IN THE MATTER OF ARBITRATION BETWEEN

Federal Education Association, Stateside Region **Union,**	)	
and	)	**FMCS Case No. 190227-04572**
	)	**Arbitrator: Neal Orkin, J.D.**
U.S. Department of Defense Domestic Dependent Elementary & Secondary Schools (DDESS) **Agency**	)	

Place of Hearing: Alexandria, VA

Date of Hearing: September 11 & 12, 2019

Appearances:

For the Union: Ben Hunter, Esq.

For the Agency: Alexa Rukstele, Esq.

Witnesses:

For the Union:

Richard Tarr

Jane Loggins

Diane Gibbs

Venita Garnett

For the Employer:

Frank King

Allen Brooks

BACKGROUND

On September 11 & 12, 2019, I conducted a hearing between the Federal Education Association, Stateside Region (Union or FEA-SR) and the Department of Defense Domestic Dependent Elementary Schools (DDESS or Agency). The Union had filed two grievances under Article 26, Section 5, of the 2005 Master Labor Agreement (MLA, J-8) between the parties, and sought arbitration after the parties could not reach agreement.

As stated in its brief, The Union has the option to pursue either an unfair labor practice (ULP) or an arbitration under the MLA, but not both (U Br., at 26, 5 U.S.C. § 7116(d)). This differs from the private sector where such option may not exist, depending upon the circumstances. An ULP there would be filed with the National Labor Relations Board (NLRB), and would be subject to specific statutory remedial action. If the aggrieved union or employee had filed a grievance under a collective bargaining agreement (CBA) that resulted in an arbitration, the arbitrator would interpret the provisions of the CBA, not the National Labor Relations Act, except in circumstances where there might be an overlap. In addition, the subject matter in contention in the private sector would be restricted by NLRB rules regarding deferral to arbitration. Such is not the case at hand.

With this option available to aggrieved parties, the Federal Sector arbitrator is granted more leeway, and the Federal Labor Relations Authority (FLRA) may defer to an arbitrator's award interpreting the ULP (*American Federation of Government Employees, Council 236 and General Services Administration,* 63 FLRA 651 [FLRA 2009]). Therefore, I shall decide the issues by interpreting the relevant sections of the MLA, the actions of the parties, and any statutory requirements.

As the party going forward on an issue of contractual interpretation or an ULP the Union has the burden to prove its case by a preponderance of the evidence.

The parties were engaged in negotiating a successor MLA to the one previously executed on 6 December 2005. The parties reached agreement over most issues, but four remained unresolved. Assisted by a federal mediator, the parties reached an agreement on 28 August 2015, that reads in part: "g. Except by mutual agreement, all agreed upon Articles/Appendices remain agreed and not subject to further modification, & "h. Parties reserve the right to modify their proposals concerning any Article/Appendix to which the parties have not yet reached agreement". (U-18). In February 2018 the Union received notice from the Agency that it would "implement DoDEA's (Department of Defense Education Agency) Last Best and Final Offer on Thursday, March 8, 2018**"**. (U-14). The Union requested the services of the Federal Service Impasse Panel (FSIP). (U-28). The Union withdrew its request and pursued mediation through the Federal Mediation & Conciliation Service (FMCS). (U-33, 34, 35).

On July 23, 2018, the Agency requested the services of the FSIP to resolve the differences between the parties. On December 14, 2018, FSIP ordered the parties to adopt the Agency's proposal concerning make-up inclement weather days. (J -6). On January 11, 2019, the Director of the Defense Civilian Personnel Advisory Service (DCPAS) signed a memorandum conditionally approving the agreement. (J-7). The Union never signed the signature page.

On February 9, 2019, the Union filed Association Grievance 2018/19, no. 19 over the Agency's submission of the unexecuted draft to DCPAS. (J-1). On February 11, 2019, the Agency's Chief Negotiator emailed the Union that it considered the effective date of the successor MLA to be January 11, 2019, the date that it was approved by the Agency Head review by the Department of Defense. (J-3). However, the Union replied that it considered the notice to be an express repudiation of the 2005 MLA, and subsequently filed Association Grievance 2018/19,no.2. (J-3). On February 5, 2019 the Agency denied both grievances. (J-2 & J-4). On May 30, 2019, it emailed the Union a "Final Draft" of the MLA, and requested the Union sign the signature page. (J-9). The Union did not sign, and sought arbitration.

ISSUES

1. **Is the Grievance Arbitrable?**

DISCUSSION

The Agency contends that the Union did not properly comply with the specific requirements of MLA, Article 26, Section 5(a) which states: "Association or Agency grievances may be filed only at the DDESS level by the respective officials at the regional level utilizing the form at Appendix Q". The Agency also relies on Article 27, Section 4 of the MLA which specifies "issues not raised during the grievance process, shall not be raised nor considered by the arbitrator during the arbitration process". By relying on Joint Exhibits 2 and 4 (notifications to the Union concerning the absence of the form in Appendix Q) given to the Union on September 10, 2019 (J-10, J-11), the Agency argues that it had properly notified the Union about this issue prior to the hearing on September 11 & 12, 2019. The Agency contends that the Union was, in fact, timely notified, satisfying the MLA requirements. Therefore, the grievances should be dismissed because of procedural deficiencies.

The Union contends that the Agency notifications in Joint Exhibits 2 and 4 are an "11th hour stunt and a frivolous attempt to manufacture a new issue which the Agency never raised during the grievance procedure in order to distract from the merits of the Union's ULP claims". (U Br. at 23). The Union also contests the validity of the formatting requirement since it does not appear in the 2005 MLA, but only in the contested 2019 version. It further argues that neither version provides an express basis for cancelation or rejection of the grievances if the formatting procedure is not met.

This issue is resolved by simply interpreting the clear language contained in MLA, Article 26, Section 5(a). Two key words in this section are "may" and "only". Used in this article, "may" signifies a

permission to file a grievance using the specified form. The drafters could have instead inserted "must" or "shall", which would indicate an obligatory condition requiring use of the form in Appendix Q. In addition, the term "only" refers to that level of the hierarchy to which the form is to be filed. Taken in its entirety, MLA Article 26, Section 5 (a) does not make the form in question, either expressly or impliedly, a mandatory requirement for processing a grievance, whereby non-use would lead to cancelation or rejection. The Union's use of a similar grievance form, previously used over an extended time period, did not violate the intent of the MLA provision in question.

When the Union filed its grievances in February 2019 the contested successor MLA, including the section at issue, would have been in effect for only one month. The parties could hardly be expected to require a newly introduced form to be a mandatory requirement in that short a time period; the Agency did not protest this at the earlier steps of the grievance procedure. This fact, in addition to the late notice concerning the improper form provided by the Agency one day prior to the arbitration hearing, lend further credence to the Union's position on this matter. Since April 2019 the Union has, however, utilized the form in Appendix Q (Ag Br., Fn. 15).

In addition, Restatement (Second) of Contracts, § 206, stipulates that if the terms of a contract are subject to interpretation, the preferable meaning is against the party who drafted the term. In this instance that would be the Agency. Furthermore, the requirement for using the grievance form in Appendix Q never went into effect. As I note later in my Award, the January 11, 2019 MLA was not properly executed.

CONCLUSION

I find that he Union has met its required burden of proof. The grievance is arbitrable.

2. Is Article 18, Section 3(f) of the MLA Enforceable, and Was the Union's Withdrawal From Its Previous Approval of Article 18, Section 1(a) Valid?

DISCUSSION

The parties began negotiations for a successor MLA in 2010. The important relevant facts in this arbitration proceeding begin with an August 28, 2015, Memorandum of Agreement between the Agency and Union that reads in part:

> a. The current MLA will remain in full force and effect until superseded by a properly executed Master Labor Agreement.
> g. Except by mutual agreement all agreed upon Articles/Appendices remain agreed and not subject to further modification .
> h. Parties reserve the right to modify the proposals concerning any Article/Appendix to which the parties have not yet reached agreement. (U-18).

The parties, after several attempts to agree on a new MLA, took their dispute to the FSIP which directed them to participate in an Informal Conference with Member Karen Czarnecki on October 23 and 25, 2018. (J-6). In its decision of December 14, 2018, the FSIP ordered the parties to adopt the Agency's proposal including the disputed Article 18, Section 3(f). (J-6, at 6-7). That section reads:

If the Agency closes schools on days that are assigned as work days as a part of the work year, due to inclement weather or other emergency, the Agency may extend the work year for an equal number of days **without compensation to employees**. (Emphasis added.).

The Union was concerned that the above contract provision contradicted the wording of the existing signed Article 11, Section 5(b):

In the event school is closed during the school year, the Agency may re-schedule the day(s) lost from non-instructional days or extend the work year. For any work assigned by the Agency under these circumstances outside the work year/day **employees will be paid his/her EHR (**Earned hourly rate). (Emphasis added.).

In related emails on January 9-11, 2019, the parties exchanged differing opinions on whether there was an executed new MLA, with the Agency stipulating that the CBA [sic] was conditionally approved as of January 11, 2019. (J-7). The January 11, 2019, email from the DCPASS Director contained a signature page on which it requested the Union sign.

On February 9, 2019, the Union filed Associated Grievance 2018/9, no. 19, regarding the Agency's submission of the unexecuted draft to DCPASS. (J-1). The response from the Agency's Chief Negotiator on February 11, 2019, stated that the effective date of the MLA was January 11, 2019, the date it had been approved by the Agency Head review by the Department of Defense. (J-3). The Union responded that it considered the notice an express repudiation of the 2005 MLA (J-3), and it filed Association Grievance 2018/19, no. 21 (J-3). The Agency denied both grievances (J-2 & J-4).

On March 7, 2019, Dr. Judith Minor, DoDEA Americas Director for Student Excellence, sent a memorandum to all bargaining unit employees titled: "Implementation of Master Labor Agreement". (U-23). On May 28, 2019, the Union notified the Agency that it was withdrawing from the parties' earlier tentative agreement over Article 18, Section 1(a). (U-39).

The Agency's Position

The Agency argues that if an agreement is reached, 5 U.S.C. §7114(b)(5) requires the parties to "execute [it] on the request of any party". (Ag Br., at 8-9). It further states "the date of execution that triggers the time limits for agency head review under [§]7114(c)(2) relates to the date on which *no further action is necessary to finalize a complete agreement*". (My emphasis added.) (Ag Br., at 9). This argument is not relevant here as the issue is whether there was, in fact, a "complete" agreement since the Union had never signed the contested MLA.

The Agency relies on *Masters, Mates, and Pilots*, 36 FLRA 555 (1990) and *AFGE National Veterans Affairs Council*, 39 FLRA 1055 (1991). (Ag Br. At 9). The Agency's Brief states: "Where the complete agreement contains *bilaterally agreed upon provisions*, to include those reached during mediation and/or an informal conference, as well as those imposed by the Panel, and *no further bargaining* is required, no further action is needed to finalize an agreement for agency head review". (id.) (My emphasis added.). The Agency assumes here that there was a "complete agreement" that included "bilaterally agreed upon provisions", making the contested provision enforceable. Such is not the case, as the Union continually refused to acknowledge Article 18, Section 3(f) as part of the successor MLA.

The Agency also argues that the Union's position that the MLA was not properly executed was unsupported by 5 U.S.C. §7119 and Authority case law. (Ag Br., at 10) It relies on 5 U.S,C, §7119(c)(5)(C). The Agency cited an instance in which a party filed an Unfair Labor Practice with the FLRA subsequent to a FSIP decision (*AFGE Local 1815* 69 FLRA 309 [2016]). In that case it was the union that had committed an Unfair Labor Practice when it failed to execute a FSIP order. (Ag Br., at 12). The Agency acknowledges here that refusal to adopt a FSIP order may be remediated by filing an Unfair Labor Practice or alternatively, an arbitration proceeding. More importantly, the Agency did not provide any legal basis that would allow enforcement of a provision in a CBA that had not been mutually agreed on or signed by both parties.

The Agency compares the present case to *Local 1815* which involved a union's failure to sign the executed agreement in order to extract concessions that it had already signed away. (Ag Br., at 13). The Agency argues that the cases are similar since FEA-SR had withdrawn its prior approval of Article 18, Section 1(a) seven months after its approval of that provision and implementation of the successor MLA. (Ag Br., at 13). However, there is a substantial difference between the two. In the present case the

Union exercised its rights under the Ground Rules for Collective Bargaining, Section L. which reads in part:

L. Initializing And Dating: …… However, until the entire Article has been agreed to, the Parties are free to reopen any previously agreed to sections or sub-sections of an Article. Upon reaching agreement on an Article, if any, it is agreed that negotiation of that Article has been concluded and any right to further negotiation of the substance of the Article will not be permitted, except upon mutual consent of the Parties. (J-5).

The Union had the legal right to withdraw its support for Article 18, Section 1(a) in its email of June 19, 2019. (U-39). It argued that bargaining for the contested Article 18, Section 3(f) had not concluded, and the successor MLA had not been properly executed. (U-39).

The Agency's Brief further states: "The Union's refusal to sign the agreement was immaterial because the Agency Head review period still begins on the date of the issuance of the FSIP decision and order unless there were *unresolved substantive bargaining issues*". (Ag Br. At 11-12). (My emphasis added.). The Agency acknowledges that the review period begins on the date of the FSIP decision, but not if there were unresolved substantive bargaining issues, as there were in the present case.

The Agency's final argument concerning the date the successor agreement takes effect would be valid, except for one major point. (Ag Br., at 13-14). The MLA was not signed or properly approved by the Union. In fact, the successor MLA, Article 35 states: "This Agreement will be considered executed on the date of *signatures by the parties designated signatories*." (Emphasis added.).

The Agency's Brief failed to mention any possible conflict between Article 11 Section 5(b) and the proposed Article 18 Section 3(f). It offered no interpretation or defense of the terms in dispute.

THE UNION'S POSITION

The Union refused to honor FSIP's decision to implement the unsigned MLA, and sought arbitration to settle this dispute. An aggrieved party, at its discretion, may choose arbitration or a remedy from the FLRA, but not both. If the party chooses arbitration, under 5 U.S.C. §7116(d), the arbitrator may consider issues of contract violations and the statute, and may grant appropriate remedies.

The Memorandum of Agreement cited earlier (U-18), and signed by both parties, required that the 2005 MLA be in full force until superseded by a *properly executed* Mater Labor Agreement. (Emphasis added.). Additionally, the Ground Rules required the parties to formally execute the entire agreement prior to submission to Agency Head review:

P. Approval of Collective Bargaining Agreement. Once agreement is reached on all proposals/provisions of the collective bargaining agreement, and it is signed, the agreement will be formally executed (signed and dated) and submitted for Agency Head review in accordance with 5 U.S.C. §7114(c)(1) through (4). (J-5).

On February 23, 2018, the Agency notified the Union that on March 8, 2018, it would implement the contested MLP whether or not the Union agreed to execute it. (U-14). The Agency did implement the MLA, incorporating the contested Article 18, Section 3(f), and on January 9, 2019, the Union refused to recognize an unexecuted agreement as binding if it included the disputed section. (J-3).

The Union's request for arbitration is based on its right to challenge an order of the FSIP, resting on established case law: *AFGE Local 3732 and Department of Transportation, Maritime Administration, U.S. Merchant Marine Academy,* 16 FLRA 318 [1984]).

The Union contests the Agency's position that the successor MLA was properly executed and sent for Agency Head Review. It stresses that on the basis of MLA Article 35, cited above, that it was not

correctly executed since the Union had not signed as required. It further argues that bargaining between the parties was not complete when the Agency alerted it that it would implement the unsigned successor MLA. It informed the Agency that there was no authority that allows the employer to implement a successor MLA without executing a final agreement. (J-1; U Br. at 36.). The Union stated it would comply with the elements of the FSIP order, but not the contested portion of Article 18. (J-3; U Br., at 38).

The Union also notes that the Agency could have filed ULP charges against the Union when it refused to abide by FSIP's order. (U BR., at 39). The Agency chose not to do so, but instead unilaterally sent the MLP for Agency Head review. Refusal to obey a FSIP order may result for either party in a ULP charge with the FLRA or an arbitration proceeding; in either case the party refusing the FSIP order does so at its own risk.

The Union contends that Article 18, Section 3(f) is a permissive subject of bargaining. It states that the contents of this disputed article were already covered by the existing Article 11, Section (5), and under Paragraph P of the Ground Rules, a matter covered by an existing agreement is considered a permissive subject of bargaining. (J-5; U Br., at 41). It further argues that it was within its rights to withdraw from bargaining for a permissive subject before the parties reached a final agreement. (*AFGE Local 3937 and Social Security Administration,* 64 FLRA 17 [2009], and *NAGE, Local R4-75 and Dept. of Interior, National Parks Service* 24 FLRA 56 [1986]). (U Br., at 41). The Union notified the Agency on November 2, 2018, that it encouraged it to withdraw the contested article. (U-8). The Union expressed concern about whether the two conflicting articles could be reconciled. It is the Union's contention that FSIP had exceeded its authority.

OPINION

As I have previously noted in my Award, I shall separately resolve the issues in this case by examining the elements of contractual matters and those that involve possible instances of Unfair Labor Practices under applicable statutes.

A. THE MASTER LABOR AGREEMENT

The major issue between the parties centers on Article 18, Section 3(f) of the successor MLA. Is it enforceable without the proper signatures of all of the parties? Can it be reconciled with existing Article 11, Section 5(b)?

Article 11, Section 5(b) reads:

In the event school is closed during the school year, the Agency may re-schedule the day(s) lost from non-instructional days or extend the work year. For any work assigned by the Agency under these circumstances outside the work year/day **employees will be paid his/her EHR (**Earned hourly rate). (Emphasis added).

The contested Article 18, Section 3(f) reads:

If the Agency closes schools on days that are assigned as work days as a part of the work year, due to inclement weather or other emergency, the Agency may extend the work year for an equal number of days **without compensation to employees**. (Emphasis added.)

The Union was concerned that the two could not be reconciled. In its November 2, 2018, email to the Agency, it wrote:

"In reviewing the agreed upon Articles of the successor MLA, it has come to my attention that the parties have already reached an agreement regarding the treatment of make-up days for inclement weather and emergencies in Article 11 (signed January 2016), and Appendix O (signed October 2010). In accordance with paragraph L. of the parties' ground rules, bargaining concluded on the subject once the parties signed off on Article 11.

The Agency's proposed Article 18 (3)(f) conflicts with both Article 11 and Appendix O. So that we can dispose of this issue prior to submitting written submissions to the Panel, please confirm (after reviewing the agreed upon language in Article 11, Section 5 and Appendix O) whether the Agency withdraws its proposed Article 18(3)(f)". (U-8).

The conflict between the two terms is evident: will employees be compensated at their earned hourly rate, or not at all for cancelation due to inclement weather conditions? The two segments are wholly at odds. In an email of November 8, 2018 (U-8), the Agency provided a cryptic and inscrutable attempt to explain how the conflicting sections might be interpreted and reconciled. The Union's response in an email one day later demonstrated its concerns over enforceability. (U-8). The Agency failed to offer any interpretation of this clause in its Brief. A plain reading of the two sections clearly displays a conflict that should have been resolved through negotiations. As I stated earlier in my Award, when there is an ambiguous contract word or term, it is strictly construed against the drafting party. (Restatement [Second] §206). For example, if a contract term states that the work shall be completed within 60 days, would that denote calendar days or work days, which would then exclude weekends and holidays?

In determining the intent and meaning of an ambiguity in a contract term one may utilize parol (oral) evidence of the parties' contemporaneous discussions, or the parties' notes to assist in a final resolution. The Agency's Brief failed to provide any written interpretation that would aid in resolving the meaning and intent of the contested section. In fact, that Brief makes no mention at all of any conflict in these terms of the contract. Additionally, no testimony was given at the hearing by any of the Agency's witnesses on this issue. From a strictly contractual perspective the contested section is unenforceable.

When the contested section was proposed by the Agency the conflict in terms may not have been evident. However, the Union's notification should have convinced the Agency of its likely

unenforceability, and negotiations should have continued. (U-8). Most importantly, the Agency's Brief never discussed the issue of interpretation, nor did it provide any clarification of how the two sections could coexist, one of the core issues in this arbitration. In essence, it offered no defense for its insistence that Article 18, Section 3(f) be valid. The Agency's Brief instead centered on clarifying the effective date for the successor MLA.

The Union's position that the MLA was not properly executed is correct. As noted in the Union's Brief, the Ground Rules required that the parties formally execute the entire agreement prior to submission to Agency Head review once agreement is reached:

> P. Approval of Collective Bargaining Agreement. Once agreement is reached on all proposals/provisions of the collective bargaining agreement, and it is signed, the agreement will be formally executed (signed and dated) and submitted for Agency Head review in accordance with 5 U.S.C. §7114(c)(1) through (4). (J-5).

Since the Union had never signed the MLA it was never properly executed. The Agency did not have the authority to submit the MLA for Agency Head review without the proper signatures. The Agency was unable to provide any legal basis or prior case in which an unsigned collective bargaining agreement or provision was properly executed. As I noted earlier in my Award, the Agency's argument that the Union's refusal to sign was immaterial because the Agency Head review period begins on the date of the issuance of the FSIP decision and order *unless there were unresolved substantive bargaining issues.* (Emphasis added.) (Ag Br., at 11-12). Again, The MLA was neither signed nor properly approved by the Union as per the successor MLA, Article 35: "This Agreement will be considered executed on the date of *signatures by the parties designated signatories*." (Emphasis added.).

The Union's position that that Article 18, Section 3(f) is a permissive bargaining subject is accurate; the subject matter was already covered by Article 11, Section 5. Therefore, the Union had the legal right to withdraw from bargaining on this term as noted earlier in my Award.

The Union also had a legal right to withdraw its previous approval of Article18, Section 1(a). The Union is correct that this right is based on the Ground Rules, Section L, as noted earlier. Bargaining over Section 18 had not concluded as the Union had never signed off on the contested Section 3(f). Additionally, that section is unenforceable on its face.

Therefore, Article 18 remains an open subject matter for bargaining that must continue.

B. **THE UNFAIR LABOR PRACTICE**

"The only sound approach to collective bargaining is to work out an agreement that clarifies the rights and responsibilities of the parties, establishes principles and operates to the advantage of all concerned". (Charles E. Wilson, CEO General Motors).

Collective bargaining in the Federal Sector is governed by 5 U.S.C.§7114, et. seq. Section (a)(4) requires:

> Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, *shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement*. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation. (Emphasis added).

Many of the facts that I have discussed previously in my Award as violations of the contract also pertain to unfair labor practices committed by the Agency.

The Union was correct in its argument that FSIP should not have issued a decision ordering the parties to accept the Agency's proposed version of Article 18, Section 3(f), as it was a permissive subject of bargaining explained earlier in my Award. The Union had a right not to accept FSIP's order and, in

turn, to file grievances leading to arbitration. The Union was within its rights to withdraw from its earlier acceptance of Article 18, Section 1(a) under the Ground Rules, Section L, as above.(U-39).

I need not base my decision on the Union's position that in a similar case (*AFGE Local 1815*, 71 FLRA 127 [2019]), language comparable to Article 18, Section 1(a) was ruled unenforceable.(U Br., at 56-58). The issue involving Section 1(a) may be resolved by other means, namely a refusal by the Agency to bargain in good faith. The Union had properly withdrawn its earlier acceptance on this section, as bargaining on Article 18 remained incomplete. The time between the Union's acceptance of Section 1(a) and its withdrawal approximately seven months later is irrelevant. When it initialed its acceptance bargaining had not concluded, and the Agency had an obligation to continue negotiations regarding Article 18. During that time period, Article 18, Section 1(a) was **never** in effect since negotiations had not been completed on that Article. So the Agency may not argue that during that seven month period the employees' rights should be determined on the basis of an unexecuted Section 1(a), and this, in turn, shall not in any way effect any remedy available to the Union.

Unfair Labor Practices are detailed in 5 U.S.C. §7116, subsection (a):

For the purpose of this chapter, it shall be an unfair labor practice for an agency-
(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

The Agency had an obligation to continue bargaining in good faith with the Union. The Agency sent an unexecuted and unsigned MLA for Agency Head review; it had no authority to do so. The Agency attempted to repudiate the 2005 MLA when it advised the Union that the effective date of the unsigned successor MLA was January 11, 2019.(J-3). In its response to the Union's grievance, the Agency stated, "… DoDEA considers the successor MLA to be in effect as of January 11, 2019."(J-2). This clearly indicates that the Agency considered the 2005 MLA no longer in effect, and thereby repudiated.

As I noted earlier in my Award, the Agency's submission for Agency Head Review violated Paragraph P. of the Ground Rules which requires execution (signing and dating) prior to submission. The Duration Clause of the disputed successor MLA (Article 35, Section 1.) also requires proper execution.(J-

9). The Agency had an obligation to continue good faith bargaining which it refused. Most importantly, the Agency provided not a single case or legal basis upon which a collective bargaining agreement or term was valid without a signature or acceptance by one of the parties. This is further evidence of bad faith bargaining.

The Agency had the right to file Unfair Labor Practice charges against the Union when the Union refused to sign the Successor MLA:

> 5 U.S.C. §7116(b),
> For the purpose of this chapter, it shall be an unfair labor practice for a labor organization:
>
> (6) to fail or refuse to cooperate in impasse decisions as required by this chapter;

The Agency also had the right to file a grievance against the Union for refusing to implement a FSIP decision. The Agency chose not to do either. Instead it sent an unexecuted and unsigned successor MLA for Agency Head review. The Agency has provided no FLRA or federal court decision that would allow the Director of DCPAS to implement a collective bargaining agreement without a union's assent.

Allen Brooks, DCPAS Director of Labor and Employee Relations, sent the Union a memo on January 11, 2019. It asserted that the effective date for the successor MLA was "December 14, 2018, the date on which the only remaining disputed provisions of the agreement were imposed on the parties and *no other steps required for execution*".(J-7) (My emphasis added). That date referred to the FSIP Decision and Order which was imposed on the parties. In its email of January 9, 2019, concerning the grievance it had filed, the Union asserted that bargaining was incomplete.(J-7).

I find that bargaining was never completed, and the Agency engaged in unfair labor practices by its refusal to continue negotiations on the unresolved segments of the MLA. The Agency had no right or authority to implement an agreement without the consent of the Union. It had the option to file ULP charges with the FLRA or to seek arbitration and continue negotiations. Instead it chose to take the extraordinary and unprecedented step by attempting to force the Union to accept a clause that is clearly

unenforceable on its face, effectively delegitimizing the collective bargaining process. The essence of collective bargaining requires mutual assent by both parties; that did not occur in the present case.

The totality of conduct by the Agency presents a clear and blatant violation of 5 U.S.C. §7116 (a)(5).

SUMMARY

1. The grievance is arbitrable.
2. Article 18, Sections 1(a) and 3(f) are unenforceable and were **never** executed.
3. The Agency engaged in unfair labor practices under 5 U.S.C. §7116 (a)(5) by refusing to negotiate in good faith with the Union.
4. The 2005 MLA remains in effect. Those Articles for a successor MLA that have been mutually agreed on and signed by both parties remain in effect.

REMEDIES

As an arbitrator I am permitted to grant remedies equivalent to those in an Unfair Labor Practice case before the FLRA (*NTEU and FDIC,* 48 FLRA 566 [1993]), and those for breach of a collective bargaining agreement. Under my authority as arbitrator in this matter I am imposing the following remedies:

1. I am retaining jurisdiction to resolve any issues regarding interpretation, clarification, or questions regarding the enforcement of my Award. The parties shall meet and confer in good faith to resolve those issues below that need clarification or negotiation. The Agency shall provide the Union with any relevant documents necessary for clarification of the

remedies. The parties shall inform me by February 28, 2020, that they are either: 1) in total agreement, thus concluding this arbitration, or 2) they require my additional services. If they are not in complete agreement, they may mutually decide to either of the following methods to dispose of the matters remaining at issue: a) a one day arbitration hearing before me, or b) my remote review of documents in contention that may include appropriate briefs and any other relevant paperwork.

2. I am authorized by *U.S. Dept of Justice, Federal Bureau of Prisons and AFGE Local 1661,* 55 FLRA 201 (1999) to reinstate or order compliance of a CBA or any of its terms. The Agency shall therefore reinstate and comply with the terms of the December 6, 2005 MLA. Those additional articles that have been mutually agreed on and signed by both parties remain in effect.
3. The Agency shall cease and desist from bargaining in bad faith.
4. The Agency shall post notices in all employee locations that it will abide by the terms of the December 6, 2005 MLA, and desist from bargaining in bad faith.
5. All bargaining unit employees shall be made whole for any loss of pay, allowances, and differentials authorized by the Back Pay Act, 5 U.S.C. §5596 resulting from the Agency's repudiation of the 2005 MLA.
6. The Agency shall preserve:
    a. Records sufficient to determine the number of additional non-compensated hours each bargaining unit employee was assigned following the Agency's repudiation of the December 6, 2005 MLA.
    b. Records sufficient to determine the number of additional non-compensated days each bargaining unit employee was assigned following the Agency's repudiation of the December 6, 2005 MLA.

c. Leave records sufficient to determine whether bargaining unit employees were charged additional leave on days the agency assigned non-compensated work hours.

d. Pay records sufficient to calculate any loss of pay resulting from changes to employees' annual pay increase.

e. Pay records sufficient to calculate any loss of retirement benefits resulting from changes to employees' annual pay increase.

7. I am also retaining jurisdiction to consider an award for reasonable attorney fees for the Union authorized under 5 U.S.C. §5596.

_____ January 2, 2020

Neal Orkin, J.D. Date