FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration Between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL VETERANS AFFAIRS COUNCIL

"Union,"

-and-

.

DEPARTMENT OF VETERANS AFFAIRS

"Employer."

OPINION AND AWARD

Case No. 220624-07115

Before
Felice Busto
Arbitrator

Appearances:

For the Union: Ibidun Roberts, Esq.
AFGE/National VA Council #53

For the Agency: Robert Vega, Esq.
Linda A. Weeden-Harris, Esq.
Dept of Veterans Affairs

The Department of Veterans Affairs [the "Agency"] and the American Federation of Government Employees, National Veterans Affairs Council [the "AFGE" or "Union"] are parties to a Master Collective Bargaining Agreement [the "Master Agreement" "Agreement" or "MCBA"] effective March 15, 2011. Jt. Ex. 1. On May 9, 2022, the Union filed a grievance alleging that the Agency violated the Agreement by failing to bargain in good faith during successor term negotiations. (Grievance No. 1). Jt. Ex. 4.[1] The Agency denied the grievance on June 23, 2022.

On July 10, 2022, the Union filed a second national grievance regarding the Agency's conduct with respect to negotiations on Articles 16 and 46 and travel issues. (Grievance No. 2). Jt. Ex. 10. On August 24, 2022 the Agency denied the grievance. By letters dated June 24, 2022 and August 24, 2022 the Union invoked arbitration pursuant to the provisions of the Agreement. Jt. Exs. 7 & 12. Thereafter, I was appointed as arbitrator by the Federal Mediation and Conciliation Service and the parties agreed to consolidate the two grievances.

Arbitration hearings were held on October 5 and 6, 2022 at the Department of Veterans Affairs and, on November 2, 2022 by agreement of the parties the hearing was held by videoconference. At the hearings, the parties argued orally and submitted documentary evidence into the record and examined witnesses. Testimony was received from Thomas Dargon, Supervisory Attorney, Kurt Martin, Chief Negotiator and William Wetmore, Chair of the Union Grievance and Arbitration Committee. Post hearing briefs

[1] On May 26, 2022, the Union filed an amendment to the Grievance withdrawing portions of the allegations regarding negotiability Articles 14 ("efficiency of the service") and 16 ("proportional allocation of awards"). Jt. Ex. 5.

were submitted by the parties on December 16, 2022. The record was closed on January 4, 2023 after submission of a Reply Brief by the Union.[2]

ISSUES

The parties were unable to agree on the framing of the issue. The Union proposed the issue be framed as follows:

> Whether the Department of Veterans Affairs violated the Master Agreement, the Ground Rules and/or the Federal Sector Labor Management Relations Statute? If so, what shall be the remedy?

The Agency proposed to frame the issues as follows:

1. Has the Union failed to timely grieve successor agreement negotiation Session 1, which addressed Article 14?

2. If so, has the Department Bargaining Team failed to bargain in good faith during successor agreement negotiation Sessions 2 through 5?

3. If not, has the Department Bargaining Team failed to bargain in good faith during successor agreement negotiation Sessions 1 through 5?

4. Has the Department Bargaining Team violated Articles 2 and 49 of the MCBA and 5 U.S.C. § 7116(a) during successor agreement negotiation Sessions 1 through 5 (subject to the Agency's timeliness objection, in which case, Sessions 2 through 5)? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 – GOVERNING LAWS AND REGULATIONS

Section 1 – Relationship to Laws and Regulations

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

[2] The Union requested and permission was granted for it to file a Reply to the Agency's Motion in Limine to Strike testimony of Thomas Dargon that was contained in footnote 1 of its brief.

Section 2 – Department Regulations

Where any Department regulation conflicts with this Agreement and / or a Supplemental Agreement, the Agreement shall govern.

ARTICLE 43 – GRIEVANCE PROCEDURE

Section 1 – Purpose

The purpose of this article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for Title 5, Title 38 Hybrids and Title 38 bargaining unit employees in resolving grievances that are within its scope, except as provided in Sections 2 and 3.

Section 2 - Definitions

A. A grievance means any complaint by an empl0yee(s] or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.

B. This article shall not govern a grievance concerning:

1. Any claimed violation relating to prohibited political activities...
2. Retirement, life insurance, or health insurance;
3. A suspension or removal in the interest of national security...
4. Any examination, certification or appointment;
5. The classification of any position which does not result in the reduction in grade or pay of an employee.

C. Under 38 USC 7422, the following exclusions also apply only to pure Title 38 bargaining unit employees:

Discussions between an employee and an EEO (ORM] counselor would not preclude an employee from opting to select the negotiated grievance procedure if the grievance is otherwise timely.

* * * *

Section 10 – Multiple Grievances

Multiple grievances over the same issue may be initiated as either a group grievance or as single grievances at any time during the time limits of Step 1. Grievances may be combined and decided as a single grievance at the later steps of the grievance procedure by mutual consent.

Section 11 – National Level Grievances

A national level grievance is one that is filed by the Union or by the Department. Grievances between the Department and the Union at the national level shall be filed by the aggrieved party as follows:

A. Within 30 calendar days of the act or occurrence or within 30 days of the date the party became aware or should have become aware of the act or occurrence or at any time if the act or occurrence is continuing, the aggrieved party (the Department or the Union] may file a written grievance with the other.

B. Upon receipt of a grievance, the parties will communicate with each other in an attempt to resolve the grievance. A final written decision, including any position on grievability or arbitrability, must be rendered by the respondent within 45 days of receipt of the grievance. If a decision is not issued in 45 days, or if the grieving party is dissatisfied with the decision, the grieving party may proceed to arbitration in accordance with article 44 arbitration. The time limits may be extended by mutual agreement.

ARTICLE 49 – RIGHTS AND RESPONSIBILITIES

Section 1 – Introduction

The Parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department into an Organization that works more efficiently and effectively and better serves customer needs, employees, Union representatives, and the Department.

Section 2 – Rights and Responsibilities of the Parties

A. In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the and obligations imposed by 5 USC Chapter 71 and this Agreement, and the maintenance of a cooperative labor-management working relationship.

B. Each party shall recognize and meet with the designated representative(s) of the other party at mutually agreeable times, dates, and places that are reasonable and convenient.

C. The Department supports and will follow statutory and contractual prohibitions against restraint, coercion, discrimination, or interference with any Union representative or employee in the exercise of their rights.

Section 3 – Union Representation

The Union will be provided reasonable advance notice of, be given the opportunity to be present at, and to participate in any formal discussion between one or more representatives of the Department and one or more employees in the unit or their representatives concerning any grievance, personnel policy or practice, or other general condition of employment. The Union will also be allowed to be present and represent a unit employee at any examination by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary/adverse action/ major adverse action against the employee and the employee requests representation.

Section 4 - Notification of Changes in Conditions of Employment

A. The Department shall provide reasonable advance notice to the appropriate Union officials) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain. The Department will work with the Union to identify and provide specific training and equipment to address concerns related to the use of technology, to include the sending and receiving of electronic communications.

Memorandum of Understanding VA/AFGE 2021
Revised Ground Rules MOU (eff. July 20, 2021)

(Relevant sections are excerpted in the Opinion).

CITED STATUTES

5 U.S.C. §7114 – Representation Rights and Duties

* * * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays

5 U.S.C. §7116 – Unfair Labor Practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

BACKGROUND

The Union represents approximately 283,000 bargaining unit employees. On December 15, 2017, the Agency gave notice to the Union to renegotiate the Master Agreement. Negotiations commenced which were protracted and resulted in the Union's filing of eight national grievances and two unfair labor practices. After a change of administration in the Executive Branch with new labor policies and priorities, the parties

attempted a "restart." On July 20, 2021 the parties entered into a global settlement to resolve the outstanding grievances and commenced negotiations with a limited reopener of 12 articles. Jt. Ex. 4. The Settlement Agreement attached the revised Ground Rules to govern negotiations.[3] Thomas Dargon, Supervisory Attorney served as the Chief Negotiator for the Union and Kurt Martin, Labor Relations Specialist, served as the Chief Negotiator for the Agency.

The Union selected to reopen Articles 12 (Details and Temporary Promotions), Article 16 (Employee Awards and Recognition), Article 22 (Investigations) Article 29 (Safety, Health, and Environment), Article 39 (Upward Mobility and Article 66 (Technology for Administering, Tracking and Measuring VBA Work). The Agency selected to reopen Article 14 (Discipline and Adverse Action), Article 23 (Merit Promotion), Article 27 (Performance Appraisal), Article 46 (Local Supplement), Article 47 (Mid-Term Bargaining) and Article 48 (Official Time). The Ground Rules provided that "[n]o additional articles may be proposed after this date. All other articles from the 2011 Master Agreement were rolled over with the exception of certain sidebar agreements reached by the parties which became effective immediately.

The parties held negotiations on the following dates and locations:

Session 1 March 1-10, 2022 (Phoenix, Arizona)
Session 2 March 29-April 7, 2022 (Washington DC)
Session 3 April 26-May 5, 2022 (Orlando, Florida)
Session 4 May 24, 2022-June 2, 2022 (Washington, DC) and
Session 5 June 28, 2022-July 5, 2022 (San Francisco, California)

[3] The parties' Ground Rules require the use of a color coded scheme to track the bargaining history with dates of each parties' proposed language and negotiators' comments to proposals.

Grievance No. 1 alleged that the Agency engaged in bad faith bargaining with respect to Articles 14, 16 and 46. Jt. Ex. 4. Grievance No. 2 alleged additional violations with respect to continued negotiations of Article 46 and other allegations regarding travel issues and the Agency's extensive caucusing. Jt. Ex. 10.

ARTICLE 14 Negotiations: (Discipline and Adverse Action)

Article 14 was one of the six articles selected by the Agency to reopen under the Ground Rules. On March 1, 2022 the Agency submitted its initial proposal on Article 14. Union Negotiator Dargon characterized the proposal as "disappointing" and further testified:

> There is really not much in here other than concessions of existing contract language. The VA, in my opinion, is proposing to strip existing rights, protections and procedures out of Article 14. T. Vol. I, 24.[4]

There were several fundamental disagreements between the parties with respect to Article 14: 1) provision on "efficiency of service"; 2) Performance Improvement Plans ("PIPs"); and 3) whether Article 14 would apply to all disciplinary actions.

With respect to the "efficiency of the service" dispute, the Agency took the position that due to the Accountability Act (38 U.S.C. §714), the existing language in Article 14 was contrary to law. The Union disagreed with the Agency's position because there is no provision in the Accountability Act that refers to the efficiency of the service. T. Vol. I, 33-39. Based on the Agency's position, the Union filed a negotiability appeal with the Federal Labor Relations Authority ("FLRA"). In addition, the Union provided the Agency with cases that held that efficiency of the service had been found to be negotiable. However,

[4] Citations to the transcripts are denominated as T. Vol. I, II or III, (page no.).

the Agency's position remained unchanged and the parties ceased bargaining over that provision pending the appeal to the FLRA.

As to the second area in dispute regarding PIPs, Article 14 required the Agency to provide employees with PIPs in order to provide them with an opportunity to improve prior to the imposition of discipline. Prior to these negotiations, the parties had been engaged in protracted litigation regarding PIPs before the FLRA. The FLRA ruled that there was no conflict between the Accountability Act and the contractual requirement in Article 27 of the Master Agreement requiring PIPs. Nonetheless, despite the FLRA ruling the Agency continued to maintain its position to limit the use of PIPs.

The Union also took issue with the Agency's reliance on initial decisions from appeals by individual employees regarding discipline to the Merit Systems Protection Board ("MSPB"). Those decisions, some of which found that PIPs were not required under the Accountability Act, apply only to the Agency and the individual employees. *See e.g. Laurie Shannon-Baily v. Dept. of Veterans Affairs, PH-0714-21-0012-1-1 (April 2021); but see Neal v. Dept. of Veterans Affairs*, 120 LRP 38692 (Dec. 2020). U. Ex. 5.

With respect to the third issue in dispute under Article 14, the Union had proposed language that would include Title 38 employees. This led to a dispute regarding non-negotiability whereby the Agency requested the Undersecretary of Health to make a determination pursuant to 38 U.S.C. §7422 ("§7422") on the issue. U. Ex. 3.

Negotiator Martin testified that the Agency's Article 14 proposal was to make "some clarifications and to clarify." T. Vol. II, 66. He testified that the Agency wanted to apply PIPs only to disciplinary/adverse actions taken under Chapters 75 and 78 and that

the "procedures in this article would not apply to actions—performance-based actions taken under Chapter 45." T. Vol. II, 67.

ARTICLE 16 Negotiations: (Employee Awards and Recognition)

Article 16 was one of the six articles selected by the Union to reopen pursuant to the Ground Rules. On April 4, 2022, the Union submitted its initial proposal for Article 16. Jt. Ex. 17. The Union's proposal proposed a reallocation of the award funds based on a percentage of the Union's represented employees. The proposal also called for the payment of monetary awards to "pure" Title 38 employees.[5]

On May 23, 2022, Martin submitted a request for a §7422 determination to the Acting Secretary of Health for the Agency to confirm that the Union's proposals for the payment of monetary awards to Title 38 employees were non-negotiable because they involved compensation under 38 U.S.C. §7422(b). Jt. Exs. 6 & 7. On the same date Martin sent the Union an Unsolicited Written Allegation of Non-negotiability regarding five other Union proposals under Article 16 because they (1) required the Agency to establish a specific awards program for unit employees; (2) created a minimum allocation for unit employees, and 3) limited the amount of money that could be allocated in other bargaining units and/or non-represented employees. Jt. Ex. 6.

On June 7, 2022, the Union submitted a response to Martin's request for a §7422 determination. Jt. Ex. 8. After receiving the Union's response, Martin notified the Union on June 10, 2022 that he was withdrawing the Agency's allegations of non-negotiability for four of the five proposals identified in his May 23, 2022 submission because these proposals had been "withdrawn, modified and presented as new proposals in the spirit of

[5] 38 U.S.C. §7401(1) addresses eight specific occupations that are often referred to as "pure" Title 38 employees.

reaching agreement." Jt. Ex. 9. On May 26, 2022, the Union then withdrew that portion of the grievance regarding the negotiability dispute in order to pursue a negotiability appeal before the FLRA. Jt. Ex. 5. Thereafter, the parties continued to exchange proposals and counterproposals on Article 16.

In addition, a dispute arose in negotiations over the Agency's proposal to provide the Union with collaboration rights (as opposed to negotiations) regarding hybrid employees. Dargon testified that the "predecisional collaboration process is distinct. It's an extra step you have to go through for hybrids. It does not supplant or supersede, or trump the Department's obligation to bargain with us." T. Vol. I, 77.

Article 46 Negotiations: (Local Supplement)

Article 46 was one of the six articles selected by the Agency to reopen pursuant to the Ground Rules. Local Supplement Agreements ("LSAs") are agreements that are negotiated at the local level and can cover a myriad of topics such as parking, telework, hours of work, and other subjects. There are hundreds of local LSAs with some dating back 20 years. Under Article 46, LSAs are required to be submitted to the national Union to for review to ensure that they do not conflict with the Master Agreement. In the event of a conflict, Article 46.A provides that the Master Agreement is controlling. Article 46.B contains procedures for their negotiation. The Ground Rules provided that local supplement negotiations could not be initiated after the effective date of the Rules.

The Agency's initial Article 46 proposal was made on April 7, 2022 and led to two disputes. Jt. Ex. 19. The first was the proposal to terminate all local supplemental agreements. The second dispute was over the effect of this proposal which would have, in the Union's view, reached into other unopened articles in the Agreement that pertain

to LSAs. Martin testified that "there are over 40 different references throughout this contract and different articles that authorize local bargaining on certain subject matters. T. Vol. II, 111. Martin also testified that by striking the existing language in Article 46 preserving LSAs, they would cease to exist by operation of law. However, to avoid confusion in the field, the Agency's proposal included language that explicitly stated that LSAs were "expired." T. Vol. II, 252-254.

The negotiations on this issue were further complicated when the Union learned that the Agency considered not just LSAs, but also Memorandums of Agreement ("MOAs"), Memorandums of Understanding ("MOUs") or even past practices to be local supplements. The Union's position was that these agreements were not local supplements under Article 46 and that the Agency's proposal was not a limited reopener and was therefore a violation of the Ground Rules. Dargon testified that "[y]ou can't call something a limited reopener and then use the procedures in Article 46 to reopen the entire contract, and this is what the Department is doing." T. Vol. I, 103.

Negotiator Martin testified that the Agency's proposal regarding Article 46 stemmed from its desire to cease bargaining at the local level. He also testified that 75% of the LSAs had been negotiated prior to 2011 and were "outdated." Martin acknowledged that the Union took a very strong position that they did not want LSAs to expire and that there was disagreement between the parties on whether to preserve or expire them.

Subsequently, the Union presented a counterproposal which identified areas that would remain subject to local supplemental agreements such as parking, hours of work, overtime, leave procedures and tours of duty. Jt. Ex. 20. The Agency then counter-proposed with some "parameters" around these subject areas during the negotiations in

Orlando. The parties continued to have discussions and the Union came back with a list of 29 areas for LSAs with procedures. However, Martin testified that the proposal lacked the parameters that the Agency was seeking.

The parties continued to discuss the Agency's Article 46 proposal when they resumed negotiations in San Francisco (week of June 28-July 5, 2022). The Union stated its objection to the Agency's proposal and reiterated its interest in preserving existing LSAs. The Agency presented its Counterproposal #2 on June 28, 2022. Prior to the end of the session, the Union presented its Counterproposal #3 later in the day which struck much of the language that the parties had been working on. Jt. Ex. 20. At this point, Martin testified that it was clear that the Union's "main interest" was in preserving LSAs.

On the following day, June 29th, the Agency's negotiators took a two and one-half day caucus to further review LSAs that it had previously gathered from the field and compiled into an electronic database. The database had LSAs, hundreds of MOUs and MOAs and there was continued disagreement about whether MOUs/MOAs constituted local supplements under Article 46.[6] Martin testified that the Agency's negotiators undertook a review to create an "exhaustive list" so the parties could agree on what was or was not an LSA. The agreements were organized into a binder and presented in a sidebar to the Union on July 1, 2022. During this sidebar, the Agency presented a proposal that would preserve LSAs for three years with conditions. Ex. A. 1. The Union rejected the proposal and the Agency, on July 1, 2022, presented its Last Best Final Offer ("LBFO") which reinserted the language that all LSAs would expire.

[6] At the hearing, Martin testified that in his view, MOAs that referred to Articles in the Master Agreement were Local Supplemental Agreements or LSAs. T. Vol. II, 226, 247.

The Agency's extensive caucus during this session is one allegation in Grievance No. 2 in which the Union alleged that the extended caucus was a dilatory tactic on the part of the Agency. Dargon testified that he believed the time was not used to do research or come back with new issues but rather to delay the process.

The Agency's conduct in negotiations and proposals with respect to Articles 14, 16 and 46 are the principal grounds for the two grievances filed by the Union regarding bad faith bargaining.

SUMMARY OF THE POSITIONS OF THE PARTIES

The Union argues that the Agency violated the Ground Rules, the Master Agreement and the FSLMRS. The Union asserts that the Agency committed two violations of the Ground Rules. First, the Union contends that the Agency violated the Ground Rules by making proposals for the purpose of reaching into other articles of the Agreement. The Union emphasizes that a violation of the Ground Rules is not subject to a totality of circumstances test. Although the Union recognizes that the parties could make formatting or non-substantive edits to rolled over articles, Section VII.A of the Ground Rules limited the parties to reopen up to six articles. However, in its LBFO on Article 46, the Agency proposed that "all references in the master agreement authorizing local bargaining or preserving local agreements are no longer enforceable." The Union maintains that this proposal is unrelated to Article 46 and was offered for the purpose of changing unopened articles in violation of the Ground Rules.

In addition, by making its LBFO prior to negotiating for four weeks, the Agency violated Ground Rule Section VI.F which provides that "[t]he parties will meet for no less than four (4) weeks per re-opened article (i.e., twelve (12) reopened articles will require

a total minimum of forty-eight (48) weeks of table bargaining) and will meet for no more than a maximum of fifty-two (52) weeks of table bargaining as set forth in Article XVIII of these Ground Rules." Because the Agency presented Article 46 on April 7, 2022, the last day of Session Two, and the parties discussed the article for six days when the Agency presented its LBFO on July 1, 2022, the Agency failed to meet for a minimum of four weeks on Article 46 in violation of the Ground Rules.

The Union also argues that the Agency violated the Master Agreement and the Federal Sector Labor Management Relations Statute ("FSLMRS") by engaging in bad faith bargaining. First, the Union maintains that the Agency unlawfully insisted to impasse on permissive subjects. The Union asserts that it is well settled that proposals that waive a party's statutory right are permissive subjects of bargaining and that insisting to impasse upon a statutory waiver violated the statute. (Citations omitted). This violation does not require a totality of circumstances analysis.

The Union argues that the Agency's proposal that the Union waive current bargaining rights regarding mandatory subjects in local agreements is permissive. The Union submits that the Agency's proposal concerning Article 46 (Local Supplement) is a waiver of the Union's statutory right to bargain over mandatory subjects. According to the Union, a party is entitled to rely on the terms and conditions established in an expired agreement and neither party is entitled to unilaterally change it. However, in its LBFO, the Agency's proposal that "all local supplemental agreements prior to the effective date of this agreement are expired *and are no longer enforceable* as negotiated agreements" constituted bad faith bargaining because the Agency insisted to impasse that it was not bound by the provisions of Article 46.

Moreover, the Union contends that the Agency's position that it did not seek a waiver of the Union's statutory rights is without merit. By limiting the Union's statutory right, the Agency's proposal was not within the required scope of bargaining and deprived the Union of its right to enforce or negotiate over conditions of employment contained in LSAs.

The Union also submits that the Agency's proposal that it could terminate conditions of employment in the future is a waiver of the Union's future statutory rights. Absent a reopener clause, a party is not permitted to demand midterm bargaining over covered by matters. The Agency insisted to impasse that "although the agreements referenced in subsection A in this section are expired and are no longer enforceable, the conditions of employment contained in those agreements continue: 1. Unless and until changed by collective bargaining under the statute." The Union asserts that the Agency's conditioning negotiations on this proposal on May 2, 2022 after the Union's objection on April 27, 2022, constituted bad faith bargaining by insisting to impasse on its permissive proposal.

The Union argues that the Agency's proposal that the Union only have collaboration rights instead of bargaining rights is permissive. The Union argues that the Agency's proposal that performance awards would not be subject to collective bargaining for hybrid employees also constituted an explicit waiver of the Union's statutory rights. The Union maintains that the authority to remove matters from collective bargaining is not applicable to hybrid employees. (Citations omitted). Therefore, the Agency's insistence to impasse on this proposal constitutes a third independent failure to bargain in good faith.

Further, the Union argues that the Agency failed to bargain in good faith by refusing to recognize precedent from the FLRA. The Union emphasizes that it is a violation of 5 U.S.C. § 7116(a)(1) and (5) for an Agency to refuse to negotiate in good faith on a proposal that has already been determined to be negotiable by the authority. (Citation omitted). This analysis is not subject to a totality of circumstances test. Here, the authority decided in *U.S. Dept. of Veterans Affair and AFGE, NVAC 53*, 71 FLRA No. 211 (2020, *reconsideration denied*), 72 FLRA No. 76 (2021), that PIPs were not contrary to the Accountability Act. The Agency's insistence that they are and reliance on a pending decision of an administrative law judge ("ALJ") of the MSPB does not determine negotiability. The Union emphasizes that the Agency's Chief Negotiator admitted that the MSPB does not determine negotiability. The Union submits that the Agency's insistence that the Union's proposal was non-negotiable independently constitutes bad faith bargaining.

The Union also argues that the Agency violated the statute when it repudiated the Ground Rules which constitute a part of the July 2021 Global Settlement Agreement. The Agency's proposal in Article 46 to reopen substantive terms in unopened articles is a repudiation of the Settlement Agreement and a violation of §7116(a)(1) and (5) of the FSLMRS.

Further, the Union argues that the Agency unlawfully engaged in surface bargaining in violation of 5 U.S.C. §7114(b)(1). To determine whether surface bargaining occurred, the totality of circumstances must be examined, including the reasons for management's actions. The Union asserts that the Agency's conduct, viewed in its entirety, demonstrates that it engaged in surface bargaining by:

(1) not coming to the table with a sincere resolve to reach agreement;

(2) asserting that it had "no interest" or "disagreed" with the Union's proposals without offering counter proposals;

(3) offering proposals to remove almost the entire section of Article 14 and almost the entire language of Article 46;

(4) frequent and premature assertions of non-negotiability;

(5) prolonged an incessant caucusing;

(6) lack of movement and concessions; and

(7) failing to send authorized representatives to negotiations.

Thus, the Union maintains that the totality of circumstance supports the conclusion that the Agency engaged in bad faith bargaining in violation of the FSLMRS and Articles 2 and 49 of the Master Agreement.

Remedies

As a remedy, the Union requests that the arbitrator issue a cease and desist order, order the Agency to rescind its proposals on permissive subjects, and order other traditional remedies for unfair labor practices. Specifically, the Union requests the Agency should cease and desist from:

1. failing and refusing to honor the July 20, 2021 settlement agreement concerning disputes arising from the May 25, 2018 issuance and subsequent implementation of Executive Ordered 13836, 13837, and 13839 ("Trump EOs"), and implementation of limitations on official time for employees described in 38 U.S.C. §7421(b) ("Title 38 employees"), the renegotiation of a draft successor master agreement ("Successor Master Agreement") and other specifically identified or related matters set forth in the settlement agreement, and the attachments contained therein, i.e., Revised Ground Rules;

2. engaging in bad faith bargaining by insisting to impasse on permissive subjects of bargaining, including proposals on waivers of the Union's statutory rights which are permissive under the statute;

3. failing and refusing to bargain in good faith about the Union's proposals concerning performance improvement plans, or any other proposals that are substantially identical to proposals already found to be negotiable, or not contrary to law, by the Authority;

In addition, the Union requests that the Agency be ordered to rescind its LBFO, return to negotiations and return to good faith bargaining. The Union also requests that the arbitrator retain jurisdiction to resolve any dispute concerning the implementation of any awarded remedy.

The Agency disagrees. The Agency argues that the totality of circumstances established that the Agency did not engage in bad faith bargaining during negotiations. As a preliminary matter, the Agency submits that the Union's claim regarding the first negotiation session between March 1 and March 10, 2022 is procedurally non-arbitrable. The Agency maintains that the Union became aware of potential bad faith from the Agency's conduct during the first negotiating session between March 1 and 10. The Agency argues that the Union failed to timely file a grievance within 30 calendar days in accordance with Article 43 of the Master Agreement. Neither of the Union's witnesses identified any reason that the 30 day time limitation should not apply to Dargon's admission during negotiations. The Agency identified the Union's national grievance on May 9, 2022 as untimely in its answer to the grievance. As a result, any allegations regarding the first session are procedurally unarbitrable.

The Agency also raised a second procedural issue. In its Brief (Footnote 1), the Agency moved to strike portions of Negotiator Dargon's testimony on the grounds that they were in the nature of confidential settlement discussions.[7]

With respect to the merits, the Agency asserts that the Union's contention that Kurt Martin, its Chief Negotiator, did not have authority to bind the Agency lacks merit.

[7] The Union objected to the Agency's motion on the grounds that it is not a proper Motion in Limine and also because the Agency failed to object to this testimony at the hearing, thereby waiving any objection. The Union requested and was granted leave to file a reply on this limited issue.

Similarly, the Union has failed to establish that the Agency's use of caucus time constituted bad faith bargaining.

Further, the Agency contends that the testimony from the Agency and Union witnesses did not establish regressive bargaining. Instead, the Agency argues that this only illustrates the complex nature of the negotiations over Article 46 and the strong interests of the parties which the Agency in good faith attempted to understand while recognizing its own interests.

Moreover, the Agency argues that the Union's position that the Agency revoked and rejected proposals related to Articles 14 and 16 arbitrarily is not supported by the evidence. The Agency emphasizes that the Union's witnesses contradicted each other when explaining the basis for the Union's proposals for Article 16 (Employee Awards and Recognition). The Agency, upon receiving the Union's initial proposals on Article 16 did not agree that there was evidence to necessitate a change in the current language that governs the allocation of employee awards. The Agency emphasizes that its position on Article 16 was taken after a careful review of the Agency award data and was neither arbitrary nor taken with an intent to frustrate the bargaining process.

The Agency maintains that the Union has failed to establish that there was undue delay in bargaining to constitute a bad faith determination. The fact that the Agency's bargaining team spent the afternoon of June 29 and most of the day on June 30 reviewing local supplemental agreements in order to respond to the Union's counter proposal on Article 46 was explained by Negotiator Martin. Martin testified that extended caucuses were not unusual after receiving Union proposals and further stated that the Agency's bargaining team took a long caucus to review all LSAs to determine if it was possible to

meet both parties' interests, including extending a period for LSAs to continue operating. The Agency further notes that after they explained their caucus activities during a sidebar with the Union, its representatives did not object.

The Agency also argues that the Union has failed to establish bad faith bargaining by insisting that the Agency bargain to impasse on permissive subjects. The Agency submits that the evidence established its sincere attempt to reach agreement on each limited reopener. There was no evidence that the Agency engaged in efforts to frustrate the bargaining process or engaged in regressive bargaining. The Union also failed to present evidence that the Agency attempted to delay the process in order to delay reaching agreement. Moreover, the Agency emphasizes that it did not revoke or reject proposals without explanation which, in some circumstances, can constitute bad faith bargaining.

DISCUSSION

I have carefully reviewed all of the evidence submitted including testimony, exhibits and arguments. Based on the parties' different formulations of the issue to be decided, I have determined that the following contains the procedural and substantive issues raised by both parties with respect to the two grievances:

1) Whether the Union failed to timely grieve negotiating Session One held between March 1 and 10, 2022?
2) Whether the Department of Veterans Affairs violated the Master Agreement, the Ground Rules and/or the Federal Sector Labor Management Relations Statute? If so, what shall be the remedy?

First, with respect to the first issue regarding whether the Union's allegation regarding whether the Agency's conduct during the March1-10 Session is untimely, I find that the issues raised with respect to the March 1-10 session are arbitrable. The Agency's

argument that the Union was required to immediately file a grievance because Dargon stated that the Agency's conduct sounded like a declaration of non-negotiability is not persuasive. Although the Union was on notice that there was an issue regarding the Agency's Article 14 proposal at that session, Dargon testified that the parties continued to discuss Article 14 at the subsequent session in Washington which took place between March 29 and April 7, 2022 and thereafter. Because discussions of Article 14 were ongoing between the parties, the Union was not required to file a grievance immediately after Session One in March 2022. In the context of negotiations, this exchange in during Session One negotiations could have made a grievance premature. Even assuming *arguendo* that the Agency's position has merit, the Union's allegations regarding the Agency's conduct alternatively constitutes a continuing violation. *See* Article 43, Section 11(A) of the Agreement.

There is a second procedural issue regarding the Agency's "Motion in Limine" contained in Footnote 1 of its Brief. I am persuaded, as the Union argues in its Reply, that the Agency's Motion in Limine comes too late. A Motion in Limine is a pre-hearing Motion and not a Motion to be entertained after the hearing and briefing has concluded.

Moreover, the Agency failed to timely object to the testimony that it now seeks to strike from Negotiator Dargon. The Agency failed to preserve its objection to strike the testimony at the hearing and even elicited some of the testimony. Negotiator Martin, who signed, but did not negotiate the Ground Rules, also provided testimony regarding his understanding of the Rules. Further, even if the Agency's Motion were germane, the testimony provided by Dargon involved bargaining history of the July 20, 2021 Settlement Agreement and the attached Ground Rules which is not tantamount to settlement

discussions that did not result in an agreement. For these reasons, the Motion in Limine to strike Dargon's testimony is denied.

Turning to the merits, I will address each of the allegations that the Union asserts, in Grievances No. 1 and No. 2, regarding the Agency's failure to bargain in good faith bad in turn. The Union has the burden to prove that the Agency violated the July 2021 Settlement Agreement and attached Ground Rules, the Master Agreement. and/or the FSLMRA by engaging in bad faith bargaining. Arbitrators have authority to resolve statutory unfair labor practices under the FSLMRS where, as here, the parties have stipulated to submit the issue to arbitration. *See e.g., NTEU Chapter 168 and U.S. Dept. of the Treasury, Customs Service,* 55 FLRA 236 (1999).

I. Violation of Ground Rules

The Union has established that the Agency violated the Ground Rules by making proposals that would affect unopened articles. Violation of Ground Rules in not subject to a totality of circumstances test. *See NTEU v. FCC,* 73 FLRA 101 (2022). It was not disputed that the Ground Rule VII.A limited each party to reopen up to six Articles in the Agreement. In addition, Ground Rule VII.B provides that the:

> Parties agree to rollover the following Articles from the 2022 Master Agreement in their entirety with the exception of the Side Bar Agreements identified below, which are effective immediately, and any reopened articles that require specific revisions to specific sections or provisions therein[…].

Jt. Ex. 3.

In its initial proposal and LBFO, the Agency proposed that "All references in the Master Agreement authorizing local bargaining or preserving local agreements are no longer enforceable." Moreover, the Agency's proposal on Article 46 included "local bargaining and local agreements." The Agency's argument that the Ground Rules

expressly permit addressing effects in other articles is not supported by the plain language of the Ground Rules. Although the Ground Rules allow for rolled over articles to address any formatting or non-substantive edits to a rolled article, the Agency's proposal constituted a substantive reach into unopened articles and, as such, was a violation of the Ground Rules. As Dargon testified, "there would never have been an understanding that you could go into rolled over articles. It would have completely defeated the point of there being a limited reopener." T. Vol. I, 93.

Ground Rule II.F provides that:

> The Chief Negotiators, by mutual agreement, are jointly responsible for the following: …
>
> 2. For rolled articles, determining the need for any formatting or *non-substantive edits* to a rolled article." (Emphasis supplied).

This plain language in the Ground Rules allows the parties to address cross-referenced language in rolled-over articles that are impacted by reopened articles, for example, to address when a rolled over article cross-references another article.[8] The Grounds Rules permit the parties to address an inconsistency or nonconforming language that results from a change in a rolled over article; however, they do not permit the Agency to make substantive proposals that would reach into unopened articles. There is nothing in the of the Ground Rules that supports the Agency's attempt to eliminate local agreements which were not cross-referenced in Article 46. To uphold the Agency's argument would defeat the express terms of the Ground Rules that allowed each party to

[8] Dargon provided other examples of such changes such as gender neutral pronouns. T. Vol. I, 8-14; or if a party eliminated a step in the grievance procedure, that step would need to be eliminated from rolled over articles. T. Vol. I, 92-93.

reopen up to six articles. The Agency's proposals on Article 46 constituted a violation of the Ground Rules.

II. Violation of the Federal Sector Management Labor Relations Statute

The Union argues that the Agency failed to bargain in good faith in violation of 7116(a)(1) and (5) by 1) insisting to impasse on permissive subjects; 2) engaging in surface bargaining; and 3) engaging in dilatory tactics .

1. Insisting to Impasse on Permissive Subjects

a. Waiver of Current Bargaining Rights

Proposals that waive a party's statutory right to bargain are permissive subjects of bargaining and insisting to impasse upon a statutory waiver violates the FSLMRS. *See e.g., FDIC HQ and NTEU,*18 FLRA 768 (1985). This violation does not require a totality of circumstances analysis. *See AFGE Local 3939 and SSA,* 64 FLRA 17. The arbitrator has authority to review the Agency's proposals and determine that it unlawfully insisted to impasse on permissive subjects. *See e.g., Independent Union of Pension Employees for Democracy and Justice and PBGC,* 72 FLRA 54 (2021).

In its LBFO on Article 46, the Agency proposed that [a]ll local supplemental agreements prior to the effective date of this agreement are expired and are no longer enforceable as negotiated agreements." Jt. Ex. 20. The Agency insisted to impasse that it would not be bound by provisions in LSAs despite the express language in Article 46 of the Agreement. Although the Agency had the right to negotiate regarding the procedures for LSAs it did not have the right to unilaterally insist that all such agreements expired. It is well settled that while a party may seek to renegotiate the terms of an agreement it cannot insist that provisions of the agreement are "expired" or "no longer enforceable."

Moreover, the Agency's assertion that it did not seek a "waiver" of the Union's statutory rights misses the point. Here the Department argues that by expiring the vehicle, i.e., Article 46, in which conditions of employment are contained (LSAs), it may expire the enforceability of those conditions of employment. The Agency's Article 46 proposal reached into other articles separate from LSAs and rendered conditions of employment unenforceable without negotiation. The effect of the Agency's proposal deprived the Union of its right to enforce conditions of employment in LSAs and its insistence on bargaining to impasse on a permissive subject violated the FSMLRS.

b. Waiver of Future Bargaining Rights

The Agency's May 2, 2022 proposal on Article 46 provided:

> "[a]though the agreements referenced in Subsection A of this section are expired and are no longer enforceable, the conditions of employment contained in those agreement continue: 1. Unless and until changed by collective bargaining Agreement under the Statute." Jt. Ex. 20.

This proposal would have permitted the Agency to change conditions of employment even though they were not encompassed by the parties negotiations on a new term agreement. The Agency conditioned negotiations on this proposal after the Union objected to it on April 27, 2022. By so doing, the Agency's bargaining to impasse on a permissive subject and constitutes another violation of the FSLMRS.

c. Collaboration Rights Versus Bargaining Rights

The Agency's proposal that awards for hybrid employees under Article 16 were not subject to collective bargaining by providing the Union with collaboration rights instead of bargaining rights. This is also a permissive subject of bargaining. *See NAGE, Local R5-136 and DVA, Ralph H. Johnson Medical Center, Charleston SC 56 FLRA 346 (2000)("However, section 7422 does not apply to hybrid employees[.]").* In *Dept. of*

Airforce, Castle AFB and NAGE, Local R12-91, 18 FLRA 642 (1985) ALJ Decision, (consultation language was found to be a waiver of the Union's statutory right to bargain). The Agency's proposal here is similar to the proposal in *Castle* and constituted a waiver of the Union's statutory right to bargain. The Agency's insistence to impasse on this permissive subject is a third failure to bargain with the Union in good faith.

The Agency's insistence to impasse on three independent permissive subjects constituted bad faith bargaining in violation of Sections 7116(a)(1) and (5) of the FSLMRS.[9]

2. Ignoring FLRA precedent

As the result of extensive litigation between the parties, the FLRA held that performance improvement plans (PIPs) were not contrary to the Accountability Act. *See US Dept of Veterans Affairs and AFGE NVAC*, 71 FLRA 211 (2020), *reconsideration denied*, 72 FLRA 76 (2021). It is a violation of the duty to negotiate in good faith to refuse to bargain on a proposal that has been determined to be negotiable by the Authority.

The evidence established that despite the ruling by the FLRA, the Agency sought to relitigate an issue that it had lost in litigation. Agency negotiators refused to accept the FLRA ruling because they "disagreed" with it. T. Vol. I, 49. Dargon testified as follows:

> So there is, again, a long history here about PIPs. We had a grievance here over this when the law was first passed in June of 2017, leading to very protracted litigation before the FLRA. Several decisions came out about it. And so we wanted to ensure that the existing protections that our employees have, again, that they get a PIP before there is a performance-based action proposed against them, was included in Article 14….
>
> And so we were quite frustrated to be sitting at the bargaining table in March and April of 2022 trying to again explain to the Department's negotiator as

[9] In 2021 the Agency was found to have engaged in bad faith negotiations for insisting to impasse on permissive subjects and was on notice that such conduct could subject it to a violation of the statute. *Dept. of Veterans Affairs and AFGE*, FMCS No.: 191120-02702 (Pearce 2021). *See* U. Ex. 6 at 26-28.

to why the same positions they took unsuccessfully in 2017, ‘18, ‘19, ‘20 and ’21 were wrong. T. Vol. I. 41-42, 49.

Martin admitted that the Agency refused to accept the FLRA precedent. He testified that “it’s an open question right now whether there’s going to be a conflict between an MSPB decision finding—potentially finding that the procedures in Article 27 are actually contrary to 714 and what the FLRA decision and said that they’re not contrary to 714.” T. Vol. II, 78. Further, Martin testified that “if the full Board [MSPB] issued a decision that was contrary to the decision the FLRA had issued, those two bodies are on an equal footing. And the dispute between them would have to be resolved.” T. Vol. II, 189. This analogy is inapposite because US Courts of Appeals are bodies with equivalent authority and jurisdiction.

Moreover, it is the FLRA and not the MSPB that makes determinations of negotiability and the decision by an administrative law judge or even the MSPB itself would not override a determination of negotiability by the FLRA which was dispositive one year earlier. Even if the MSPB had ruled on this issue, which the Agency was apparently waiting for, it would have no effect on FLRA precedent. The Agency’s refusal to abide by FLRA precedent in negotiations constitutes a failure to bargain in good faith in violation of §7116(a)(1) and (5) of the FSLMRS.

3. Repudiation of a Settlement Agreement

For the reasons stated at pages 24-26 supra, the Agency repudiated the July 2021 Settlement Agreement which attached the Ground Rules. A party’s repudiation of unambiguous terms in a Settlement Agreement constitutes a violation of §7116(a)(1) and (5). *See DODDS and Overseas Education Assn.,* 50 FLRA 424 (1995). The Agency’s

Article 46 proposal to alter substantive terms in unopened articles is a repudiation of the parties Settlement Agreement and constitutes a separate violation of §7116(a)(1) and (5).

III. Surface Bargaining

The Union argues that the Agency also engaged in surface bargaining and did not come to the table with a sincere resolve to reach agreement. *See AFGE Council of Prisons Local 33 and Bureau of Prisons, FCC Oakdale, La.,* 64 FLRA 288 (2009) ('[w]hen an agency gives the impression that it is futile for the union to attempt negotiations over its proposals, the agency has failed to engage in good faith bargaining in violation of the Statute."). Although the Union's argument regarding surface bargaining has several underpinnings, as explained below, I find some, but not all, to support this conclusion. To conclude that the Agency engaged in surface bargaining requires an examination of the totality of circumstances.

The Union argues that the Agency insisted on unreasonable positions to avoid negotiating and therefore engaged in bad faith bargaining. Proper bargaining requires a give and take on proposals, although agreement may not be reached on all issues. *See* e.g. *Baltimore v. AFGE,* 16 FLRA 217 (1984).

The evidence established that the Agency's repeated assertions that it had "no interest" or that it "disagreed" with the Union's proposals without counter proposal lends support to the Union's position that the Agency engaged in surface bargaining. Martin admitted that he repeatedly made such statements.[10] The negotiating notes established that on heels of these statements the Agency did not make counterproposals.

[10] During the May 27, 2022 negotiations the bargaining notes reflect that Martin said he disagreed 45 times, Negotiator Koemelink said it 13 times and Negotiator Foster said it twice. Jt. Ex. 10; T. Vol. II , 275.

The analysis of the totality of circumstances to establish surface bargaining also includes the Agency's regressive proposals on Articles 14 and 46. The Agency's proposals on both articles were regressive and attempted to remove longstanding provisions of the Agreement regarding Discipline/Adverse Action and LSAs from the Agreement. The Agency sought to remove the entirety of Article 14 except for the first sentence and the entirety of Article 46. Jt. Ex. 19. Negotiator Martin conceded that the Agency has a "higher burden" when "we're coming off current language." T. Vol. II, 89, 119, 196.

With respect to Article 14, the Agency wanted to unleash itself from requirements regarding discipline. The proposal to strike the "efficiency of the service" from the article was based upon the Agency's refusal to honor the FLRA precedent regarding PIPS that was previously discussed. Martin testified that "[t]he Departments position was that we did not want PIPs or the requirement for the Department to provide a reasonable opportunity for employees to demonstrate acceptable performance when we took actions under either Chapter 75 or 714." T. Vol. II, 67-68. The Agency sought to strike this language and also to limit the Article to Discipline and Adverse Action taken pursuant to Chapters 75 and 74 and limit the requirement for PIPS solely for Chapter 43 employees. As Negotiator Martin testified "[i]t was an attempt to make clear that the procedures in Article 27 (i.e., requirement for PIPs) solely to Chapter 43 actions. That was the attempt." T. Vol. II, 180.

The Agency's Article 14 proposal also sought to eliminate admonishments and reprimands. T. Vol. II, 178. This represented a substantial gutting of the existing rights afforded to represented employees.

Similarly, with respect to Article 46, there was testimony that LSAs had been in effect at least since the 1990 Master Agreement. The Union represents some 283,000 employees across the nation whose workplaces are diverse. As a result, there are hundreds of LSAs that address issues, such as parking, telework, overtime and other subjects. Martin's testimony that they were "antiquated," "burdensome" and that Agency simply did not want them anymore supports a surface bargaining conclusion[11]. He acknowledged that "we had never really envisioned a scenario where we wanted them to continue to preserve these local agreements…And so that was a position we were firm on." T. Vol. II, 121. The Agency's lack of movement, as demonstrated by its proposals and counterproposals with respect to Articles 14 and 46 also support the conclusion that the Agency engaged in bad faith bargaining under the totality of circumstances.

Moreover, the Agency's proposal regarding Article 46 had the effect of reaching into other unopened articles that referred to LSAs. Dargon testified regarding the Union's issues with the Agency's Article 46 proposal :

> …they never really explained what the problem was to begin with…we asked them time and time again, can you tell me what's wrong with the LSA in Indianapolis? Do any of you here have a problem with your LSAs, right? Not a single management official said anything…
>
> They seemed to be wanting to terminate these agreements in principle and the bigger issue is that proposing, really insisting that we terminate these local agreements is a waiver of our rights to bargain. T. Vol. I, 97.[12]

[11] The negotiations on Article 46 were further derailed by the Agency's insistence that Memorandums of Understanding ("MOUs") and Memorandums of Agreement "(MOAs") were LSAs that were governed by Article 46. T. Vol. II, 226, 247.

[12] Notes by the Union negotiators on the Agency's Article 46 proposals contain numerous references to the Agency's proposal being a "waiver" of the Union's statutory rights and a violation of the Ground Rules. See. Jt. Ex. 20; U. Ex. 1.

Martin admitted so much at the hearing:

> Q. So the Agency's proposal here to eliminate all areas in the article that provide for local bargaining, was to reach into those other article and change them. Correct?
>
> A. Yes. T. Vol. II, 268.

Martin further testified that he believed the Ground Rules permitted this because Article 46 "touches on all of those other things where local bargaining is referenced" and that he wanted a "unilateral ability to be able to make a change." T. Vol. II, 118, 270. Martin testified that his interest was in changing matters such as overtime, hours of work, alternative work schedules, time and leave and telework. T. Vol. II, 112. However, these subjects are addressed in unopened articles.[13]

In support of its position, the Agency argues that "[n]egotiations over Article 46 includes substantive issues that would require reaching into other Articles within the MCBA." Agency Brief at 20, note 4. However, this argument is premised upon a distorted interpretation of the Ground Rules allowing for formatting and other non-substantive revisions in unopened articles. Although LSAs contain substantive provisions, Article 46 is the vehicle by which they are negotiated and does not support the Agency's arguments with respect to its proposals and conduct in negotiations over Article 46. As set forth above, Ground Rules permitted non-substantive changes to other articles affected by a reopened article, but did not permit a substantive reach into unopened articles. Martin's testimony leaves no doubt that this was the Agency's objective.

The Agency also argues that there is no "bright line" for regressive bargaining. Nonetheless, the Agency's conduct with respect to its Article 14 and 46 proposals coupled

[13] *See* Article 21 (Overtime, Alternative Work Schedules and Hours of Work); Article 35 (Time and Leave); Article 20 (Telework).

with its lack of movement and "take it" or "leave it" conduct during negotiations on these issues as described above established surface and regressive bargaining under the totality of circumstances. Accordingly, the Agency has engaged in violations of Sections 7116(a)(1) and (5) and 7114(b)(1) by failing to bargaining in good faith with the Union.

I do not find that the Agency engaged in bad faith bargaining with respect to its declaration(s) of non-negotiability, caucusing or failure to send representatives with authority to the negotiations.

First, with respect to the Agency's assertion of non-negotiability on May 23, 2022, regarding the Union's proposal to reallocate employee awards in Article 16 the Agency identified its reasoning in its denial of the grievance. The Agency's position on negotiability involved its position that the Union's proposals would require it to provide mandatory compensation in violation of 38 U.S.C. §7422. That same day the Agency requested a §7422 determination by letter from the Acting Secretary Under Secretary of Health. The Union argues that this was not the correct official; however there is no basis on which to conclude that this request was made in bad faith.

The Union further argues that the Agency's invocation of non-negotiability on May 23rd served to frustrate and delay the process because the Agency withdrew its §7422 request on June 10, 2022 after the Union, on May 26, 2022 filed a negotiability appeal with the FLRA. However, what the Union fails to mention is that between May 26 and June 3, 2022 negotiations regarding Article 16 continued and several of the Union's proposals were withdrawn. This action by the Union in its counterproposal is what prompted the Agency to withdraw its request for a non-negotiability determination on June 10, 2022. Jt. Ex. 6. Although the Agency's action caused the Union to undertake efforts

to appeal the negotiability assertion, the delay with respect to negotiations was not excessive. The Agency's conduct with respect to its declaration of non-negotiability with respect to five of the Union proposals on Article 16 did not constitute surface bargaining.

Similarly, the allegations in Grievance No. 2 regarding the Agency's extended caucus during Session 5 negotiations in California does not rise to the level of bad faith bargaining. At the start of continuation of negotiations on Article 46 that week the Union made it clear that they would not agree to the Agency's proposal that called for, among other things, the expiration of LSAs. Negotiator Martin testified that this caused the Agency, which had previously undertaken a review of LSAs, to re-examine its position and the negotiating team undertook a review of its computerized database of LSAs by topic and area. Although this did waste valuable time that was scheduled for negotiations, I do not find that it was a delay that was intended to frustrate or obstruct negotiations as opposed to an effort by the Agency to reassess its position in light of the Union's strong interest in preserving LSAs. Moreover, the record does not support the Union's assertion that the Agency engaged in "incessant" caucusing throughout the negotiations.

Nor was there evidentiary support that the Agency's bargaining representatives did not have authority to make agreements. The evidence established that Martin had authority to speak for the management team and make agreements to bind the Agency as Chief Negotiator. The Union's testimony on this point was less than compelling:

> Q. …Was there ever an issue with whether the parties at the table had authority to agree on a proposal?
>
> A. Well, Sometimes. …I mean, sometimes they would agree to something, just to step out. And then they would let us know what their position was or maybe we would have a side bar discussion out in the hallway. T. Vol. I, 29-30.

Such conduct is common in negotiations and does not rise to the level of bargaining in bad faith.

Thus, The Union has not established that the Agency engaged in bad faith bargaining by requesting a non-negotiability determination on May 23, 2022, that it engaged in dilatory tactics in caucusing during negotiations, or that it failed to send authorized representatives to negotiations.

CONCLUSION

For the foregoing reasons, the Agency has not met its burden to establish that the allegations in the Union's May 9, 2022 grievance (Grievance No. 1) regarding Session 1 (March 1-10, 2022) are untimely and procedurally unarbitrable. The Agency's Motion in Limine to strike testimony of Negotiator Dargon is denied.

The Union has established that the Agency violated the July 2021 Settlement Agreement and Ground Rules, and Articles 2 and 49 of the Master Agreement. The Agency has also violated the FSLMRS by unlawfully insisting to impasse on permissive subjects, failing to recognize FLRA precedent, repudiating the July 2021 Settlement Agreement and Ground Rules, engaging in surface bargaining and failing to bargain in good faith with the Union.

With respect to Grievance No. 2, the Agency's course of conduct in negotiations and proposals regarding Article 46 violated the July 2021 Settlement Agreement and Ground Rules, Articles 2 and 49 of the Master Agreement and the FSLMRS by failing to bargain in good faith with the Union. The remaining allegations in Grievance No. 2 regarding dilatory tactics and failure to send authorized representatives to negotiations have not been substantiated.

AWARD

Based on the evidentiary record and totality of circumstances the Agency has violated the July 2021 Settlement and Ground Rules, Articles 2 and 49 of the Master Agreement and Sections 7114(b)(1) and Sections 7116(a)(1) and (5) of the FSLMRS by committing unfair labor practices and failing to bargain in good faith with the Union ("Grievance No. 1").[14] The Agency has also violated the July 2021 Settlement and Ground Rules, Articles 2 and 49 of the Master Agreement and the FSLMRS by committing unfair labor practices and failing to bargain in good faith as alleged in Grievance No. 2 with respect to its conduct and proposals regarding Article 46.

The Arbitrator directs the Agency to cease and desist from:

1) Violating Sections 7114(b)(1) and 7116(a)(1) and (5) of the Federal Service Labor Management Relations Statute and in so doing, violating Articles 2 and 49 of the 2011 Master Agreement and the July 2021 Settlement Agreement between the American Federation of Government Employees, and the Department of Veterans Affairs and by:

2) Bargaining in bad faith during collective bargaining negotiations with the American Federation of Government Employees by 1) violating the July 2021 Settlement Agreement and Ground Rules for negotiations; 2) insisting to impasse on permissive subjects; 3) ignoring FLRA precedent; 4) repudiating the July 20, 2021 Settlement Agreement; and 5) engaging in a course of conduct of surface bargaining and bad faith bargaining;

3) Engage in good faith bargaining with the Union and rescind its proposals for Article 14 Article 46;

4) Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   Electronically post the NOTICE below, signed by the Secretary and post in the same locations and manner as would be required after an order of the FEDERAL LABOR RELATIONS AUTHORITY. The

[14] The Union has not established that the Agency's conduct with respect to seeking §7422 determinations regarding non-negotiability was in bad faith.

electronic NOTICE shall be posted and maintained for 60 consecutive days. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

5) The Arbitrator will retain jurisdiction for 60 days to resolve any disputes arising regarding the remedy.

NOTICE TO ALL EMPLOYEES

POSTED PURSUANT TO AN ARBITRATION OPINION AND AWARD
BETWEEN AFGE AND THE DEPARTMENT OF VETERANS AFFAIRS

An Arbitrator having authority comparable to that of an administrative law judge of the Federal Labor Relations Authority has found that the United States Department of Veterans Affairs, violated the July 2021 Settlement Agreement and Ground Rules for negotiations, Articles 2 and 49 of the Master Agreement and the Federal Service Labor Management Relations Statute and has ordered us to post and abide by this Notice.

`WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT bargain in bad faith during collective bargaining negotiations with the American Federation of Government Employees by 1) violating the July 2021 Settlement Agreement and Ground Rules for negotiations;
2) insisting to impasse on permissive subjects; 3) ignoring FLRA precedent;
4) repudiating the July 20, 2021 Settlement Agreement and Ground Rules;
5) engaging in a course of conduct of surface bargaining and bad faith bargaining;

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured them by the Federal Service Labor-Management Relations statute.

WE WILL, rescind proposals regarding Article 14 and 46 and hereafter bargain in good faith and with a sincere resolve to reach a collective bargaining agreement.

(VA)

By: (Signature) (Title)

Date

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Dated: March 9, 2023
Ocean Grove, New Jersey

Felice Busto

State of New Jersey }
County of Monmouth } ss:

On this 9th day of March, 2023, before me personally came and appeared Felice Busto to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Madeline R Boone

Madeline R Boone
NOTARY PUBLIC
State of New Jersey
ID # 50198320
My Commission Expires 6/23/2027