objectives or office coverage, the Employer may temporarily change, for a specified period of time, an employee's AWS (e.g., require an employee to come off a compressed schedule, change starting and ending times of workdays for an employee, etc.) The Employer will limit this change to as short a time as necessary and notify impacted employees and the local chapter of the expected expiration date at least five (5) workdays in advance of the change, where possible.

Union Argument

The Union acknowledges that where physical presence is necessary due to an emergency or workload problem, office coverage should be a proper factor in whether an employee’s AWS should be temporarily changed. The Agency’s proposal in this regard is too vague – considering only interference with “office coverage.” It is arguable that any absence due to AWS interferes
with office coverage. Accordingly, the Agency’s proposal is not a standard at all, but serves to provide managers with a constant reason to change an employee’s AWS. The Union’s proposal strikes an appropriate balance between the Agency’s stated interest in accounting for office coverage and the Union’s need for a meaningful standard.

**Union Interest Statement**

The Union has an interest in assuring proper administration of the AWS program and its proposal accurately captures all relevant considerations. Office coverage is certainly contemplated by workload and programmatic objectives and to include it as another consideration runs the risk of improper denials.

**Management Argument**

The Agency’s proposal balances its need to accomplish its mission, through the timely completion of workload and through sufficient office coverage, with the employee’s proposed AWS schedule. The Union fails to explain how consideration of office coverage would “run the risk of improper denials” when it implicitly admits that office coverage is a proper criteria under the guise of workload and programmatic objectives.

**Management Interest Statement**

The Agency's interest is to ensure the employer can maintain adequate office coverage.

**Recommendation**

I recommend the parties adopt the Agency’s proposal modified as follows (only disputed portion appears):

In the event of an emergency or workload problem, which interferes with an organization's ability to meet its workload or programmatic objectives or physical office coverage, the Employer may temporarily change, for a specified period of time, an employee's AWS (e.g., require an employee to come off a compressed schedule, change starting and ending times of workdays for an employee, etc.).

The modified proposal sufficiently captures both parties’ interests concerning the administration of the AWS program including office coverage.

**Article 25, Section 13A**

**Union Proposal**

FDA employees continue to be eligible to work an "Any 80" schedule. Under this type of
schedule, employees may complete their tour of duty any time within the basic work requirement and time bands specified in Section 4 above. Further, the Maxiflex schedule outlined in this Article is intended to permit FDA employees to work an "Any 8" and "Any 40" schedule in the same manner as they did prior to this Agreement.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

First, the vast majority (nearly 60%) of the employees in the new consolidated unit that must decide whether to ratify this contract work in the FDA. They have had the benefit and flexibilities outlined in § 13A available to them since before implementation of the 1999 CBA. Elimination of this benefit will do great harm to the FDA employees’ acceptance of a contract. Second, throughout bargaining, the Agency indicated to the Union that the proposed maxiflex schedule would allow FDA employees to work the same schedule, just under a different name. The Union’s proposal is aimed at capturing and memorializing this commitment. Third, as with any impasse over a new contract, the party wishing to change a major benefit should have the burden of demonstrating why a change is needed. The Agency has not offered any tangible reason to eliminate the provision, other than its statement that FDA terms of art could lead to confusion. This reason is by no means sufficient to eliminate a long-standing benefit. At the beginning of bargaining, the Agency had opposed extending this benefit to everyone covered by this contract, i.e., those outside FDA, and the Union relented by withdrawing its expansion proposal. The Union met the Agency’s prime interest and the Union asks that the Agency now meets ours.

Fourth, even if after a decade under this system, the Agency should suddenly discover that this work schedule creates an adverse impact, the contract does little to stop it from invoking its right to proceed to the FSIP for a change under its expedited AWS/CSW regulations. The Agency therefore suffers no long-term harm from this proposal.

Union Interest Statement

The Union has an interest in ensuring that FDA employees continue to be able to work under the same types of schedules as they have been since 1999 under the current contract. Throughout bargaining, the Employer indicated to the Union that the proposed maxiflex schedule would allow FDA employees to work the same schedule, just under a different name. The Union's proposal is aimed at capturing and memorializing this commitment. Further, to the extent that the Agency disavows having made these assurances, the Union's proposal is simply aimed at preserving status quo (at least eight years of status quo) for FDA employees.
Management Argument

The maxiflex definition sufficiently addresses any substantive reason for this language, and to approve the Union’s proposal would be unduly confusing as “any 8,” “any 40” and “any 80,” are FDA terms of art which simply do not belong in a consolidated agreement. The reason maxiflex was fashioned in the manner agreed to by the parties is to address the Union’s concerns for flexibility of employee schedules. In addition, the “any 8,” “any 40” and “any 80,” schedule is not mentioned anywhere else in this agreement. Under a consolidated agreement, to the extent possible, terms should be uniform. The parties have agreed to the substantive terms of a maxiflex schedule. This schedule encompasses the former FDA specific incarnations of “any 8,” “any 40” and “any 80,” and to adopt the Union’s language would simply invite confusion among all bargaining unit employees – including those at FDA – and would undermine the very purpose of a uniform agreement.

Management Interest Statement

The maxiflex definition sufficiently addresses any substantive reason for this language, and to approve it would be unduly confusing as these are FDA terms of art in a consolidated agreement.

Recommendation

I recommend the parties remain silent and follow the past practice and the Agency’s statement that maxiflex incorporates “the former FDA specific incarnations of “any 8,” “any 40” and “any 80.”

Article 25, Section 13B/Section 13

Union Proposal

When it is impracticable to prescribe either a regular tour of duty or a tour of duty for an employee under the AWS/Maxiflex schedules listed in Section 4 above, the Employer may establish a first forty tour of duty. There is a presumption that it is impracticable to prescribe a regular tour of duty or tour of duty outlined in Section 4 above for the following positions, which are appropriate for a first forty include, FDA Inspectors, Investigators, Laboratory Analysts, and employees reviewing an activity funded (in whole or in part) by a user fee. This list is not exhaustive. As with AWS/Maxiflex schedules, an employee must obtain supervisory approval to work a first forty tour of duty. Modifications and/or termination of a first forty tour are subject to the provisions of this Article.

Management Proposal

When it is impracticable to prescribe either a regular tour of duty or a tour of duty for FDA employees under the AWS/Maxiflex schedules listed in Section 4 above, the Employer may establish a first forty tour of duty. Positions that are appropriate for a first forty include, but are
not limited to, FDA Inspectors, Investigators, Laboratory Analysts, and employees reviewing an activity funded (in whole or in part) by a user fee. As with AWS/Maxiflex schedules, an employee must obtain supervisory approval to work a first forty tour of duty. Modifications and/or termination of a first forty tour are subject to the provisions of this Article.

Union Argument

During bargaining, it was the Agency that suggested that the parties incorporate the first forty tour of duty into the Agreement as a way to ensure that FDA employees continued to enjoy the flexibilities of their current AWS programs. The Agency then also created, with the assistance of Mr. Russ Abbott, the list of positions for the First Forty tour of duty. The Agency repeatedly indicated that by holding a position on this list, the employee would be allowed to work a first forty tour. Later, however, it became clear that the Agency retreated from its position. The Agency wants to require each individual employee to request the schedule and leave it to the discretion of individual supervisors. The parties have already bargained over and developed the list of appropriate positions. Accordingly, the Agency’s concern over a case-by-case determination is unfounded. Effectively, the case-by-case determination has already been made. The Union’s proposal ensures consistency in decision-making.

Union Interest Statement

The Union is interested in ensuring fairness in administering the first forty tour, a tour authorized by regulation. Given that the tour is available pursuant to regulation, there is no reason to restrict it to FDA employees. Further, the Union is concerned with preventing disparate treatment among the same class of employees and in eliminating the need on a case-by-case basis to demonstrate the need for the first forty tour. The Union does not think it is good use of time or resources to require each individual person to make a case for the first forty when the parties have already agreed on a list of appropriate positions.

Management Argument

Under Federal regulations, employers make determinations about who may work a “first 40" schedule (consistent with overtime rules) on a case-by-case basis “where it is impracticable to prescribe a regular schedule of definite hours of duty for each work day of regular a scheduled administrative workweek,” based upon the demands of that particular employee’s job. The Union’s language would establish a presumptive eligibility to work such a schedule, regardless of specific facts. This proposal was fashioned to address FDA issues consistent with the spirit and language of OPM regulations defining “first 40" tours of duty. The Agency’s proposal is more consistent with the intent and language of OPMs rules regarding first forty tours of duty.

Management Interest Statement

The Agency's interest is to ensure consistency with Federal regulations. Under Federal regulations, employers make determinations about who may work a first 40 schedule (consistent
with overtime rules) on a case-by-case basis, based upon the demands of that particular employee's job; the Union's language would establish a presumptive eligibility to work such a schedule.

**Recommendation**

I recommend the parties adopt the Agency’s proposal modified as follows:

When it is impracticable to prescribe either a regular tour of duty or a tour of duty for employees under the AWS/Maxiflex schedules listed in Section 4 above, the Employer may establish a first forty tour of duty and will do so fairly and equitably. Positions that are appropriate for a first forty include, but are not limited to, FDA Inspectors, Investigators, Laboratory Analysts, and employees reviewing an activity funded (in whole or in part) by a user fee. As with AWS/Maxiflex schedules, an employee must obtain supervisory approval to work a first forty tour of duty. Modifications and/or termination of a first forty tour are subject to the provisions of this Article.

The modified proposal ensures fairness in administration and is consistent with Federal regulations and thereby meets the parties’ interests.

**Article 26, Section 5D/6D**

**Union Proposal**

Employees on a flexible workplace arrangement are required to report to the official duty station according to the schedule determined by the Employer. Employees on continuing flexible work arrangement should expect to report to the conventional work site a minimum of one (1) day per pay period. In addition, the Employer reserves the right to require more frequent days at the conventional work site, either planned or unplanned, due to special circumstances, including, but not limited to, office assignments, meetings, absence of other employees, emergency situations, or training classes. Any regular AWS off days shall not be counted against flexiplace days. Employees may attend these unplanned meetings via telephone unless physical presence is required.

**Management Proposal**

Employees on a regular and recurring flexible workplace arrangement are required to report to the official duty station according to the schedule determined by the Employer. In addition, the Employer reserves the right to require more frequent days at the conventional work site for situations deemed appropriate by the supervisor either planned or unplanned, due to special circumstances, including, but not limited to, office assignments, meetings, absence of other employees, emergency situations, or training classes. Employees may attend these unplanned meetings via telephone unless physical presence is required.
Union Argument

The Union’s proposal apprises employees of the current OPM guidelines regarding requirements to report to the conventional work site at least one day per pay period while on flexiplace. The proposal also makes employees aware of constraints associated with a flexiplace request, and, as such, the program will be implemented with much less confusion. The Agency’s proposal grants it unchecked discretion to direct an employee to report to the conventional work site. Such broad language is subject to managerial abuses. There is no evidence demonstrating the Agency needs such broad language to authorize it to require flexiplace employees to come into the office when needed. The program has been in effect for over ten years in some of the units, and at no time has the Agency ever informed the Union that flexiplace was compromising the Agency’s ability to complete mission-critical work. The Agency’s proposal is simply too broad to protect against confusion and inconsistent application of flexiplace privileges. The Union’s proposal informs employees and managers of the parameters of the flexiplace program to ensure that such inconsistencies do not occur. The Union’s proposal also clearly distinguishes between AWS and Flexiplace – two separate programs that should not negatively impact each other.

Union Interest Statement

The Union has an interest in informing employees of the current state of the law - that they can expect to report to the office at least once per pay period. It is important that employees are well informed as to the legal constraints on any flexiplace request. Further, the Union has an interest in clearly defining when an employee will be required to return to the office. The parties agreed to those circumstances (planned or unplanned, due to special circumstances, including, but not limited to, office assignments, meetings, absence of other employees, emergency situations, or training classes) and the additional language proposed by the Employer has the possibility of causing confusion, differing supervisory decisions, and unfair, inconsistent treatment of employees. Lastly, the Union has a strong interest in informing employees (and managers) that AWS and Flexiplace are separate programs and one should not negatively affect the other. Currently, two of the existing agreements permit supervisors to count AWS days against flexiplace and the Union has an interest in clarifying that this is not the case rather than going silent on the issue. Silence will undoubtedly lead to differing, inconsistent treatment of employees.

Management Argument

The proper method for determining what flexiplace arrangement, if any, is appropriate should be made by the supervisor in consultation with the employee. The Union’s proposed language – regarding the minimum number of days an employee need to report to the conventional work site – could lead to confusion. Although there may be rare occasions in which such an arrangement might be appropriate, an erroneously perceived presumption of appropriateness serves no one’s interests. The parties should remain silent on the number of days, and allow the supervisor and employee to work such an arrangement out on a case-by-case basis, taking into account the operational and mission needs of the Agency. Grievances could then be addressed to the
appropriateness of said arrangements, based upon the other criteria set forth in this Article and the specific facts, without the unnecessary reference to overly vague minimums or maximums.

Management Interest Statement

The Agency's interest is to allow managers and employees to work out flexible work arrangements among themselves.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

Employees on a regular and recurring flexible workplace arrangement are required to report to the official duty station according to the schedule determined by the Employer. In addition, the Employer reserves the right to require more frequent days at the conventional work site for situations deemed appropriate by the supervisor either planned or unplanned, due to special circumstances, including, but not limited to, office assignments, meetings, absence of other employees, emergency situations, or training classes. Any regular AWS off days shall not be counted against flexiplace days. Employees may attend these unplanned meetings via telephone unless physical presence is required.

The modified proposal sufficiently addresses both parties’ interests concerning informing the employee when they can expect to report to work and allowing managers and employees to workout the arrangement.

Article 30, Section 1B

Union Proposal

The Employer and Union agree that the effectiveness of this program will be evaluated within six (6) months from the end of the performance period by a joint labor-management workgroup. There will be equal numbers of NTEU representatives and management officials.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union proposal reflects the interest specified in 5 C.F.R. § 430.205(d), wherein “[a]gencies are encouraged to involve employees in developing and implementing their [performance appraisal] program(s).” The Union’s proposed language would go a long way toward achieving this interest by creating a joint committee to identify and address any problems associated with
the new performance system. The fact that this new system being is very different from prior performance appraisal systems may potentially lead to confusion and questions from both managers and employees, and having a forum in which these concerns can be expressed and remedied would be a great help to all parties involved. By addressing problems early on, the performance appraisal system (even during the first year or so of implementation) will be more effective and instill greater confidence in employees and managers that it is being administered in the appropriate fashion. The fact that the system has been implemented already does not change the fact that improvements could be made if a forum were created to voice such concerns. It also bears noting that PMAP has not been implemented in all the units for the past two years – in certain of the units it was only implemented last year.

Union Interest Statement

The Union has an interest in identifying and addressing - through joint efforts - problems associated with the new performance system. Indeed, the Union's interest is the same as outlined in 5 C.F.R. § 430.205(d) wherein agencies are encouraged to involve employees in developing and implementing performance systems. The fact that this appraisal system is new (and in large measure very different from prior systems) only underscores the Union's interest here. The Union has an interest in ensuring that problems are addressed early on and that the system has integrity.

Management Argument

The Department’s Performance Management Appraisal Programs (PMAP)(a Department-wide performance management system) has been in place for 2 years, and there is no useful purpose that this committee’s review will serve, other than to use official time.

Management Interest Statement

The Agency does not understand what value this evaluation process would add as PMAP has been implemented approximately 2 years.

Recommendation

The PMAP was not implemented uniformly in all units. Thus, the time the program has been in place varies depending on the unit. Allowing for employee input increases employee acceptance of the program to which they are contributing regardless of the original implementation date. Therefore, I recommend the parties adopt the Union’s proposal.

Article 30, Section 5A

Union Proposal

Not later than forty-five (45) days before proposed implementation of a new performance plan for employees, the Agency will notify the Union of the proposed change. The Union may make
recommendations and present supporting evidence pertaining thereto. The Employer will consider the Union's presentation and advise the Union, in writing, of the results of its review no later than ten (10) workdays prior to implementation.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

When afforded an opportunity to review plans prior to distribution and an opportunity to submit comments and recommendations, the Union’s involvement actually assists the Agency. The Union is currently afforded such an opportunity in three of the existing agreements, so adoption of the Union’s proposal represents a preservation of the status quo. The Agency appears to be confusing the submission of comments and recommendations with an obligation to bargain. There is no “quasi-bargaining obligation” involved in the Union’s proposal as alleged by the Agency, and nothing in the Union’s proposal seeks to force the Agency to bargain over the implementation of performance plans. Further, this proposal does not deal with negotiable effects of changes to performance plans that may be negotiable during mid-term bargaining. The Union’s proposal specifically addresses the implementation of new performance plans for employees, and in no way binds the Agency to the comments and recommendations made by the Union. The Union simply seeks to be allowed to continue the successful practice of submission of comments and recommendations in an effort to ensure the most accurate information is contained in performance plans. The proposal benefits both managers and employees and has been used to great effect in the past.

Union Interest Statement

The Union has an interest in reviewing plans prior to their distribution and in submitting any recommendations or comments to the Employer. The Union's interest here is much the same as that of the employees when they are given a plan to review - both groups are interested in assuring that the plan accurately depicts the work of the employees so that appraisals can be done properly. The Union has this right currently in existing agreements, the Union is therefore interested in preserving the status quo.

Management Argument

To the extent the Union’s proposal deals with non-negotiable changes to the Agency-wide performance plan, the Agency has no interest in adding quasi-bargaining obligation to areas in which it has no obligation to bargain. To the extent the Union’s proposal deals with negotiable effects of such changes, theses are already addressed in the procedure of Article 3 (Mid-Term Bargaining). Beyond that, the Union’s proposed procedure is redundant because employees are given the opportunity to review the plan to determine whether the plan accurately depicts their work – Union involvement should come at this stage in conjunction with that of the employee.
This prevents the addition of an unnecessary second review step and ensures that recommendations to a particular plan are made relative to the employee for which to plan covers rather than to a generic model.

Management Interest Statement

To the extent the Union's proposal deals with non-negotiable changes to the overall performance plan, the Agency has no interest in adding quasi-bargaining obligation to areas in which it has no obligation to bargain. To the extent the Union's proposal deals with negotiable effects of such changes, these are already addressed in the procedures of Article 3 (Mid-Term Bargaining).

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows (only disputed modified portion appears):

The Employer will consider the Union's recommendations and advise the Union, in writing, of the results of its review no later than three (3) workdays prior to implementation.

The proposal raises no bargaining obligations and the input provided by the Union may be beneficial. Absent a bargaining obligation, there is no need for a response prior to three days before implementation.

Article 30, Section 5G

Union Proposal

All employee performance will be measured against reasonable expectations and actual, observable performance. Performance appraisals will be based on a reasonable and representative sample of the employee's work. All performance appraisals will be based on individual performance.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposal seeks to ensure employees are fairly appraised and that the merit system is applied in the proper fashion. The Agency is concerned about “arguably non-negotiable limitations” being placed on their rights, but the language proposed by the Union does not appear to fall into that category. In NTEU and Department of Health and Human Services, Office of Hearings and Appeals, Baltimore, MD, 39 FLRA 346 (1991), the Authority held that “proposals
governing only the application of performance standards and critical elements do not conflict with
management’s rights to direct employees and to assign work.” Further, the Authority determined
that “observable performance” was an acceptable phrase when describing the factors upon which
performance ratings should be based. The Agency cited, in addition to the case above, POPA and
Patent and Trademark Office, Department of Commerce, 29 FLRA 1389 (1987), in which the
Authority held that a union proposal that “performance standards must be fair, equitable and
reasonable to permit the accurate evaluation of job performance” was an illegal infringement on
management right to determine the content of performance standards. The Union’s proposal does
not seek to determine the elements that will comprise the performance standards. The Union’s
language simply seeks to ensure that performance appraisals will be based on the proper factors.
Nothing in the Union’s proposal attempts to guide the Agency in establishing performance
criteria.

Union Interest Statement

The Union has an interest in protecting employees and promoting the merit system. The Union's
proposal ensures that supervisors will only consider the proper factors in their appraisals.

Management Argument

The Union’s proposal should be rejected, as it imposes non-negotiable limitations on the
Agency’s rights to determine performance standards (“reasonable expectations”).

Management Interest Statement

The Agency's interest here is to prevent arguably non-negotiable limitations on the Agency's
rights to determine performance standards ("reasonable expectations"). See 39 FLRA 346 (1991),

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

   Established performance standards will be measured against observable employee
   performance.

The modified proposal meets the parties’ interests as it focuses on the application of performance
standards to employees.

   Article 30, Section 5H

Union Proposal

The employer will consider various factors, including extenuating circumstances outside the
control of the employee, when evaluating employee performance.

**Management Proposal**

**NO PROPOSAL SUBMITTED**

**Union Argument**

The Union’s modified proposal addresses the Agency’s negotiability concerns. Further, the Union’s proposal is similar to that contained in AFGE, Local 3172 and U.S. Department of Health and Human Services, Social Security Administration, Vallejo District Office, 35 FLRA 1276 (1990) (SSA Vallejo). Where the Authority examined union proposals requiring the agency to consider various factors, including those outside the control of the employee, when assessing employee performance. The Authority held:

The proposals would not obligate the Agency to change any of its existing performance standards and would not inhibit the [a]gency in promulgating new standards. The proposals, moreover, would not require the [a]gency to revise any performance evaluations based on the identified events or processes. Rather, the sole objective of the proposals, as described by their wording and by the [u]nion’s explanation of their intent, is to identify certain circumstances which management should consider when evaluating employee performance.

**Union Interest Statement**

The Union has an interest in protecting employees and promoting the merit system. The Union's proposal ensures that supervisors will only consider the proper factors in their appraisals.

**Management Argument**

The Union’s proposal in non-negotiable.

**Management Interest Statement**

This proposal is non-negotiable. See 36 FLRA 834 (1990).

**Recommendation**

I recommend the parties adopt the Union’s proposal modified as follows:

The Employer will consider extenuating circumstances outside the control of the employee, when applying performance standards against employee performance.

The modified proposal is an application of performance standards and, therefore, negotiable.
**Article 30, Section 5K**

**Union Proposal**

The Employer shall not establish any quota system for appraisals.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

The Union’s interest here is simple: to protect the integrity of the merit system. At the very core of the merit system is the principle that employees must be evaluated on the basis of individual merit. The Union’s proposal protects that right by ensuring that the Agency not establish or implement a quota system. As noted in its interest statement, during the training phase of PMAP (the new performance evaluation system) implementation, employees repeatedly heard that the new system would have quotas because awards were now only going to be awarded to the top tier of employees and supervisors could not have too many employees at the top.

Accordingly, there is great suspicion, irrespective of whether it is warranted, that the Agency has set pre-determined numbers of the maximum number of Exceptional ratings each supervisor can grant. The Union’s proposal seeks to alleviate these employee concerns. The Agency notes in its interest statement that the Union’s proposal is “arguably non-negotiable.” The Agency notably does not provide support for that “arguable” assertion. The Agency would have to demonstrate that the Union interfered with some management right before the Arbitrator could find that the proposal was non-negotiable. The Agency has no management right to violate the merit system. Accordingly, it cannot be maintained that the Union’s proposal interferes with any legitimate management right.

**Union Interest Statement**

The Union has a strong interest in preventing the appearance of quotas. There is much suspicion that the new appraisal system is designed to minimize the number of employees receiving high appraisal scores. As such, the Union is seeking to prevent such a quota system.

**Management Argument**

The first sentence of the Union’s proposal is non-negotiable. With respect to the second sentence of the Union’s proposal, the Agency’s intention in implementing a new performance management system is not, as the Union seems to suspect, to set quotas for various rating levels. Instead, the intention is to ensure that ratings are in line with actual performance, rather than unduly inflated by managers merely seeking to avoid conflict with their employees. Consequently, the justification for the second sentence of the Union’s proposal is without merit.
Management Interest Statement

The proposal is arguably non-negotiable.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

In order to ensure that ratings are in line with actual performance, the Employer will not apply performance standards in a manner that would create a quota system for rating employees.

The modified proposal involves the application of performance standards and meets both parties’ interests.

**Article 30, Section 6A4**

**Union Proposal**

Should the Employer decide not to keep the areas identified in the administrative requirement CJE uniform across specific positions, i.e., all employees in one series should be treated equally for purposes of the administrative CJE requirement, it will serve written notice on NTEU of such a change and negotiate as required by law before implementing the change.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

This proposal would recognize and affirm the current practice while preserving management’s right to make changes. Whether those changes are substantively negotiable or negotiable only in impact and implementation will be based on the specific proposed change. This proposal reflects how the law deals with this issue.

**Union Interest Statement**

The Union here is interested in consistency and uniformity. All employees have a new CJE - the administrative requirement - as part of the new appraisal system. The Union has concern over the disparate treatment that may result from such an amorphous, ill-defined CJE and is looking to minimize any unfair treatment across similar positions.

**Management Argument**
Although the Union's language would require management to "strive" to meet these goals, in actuality, it may be difficult to do so across various series of positions. For example, Management Analyst in FDA may have different administrative requirements than one in SAMHSA or HRSA. In addition to the above argument, the Union's modified proposal is arguably non-negotiable. As it suggests that the Agency is required to bargain the actual change over an employee's critical job element.

Management Interest Statement

The proposal is arguably non-negotiable, as it presumes to set what the content of performance elements should be.

Recommendation

The words “negotiate as required by law” does not require the Agency to bargain. Therefore, I recommend the parties adopt the Union’s proposal.

**Article 30, Section 6B1**

**Union Proposal**

B. Performance Standards.

1. Performance standards define what is successful performance on the element. Written performance measures shall be established at the "Fully Successful" level for all elements and at one level above and at one level below the fully successful level.

The Agency will have six months from the effective date of the contract to draft and propose written performance standards at multiple levels for those positions that do not have them as of January 2008.

**Management Proposal**

B. Performance Standards.

1. Performance standards define what is successful performance on the element. Written performance measures shall be established at the "Fully Successful" level.

**Union Argument**

The Union’s proposal seeks more specificity with regard to the Agency’s new appraisal system, which should yield enormous benefits to the managers as well who have to apply the system. For example, this information should minimize instances of disparate treatment and reduce the time managers need to judge performance. Over a decade ago, this same Agency opposed a similar
union demand that performance standards be defined at more than one level. When the FSIP had to resolve that dispute, if found in favor of the Union. Even the OPM advises agencies to draft performance standards at multiple levels when they have more than three levels of performance in their system – as the Agency does. Further, the Union’s proposed modification gives the employer time to conform to the requirement in those offices where multi-level standards are not in place today.

**Union Interest Statement**

The Union has an interest in making sure that employees are apprised of what is expected of them to meet certain performance standards. Employees should be appropriately informed of the difference between what makes one "fully successful" and the type of performance that makes one both more and less so. Once again, the newness of this appraisal system has created much apprehension and suspicion among employees. The Union is seeking to alleviate these problems by making the system as transparent as possible.

**Management Argument**

The Union’s proposal adds unnecessary work not required by regulation. The Agency’s proposal is consistent with the regulatory requirements for defining specific levels of performance. Specifically, 5 C.F.R. § 430.206(b)(8)(i)(B) requires an agency to establish performance standards only at the “Fully Successful” level, and gives the Agency discretion to establish them at other levels. This decision whether to establish performance standards at levels other than “Fully Successful” should remain within management’s discretion. The preparation of performance standards and completion of performance evaluations can be extremely time consuming, and needs to be balanced with a supervisor’s other supervisory responsibilities. Under the Union’s proposal, all supervisors, regardless of workload demands and resulting conflicts, would be required to prepare performance standards at three levels instead of one (as required by regulation). In absence of the Union’s language, supervisors still have discretion to prepare such standards at more than the “Fully Successful” level. Absent a compelling reason, this requirement should not be imposed upon management.

**Management Interest Statement**

The Union's proposal adds unnecessary work not required by regulation. The Agency's proposal mirrors regulatory obligation.

**Recommendation**

It benefits employees to know the performance objectives that have to be met in order to achieve a particular performance rating. This knowledge can reduce the number of performance based grievances. The year in which the standards are created or modified is the year where additional Agency effort is required. This should not be a constant effort. Therefore, I recommend the parties adopt the Union’s proposal.
Article 30, Section 7A6

Union Proposal

A written narrative is not required in connection with the progress review unless performance is less than Fully Successful or an employee requests a written narrative. If a written narrative is prepared, a copy will be furnished to the employee. The supervisor and the employee will sign and retain a copy of the progress review documentation. If the employee declines to sign and date the form, the supervisor shall note that the employee declined to sign, citing the date the employee was given a copy.

Management Proposal

A written narrative is not required in connection with the progress review unless performance is less than Fully Successful. If a written narrative is prepared, a copy will be furnished to the employee. The supervisor and the employee will sign and retain a copy of the progress review documentation. If the employee declines to sign and date the form, the supervisor shall note that the employee declined to sign, citing the date the employee was given a copy.

Union Argument

The Union proposal is simple: employees must understand why they receive a particular progress review if they are to improve their performance and excel. A written narrative is the most valuable tool in achieving this understanding.

The Agency’s sole objection to the Union’s proposed language is that it would “add an unnecessary paperwork burden.” This claim does not in any way address the merits of the Union’s proposal or provide a legal basis to deny it. It simply appears that the Agency is unwilling to fully apprise its employees of the factors that went into a progress review score and it does not appear as if the Agency has a particular interest in employees having a complete understanding of the areas in which they may need to improve.

Union Interest Statement

The Union has an interest in protecting employees and making this new appraisal system as transparent as possible. Employees should be provided a written narrative if requested to be able to fully understand why they were rated as they were and adjust their performance accordingly.

Management Argument

The Union’s proposal would add an unnecessary paperwork burden upon the Agency. The Agency’s proposed language would require a written narrative in those circumstances where such a narrative would be of the most use, i.e., notifying an employee who scores below “Fully Successful” where he/she fell short, in order to give that employee guidance on where his/her
performance needs to improve to function as a “Fully Successful” employee. Supervisors face substantial demands on their time, not only from the performance management system but in their day-to-day supervisory duties as well. Requiring supervisors to prepare a written narrative whenever the employee requests one will make it extremely difficult for managers to prioritize between the preparation of such narratives and other supervisory duties. The Agency’s proposal properly prioritizes narratives for employees below the “Fully Successful” level, while leaving supervisors free to otherwise prepare them where workload permits.

Management Interest Statement

The Union's proposal would add an unnecessary paperwork burden upon the Agency.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

A written narrative is not required in connection with the progress review unless performance is less than “Fully Successful.” However, where performance has declined, the supervisor will provide written feedback when requested. If a written narrative is prepared, a copy will be furnished to the employee. The supervisor and the employee will sign and retain a copy of the progress review documentation. If the employee declines to sign and date the form, the supervisor shall note that the employee declined to sign, citing the date the employee was given a copy.

Other than employees who receive a less than “Fully Successful” progress review, the modified proposal allows employees who need to be aware of their declining performance to request and receive written feedback. It limits additional paperwork to those situations where written notice is important. Thus, it adequately meets the interests of both parties.

Article 30, Section 8B3

Union Proposal

All scored performance appraisals other than fully successful must contain a written narrative justification for each score given beyond simply stating that the standards have or have not been met. Upon request, the Employer will provide a written narrative to any employee receiving a Fully Successful appraisal.

Management Proposal

When the employee's final rating is below "Fully Successful", the rating official shall prepare a written explanation describing the specific areas in which the employee failed.

Union Argument
The Union’s proposal merely seeks to have the manager inform the employee why his or her performance was judged to be at a certain level. Not only will this improve the chances the employee will accept the rating, but it will also help protect the Agency from complaints that employees were evaluated disparately. The language does not require that the manager work excessively in this once a year event to create the justification.

**Union Interest Statement**

The Union has an interest in protecting employees and making this new appraisal system as transparent as possible. In order to achieve transparency, supervisors should prepare written explanations for all scores other than Fully Successful (presumably the norm, or average) so that employees understand what to do to receive an outstanding score and what not to do to avoid a below than Fully Successful rating. Further, as noted above, employees should be provided a written narrative, if requested, to be able to fully understand why they were rated as they were and adjust their performance accordingly.

**Management Argument**

The real issue is piling additional performance management workload onto supervisors, with no recognition of the situation in which such narratives should be a priority, i.e., those who score below a Fully Successful or other workload demands. Written explanations or narratives should be required for employees who score below Fully Successful to provide notice to the employee of where they need to improve to be a Fully Successful employee. Requiring more from the supervisor undermines his/her ability to prioritize among performance management issues and the supervisor’s other mission-related duties. The Agency’s proposal would not preclude supervisors from preparing other written justifications if workload priorities permit. Requiring such a narrative, however, would undermine the ability to effectively manage.

**Management Interest Statement**

The Agency's interest in its own language is to prevent unnecessary and burdensome paperwork for the supervisor. The Agency’s language addresses those areas where such a narrative is necessary (identifying areas where the minimally or unsuccessful employee needs improvement to reach the Fully Successful level).

**Recommendation**

I recommend the parties adopt the Agency’s proposal modified as follows:

When the employee's final rating is below "Fully Successful," the rating official shall prepare a written explanation describing the specific areas in which the employee failed. When an employee’s rating has declined, the supervisor will prepare a written explanation describing the specific areas in which the employee’s performance has declined.
Other than employees who receive a final rating below “Fully Successful,” the modified proposal allows the employees who need to be aware of their declining performance to receive written feedback. It limits additional paperwork to those situations where written notice is important. Thus, it adequately meets the interests of both parties.

**Article 30, Section 8B4**

**Union Proposal**

When the employee's proposed final rating is Unacceptable, the rating official shall first discuss the proposed rating with the employee. The employee will be given an opportunity to respond to the rating in writing. If the rating official does not change the proposed rating, the rating official shall provide the reviewing official with the appraisal and any written response prepared by the employee. Upon request, the employee may meet with the reviewing official. The reviewing official shall review and approve/disapprove the rating.

**Management Proposal**

When an employee's supervisor has determined that a rating of Unacceptable may be issued to an employee, they will submit the rating and appropriate documentation for second level review. If the second level review establishes that a rating of Unacceptable is appropriate, the final rating of Unacceptable will be prepared. A second-level review is required for all Unacceptable ratings.

**Union Argument**

The Union’s proposed language seeks to afford employees facing an impending Unacceptable rating an opportunity to discuss the rating and provide comments before the rating is issued. Further, employee comments are also included in the file for second level review. This process has various benefits. First, it is possible that, on the basis of employee comments, the rating official will reconsider the Unacceptable rating and change it to a more favorable rating. This would alleviate the very likely possibility of the employer initiating an adverse action against the employee. Second, if the rating official reviews the employee’s comments but still believes the Unacceptable rating is warranted, then the employee’s comments will be part of the record when the Unacceptable rating is reviewed. Providing the employee with an opportunity to meet with the reviewing official would also ensure that all factors are being taken into account when determining whether the Unacceptable rating was justified. Finally, the Employer is left as the ultimate decision maker as to approving or disapproving the Unacceptable rating. The employee’s involvement throughout the process will ensure that the final decision is made with all the available facts and circumstances. Contrary to the Agency’s claim, this issue is not covered in Article 31. While Article 31 governs Unacceptable Performance, that Article focuses on procedures after the employee has received a rating, not the pre-involvement sought by this proposal.
Union Interest Statement

The Union has an interest in ensuring that employees have an opportunity to be heard and to discuss with their supervisor (and the reviewing official) a possible Unacceptable rating prior to its issuance. This is important because the Employer will likely initiate an adverse action against the employee. Further, employees should have an opportunity to provide comments when faced with such a low rating, and those comments should be included in any subsequent review of the rating to ensure that all information is taken into account.

Management Argument

This issue is already addressed under Article 31 (Unacceptable Performance). The Agency’s proposal is consistent with the regulatory requirements for rating an employee as Unacceptable, i.e., that it must be reviewed by a higher level before it is issued. In actuality, the only purpose for such a proposal is to permit the employee (either themselves or through the Union) to negotiate their rating. Such a purpose is not appropriate. As for the Union’s argument that this “opportunity to be heard” is important because Unacceptable ratings lead to adverse actions, an employee cannot be subjected to adverse action for unacceptable performance without first being put on a performance improvement plan (PIP) and following the procedures mandated by Article 31 and 5 C.F.R. Part 432. Further, employees who receive an Unacceptable rating clearly have the right to grieve the rating, at which time they may make whatever arguments they deem appropriate. Although nothing precludes a rating official or reviewing official from obtaining comments from the employee prior to final issuance of the rating, such a requirement should not be imposed. It serves as yet another unnecessary – and, indeed, improper – step in the process and unduly delays the opportunity to timely implement the PIP.

Management Interest Statement

This issue is already addressed under Article 31 (Unacceptable Performance).

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

When an employee's supervisor has determined that a rating of Unacceptable may be issued to an employee, the supervisor shall first discuss the proposed rating with the employee. The employee will be given an opportunity to respond to the rating in writing. The supervisor shall provide the appraisal, the appropriate documentation and any written response prepared by the employee for a second level review. If the second level review establishes that a rating of Unacceptable is appropriate, the final rating of Unacceptable will be prepared. A second-level review is required for all Unacceptable ratings.

The modified proposal notifies the employee and allows the employee to provide the Agency with information that may be helpful in preparing the final rating.
Article 30, Section 9A

Union Proposal

Employee Not Under a Plan for at Least 90 days. An employee is considered to be rateable if he/she has performed under a plan for at least ninety (90) days during the rating period. If a final rating cannot be prepared at the end of the annual rating period because the employee has not been under a plan for at least ninety (90) days, the rating period shall be extended until ninety (90) day period is reached. A final rating shall be prepared as soon as possible after ninety (90) days is reached, normally within thirty (30) days.

Management Proposal

The rating period will be extended if the employee has performed for more than 45 days, but less than 90 days, under a plan (i.e., one-half the minimum appraisal cycle) prior to the end of the appraisal cycle. For example, if a performance plan is established for an employee on November 1, there would be more than 45 days left in the appraisal cycle, which ends on December 31. In this case, the appraisal period would be extended until January 31, to allow for a full 90-day period on which to base the appraisal.

The rating period will not be extended if the employee has performed less than 45 days under a plan.

If the employee was issued a summary rating for another position within HHS, or under another supervisor within HHS, earlier in the performance year, that summary rating will become the rating of record if the employee has not worked under a performance plan in the new position for at least 90 days.

Union Argument

Pursuant to 5 C.F.R. § 430.208(g) “[w]hen a rating of record cannot be prepared at the time specified, the appraisal period shall be extended. Once the conditions necessary to complete a rating of record have been met, a rating of record shall be prepared as soon as practicable.” The Union’s proposal complies with this obligation to extend the appraisal period. The Agency’s proposal, allowing an extension of the appraisal period under certain – but not all circumstances – appears to conflict with § 430.208(g)’s requirement that the appraisal period “shall be extended.”

Union Interest Statement

The Union's interest here is compliance with 5 C.F.R. § 430.208(g) wherein an agency is required to extend the appraisal period.
Management Argument

The Agency’s proposal is consistent with its performance management plan and is designed to ensure sufficient time on-duty to rate employees, while preventing the inefficiency inherent in the Union’s proposal.

Management Interest Statement

The Agency's interest is to remain consistent with the Department-wide performance management plan, and to give managers a reasonable window of time in which to rate an employee.

Recommendation

I recommend the parties adopt the Union’s proposal. The Agency’s proposal lacks a clear explanation for rating those employees who require a rating and have performed less than 45 days. 5 CFR 430.208(g) requires that the appraisal period be extended.

Article 30, Section 9D

Union Proposal

Temporary Assignments Outside the Agency. The rating official will make a reasonable attempt to obtain a performance assessment for any temporary work assignment by an employee performed outside the Agency. At a minimum, the rating official will contact the temporary duty supervisor and request a memorandum describing the assignments performed by the employee and an assessment of how well the employee performed the assignments. If definitive information is obtained, the rating official will consider it in developing the final rating for the annual rating period.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The language proposed by the Union seeks only to ensure that a rating official “make reasonable attempt” to obtain information regarding the employee’s performance in the temporary assignment, and does not, as the Agency contends, require the Agency to incorporate another agency’s mission elements into its own performance rating. The phrase “If definitive” provides the rating official with discretion to consider the information received from the temporary duty supervisor and whether that information is relevant to the performance appraisal being prepared. There is no requirement to use the information obtained, and certainly no requirement to incorporate the other agency’s mission elements into the performance rating.
Union Interest Statement

The Union has an interest in crediting employees for any temporary work performed outside the Agency. This approach will provide a more accurate appraisal of the work actually performed by an employee.

Management Argument

The Union’s proposal would require the Agency to incorporate performance under another agency’s mission elements into its own performance rating, regardless of difference in mission or objectives. The purpose of the Agency’s performance management system is to appraise the employee’s performance in working to achieve the mission and goals of HHS. Absent a nexus between the mission and goals of HHS and those of another agency to which an employee is assigned, the contributions of the employee to another agency are simply not relevant to the purposes for which the employee is being rated under the HHS performance management system. The Union’s proposal goes beyond the scope of PMAP and its application to employees conducting the work of the Agency.

Management Interest Statement

The Union's proposal would require the Agency to incorporate performance under another Agency's mission elements into its own performance rating, regardless of difference in mission or objections.

Recommendation

I recommend the parties adopt the Union’s proposal which does not require the Agency to incorporate performance under a different mission and/or different objectives. The proposal requires the Agency to consider the employees performance. The duties and responsibilities may be similar to those that the employee was performing for the Agency. Making such a comparison as well as arranging for the exchange of performance information can be coordinated prior to approving the temporary assignment.

Article 30, Section 17

Union Proposal

The Union and the Agency shall jointly develop a training program through a joint labor-management team to train employees on Articles 30 and 27. The team shall have an equal number of labor/management individuals. NTEU representatives will be given sufficient official time to assist with developing this training. The team will present an IVT training broadcast for each of the covered OPDIVs/STAFFDIVs.

Management Proposal
Union Argument

The Union’s proposal will ensure that managers and employees all have the same understanding with regard to those articles. The end result of this contract bargaining will bring about changes in the performance system and awards program, so managers and employees previously trained may not be aware of the changes that have been made. It is in the best interests of both parties to ensure that all managers and employees are properly informed of the changes that have been made since the unilateral implementation and any new procedures that will be in effect.

Union Interest Statement

The Union has an interest in ensuring that managers and employees all have the same understanding with regard to the Articles 27 and 30. The Employer conducted certain training when it unilaterally implemented the new performance system and awards program. The parties' contract bargaining will bring about changes to that program and the Union is concerned that supervisors and employees who were trained previously will not understand the changes due to negotiations.

Management Argument

The parties have already agreed to allow the Union to provide bargaining unit employees with training on the collective bargaining agreement as a whole (including the terms of this Article), so the process proposed by the Union would be redundant. Further, to the extent training is actually required to implement the performance management system (as modified by the agreement), it is supervisors, i.e., those who will be performing the procedure laid out in Article 30, who require the training. Terms regarding training of supervisors have been held non-negotiable by the Authority.

Management Interest Statement

NO STATEMENT SUBMITTED

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows (only the modified portion is provided):

The Union and the Agency may jointly develop a training program through a joint labor-management team to train employees on Articles 30 and 27. The team shall have an equal number of labor/management individuals.

Joint contract training is usually more effective and efficient. The modified proposal provides the
opportunity for joint training if the parties can agree to it. The proposal does not mention supervisors. However, supervisors can be included at the Agency’s discretion.

**Article 42, Section 2/6A**

**Union Proposal**

The Employer participates in the contractor-issued charge card program established and administered on a government-wide basis by GSA. The parties bargained over the implementation of this program and agree to incorporate that LOU into this Agreement have it apply to all employees. Employees identified by the Employer to participate in this program for official business travel must submit an application for the charge card to the contractor, subject to a credit check and, when approved for participation, must adhere to all rules and procedures of the program, consistent with the agreement.

**Management Proposal**

The Employer participates in the contractor-issued charge card program established and administered on a government-wide basis by GSA. Employees identified by the Employer to participate in this program for official business travel must submit an application for the charge card to the contractor, subject to a credit check and, when approved for participation, must adhere to all rules and procedures of the program.

**Union Argument**

In 2006, NTEU and FDA bargained over and signed an agreement regarding the government charge card program. The Union’s proposed language seeks to maintain the negotiated agreement between the parties and apply its provisions to all of the NTEU-represented OPDIVs. The parties’ agreement does not contain any FDA-specific provisions, so applying it to the Department’s other OPDIVs would not require any additional modification of the agreement. Further, all of the Department’s OPDIVs share the same interests and principals as related to the charge card program and applying the 2006 LOU would ensure continuity amongst all of the OPDIVs in administration of the program.

**Union Interest Statement**

The Union has an interest in not “reinventing the wheel.” The parties bargained over this change in 2006 and ultimately signed an agreement over the government charge card program at FDA in November 2006. The Union has an interest in applying that agreement to all of the OPDIVs since the same interests and principals apply across the Department. The agreement does not contain any FDA-specific provisions.

**Management Argument**

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The Agency has implemented its terms on the travel card program. Therefore, there is no LOU to implement. The Union was given notice of this implementation and did not timely exercise its rights.

Management Interest Statement

The Agency's interest is that at this point in time there is no LOU to cover the contractor-issued charge card program; hence there is nothing to incorporate under this agreement.

Recommendation

The Agency has stated that it “has implemented its terms on the travel card program.” Inasmuch as this action occurred during the subject mediation/arbitration process, this recommendation in no way waives either parties’ right concerning the Agency’s conduct. Accordingly, in light of the parties’ past practice, I recommend the parties adopt the Union’s proposal so long as it is not precluded by law.

**Article 42, Section 3E**

**Union Proposal**

The Employer will not reduce the per diem or lodging rate for employees on long-term travel assignments (i.e., in excess of 90 days).

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

The Union’s proposal protects those employees that do not have – even during long-term stays – reasonable, reliable access to kitchens and grocery stores. Further, the proposal protects those employees who may not be able to find a lodging rate – even for a long-term stay – that is lower than the government lodging rate. There is absolutely no guarantee that an employee will be staying at lodging that has a kitchen or that offers a discounted rate for long-term stays. Moreover, while the FTR grants the Agency the discretion to lower the rate, when an Agency exercises that discretion, the Union has every right to bargain over that decision. Therefore, when the Agency states that it seeks to “retain its discretion,” it is the equivalent of saying the Agency has no interest in bargaining with the Union.

**Union Interest Statement**

The Union has an interest in ensuring that employees receive sufficient reimbursement for lodging and per diem, even for long-term travel assignments. The Union's proposal protects those employees who do not have - even during long-term stays - reasonable, reliable access to kitchens
and grocery stores. Further, the Union's proposal protects those employees who may not be able to find a lodging rate - even for a long-term stay - that is lower than the government lodging rate.

**Management Argument**

Per 41 C.F.R. § 301-11.200, the Agency has the authority to reduce per diem when it knows in advance that lodging-related expenses will be less than the per diem rate. The Union’s proposal would not allow the Agency to make such a reduction in per diem, resulting in an unnecessary windfall to the employee. Further, the Union’s proposal does not account for a situation in which the employee has received some sort of moving or relocation expense for an extended assignment.

**Management Interest Statement**

The Agency's interest is to reserve its discretion under the FTR in reducing the cost to the government as much as possible for the entire period of travel/occupancy regardless of stay/lodging. Long term travel typically results in a lower per diem cost. The Union's proposal in affect would limit the Agency's ability to reasonably lower rates as determined appropriate to the cost of the travel assignment.

**Recommendation**

I recommend the parties adopt the Union’s proposal modified as follows:

> After travel arrangements have been consummated, the Employer will not reduce the per diem or lodging rate for employees on long-term travel assignments (i.e., in excess of 90 days).

The Agency has stated that the trip planners who make the travel arrangements are Agency employees. Accordingly, the Agency should be able to determine the lowest rate of travel in advance of the trip and the modified proposal allows the Agency to do so.

**Article 42, Section 11A**

**Union Proposal**

Employees shall receive 50% share of all savings that they achieve by staying in hotels whose costs are below the limits allowed by the GSA travel regulations or in locations free of charge. The Employee shall be entitled to this 50% amount irrespective of the individual making the reservation. The only requirement is that the employee stays in a hotel or another location lower than the hotel rate allowed by GSA travel regulations.

**Management Proposal**

**NO PROPOSAL SUBMITTED**
Union Argument

The Union is interested in maintaining the gainsharing program that is currently in place at FDA and expanding that program to the other OPDIVs. This program would further the cost-efficiency of the Agency, and will contribute to more efficient and effective government. The significant cost-cutting potential of this program outweighs the Agency’s desire to avoid administrative burdens involved in the operation of this program. Further, the Agency’s stated interest throughout Article 42 is to save money. The Union’s proposal serves that purpose.

Union Interest Statement

The Union is interested in maintaining the gainsharing program that is currently in place at FDA and expanding that program to the other OPDIVs. The program has been in effect since 2002 and has operated effectively at FDA. The Union would like to see other OPDIVs reward employees in the same manner, while they too save on travel expenses.

Management Argument

The Union’s proposal would impose upon all of the Operating Divisions to implement a gainsharing program. Implementing such a program would create substantial administrative burdens upon the Agency to track and administer payment under this program. Further, employees should not be awarded for savings incurred as a result of the efforts of the trip planner. Trip Planners are management employees who arrange for the travel of employees, including those in the BU.

Management Interest Statement

The Agency's interest is to avoid the administrative burdens and complications such a program would entail - i.e., tracking and administering eligible gainsharing and ensuring payment under this program.

Recommendation

I recommend the parties adopt the following proposal:

The Employer will continue the FDA travel gainsharing program. The parties will establish a labor-management committee to review the program and recommend the cost effectiveness of expanding the program to other OPDIVs.

There was no evidence that the current FDA program was not cost effective. The proposal provides for an assessment of the existing program to determine whether expanding the program would create a burden on the Agency and, if so, whether there are options to reduce or eliminate the burdens.
**Article 42, Section 11B**

**Union Proposal**

The parties will establish a committee to explore the possibility of additional gainsharing opportunities.

**Management Proposal**

**NO PROPOSAL SUBMITTED**

**Union Argument**

The Union has an interest in exploring gainsharing programs outside the traditional lodging area. For example, there are gainsharing opportunities as they relate to frequent flyer awards and other aspects of business travel. The Union has an interest in doing its part to save budget funds by looking for new ways to cut costs. The Agency’s interest is to avoid the administrative burdens and complications such a program would entail. However, empowering a committee to explore additional gainsharing opportunities actually decreases the burden on the Agency, for the responsibility for such opportunities has been delegated to a committee. The committee in question would merely be advisory and would place no significant burden to the Agency.

**Union Interest Statement**

The Union has an interest in exploring gainsharing programs outside of the traditional lodging area. For example, there are gainsharing opportunities as they relate to frequent flyer awards, etc. The Union has an interest in doing its part to save precious budget dollars.

**Management Argument**

The Union’s proposal would impose upon all of the Operating Divisions to implement a gainsharing program. Implementing such a program would create substantial administrative burdens upon the Agency to track and administer payment under this program. Further, employees should not be awarded for savings incurred as a result of the efforts of the trip planner. Trip Planners are management employees who arrange for the travel of employees, including those in the BU.

**Management Interest Statement**

The Agency's interest is to avoid the administrative burdens and complications such a program would entail - i.e., tracking and administering eligible gainsharing and ensuring payment under this program.
Recommendation

I recommend the parties add the following language to the recommended proposal for Article 42, Section 11B:

The committee will explore the possibility of establishing additional gainsharing opportunities and determine whether expanding the program would create a burden on the Agency.

There was no evidence that the current FDA program was not cost effective. If the program is determined to be cost effective, establishing additional gainsharing opportunities will benefit the parties as well as the employees.

Article 42, Section 12

Union Proposal

The parties incorporate by reference all MOUs relating to travel (either local or national), including, but not limited to the Voluntary Foreign Travel and Mandatory Foreign Travel MOUs. A copy of those agreements are appended hereto.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

Over the years, the parties have bargained extensively over travel issues and have incorporated those agreements into longstanding MOUs. There is no reason to depart from these policies. Upon their expiration, either party could have sought to terminate the agreement rather than let it continue as a past practice. The Agency never did. This inaction undermines any argument that the practice needs to be abandoned altogether. The Union also seeks to avoid disruption to the conduct of foreign inspections and assignment of employees to such inspections and leave these effective, longstanding, workable agreements in place. The Agency offers a rather weak argument that it is concerned that the agreements will apply across the board to all the OPDIVs. First, the agreements themselves are specific to the Office of Regulatory Affairs within the FDA. The Union has a right to specific notice if the Agency seeks to terminate a practice. To date, the Agency has not specifically notified NTEU that it intended to eliminate the provisions contained in the travel MOUs.

Union Interest Statement

The Union has an interest in maintaining the status quo as it relates to the parties' travel
agreements. The Union is also interested in protecting its right to receive specific notice of changes in working conditions and in being afforded the opportunity to bargain over those changes. These agreements have been in place since at least 2001, and the Union has an interest in ensuring continuity of travel procedures until such time as new procedures are bargained and put in place. It should be noted that the specifically-identified agreements are FDA only.

Management Argument

The MOU between the FDA and NTEU signed June 11, 2003, regarding Mandatory Foreign Inspection Assignments, should not be incorporated into the consolidated HHS/NTEU CBA. The express language in paragraph 25 of the referenced MOU shows the parties did not intend for this MOU to be carried over into a successor CBA. That language states "...[t]he MOU will expire upon the expiration of the current FDA/NTEU CBA or on the effective date of its successor..." Second, this MOU was negotiated to address specific circumstances that FDA was then encountering. The then-ACRA sent a September 29, 2003 memorandum to NTEU outlining the type of incentives the FDA would provide to employees to increase the number of volunteers for foreign inspections. This memorandum merely represents the ACRA's voluntary efforts to increase the number of volunteers. There is nothing about it that can be construed as a binding agreement. Moreover, the record shows that the incentives offered by the previous ACRA have not increased the number of volunteers for foreign inspections. Based on the above, it is grossly unfair to saddle the FDA -- and the other OPDIVs who are party to this agreement -- with outdated MOUs whose terms do not meet their current organizational and programmatic needs.

Management Interest Statement

The Agency's interest is to capture all travel-related issues under a single article of this agreement (rather than repeatedly incorporating external documents by reference), which applies across all of the Operating Divisions.

Recommendation

With the LOUs appended to the Agreement, the LOUs will be in one place. Accordingly, I recommend the parties adopt the Union’s proposal.
Article 42, Section 13/3

Union Proposal

The Employer will authorize business class travel under 41 CFR 301-10.124(h), which provides that employees will be permitted to travel business class if the origin and/or destination are OCONUS and the scheduled flight time, including stopovers and change of planes, is in excess of fourteen (14) hours for ORA employees who are traveling to conduct foreign inspections. Premium-class international travel is subject to strict review, clearance, and approval processes with which employees are required to comply. The authority to review all requests for international premium-class travel and to deny any such request, irrespective of OPDIV recommendation/approval, resides with the designated official at the Department level, consistent with HHS and government-wide regulations.

Management Proposal

Employees must use coach class accommodations for travel by airline or train, unless specifically authorized and approved to use a higher class of service ("premium class," which includes, e.g., first class and business class), consistent with government-wide regulations and the HHS Travel Manual. Premium-class international travel is subject to strict review, clearance, and approval processes with which employees are required to comply. The authority to review all requests for international premium-class travel and to deny any such request, irrespective of OPDIV recommendation/approval, resides with the designated official at the Department level, consistent with HHS and government-wide regulations.

Union Argument

The Union’s proposal to permit employees from the Office of Regulatory Affairs (ORA) (a small subset of the FDA) who travel overseas to conduct foreign inspections, which typically last three weeks, to travel business class if they choose not to make a stopover. The Federal Travel Regulation (41 C.F.R. § 301-10.124(h)) authorize business class travel under these circumstances. Employees who travel business class must travel directly to the location rather than stop over for a night or two, meaning employees under this practice have fewer days out of the office on a round trip flight schedule. The bulk of the abuses referenced in its interest statement were not bargaining unit employees – it was primarily executives and political appointees within the Federal government that were the main abusers.

Union Interest Statement

The Union has an interest in maintaining the status quo as it relates to the parties’ travel arrangements. The Union is also interested in protecting its right to receive specific notice of changes in working conditions and in being afforded the opportunity to bargain over those changes. These agreements have been in place since at least 2001, and the Union has an interest in ensuring continuity of travel procedures until such time as new procedures are bargained and
put in place. It should be noted that the specifically-identified agreements are FDA only.

Management Argument

The Agency’s proposal is a reasonable means for the Agency to efficiency manage its travel budget. Under this proposal, consistent with government-wide travel regulations, the Agency has the discretion whether to authorize premium air or train service. By contrast, the Union’s proposal would require the use of business class travel (a form of premium class travel) where the minimum requirements of the federal travel regulations are met.

Management Interest Statement

The Agency's interest is to reserve its discretion under the Federal Travel Regulations to authorize business class travel under certain circumstances, rather than creating an entitlement to such travel (as provided under the Union's proposal) under those circumstances. The importance of the Agency's interest in this matter is highlighted by recent reports of abuse of the use of business class travel in the Federal government.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows (only the modified portion provided):

Employees must use coach class accommodations for travel by airline or train, unless specifically authorized and approved in accordance with Federal Travel Regulations, to use a higher class of service ("premium class," which includes, e.g., first class and business class), consistent with government-wide regulations and the HHS Travel Manual.

The Agency’s proposal is more cost effective and, as modified, affords management the discretion to authorize and approve in accordance with the Federal Travel Regulations.

Article 42, UNNUMBERED/Section 13

Union Proposal

Leave in conjunction with travel must be approved in advance and reflected on the travel order. (Emergency situations arising during travel, such as sudden illness, must be raised with an appropriate management official and any extended leave must be approved.) Employees are prohibited from taking annual leave in conjunction with international trips that are paid for, in whole or in part, by one or more non-Federal source(s). Employees may take up to two days of annual leave (not to exceed the number of TDY days) in conjunction with domestic trips that are paid for, in whole or in part, by one or more non-Federal source(s). An employee may be permitted to use up to five (5) days of annual leave in conjunction with an international trip paid by the Employer three times per fiscal year.
Management Proposal

Leave in conjunction with travel must be approved in advance and reflected on the travel order. (Emergency situations arising during travel, such as sudden illness, must be raised with an appropriate management official and any extended leave must be approved.) Employees are prohibited from taking annual leave in conjunction with international trips that are paid for, in whole or in part, by one or more non-Federal source(s). An employee may be permitted to use no more than two (2) days of annual leave in conjunction with a single international trip paid by the Employer three (3) times per fiscal year.

Union Argument

The Union’s proposal would limit annual leave when used in conjunction with travel. The HHS Travel Manual, § 6-00-70 expressly prohibits employees from using annual leave in conjunction with any trip paid in whole or in part by non-Federal sources. Absent a different provision in the parties’ CBA, employees will have these leave requests denied. A proposal to go silent is, effectively, a proposal to adopt the Agency’s position. The Union’s proposal allows for a modest number of days that employees can add a domestic trip.

Union Interest Statement

The Union has an interest in continuing the status quo and protecting employees from draconian leave policies. Currently, employees are entitled to take up to five days of annual leave in conjunction with an international trip assignment. Employees being sent on multiple-week assignments away from their homes and families, should, at the very least, be allowed to stay over for more than two days. The Union recognizes the Employer's concern regarding public perception, but this concern could easily be addressed through training and education efforts as opposed to denials of leave.

Management Argument

The Agency’s proposal remains silent on the number of days of leave available to use in connection with domestic trips paid for (in whole or in-part) by non-Federal sources. Supervisors should be allowed to maintain the discretion to determine when annual leave may be used in connection with domestic trips as opposed to it being mandated by the Agreement. The Agency’s interest is to avoid the appearance that Federal funds are being used to finance holidays or junkets that are not available to the general public.

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1The parties have already agreed that where the HHS Travel Manual and the CBA conflict, the CBA will govern. Absent an express conflict, however, the Agency will instruct employees to follow the HHS Travel Manual. The relevant sections are appended hereto.
Management Interest Statement

The Agency's interest is to remain silent on the number of days of leave available to use in connection with domestic trips paid for (in whole or in-part) by non-Federal source. With respect to travel paid for by the Employer, the Agency's interest is to avoid the appearance that Federal funds are being used to finance holidays or junkets that are not available to the general public.

Recommendation

Although the Agency’s proposal allows employees to take annual leave in conjunction with international travel, the Agency wants to remain silent on allowing employees to take annual leave on domestic trips. The Agency’s interest in “avoid[ing] the appearance that Federal funds are being used to finance holidays or junkets” does not provide a clear understanding of its reasoning as to the distinction between international and domestic travel. Therefore, I recommend the parties adopt the following modified proposal:

Leave in conjunction with travel must be approved in advance and reflected on the travel order. (Emergency situations arising during travel, such as sudden illness, must be raised with an appropriate management official and any extended leave must be approved.) An employee may be permitted to take up to two days of annual leave (not to exceed the number of TDY days) in conjunction with domestic trips that are paid for by the Employer. An employee may be permitted to use up to three (3) days of annual leave in conjunction with an international trip paid for by the Employer three times per fiscal year.

Article 42, UNNUMBERED SECTION ADDRESSING TRAVEL RADIUS

Union Proposal

The local travel area is a forty (40) mile radius around the employee's post-of-duty.

Management Proposal

The local travel area is a fifty (50) mile radius around the employee's post-of-duty.

Union Argument

The Union’s interest is the same as outlined in Article 22, § 11B. The Union therefore adopts those arguments here without restating them.

Management Argument

The Agency’s proposal maintains a reasonable radius for official duty stations, particularly given the size of large metropolitan areas and considering travel costs such as lodging and per diem
could be incurred. Reducing the radius to less than 50 miles would allow employees to incur lodging and per diem expenses for traveling between relatively close locations.

Recommendation

I recommend the parties adopt the following Proposal:

The local travel area is a forty-five (45) mile radius around the employee's post-of-duty.

The reasoning for the recommended radius is the same as was provided in the recommendation for Article 22, Section 11B.

Article 44, Section 5G1

Union Proposal

For all proposed suspension actions under this Article in excess of four (4) days, if an employee chooses to make an oral reply, it may be held via audio or video-conference when the employee, the employee's representative, and the oral reply official do not work in the same commuting area. However, if the employee or the employee's representative requests a face-to-face meeting for any proposed suspension, management will determine where the face-to-face reply will be heard and the employee and one representative will be reimbursed for travel and per diem that is reasonable under GSA regulations.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The parties have already agreed to provisions whereby employees will be afforded an opportunity to present face-to-face oral replies in cases of unacceptable performance (Article 31) and adverse action (Article 43). The Union’s proposed language in this section seeks to apply the same standards to situations in which an employee faces a suspension in excess of four (4) days. The Agency’s sole objection to this provision is related to its desire to save travel costs associated with oral replies in suspension actions. The Union believes proposed suspensions in excess of four days are serious enough to warrant the opportunity for a face-to-face oral reply. The Union’s proposal provides the Agency with the ability to control costs in these situations by way of determining the location where face-to-face replies will be heard. By allowing the Agency the right to determine the location of face-to-face replies, the Union’s proposal comes very close to achieving the Agency’s interest in saving on travel costs.
Union Interest Statement

The Union has an interest in contract consistency. The parties have already agreed to afford employees the opportunity to present an oral reply in Article 31 (Unacceptable Performance) and Article 43 (Adverse Action). The same opportunity should exist where the employee faces a proposed suspension.

Management Argument

Although employees have the right to make an oral reply in response to a suspension action, and to be represented by the Union, the Union still has the responsibility to either find a local representative to represent the employee or to take advantage of available technology to have the representative attend remotely. The Union should be required to utilize its more generous steward allocation, as well as video-conferencing and audio conferencing technology, rather than wasting Agency resources on unnecessary travel. The Union fails to acknowledge that suspensions of fourteen (14) days or less have been legally recognized as being more akin to reprimands than to suspensions of more than fourteen (14) days, demotions or removals. The latter are covered by a different article of the contract, See Article 43 (Adverse Action), and give rise to different legal rights, the former are governed by this article, and do not give rise to the same legal rights and protections.

Management Interest Statement

The Agency's interest is to save unnecessary travel costs for oral replies in non-adverse action disciplinary matters.

Recommendation

The existence of technology precludes any attempt to distinguish the need for face-to-face replies for suspensions between five and fourteen days and suspensions of less than four days. Thus, I recommend the parties not adopt the Union’s proposal.

Article 44, Section 5G2/5G

Union Proposal

For all other proposed disciplinary actions, if an employee chooses to make an oral reply, such reply will be made at the worksite of the employee if both s/he and the deciding official work in the same location. When the employee and the deciding official are not in the same location an oral reply will be delivered by audio- or video-conference, as circumstances permit, unless otherwise determined by the Employer for purposes of that case only.
Management Proposal

If an employee chooses to make an oral reply, such reply will be made at the worksite of the employee if both s/he and the deciding official work in the same location. When the employee and deciding official are not in the same location, an oral reply will be delivered by audio- or video-conference, as circumstances permit, unless otherwise determined by the Employer for purposes of that case only.

Union Argument

The Union’s proposed language is tied to that of § 5G1. The Union is simply highlighting the difference between suspension actions and all other proposed disciplinary actions. Due to the severity of proposed suspension actions in excess of four days, the Union believes there should be stronger provisions in place regarding oral replies than those required for less serious disciplinary actions.

Union Interest Statement

The Union's interest is to highlight the difference between 5G1 (suspensions) and 5G2 (all other proposed disciplinary actions).

Management Argument

For the reasons set forth in the Agency’s argument regarding Section 5G1, the distinction the Union seeks to draw in its proposal is inappropriate.

Management Interest Statement

The Agency's interest is to save unnecessary travel costs for oral replies in non-adverse action disciplinary matters.

Recommendation

The existence of technology precludes any attempt to distinguish the need for face-to-face replies for suspensions between five and fourteen days and suspensions of less than four days. Thus, I recommend the parties adopt the Agency’s proposal.

Article 44, Section 6A

Union Proposal

If the Employer's final decision is that an employee will be suspended for a period of not more than fourteen (14) calendar days, the suspension will take effect as soon as possible, but no sooner than seven (7) workdays after the employee's receipt of the final decision.
Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposed language is an attempt to ensure that Agency operations are not significantly disrupted when an employee begins serving a suspension. While it is recognized that there is a management right to discipline employees, the Union believes its proposal is in the best interests of all parties when an employee is scheduled to be out of the office. Not only would the proposed language allow the employee sufficient time to gather all documentation related to the suspension and meet with his or her Union representative, but the disruption of office operations would be kept to a minimum as the employee would be able to prepare any work assignments to the point that other employees would not need to take on additional work in the employee’s absence. The Agency believes that “there is no legitimate reason for the Union’s proposal,” but that is simply not the case. There are legitimate, mutually beneficial reasons for the Union’s proposal. The Agency also objects to the Union’s proposal because it wants to preserve its rights to discipline employees. This proposal does not affect its ability to discipline employees. Rather, it simply delays enforcement of an action.

Union Interest Statement

The Union is looking to ensure that employees facing a suspension have sufficient time to gather documentation related to the suspension and meet with a Union representative and to complete work assignments to minimize office disruption prior to the suspension becoming effective.

Management Argument

Once management has made a decision that an employee should be suspended, it should have the right to implement that suspension when it chooses. First, an employee who is suspended has already had sufficient time to “gather documentation related to the suspension.” Second, if management makes the decision to suspend an employee, the employee could not reasonably be held specifically responsible for disruption of work solely due to his/her absence during the suspension. The Union’s proposal interferes with the right of management to discipline employees.

Management Interest Statement

The Agency's interest is to preserve its statutory right to manage, discipline and assign employees, and there is no legitimate reason for the Union's proposal.

Recommendation

If the Agency chooses to disrupt the completion of work assignments, it is within its discretion to
do so. When an employee is suspended s/he is not responsible for completing work assignments. Therefore, I recommend the Union’s proposal not be adopted.

**Article 55, Section 1**

**Union Proposal**

All requests for approval of outside activity, including outside employment, will be evaluated fairly, equitably and consistent with the regulations set forth in 5 C.F.R. parts 2634, 2635, and 5501. All requests for outside activity must be submitted in writing on the appropriate form, sufficiently in advance of the proposed start date for the outside activity to permit the Employer to make a determination on approval or disapproval. The Employer will make a good faith effort to perform its review promptly. The Employer will either approve or disapprove the request within ten (10) calendar workdays following receipt. No outside activity or employment requiring advance approval may be engaged in until such participation has actually been approved by the Employer.

**Management Proposal**

All requests for approval of outside activity, including outside employment, will be evaluated consistent with the regulations set forth in 5 C.F.R. parts 2634, 2635, and 5501. All requests for outside activity must be submitted in writing on the appropriate form, sufficiently in advance of the proposed start date for the outside activity to permit the Employer to make a determination on approval or disapproval. The Employer will make a good faith effort to perform its review promptly. However, the Employer's failure to promptly make its determination within this period shall not be deemed approval of a request for outside activity. No outside activity or employment requiring advance approval may be engaged in until such participation has actually been approved by the Employer.

**Union Argument**

The Union’s proposed language seeks to ensure that all employees are treated equally when seeking approval to engage in outside activities, and that a decision on such request be handled in an expeditious manner. Safeguards such as these are currently found in the ACF, NCHS, FDA, HRSA, and SAMHSA contracts, and despite the Agency’s assertions, do not interfere with management’s rights to approve or disapprove the outside activity. The Union’s language simply requires that the Agency not discriminate in any manner when approving or rejecting outside activity requests, and it does not expand or contract the regulations to which the Agency is required to adhere. Moreover, the Agency had originally agreed with this language and included it in its proposals. Recent concerns among employees that requests for outside activity have languished and been ignored signals a need for a definitive timeframe in which requests should be acted upon. It is unreasonable (sic) to require the Agency to act on requests in a timely manner, and three of the current contracts – FDA, NCHS, and SAMHSA – currently contain provisions similar to that proposed by the Union. The Union believes this timeframe is extremely effective
and should be maintained in the consolidated agreement. Further, in its 08/08/07 proposals, the Agency had also agreed to a timeframe – twenty (20) workdays – but has since backed off that proposal.

**Union Interest Statement**

The Union's interest is clear - it would like the Employer to treat all employees seeking approval to engage in outside activities in a fair and equitable manner. The Union - as the exclusive representative - has an obvious interest in ensuring such treatment. Further, the Union's proposal for fair and equitable treatment is consistent with the ACF, NCSH, FDA, HRSA and SAMHSA contract. Further, the Union is looking to have a definitive time frame placed on these requests. There has been recent concern that requests have languished and gone un-acted upon. The Union is trying to correct that situation. The Union's proposal is also consistent with three of the existing contracts - NCHS, SAMHSA and FDA - and the Union has an interest in continuing the status quo in those OPDIVs and expanding it to the other OPDIVs in an effort to address the concern over the Employer's failure to act on requests in a timely fashion.

**Management Argument**

The Union’s proposal, as worded, (1) is non-negotiable, (2) would lead to differential enforcement of outside activity rules, and (3) sets an artificially short period of time for review of approval requests. The Union’s “fairly, equitably” language would effectively add new criteria to determine whether an outside activity request will be approved and make such decisions grievable. OGE has taken the definitive position that the authority of agencies to make supplemental rules and to make determinations approving (or disapproving) requests for outside activities was sole and exclusive and the Authority has adopted OGE’s interpretation in finding non-negotiable proposals that infringed on that authority. As the Union’s proposal would make the “fairly, equitably” criteria enforceable in arbitration, it is non-negotiable as an excessive infringement upon the Agency’s sole and exclusive authority. The addition of “fairly, equitably” to the criteria to be utilized will lead to disparate treatment in approval/disapproval of such requests, between employees covered by the agreement and those not covered. Injecting this language into the decision making process could lead arbitrators to erroneously reverse disapprovals of outside activity, inadvertently placing employees at risk of civil or criminal prosecution for violating conflict of interest laws, without a “safe harbor.” The ten (10) day turnaround proposed by the Union is unduly restrictive. Some outside activity requests must go through several levels of review before a decision can appropriately be made. The Union has already conceded that failure to meet an artificial deadline does not result in automatic approval, little purpose is served by setting a defined time frame, when such a time frame may work to the detriment of employees seeking approval of outside activities.

**Management Interest Statement**

The Agency's interest is to (1) not interfere with its sole and exclusive right to approve or disapprove outside activity [see 72 FR 5624-42 (October 3, 2007), and 59 FLRA 331 (2003)] by
adding criteria to the determination (i.e., fairly and equitably), and (2) not unduly hamstring the Agency from conducting the necessary review - which can require up to four levels of review - by means of artificially constructive deadlines. The Agency's interest is also to protect its sole and exclusive rights to approve or disapprove outside activity by making it clear that failure to promptly make its determination is not deemed approval of the outside activity.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

All requests for approval of outside activity, including outside employment, will be evaluated fairly, equitably and consistent with the regulations set forth in 5 C.F.R. parts 2634, 2635, and 5501. All requests for outside activity must be submitted in writing on the appropriate form, sufficiently in advance of the proposed start date for the outside activity to permit the Employer to make a determination on approval or disapproval. The Employer will make a good faith effort to perform its review promptly and, within three calendar days after receiving the request, will notify the employee when s/he will receive notice of approval or disapproval. However, the Employer's failure to promptly make its determination within this period shall not be deemed approval of a request for outside activity. No outside activity or employment requiring advance approval may be engaged in until such participation has actually been approved by the Employer.

The modified proposal meets both parties’ interests as it provides for fair and equitable treatment; notice when to expect a decision; it does not interfere with the Agency’s right to approve or disapprove outside activity; and it does not “hamstring” the Agency from conducting a review.

Article 55, Section 4/3

Union Proposal

The Employer's decision to approve or deny an outside employment or outside activity request will be made in writing. If the request is denied, the Employer will provide the specific reasons for denial. If an employee wishes to dispute the Employer's disapproval of her/his request to engage in outside employment or activity, the employee may request reconsideration by the official who has been delegated the authority to approve or deny such a request within the employee's OPDIV/STAFFDIV. The Employer will approve or deny the reconsideration within five workdays of receiving the request for reconsideration. If the request is denied, the Employer will provide the reasons in writing if they are different from those cited in the initial denial; otherwise, the Employer will notify the employee in writing that the reconsideration has been denied for the same reasons. If an employee continues to disagree with the Employer's decision to disapprove the request, the employee may file a grievance at the final step of the grievance procedure.
Management Proposal

The Employer's decision to approve or deny an outside employment or outside activity request will be made in writing. If an employee wishes to dispute the Employer's disapproval of her/his request to engage in outside employment or activity, the employee may request reconsideration by the official delegated authority to approve or deny such a request within the employee's OPDIV/STAFFDIV, and is within management's discretion to grant reconsideration. Decisions on approval or disapproval of outside employment or outside activity are not grievable.

Union Argument

The Union’s proposed language is an attempt to ensure that any denial of outside activity is appropriate and based on a reasonable justification. There is concern that employee requests are being denied without providing an explanation to the employee. The Union’s language adds transparency to this process and allows employees to have a complete understanding of the reasons for a request being denied. The process for reviewing denials of outside activity is currently the status quo in six contracts – Multi-regional, ACF, NCHS, SAMHSA, FDA, and HRSA – and the Union believes maintenance of the status quo and application to the remaining OPDIVs is the most reasonable action to take. Additionally, the Union’s proposal would provide employees with an avenue of recourse in the event a request for outside activity is denied. Currently, none of the six contracts cited above exclude denials of requests for outside activity from the grievance procedure. Further, it is noteworthy that the Agency had originally sought to include outside activities as an exception to Article 45, but eventually withdrew that proposal.

Union Interest Statement

The Union has an interest in ensuring that any denial of an outside activity is appropriate. There is some concern that activities are rejected and the employee is not given any reason for the denial. The Union's proposal is aimed at setting up a transparent process so that employees fully understand why a request was denied. This interest is consistent with the status quo where six of the contracts (Mutli-Regional, ACF, NCHS, SAMHSA, FDA, and HRSA) have a process for reviewing denials of outside activities. Further, the Union has an interest in recourse for employees whose requests are denied – i.e., through a grievance. This interest is also consistent with the status quo where six of the contracts (Mutli-Regional, ACF, NCHS, SAMHSA, FDA, and HRSA) allow employees to grieve denials of outside activities. As was the case in Article 45, the Union does not have an interest in restricting the scope of the grievance article, absent some justification for such restriction.

Management Argument

The Union’s proposal is non-negotiable. The authority delegated to the Agency by OGE to approve or disapprove outside activity requests is sole and exclusive; consequently, these determinations are neither negotiable nor grievable. The purpose behind the requirement to seek prior approval for outside activities is to protect employees from running afoul of criminal
conflict of interest statutes. An arbitrator’s decision permitting an employee to partake in outside activities – unlike the authorization from duly-delegated ethics officials – would provide no legal cover for an employee subject to civil or criminal prosecution for violating said statutes. As for the Union’s proposal setting a fixed period of time for reconsideration, this suffers from the same infirmity as its proposal for a fixed period of time for approval/disapproval. If the Agency is unable to reach a decision on reconsideration within that time period, the request must be presumptively denied. As that decision (like the approval/disapproval decision) would not be grievable, no constructive purpose would be served by the Union’s proposal.

**Management Interest Statement**

The Agency's interest is to provide an employee whose request to participate in outside activity is denied (1) written notification of the denial, and (2) the opportunity for reconsideration. Further, because approval or disapproval of requests for outside activity is within the sole and exclusive authority of the Agency, any decision on reconsideration is per se within the Agency's exclusive discretion and cannot be grieved as a non-negotiable management right.

**Recommendation**

I recommend the parties adopt the Union’s proposal modified as follows:

The Employer's decision to approve or deny an outside employment or outside activity request will be made in writing. If the request is denied, the Employer will provide the specific reasons for denial. If an employee wishes to dispute the Employer's disapproval of her/his request to engage in outside employment or activity, the employee may request reconsideration by the official who has been delegated the authority to approve or deny such a request within the employee's OPDIV/STAFFDIV. The Employer will approve or deny the reconsideration as soon as possible. If the request is denied, the Employer will provide the reasons in writing stating whether the denial is based on the same reasons given for the initial denial or provide different reasons.

If an employee continues to disagree with the Employer's decision to disapprove the request, the employee may file a grievance at the final step of the grievance procedure (the parties may agree to use the expedited arbitration).

The modified proposal is consistent with the parties’ past practice of which no evidence of problems was revealed.

**Article 55, Section 6A/4**

Union Proposal

When an employee is ordered to divest his or her financial holdings, the following provisions will apply:
The Employer must serve written notice on the employee of its order that he/she divest. The notice must be sent via certified mail and must include the specific reasons for the order of divestiture as well as a review of all releasable evidence that the Employer has relied upon in making the divestiture determination.

Management Proposal

When an employee is ordered to divest his or her financial holdings, the Employer will provide notice, either orally or in writing, to the employee of its order that he/she divest.

Union Argument

The Union’s proposed language seeks to ensure employee due process and notice rights are preserved. It is imperative that the procedures for such notice be as comprehensive as possible to ensure the employee is properly apprised of his/her obligations. The language proposed by the Union is consistent with that contained in the FDA contract, and preserving the status quo at FDA while expanding due process and notice rights to the other OPDIVs is of significant interest to the Union.

Union Interest Statement

The Union is concerned here with an employee's due process and notice rights. Given the import of ordering an employee to divest him/herself of certain financial holdings, an employee should receive that order in writing and have the reasons specified. The Union is also concerned with protecting the status quo for FDA employees and in expanding this due process/notice right to the other OPDIVs. The Union's proposal is currently in effect at FDA.

Management Argument

The Agency’s proposal provides the employee with the necessary notice of the need to divest pursuant to the government-wide ethics rules. The Union’s proposal has no basis in OGE regulations; when OGE has imposed a requirement that communications be in writing, it has said so specifically in its regulations. Any proposal to eliminate the ability of the DAEO, agency ethics officials, or agency designees to direct divestiture orally is in derogation of the government-wide ethics rules which are within the exclusive province of OGE. Further, the proposal would impinge upon management’s right to assign work which includes the right to determine the particular duties or functions to be assigned and the particular positions or employees to whom work will be assigned.

Management Interest Statement

The Agency's interest is to ensure that its sole and exclusive right to make divestiture determinations, See 59 FLRA 311 (2003), is not inhibited by the insertion of rights and timelines, which would interfere with the legal requirement to divest within 90 days of notice.
Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

When an employee is ordered to divest his or her financial holdings, the Employer will provide notice in writing to the employee of its order that he/she divest. The notice will include specific reasons for the divestiture.

The modified proposal meets both parties’ interests as it does not affect the Agency’s right to make divestiture determinations and provides written notice with reasoning to employees.

Article 55, Section 6B

Union Proposal

In order for employees to be made aware of their legal rights regarding the divestiture order, the notice must include copies of all pertinent authorities and regulations that are the basis for the divestiture order, including but not limited to copies of 5 CFR 2634, 5 CFR 2635, and 5 CFR 5501.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union’s proposal would ensure that employees are made fully aware of their rights and any justification for a divestiture order. Considering the divestiture order will be based on particular regulations, it should not be viewed as an infringement on any management right to simply include a copy of the pertinent regulations that are the basis of the divestiture order when providing notice to the employee. The Union’s proposed language is consistent with that of the FDA contract, and preserving the FDA status quo while expanding to the other OPDIVs would ensure that employees fully understand the divestiture process.

Union Interest Statement

The Union is concerned with protecting an employee’s rights and ensuring that employees understand the divestiture process. Given that divestiture is a heavily regulated area, employees will better understand the process if the Employer provides various regulatory authorities for the decisions. The Union is also concerned with protecting the status quo for FDA employees and in expanding this right to the other OPDIVs. The Union’s proposal is currently in effect at FDA.
Management Argument

The Union’s proposal places procedural burdens on the Agency (i.e., providing copies of the applicable regulations to each employee ordered to divest) that could substantially restrict the ability of the Agency to act expeditiously in an area committed to the sole and exclusive authority of management. Requiring the Agency to provide copies each and every time is unduly wasteful and would “protract [ ] matters that must be resolved expeditiously and uniformly in conformance with the mandate of Executive Order 12674.”

Management Interest Statement

The Agency's interest is to ensure that its sole and exclusive right to make divestiture determinations, see 59 FLRA 311 (2003), is not inhibited by the insertion of rights and timelines, which would interfere with the legal requirement to divest within 90 days of notice.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

In order for employees to be made aware of their legal rights regarding the divestiture order, the notice must include citations of all pertinent authorities and regulations that are the basis for the divestiture order, including appropriate quotations of 5 CFR 2634, 5 CFR 2635, and 5 CFR 5501.

The modified proposal adequately meets the interests of both parties by providing employees with pertinent citations and appropriate quotations of the authorities relied upon by the Agency without interfering with the Agency’s right to make divestiture determinations or the requirement to divest within 90 days of notice.

Article 55, Section 6C

Union Proposal

After notice is served and prior to the Employer taking any action in support of the divestiture order, the Employer will give the employee, consistent with 5 C.F.R. § 2635.403, a reasonable period of time to respond both orally and in writing. The employee will have at least forty-five (45) days to respond.

Management Proposal

NO PROPOSAL SUBMITTED
**Union Argument**

The Union’s proposed language is a reflection of the requirements of 5 C.F.R. § 2635.403 to provide employees a reasonable period of time to respond to a divestiture order. The Union’s proposed language places no greater burden on the Agency than is already contained in the referenced regulation, and it is consistent with language contained in the current FDA contract. Preservation of the status quo and application to the other OPDIVs will ensure employees are properly apprised of all their rights during the divestiture process.

**Union Interest Statement**

The Union is concerned with an employee's due process rights. Given the import of ordering an employee to divest him/herself of certain financial holdings, an employee should be allowed to respond to the order prior to divesting. The Union is also concerned with protecting the status quo for FDA employees and in expanding this right to the other OPDIVs. The Union's proposal is currently in effect at FDA.

**Management Argument**

Employees do not enjoy rights to reconsideration of divestiture orders. The regulations provide employees with a reasonable opportunity (not to exceed 90 days) to comply with the divestiture order, not to contest the divestiture order. The Union’s proposal would impede the employee’s ability to utilize that 90 day period for the purpose it was intended. Finally, as divestiture decisions are within the sole and exclusive authority of the Agency, a procedure such as that proposed by the Union is of no practical or enforceable use – these orders are non-grievable.

**Management Interest Statement**

The Agency's interest is to ensure that its sole and exclusive right to make divestiture determinations, see 59 FLRA 311 (2003), is not inhibited by the insertion of rights and timelines, which would interfere with the legal requirement to divest within 90 days of notice.

**Recommendation**

I recommend the parties adopt the Union’s proposal modified as follows:

After notice is served and prior to the Employer taking any action in support of the divestiture order, the Employer will give the employee a reasonable opportunity (not to exceed 90 days) to comply with the divestiture order.

The modified proposal complies with the regulations and adequately meets the parties’ interests.
**Article 55, Section 6D**

**Union Proposal**

If after that time the Employer decides either to order the divestiture or to deny the employee a Certificate of Divestiture, the Employer must provide a final written decision to the employee via certified mail. The decision should address all of the arguments and evidence raised by the employee in his or her defense as well as a specific legal basis for the denial, including legal citations. Pursuant to 5 C.F.R. § 2635.403, the entire process, absent unusual hardship as determined by the agency, shall be resolved within ninety (90) calendar days.

**Management Proposal**

NO PROPOSAL SUBMITTED

**Union Argument**

The Union’s proposed language is simply aimed at ensuring fair treatment for employees during the divestiture process. Employees should receive a formal decision regarding the divestiture and the Employer should ensure its receipt via certified mail. To guarantee a fair process, the decision should at least address each of the employee’s defenses and the specific reasons for the denial. The Union’s proposal is consistent the requirements of 5 C.F.R. § 2635.403 in that it requires that the process be resolved within 90 days.

**Union Interest Statement**

The Union is concerned with protecting an employee's rights and ensuring that employees understand the divestiture process. Given that divestiture is a heavily regulated area, employees will better understand the process if the Employer provides various regulatory authorities for the decisions. The Union is also concerned with protecting the status quo for FDA employees and in expanding this right to the other OPDIVs. The Union's proposal is currently in effect at FDA.

**Management Argument**

As divestiture orders are non-grievable, no legitimate reason exists for the procedure set forth by the Union. Such a procedure sets up several burdens for the Agency without any constructive reason for doing so. In doing so, detailed reconsideration procedures would disrupt the very purpose behind the ninety-day window provided by § 2635.403(d) – to give the employee time to divest, not to allow the employee to challenge the divestiture order. With respect to its proposal as it relates to Certificates of Divestiture, the proposal is particularly inappropriate. Certificates of Divestiture are issued by OGE, not the Agency.
Management Interest Statement

The Agency's interest is to ensure that its sole and exclusive right to make divestiture determinations, see 59 FLRA 311 (2003), is not inhibited by the insertion of rights and timelines, which would interfere with the legal requirement to divest within 90 days of notice.

Recommendation

Inasmuch as prior Sections provide adequate protection for employees, I recommend the Union’s proposal not be adopted.

Article 58, Section 1

Union Proposal

Subject to local bargaining upon request, the Employer agrees to provide employees with a comparable workstation(s), office(s) or other work area(s). When the Employer makes a change in office space or equipment, the Employer will notify the Union in advance of the change pursuant to the requirements of Article 3, Midterm Bargaining. Unless a floor plan is unavailable at the time of notice, this notice will include a proposed floor plan reflecting the changes as well as a move schedule, list of impacted employees, and reasons for the move. The assignment of workstations, office and work areas will be done on a seniority basis. The overall square footage of the work area will be adequate to accommodate all equipment and filing needs. Generally, employees will pack their own desk, personal belongings, and workstation files. This paragraph only applies if the local chapter does not invoke bargaining. If the chapter invokes bargaining, any and all issues will be bargained by the parties and this paragraph does not apply.

Management Proposal

This article is the sole agreement regarding the obligations of the Employer when a decision has been made to move, co-locate, or open a new office. The Employer agrees to provide employees with a comparable workstation(s), office(s) or other work area(s) to the extent practicable, (e.g., furniture, carpeting, filing cabinets, automation equipment, phone system(s), etc.) and within budgetary constraints. The overall square footage of the work area will be adequate to accommodate all equipment and filing needs. Generally, employees will pack their own desk, personal belongings, and workstation files. The Employer is not required to relocate an office, break a lease or incur excessive costs to meet this standard.

Union Argument

The Union has attempted to meet the Agency’s stated interest of not wanting to bargain over every office move. However, whether the Agency wants to or not, the law requires it to do so. For those moves where the local chapter is willing to abide be a strict seniority process, the parties will conduct moves as the Agency has proposed without any bargaining. In all other
instances, however, where the Union chooses to bargain, the parties must do so.

Union Interest Statement

The Union has an interest in preserving its right to bargain over mid-term changes, including office moves and relocations, and in protecting impacted employees during these negotiations. Further, the Union has an interest in ensuring that each move and relocation meets all the needs of those impacted - from specific safety concerns, to office selection, to the role of seniority, etc. and a catch-all article cannot adequately address all of these issues. Like the Employer, the Union recognizes that under certain mutually-agreeable circumstances, it is best to have default processes in place. The Union believes, however, that this process is better as the fall-back than the norm. Further, the Union has never - in any of the six OPDIVs - waived this right to bargain by including a general "space moves" article in the parties' agreement, so the Union is interested in maintaining the status quo.

Management Argument

The Agency’s proposal prevents having to negotiate over each and every move or change in specific office space or work area. It is a more efficient use of resources to refer to generally applicable contractual language contained in a CBA that has already been bargained, rather to re-bargain the same issues for each and every move.

Management Interest Statement

The Agency's interest is to prevent having to negotiate over each and every move or change in specific office space or work area.

Recommendation

I recommend the parties adopt the following modified proposal:

When the Employer makes a change in office space or equipment, the Employer will notify the Union in advance of the change. Subject to local bargaining upon request, the Employer agrees to provide employees with a comparable workstation(s), office(s) or other work area(s). The assignment of workstations, office and work areas will be done on a seniority basis. The overall square footage of the work area will be adequate to accommodate all equipment and filing needs. Generally, employees will pack their own desk, personal belongings, and workstation files. This paragraph only applies if the local chapter does not invoke bargaining. If the chapter invokes bargaining, any and all issues will be bargained by the parties and this paragraph does not apply.

The modified proposal provides for the occasion where the Agency may move without having to bargain and maintains the Union’s right to bargain where circumstances require it. If the Union chooses to bargain, it follows the procedures in Article 3.
Article 58, Section 2

Union Proposal

If the local chapter chooses to bargain over an office move, the parties will follow the procedures outlined in Article 3.

Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

This proposal is simply recognition that the parties will follow the procedures outlined in Article 3 if there is bargaining over a move. Such a provision is beneficial to eliminate confusion.

Union Interest Statement

The Union's interest on this proposal is simply to direct the parties to the midterm bargaining Article (Article 3) in the event that a space move is being negotiated. The Union has an interest in uniformity of bargaining process and therefore would like to see the same process for bargaining over office moves and relocation as over all other midterm matters.

Management Argument

NOT SUBMITTED

Management Interest Statement

The Agency's interest is to prevent having to negotiate over each and every move or change in specific office space or work area.

Recommendation

If the Chapter chooses to bargain, the Union proposal directs them to the proper procedures. Accordingly, I recommend the parties adopt the Union’s proposal.

Article 58, Section 3

Union Proposal

Nothing in this Article relieves the Employer of its obligation to provide specific notice to the Union and to bargain over any and all issues regarding anticipated office moves, relocations, etc.
Management Proposal

NO PROPOSAL SUBMITTED

Union Argument

The Union strongly believes that it is necessary to include a provision that the Agency is not relieved of any of its bargaining obligations.

Union Interest Statement

The Union is interested in clarifying the Employer's obligation with regard to office moves. The issue of space moves was contentious during bargaining, and the Union has an interest in making it clear what the parties agreed to bargain over.

Management Argument

NOT SUBMITTED

Management Interest Statement

The Agency's interest is to prevent having to negotiate over each and every move or change in specific office space or work area.

Recommendation

The information in this proposal is included in Section 1. Accordingly, I recommend the Union’s proposal not be adopted.

Article 60

Union Proposal

NO PROPOSAL SUBMITTED

Management Proposal

Section 1

Before filing an unfair labor practice (ULP) charge with the FLRA, either Party to this Agreement will provide at least thirty (30) days advance notice to the other Party of its intent to file the ULP. This notice will be in writing (either on paper or by e-mail) and should contain the following:

A. a statement of the conduct complained of;
B. a statement concerning why it is believed the conduct constitutes a ULP;

C. at the complaining Party's option, a statement of the relief it believes it is legally entitled to; and

D. at the complaining Party's option, any proposal it wishes to make to resolve the matter informally.

The Parties are encouraged to attempt to resolve the issue informally, but this provision does not constitute a waiver of either Party's right to pursue the ULP.

Section 2

A. The other Party will respond to the advance notice. The response may contain any counter-proposal that the Party wishes to make. The Parties may elect to meet to try to resolve the matter. The Parties may also request the assistance of the FMCS in an effort to resolve the matter.

B. Nothing herein requires a Party to continue to pursue informal alternative dispute resolution processes if the deadline for filing with the FLRA would pass or if the Party is seeking a temporary restraining order as relief for the alleged ULP.

Section 3

Notices provided by the Union under this Article must be provided to the Employer's designated official. Notices provided by the Employer under this Article must be provided to the Union's National Office. A courtesy copy may also be provided to the local Chapter President, if the issue involves only one OPDIV in a single geographic location.

Union Argument

Under this proposal, if implemented, this would constitute a waiver of the statutory right to file such a charge at any time prior to the six-month time limit imposed by 5 U.S.C. § 7118(a)(4). Under federal law, a proposal seeking a waiver of a statutory right cannot be taken to impasse – a statutory right may be waived voluntarily, but because the Union objects to this proposal, it must fail. The Union has an interest in enforcing its statutory right to file a ULP charge at any time within six months of the events giving rise to the claim. Further, the Union has absolutely no obligation to bargain over any waiver of its statutory rights and has an interest in enforcing this right to bargain only over mandatory subjects.

Union Interest Statement

The Union has an interest in enforcing its statutory right to file an unfair labor practice at any time within six months of the events giving rise to the claim. Further, the Union has absolutely
no obligation to bargain over any waiver of its statutory rights and has an interest in enforcing this right to bargain only over mandatory subjects. Lastly, the Union has no interest in adopting the process outlined by the Employer, as experience has shown that the Employer does not staff the office charged with informal resolution of ULPs. The Union does not have an interest in delaying enforcement of a statutory right for the sole purpose of delay.

Management Argument

Contrary to the Union’s argument, it would suffer no prejudice from this proposal, as it would not compromise the six-month limitations period of filing an unfair labor practice charge with the Authority – the delay would only be thirty (30) days, leaving a full five months to file the charge. This thirty (30) day period would allow the parties to potentially remedy the conduct giving rise to the charge.

Management Interest Statement

The Agency's interest in this Article is to facilitate informal resolution of potential unfair labor practices before formal filing. Nothing in this proposed Article prejudices either party's right to file a ULP charge if the parties cannot informally resolve the issue.

Recommendation

I recommend the parties adopt the following modified proposal:

The parties agree that it is in their best interest to have ULP charges resolved, with appropriate remedies, as soon as feasibly possible. Toward that end, the parties agree to attempt to resolve ULP issues and charges at the earliest possible stage. This provision does not constitute a waiver of either party’s right to file a ULP charge at any time.

The modified proposal maintains the parties’ right to file a charge while providing the opportunity for the parties to informally resolve ULP charges and matters that lead to the filing of ULP charges.

Article 66-A-76 Studies, Section 1

Union Proposal

The Employer will notify the Union prior to review of an activity pursuant to OMB Circular A-76. This notification will be as much in advance as reasonably possible, but in no event will it be fewer than five workdays prior to notification to the employees. The notification will, at a minimum, identify the function to be studied, the corresponding positions, impacted employees, location of impacted employees, and projected timeframes for the conduct of the study.
Management Proposal

The Employer agrees to inform the Union prior to a review of an activity pursuant to OMB circular A-76. This notification will be made at the same time the affected employees are notified. This notification will, at a minimum, identify the function to be studied, the corresponding positions, impacted employees, location of impacted employees, and projected timeframes for the conduct of the study.

Union Argument

The Union’s proposal greatly benefits the Union and the Agency’s assertion that there is “simply no value added reason to” give the Union advance notification of an A-76 study displays a profound lack of understanding and respect for the role of the exclusive representative. The Union offers the following “value added reasons”: time needed to brief relevant staff members internally (National President, PR Department, National Counsels and Field Reps who are responsible for impacted chapters, etc.); ability to seek clarification or additional information from the Agency; sufficient time to review materials and understand the impact; and basic appreciation for the Union as the exclusive representative of bargaining unit employees. The Union’s proposal is also a direct result of a problem that arose in July 2007. The Agency gave no advance notification and did not identify impacted employees by name, location, number, or series. The result was absolute chaos for the Union. The lack of information paralyzed the Union’s ability to answer questions and made the Union look impotent in the eyes of impacted employees. The Union’s proposal would eliminate recurrence of this situation and places no burden on the Agency. With regard to the concern that a study may be abandoned between notice and announcement, the Agency could simply request that the Union not share the information until an employee announcement is made.

Union Interest Statement

The Union has an interest in notification prior to the announcement of an A-76 study to the impacted bargaining unit employees. Prior notification allows the Union to ascertain the impacted class, ask questions, and solicit additional information. Further, advance notification gives the Union sufficient time and opportunity to inform the local chapters and to brief others internally who may field questions related to the study (e.g., the National President). Advance notification similarly allows the Union time to prepare for questions that will be raised by the impacted employees.

Management Argument

The Agency’s proposal preserves the notice requirements of the A-76 Circular, while at the same time preventing potentially inaccurate or outdated information from going to employees. Nothing in the A-76 Circular requires an employer to give the Union notice in advance of the notice to affected employees, and there is simply no value added reason to do so. Pursuant to the A-76 Circular, Public Announcements starts the clock for the deadlines set out in the Circular, and
notice to the Union may be interpreted as a “Public Announcement,” thereby prematurely commencing the process. Further, the Agency could either elect to modify the study in question or, indeed, cancel it, at any time prior to the Public Announcement; once the announcement is made, however, the Agency must get permission to cancel the study, and must also publish a detailed rationale for a cancellation decision. Likewise, with modifications, if the Agency changes its mind regarding competitive sourcing between the time it notified the Union and the time it would be required to notify employees, leading to employees receiving potentially incorrect or outdated information from the Union in the interim period. Thus, giving the Union the notice it requests could interfere with the Agency’s ability to take such steps prior to the Public Announcement.

Management Interest Statement

The Agency's interest is to preserve the notice requirements of the A-76 Circular, while at the same time preventing potentially inaccurate or outdated information from going to employees. Nothing in the A-76 Circular requires an employer to give the Union notice in advance of the notice to affected employees, and there is simply no value added reason to do so. Further, the Agency could change its mind regarding competitive sourcing between the time it notified the Union and the time it would be required to notify employees, leading to employees receiving potentially incorrect or outdated information from the Union in the interim period.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

The Employer will notify the Union prior to review of an activity pursuant to OMB Circular A-76. This notification will be as much in advance as reasonably possible, but in no event will it be fewer than three workdays prior to notification to the employees. The notification will, at a minimum, identify the function to be studied, the corresponding positions, impacted employees, location of impacted employees, and projected timeframes for the conduct of the study.

The modified proposal adequately meets the parties’ interests. The Agency could easily incorporate the short timeframe into its plans and thereby alleviate any last minute changes and outdated information.

Article 66-A-76 Studies, Section 2

Union Proposal

The Union will be afforded the opportunity to appoint a bargaining unit employee to serve as a subject matter expert on teams regarding Performance Work Statement (PWS) and Most Efficient Organizations (MEO).
Management Proposal

The Union will be afforded the opportunity to recommend a bargaining unit employee to serve as a subject matter expert on teams regarding Performance Work Statement (PWS) and Most Efficient Organizations (MEO).

Union Argument

The Union’s proposal simply memorializes what has been the parties’ practice with regard to the establishment of a Performance Work Statement (PWS) and Most Efficient Organization (MEO) team.

Union Interest Statement

The Union has an interest in preserving the status quo in appointing a bargaining unit employee to the PWS and MEO team. The Union is interested in selecting these individuals without the approval of the Employer, so long as the employee is a proper subject matter expert and can be released from duty. The Union's proposal accurately describes the parties' current practice.

Management Argument

During the streamlined study process, there is no PWS team in which bargaining unit employees may be appointed. Further, the OMB A76 Circular does not provide for an absolute right of the Union to “appoint” bargaining unit members to any team, rather, that bargaining unit members may participate on those teams as applicable. Thus, the Agency should be allowed to retain its right to determine and appoint employees who meet the requirements of a technical or functional expert.

Management Interest Statement

The Agency's interest are to ensure that it retains the right to appoint bargaining unit employees on the PWS and MEO teams. Although the Union would have the right to recommend bargaining unit employees, the Agency should be allowed to retain its right to determine if the employee meets the requirements as a technical or functional expert.

Recommendation

I recommend the parties adopt the Union’s proposal modified as follows:

The Union will be afforded the opportunity to appoint a bargaining unit employee subject matter expert to serve on teams regarding Performance Work Statement (PWS) and Most Efficient Organizations (MEO). In order to qualify and serve on Performance Work Statement (PWS) and Most Efficient Organizations (MEO) teams, the appointed employee must meet the technical or functional qualifications established by the Agency.
The modified proposal meets both parties’ interests as it allows the Agency to retain its right to
determine the technical or functional requirements of the expert and affords the Union the right to
appoint a bargaining unit employee who meets those requirements.

**Article 66-A-76 Studies, Section 4**

**Union Proposal**

Pursuant to OMB Circular A-76, any bargaining unit employee has the right to elect not to
participate in the study as a team member at any time, regardless of whether appointed by NTEU
or assigned by the Agency. This should not be interpreted to mean that employees may decline to
furnish information concerning their duties and responsibilities or other factual matters related to
their employment to the A-76 study contractor in connection with the studies.

**Management Proposal**

Pursuant to OMB Circular A-76, any bargaining unit employee has the right to elect not to
participate in the study as a team member at any time, regardless of whether recommended by
NTEU or assigned by the Agency. This should not be interpreted to mean that employees may
decline to furnish information concerning their duties and responsibilities or other factual matters
related to their employment to the A-76 study contractor in connection with the studies.

**Union Argument**

The issue in this section is the same as in A-76 Article, § 2 – whether the Union should be
permitted to appoint or simply recommend an appointment to the PWS and MEO teams.

**Union Interest Statement**

The Union has an interest in preserving the status quo in appointing a bargaining unit employee to
the PWS and MEO team. The Union is interested in selecting these individuals without the
approval of the Employer, so long as the employee is a proper subject matter expert and can be
released from duty. The Union's proposal accurately describes the parties' current practice.

**Management Argument**

During the streamlined study process, there is no PWS team in which bargaining unit employees
may be appointed. Further, the OMB A76 Circular does not provide for an absolute right of the
Union to “appoint” bargaining unit members to any team, rather, that bargaining unit members
may participate on those teams as applicable. Thus, the Agency should be allowed to retain its
right to determine and appoint employees who meet the requirements of a technical or functional
expert.
Management Interest Statement

The Agency's interest are to ensure that it retains the right to appoint bargaining unit employees on the PWS and MEO teams. Although the Union would have the right to recommend bargaining unit employees, the Agency should be allowed to retain its right to determine if the employee meets the requirements as a technical or functional expert.

Recommendation

In light of the recommendation made for Section 2, I recommend the parties adopt the Union’s proposal.

Article XX (Tobacco)

Union Proposal

NO PROPOSAL SUBMITTED

Management Proposal

The Agency, as part of its mission to promote healthy practices, has decided that all space occupied by HHS employees, whether owned and/or leased, including buildings, facilities and property are free of all tobacco products. This means that no tobacco product including, but not limited to, snuff, cigars, cigarettes, or any other product containing tobacco may be used by employees inside the buildings or on the grounds of the above facilities; including outside of building, in garages, or inside private cars while on the grounds of HHS owned or leased facilities.

Union Argument

Employees are entitled to make legal choices, even ones that many would consider bad ones, provided there is no adverse effect on their performance. Smoking is one of those decisions. The Agency’s proposal abrogates this free and legal choice. Rather, the Agency only seeks to further its “mission to promote healthy practices.” Such a policy is overly broad, restricting employees from even smoking in privately owned cars in HHS parking lots or at safe distances from HHS buildings and other employees.

Union Interest Statement

The Union is interested in protecting the free and legal choice of employees - even what an overwhelming majority may characterize as a bad choice. The Union is concerned with protecting against what it views as an overly intrusive, broad, and "big brother" policy regulating employees' personal, legal habits. Further, the Union seeks to prevent disparate treatment of employees based on where they work and how close their building is to public property. For
example, headquarters employees working on certain campuses will be treated much differently than employees working in resident posts or other remote areas.

Management Argument

One of the missions of the Department of Health and Human Services is to promote the health of the American people – its own employees included. No smoking programs are one of the means by which the Agency seeks to achieve this mission. First, the Agency’s proposal would not prohibit employees from smoking on their own time in places other than Agency-occupied property. Second, Agency-occupied property is a place of business, over which the Agency should have the right to implement reasonable controls both to promote the health of its employees, contractors and visitors, and its public image in dealing with those outside the Agency. Third, the Agency’s existing policies are routinely violated (e.g., employees smoking within 25 feet of an entrance or intake duct), and oftentimes enforcement of these rules is extremely difficult; an outright ban would be more readily enforceable.

Management Interest Statement

The Agency’s interest in this Article is to advance the Agency’s health-related mission by prohibiting employees, contractors and visitors from engaging in particularly unhealthy behavior on HHS-owned or leased grounds.

Recommendation

I recommend the parties adopt the Agency’s proposal modified as follows:

The Agency, as part of its mission to promote healthy practices, has decided that all buildings occupied by HHS employees, whether owned and/or leased, and space immediately surrounding the building shall be free of all tobacco products. This means that no tobacco product, including, but not limited to, snuff, cigars, cigarettes, or any other product containing tobacco, may be used by employees inside the buildings or within 50 feet immediately surrounding the building. This section does not apply inside private cars or in parking garages more than fifty feet from the building.

The modified proposal provides a reasonable restriction that protects employees, adequately addresses employee rights, and balances the parties’ interests.

In accordance with the parties’ Ground Rules, I submit the above recommendations, which absent notification of concern from the parties, become final on April 30, 2008.

Date: April 23, 2008

[Signature]

Marvin E. Johnson
Mediator/Arbitrator