In the Arbitration Between

DEPARTMENT of DEFENSE EDUCATION ACTIVITY

and

FEDERAL EDUCATION ASSOCIATION

Opinion and Award

FMCS Case No. 200622-07341 (#AG 20-02 - Bad Faith Bargaining/Unfair Labor Practices)

On Brief

For the Agency	-	Karen Mayo, Esq.
For the Union	-	Suzanne Summerlin, Esq.
Arbitrator	-	Charles Feigenbaum

The parties to this dispute are the Department of Defense Education Activity (DoDEA or Agency) and the Federal Education Association (FEA or Union). The Arbitrator was selected under the procedures of the Federal Mediation and Conciliation Service (FMCS). There was no hearing; by agreement of the parties and the Arbitrator, the record consists of written documentation (evidence and argument) provided to the Arbitrator via email attachments.

Based on this record, I make the following findings and Award.

ISSUE

There are three sub-issues to this dispute. The parties stipulated the first two

as follows:

1. Did the Agency violate the Statute,[1] specifically sections 7116 – 7119,[2] during term negotiations from May, 2019 through April, 2020 when it relied on the Trump Administration Executive Orders #13836, 13838, and/or 13839?

2. Did the Agency violate the Statute, specifically sections 7116 - 7119, during term negotiations from May, 2019 through April, 2020 by failing to bargain in good faith if it refused to bargain over mandatory subjects of bargaining?

The parties' briefs show separate statements of sub-issue 3.[3] Based on my review of the entire record, I find that sub-issue 3 is:

3. If the Agency is found to have violated any applicable law, rule, or regulation, what should the remedy be?

BACKGROUND

DoDEA operates 163 schools within three (3) regions in eight (8) districts located in 11 foreign countries, seven (7) states and two (2) territories. The Agency has 14,000 employees who serve more than 71,000 children of active duty military and DoD civilian families.

FEA is the exclusive representative for a bargaining unit composed of all non-supervisory professional school level personnel including Not-to-Exceed employees at Department of Defense Dependents Schools (DODDS), excluding DoDEA's Europe South region. Also excluded are all non-professional employees, educational aides, substitute teachers, management officials, supervisors and other employees otherwise excluded by the Statute. FEA is an affiliate of the National Education Association.

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[1] "By 'the Statute,' the parties stipulate that it refers to 5 U.S.C. Chapter 71 also known as the Federal Service Labor-Management Relations Statute."
[2] §7116. Unfair labor practices; §7117. Duty to bargain in good faith; compelling need; duty to consult; §7118. Prevention of unfair labor practices; §7119. Negotiation impasses; Federal Service Impasses Panel.
[3] DoDEA -- "If the Agency has found to have violated any of the applicable law, rules, and regulations stated above, what would the remedy be?" FEA – "If the Agency is found to have violated any of applicable law, rules, and regulations, what would the remedy be?"

From 1989 on, DoDEA and FEA were parties to a collective bargaining agreement (CBA) that continued to roll over. The Agency notified the Union in July 2013, that it wished to modify the 1989 CBA. There then ensued five and one-half years of ground rules negotiations, which included FMCS and Federal Service Impasses Panel (FSIP, Panel) intervention. The Panel decided the ground rules in *2019 FSIP 001,* February 19, 2019.

Bargaining on substantive issues began on June 17, 2019, and, with extensive FMCS assistance, concluded on February 28, 2020. The Parties reached tentative agreement on 30 articles, combined nine articles into other articles, and two articles were withdrawn. However, there was no agreement on 19 articles (99 separate provisions), and the Panel ultimately resolved the dispute in *2020 FSIP 042*, September 08, 2020.

FEA filed grievance AG 20-02 on April 13, 2020. The grievance alleges that the Agency committed unfair labor practices by taking non-mandatory proposals to impasse and that it engaged in bad faith bargaining by refusing to bargain over mandatory subjects of bargaining. DoDEA denied the grievance on May 01, 2020, and the grievance is what is properly before me.[4]

On May 25, 2018, while the parties were still negotiating ground rules, then President Donald J. Trump issued Executive Orders (EOs) 13836, 13837, and

[4]Part of the agreed-upon procedure for this arbitration was that the parties could file briefs (March 10, 2022) and reply briefs (April 07, 2022). The Agency reply brief claimed that the grievance is moot: "The parties engaged in an arbitration/mediation with FSIP on March 18, 2022. After several hours of mediation, the parties reached and signed an agreement resolving all but one issue which was a subject that was not before FSIP." It further argues that the grievance that gave rise to this arbitration was "procedurally non-arbitrable because it (and the Union's brief) lacks specificity in accordance with Article 12, sections 2.B(2) & (3) as well as 5.D of the Master Labor Agreement." The Union reply brief says that the Agency said nothing about non-arbitrability in its case in chief. That is true. It is fatally late to raise a non-arbitrability argument at this date in the Agency's reply brief. Also, I disagree that this case is moot. What happened with FSIP on March 18, 2022, is irrelevant. The grievance alleges DoDEA engaged in bad faith bargaining in 2019 and 2020. The Union has not seen fit to modify or withdraw the grievance. What happened after the grievance and the alleged bad faith behavior has no bearing on the case that is now before me for adjudication.

13839, all relating to the administration of the Federal civil service and the rights of federal employees to engage in collective bargaining.

In June 2018, a coalition of 17 labor unions, including FEA, challenged the validity of the EOs. The Unions claimed:

1. The EOs were unlawful because the President did not have authority to issue executive orders that subvert the will of Congress;
2. The EOs violated the Constitution, specifically the Take Care Clause and the First Amendment right to freedom of association;
3. The EOs and their various provisions violated particular requirements of the Statute; and the EOs' "cumulative impact" violated the right to bargain collectively as guaranteed by the Statute.

The District Court held that the EOs partially violated the Statute and enjoined implementation of certain provisions.[5] On appeal, a three judge panel of the D.C. Circuit Court ruled that the District Court lacked subject matter jurisdiction to hear the merits of the Unions' case. Instead, it found "that the unions' claims fall within the exclusive statutory scheme, [i.e., negotiated grievance procedures] which the unions may not bypass by filing suit in the district court."[6]

POSITIONS OF THE PARTIES

FEA

In its filings with the FSIP, the Agency alleged that numerous Union proposals should be rejected because they violated one of more of the EOs, and that many of its own proposals should be adopted because they were consistent with the EOs. However, the EOs that DoDEA relied on directed agencies to violate the Statute by refusing to bargain over mandatory subjects and by taking actions that are inconsistent with the duty to bargain in good faith.

The Agency Insisted to Impasse on Non-Mandatory (Permissive or

[5] *AFGE v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018),
[6] *Am. Fed'n of Gov't Employees, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019). The Trump EOs were revoked by President Biden in EO 14003, January 22, 2021.

Illegal) Subjects of Bargaining

It is axiomatic that insisting to impasse on non-mandatory (permissive or illegal) subjects of bargaining constitutes an unfair labor practice (ULP) under 5 U.S.C. §§7116(a)(1) and (5), and further violates the duty to bargain in good faith under 5 U.S.C. §7114(b).[7] A party has no duty to bargain over permissive subjects of bargaining, therefore a party may not insist to impasse over such matters. Insistence to impasse on permissive subjects of bargaining independently violates the Statute "without regard to whether such insistence was in good or bad faith."[8] The Agency's actions resulted in both a straight statutory violation, and a violation of the duty to bargain in good faith.

Permissive subjects include those that are outside the scope of bargaining because they involve "proposals that a party negotiates to limit a right granted to it by the Statute."[9] Proposals that require a party to waive a statutory right are permissive.

The Agency committed a ULP when it proposed to eliminate all Memoranda of Understanding (MOUs), many of which contain permissive subjects of bargaining, in its initial proposal and refused to alter its stance on its proposed unequivocal elimination of the MOUs.[10]

There are more than 290 MOUs that have been freely entered into by the parties over the course of the past three decades. The Agency proposal is to create:

> . . . a "clean slate" which will ensure that all interested parties are operating under one single written agreement. . . . The Union proposal is for the over 290 known MOUs to remain in effect. . . .

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[7] *AFGE Local 3937 and SSA Balt., Md.*, (*SSA Baltimore*) 64 FLRA 17, 21 (2009) and *FDIC, Headquarters and NTEU*, 18 FLRA 768, 771-771 (1985) (*FDIC*)
[8] *SPORT Air Traffic Controllers Org. and Air Force Flight Test Center Edwards Air Force Base*, 52 FLRA at 347, *citing Bartlett-Collins Co. and American Flint Glass Workers of North America*, 237 NLRB 770, 772-773 (1978).
[9] *FDA*, 53 FLRA at 1273-74 (1998); *FDIC*, 18 FLRA at 771
[10] See *Social Security Administration and Association of Administrative Law Judges* (AALJ), 121 LRP 17751 Arb. John T. Nicholas (May 2021.)

The Agency's proposal as submitted to the FSIP failed to consider that many of the MOUs at issue undoubtedly contained permissive subjects of bargaining. A cursory review makes it immediately apparent that a number of MOUs contain permissive subjects of bargaining. Examples include MOUs on:

- CAC card log-on: wherein the parties negotiated the *methods and means* of implementing a security procedure established by the Agency;
- Sure Start Calendar, wherein the Parties permissively negotiated *when* a particular Agency program would start; and
- ASPEN Implementation wherein the Parties permissively negotiated a *schedule* with 2.5 days of classroom preparation and set-up for educators.

In *AALJ*, Arbitrator Nicholas ruled that SSA had committed an unfair labor practice when it "refused to move off its original proposal and required the elimination of all existing MOUs." The case is instructive because the SSA proposal to eliminate all MOUs during successor bargaining is effectively identical to the one proposed by DoDEA. The arbitrator acknowledged that "a party's unwillingness to adopt the negotiating party's proposal does not constitute an unfair labor practice" alone, and "neither does a refusal to make concessions."

He held, however, that:

> . . . when the Agency proposed to eliminate twenty-six MOUs that undoubtedly contained permissive subjects of bargaining in its initial proposal, and refused to alter its stance on the unequivocal elimination of the MOUs, all of them, it is quite apparent that the Agency indeed insisted to impasse the twenty-six agreed upon MOUs, which in turn, effectively waived the Union's right to bargain on permissible issues.

Here, as in *AALJ,* DoDEA refused to move from its position that all MOUs must be summarily eliminated to create a "clean slate." The violation here is far more egregious than the one committed in *AALJ*, because instead of summarily and arbitrarily eliminating 26 MOUs, the Agency sought to erase 290-plus MOUs.

The Agency further committed ULPs by insisting to impasse on proposals that were in direct violation of the Statute or otherwise non-mandatory.[11]

Refusal to Bargain Over Mandatory Subjects of Bargaining and Bad Faith Bargaining[12]

DoDEA allowed interference above the level of recognition in term bargaining by deferring to the dictates of President Trump's EOs, rather than bargaining in good faith over mandatory subjects. Management above the level of exclusive recognition may not prevent lower level managers from fulfilling their bargaining obligations.[13] When management at the level of recognition has no choice but to follow the dictates of upper level management, it is evidence that the agency has violated the Statute.[14]

Agency proposals relating to mandatory subjects were tainted by the issuance of the EOs. This can be seen in such provisions as official time, the length of the duty day, and the grievance procedure.

The duty to bargain in good faith under the Statute requires that an agency be "willing to discuss the issues with an open mind, and to engage in a 'give and take' relationship," otherwise meaningful bargaining is foreclosed.[15] This duty requires a party to "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."[16]

The Agency's plan from the outset of the issuance of the ground rules in *19 FSIP 001* was the same as nearly every agency in the federal government at that time: get before the Trump-appointed FSIP (composed of non-neutral "union busters") as quickly as possible. Each EO announced the endpoint that

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[11] *Food & Drug Administration, Northeast and Mid-Atlantic Regions*, 53 FLRA 1269 (FLRA 1998) (Insistence to impasse on a "non-mandatory" subject of bargaining is a ULP).
[12] The FEA brief lists these as two separate issues but I find they are essentially the same allegation, that is, the Agency bargained in bad faith.
[13] *Boston Dist. Recruiting Command, Boston, Mass*., 15 FLRA 720, 726 n.5 (1984).
[14] *Dep't of Interior, Water & Power Res. Servs., Grand Coulee Project*, 9 FLRA 385, 388 (1982); see *also Dep't of Interior, Wash., D.C*., 25 FLRA 91, 96-97 (1987).
[15] *Fed. Aviation Admin. Nw. Mountain Region, Seattle, WA and Professional Airways Systems Specialists*, 14 FLRA at 672.
[16] *Amalgamated Transit Union Int'l AFL-CIO v. Donovan*, 767 F.2d 939, 949 (D.C. Cir. 1985).

agencies must strive toward, and that they are to "commit the time and resources necessary" to achieve those objectives. In the unlikely event that an agency somehow failed to bring all of its resources to bear upon the assigned task of browbeating the union into accepting the stated term in the context of an negotiation, it must either bring the matter to mediation and then to the Panel, or must explain to the President of the United States through the Director of the Office of Personnel Management (OPM) why the agency relented, and thereby, shamefully, failed to achieve the goal.

To reach its goal of getting before FSIP and imposing its own anti-union language as quickly as possible, the Agency presented unreasonable and inflexible proposals. At no point during the bargaining process did the Agency approach negotiations with a sincere desire to reach a collective bargaining agreement with the Union. By proffering proposals that were dictated by the EOs, without any regard to its statutory duty to bargain in good faith, and by roundly refusing to move off of those proposals, the Agency bargained in bad faith.

The Agency's proposals were so extreme that they demonstrated an intent to frustrate the entire bargaining process. Management's proposals on official time were designed to prevent Union representatives from filing grievances on behalf of bargaining unit members. Its proposal contained the statement that it "wishes to set forth the amount of time that will be granted," meaning, the Agency wishes to control when and where and how bargaining unit employees can represent their Union and each other as Union representatives. Further, the Agency's proposal eliminates the official time status of the Union's President – who works full days with the Agency to resolve issues and improve the relationship with the Union and the Agency. Again, all of these proposals were submitted with no genuine consideration offered in return. The Agency sought a "take back" CBA at every turn.

The Agency failed to bargain in good faith by arbitrarily placing limits on

official time -- including by giving itself the sole discretion to deny official time for Union representatives who wished to meet with bargaining unit members to investigate, prepare, and participate in relevant meetings and hearings.

The Agency's obstinate "take-it-or leave-it" approach to bargaining is not merely a case of "hard-bargaining" as an agency may claim, but rather is evidence that management refused to bargain with Union negotiators.

A party cannot be forced to waive its statutory rights.[17] Proposals that reduce union statutory or regulatory rights without offering significant consideration in return are considered bad faith, and violations of the Statute.[18] Negotiation of such clauses is evidence of bad faith surface bargaining.[19]

The Agency committed a ULP when it sought to impose limitations on the Union's statutory right to a broad grievance procedure, when it offered the Trump EOs as its reason, and offered no genuine consideration in return for its proposal. In support of its proposals for the grievance procedure, the Agency explained to FSIP that it:

> . . . .proposes to exclude issues from the negotiated grievance process for which other options for redress are available. . . . This proposal is also consistent with Executive Order 13839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (May 25, 2018)."

Excluding valid subjects from the grievance-arbitration process is inherently antithetical to the Statute. All federal sector collective bargaining agreements must contain a grievance procedure. 5 U.S.C. 7121 (a)(1). The term

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[17] *See Merit Sys. Prot. Bd. Prof'l Ass'n*, 30 FLRA 852, 861-62 (1988).
[18] *Hydrotherm, Inc*., 302 NLRB 990, 994–95 (1991); *Social Security Administration* 52 FLRA114 (1997) (using analogous provisions of the National Labor Relations Act to interpret the Statute); *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth*., 464 U.S. 89, 92 (1983) (Statute is analogous to the National Labor Relations Act).
[19] *NLRB v. A-1 King Size Sandwiches, Inc*. 732 F.2d 872 (11th Cir. 1984). In *A-1 King Size*, the Eleventh Circuit found that the Board correctly inferred bad faith from the company's insistence on proposals forcing employees to surrender their statutory rights to bargain, strike, and subject matters to grievance and arbitration procedures, when the proposals were so unusually harsh and unreasonable that they were predictably unworkable. *Id*. at 874.

"grievance" is broadly defined by the Statute. A grievance can encompass "any matter relating to the employment of the employee." 5 U.S.C. 7103 (a)(9)(B).[20]

Historically, the parties have shared a broad grievance procedure, pursuant to the Statute. In *20 FSIP 042,* the Agency sought to eliminate all of these subjects, plus the employee's right to grieve adverse actions under the Statute.

It is not necessarily an unfair labor practice to bargain to impasse over the scope of a contractual grievance procedure. However, as the D.C. Circuit has held, agencies have the burden in proving why it should limit the scope of the grievance procedure.[21]

One Agency proposal seeks to overturn an arbitration decision upheld by the Authority, in litigation that has been persisting since 2002. As recently as Fall 2021, the Agency faced a show cause order from the Authority as to why it continues to refuse to implement the arbitrator's decision twenty years after the fact.[22]

The Agency's proposal excluded "anticipatory grievances (e.g. "Goodbye" grievances") from the negotiated grievance procedure. The "goodbye grievance" concerns pay issues that arise during the employee's time working for the Agency. Numerous arbitrators have held the "goodbye grievance" to be valid. Federal courts have long recognized that a premature notice of appeal is effective.[23]

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[20] To be sure, the Statute also specifies that certain types of disputes may *not* be submitted to the grievance procedure for resolution. Excluded are disputes over position classification, as well as retirement, life insurance, and health insurance benefits. 5 U.S.C. 7121 (c).
[21] *Am. Fed'n of Gov't Emps., Locals 225, 1504, & 3723 v. Fed. Labor Relations Auth*., 712 F.2d 640, 644 (D.C. Cir. 1983) (As then-District Judge Ruth Bader Ginsburg wrote, "… the question of scope should never reach the Panel; if it does, the Panel must decide in favor of a broad scope agreement.).
[22] *DoDEA and FEA* , 72 FLRA No. 74, Jun 25, 2021.
[23] *Buffkin v. DoD*, 957 F.3d 1327 (Fed. Cir. 2020 "Given the informal nature of arbitration and the lack of surprise to the agency, '[l]ittle would be accomplished by prohibiting the

The Agency's lack of any statutorily acceptable explanation for its insistence to impasse on an attempt to narrow the grievance procedure, coupled with the proposal's lack of any consideration offered, makes it a bad faith proposal.

Further, the Agency's blind adoption of the EOs evidences it did not come to the table with a good faith mindset to reach agreement. The Agency followed EO 13839, §3, which instructs agencies that they should, "[w]henever reasonable[,]" endeavor to exclude from the negotiated grievance procedures any issues relating to an employee's removal for misconduct or unacceptable performance." Where the Agency made clear that any attempt to negotiate would be futile, it acted in bad faith.[24] Futility is apparent once it became clear the Agency was ministerially following the directive of the EO.

In effect, agency negotiators are told that they must enter into the negotiating arena wielding predetermined goals, and must be prepared to fight to the death on prescribed issues, in a manner not consistent with the "give and take" negotiating process that the duty to bargain in good faith anticipates. It should be noted that §7114(b) of the Statute obligates agencies and unions "to send representatives to the bargaining table who are *fully authorized* to discuss and negotiate over any condition of employment." [*Italics* provided].

Because the Parties arrived at FSIP as a consequence of bad faith bargaining, the impasse resolution process is delegitimized, along with any Tentative Agreements (TAs) the Union may have been forced to sign (or face its own unfair labor practice charges) in the face of insurmountable anti-union tactics by the Agency. The bad faith bargaining by the Agency tainted the entire bargaining and post-bargaining process.

The Union requests a *status quo ante* remedy, in addition to all the relief

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[arbitrator] from reaching the merits of" a grievance where a premature request for arbitration has been filed.'"

[24] *Federal Bureau of Prisons Federal Correctional Institution Bastrop, Texas and American Federation of Government Employees, Local 3828, AFL-CIO*, 55 FLRA 848, 855 (1999).

sought in its grievance, and any other relief deemed appropriate by the Arbitrator.

In 5 U.S.C. § 7105(g)(3), the Statute provides the Authority with wide discretion to craft a remedy, which can include requiring an agency to take any remedial action it considers appropriate to carry out the policies of the Statute. This wide discretion includes the authority to issue a stay a Panel order.[25] Moreover, under 5 U.S.C. § 7118(a)(7), if the Authority determines that an agency has engaged in, or is engaging in an unfair labor practice, then the Authority will issue an order requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect.[26]

Arbitrators are empowered to order the same remedies as the Authority in arbitrating grievances involving unfair labor practice allegations.[27] An arbitrator's remedial authority is limited only by the grounds for exceptions contained in 5 U.S.C. 7122: the remedy must not violate federal law or regulations, nor can it be deficient on the limited grounds applied by federal courts in the private sector.

The Authority has found that a *status quo ante* remedy is required to effectuate the purposes and policies of the Statute and prevent rendering

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[25] *NTEU and Department of Homeland Security, Customs and Border Protection*, 63 FLRA 183 (2009); *NTEU and Federal Deposit Insurance Corporation*, 32 FLRA 1131 (1988).
[26] *National Treasury Employees Union v. Federal Labor Relations Authority*, 856 F.2d 293, 295 (D.C. Cir. 1998).
[27] *NTEU and Federal Deposit Insurance Corporation*, 48 FLRA at 570 ("[A]n arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of an unfair labor practice as those authorized under section 7118 of the Statute."); *National Treasury Employees Union v. FLRA*, 910 F.2d 964, 967 (D.C. Cir. 1990) (*en banc*) (The Authority is granted broad authority under the Statute to remedy unfair labor practices.); *AFGE Local 1138 and Defense Commissary Agency*, 49 FLRA 1211, 1212-1213 (1994); *Department of Health and Human Services Region V and National Treasury Employees Union Chapter 230*, 45 FLRA 737, 743 (1992) (Arbitrators have the authority to determine whether agencies have committed unfair labor practices in violation of the Statute.), *citing Social Security Administration, Office of Hearings and Appeals, Kansas City, Missouri and American Federation of Government Employees, Local 1336*, 29 FLRA 1285, 1287 (1987).

meaningless the statutory duty to bargain in good faith.[28]

Based on the foregoing reasons, the Union's grievance should be sustained and a status quo ante relief granted, ordering the Parties to begin bargaining again, this time free of the spectre of the illegal EOs and the Agency's unfair labor practices. The Union further seeks an order requiring a notice posting of the Arbitrator's findings reflecting that the Agency violated the Statute signed by the Agency Director, and an order for the Agency to cease and desist from further violations of law.

DoDEA

The Agency Did Not Violate 5 U.S.C. Sections 7116 – 7119 During Term Negotiations From May, 2019 Through April, 2020 as Executive Orders No. 13836, 13838, and/or 13839 Were in Full Force and Effect

The Statute's requirement that both management and unions abide by their obligation to "meet and negotiate in good faith" has been interpreted as meaning that the parties to any negotiations must generally "enter into discussions with an open mind and a sincere intention to reach an agreement."[29]

Additionally, the Statute outlines which matters are subject to negotiation and the extent to which those matters must be discussed by management and union to fall within the definition of "good faith bargaining." The Statute outlines a three-tier system based upon the negotiability of matters in collective bargaining discussions. The Statute provides for "mandatory" subjects of bargaining over any condition(s) of employment (5 U.S.C. §§7102(2), 7103(a)(12), and (14). Two examples applicable in this case are §§7121(a) and 7131(d), the

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[28] *Dept. of Navy, Naval Underwater Systems Center, Newport, Rhone Island and Federal Union of Scientists and Engineers/NAGE, Local R1-144*, 30 FLRA 697, 701(1987); *United States Army Adjutant General, Publication Center, St. Louis, Missouri and AFGE Local 2761*, 35 FLRA 631, 634-35 (1990); *Long Beach Naval Shipyard Long Beach, California and Federal Employees Metal Trades Council*, 17 FLRA 511, 527 (1985).

[29] See, *United Steelworkers of Am., AFL-CIO-CLC, Local Union 14534 v. Nat'l Labor Relations Bd.,* 983 F.2d 240, 245 (D.C. Cir. 1993) (quoting *Sign and Pictorial Union Local 1175 v. Nat'l Labor Relations Bd*., 419 F.2d 726, 731 (D.C. Cir. 1969)).

scope of the grievance procedure and the use of "official time."

Next the Statute carves out a narrow category of matters in §7106(b)(1) as "permissive" matters for bargaining. Parties may bargain over permissive matters at the election of the agency. 5 U.S.C. §7106(b)(1). Specifically, the numbers, types, and grades of employees or positions assigned to any project or the technology, methods, and means or performing work may be negotiated.

Finally, §7106(a) prohibits negotiation over matters relating to management rights. Thus, unions may not interfere with the rights of Federal agencies "to determine the mission, budget, organization, number of employees, and internal security practices of the agency" or "to hire, assign, direct, layoff, and retain employees ... or to suspend, remove, reduce in grade, or pay, or take other disciplinary action against such employees" as allowed by law.

The Statute (§7117(a)(1)) also frees Federal agencies from having to negotiate over "matters which are the subject of any . . . Government-wide rule or regulation." This means that the right to collective bargaining does not extend to rules or regulations that are "generally applicable throughout the Federal Government," even if the rule does not "apply to . . . a fixed minimum percentage of the federal civilian workforce."[30]

President Trump's three EOs provided Federal agencies with certain procedures that they should seek to institute during negotiations with unions. EO 13836 instructed Federal agencies not to negotiate over "permissive" subjects. EO 13837 instructed Federal agencies to try to limit the extent to which collective bargaining agreements authorize "official time," meaning time spent by employees on union business during working hours. Additionally, this EO also established rules that limit whether "agency time and resources" could

[30] See, *Overseas Educ. Ass'n, Inc. v. Fed. Labor Relations Auth.*, 827 F.2d 814, 816–17 (D.C Cir. 1987); see also, *Am. Fed'n of Gov't Emps., Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 741 (D.C. Cir. 1986).

be used by employees on non-government business. EO 13839 sought to exclude from grievance proceedings any dispute over a decision to remove an employee "for misconduct or unacceptable performance." Basically, this executive order prohibited Federal agencies from resolving disputes over employee ratings and incentive pay through the grievance or arbitration proceedings, and it mandated that some subpar employees may have no more than thirty days to improve their performance before being reassigned, demoted, or fired. These executive orders sought to enforce these goals by directing Federal agencies to "commit the time and resources necessary" to achieve these results and required agencies to notify the President through OPM if the goals were not met. The orders also required agencies "to fulfill their obligation to bargain in good faith" throughout their dealings with unions.

It is uncontested that the President of the United States possesses inherent constitutional power, as the head of the Executive Branch, to issue an executive order on Federal labor-management issues. However, any executive order issued by a President in this area must be consistent with the will of Congress and ultimately, that is the principle that guides Federal court conclusions regarding the merits of the unions' claims that an executive order has violated the Statute.

Negotiations between FEA and DoDEA were never concluded while these three EOs were in place, and the FEA was provided the opportunity to submit any and all proposals which were then reviewed and addressed by the Agency in a counterproposal.

It is important to note that every proposal submitted by FEA was reviewed and responded to by the Agency's Chief Negotiator. The parties were able to agree to 30 articles, or well over half of the articles presented by FEA during the 25 weeks of negotiations and mediation, at times with the assistance of FMCS. The parties both remained committed, and the Agency referred the

remaining 19 articles to impasse in order that the parties could reach agreement. In reviewing the Agency's summary of the status of negotiation of the 19 remaining articles, the Agency was able to articulate justifications for its position(s) on the various articles/proposals outside of the EOs. One of the main goals of the Agency was to update all its current contract and make them consistent across the various unions. Since they had each been updated at various points over the course of the last few years, FEA's contract needed updating having been implemented back in 1989. Most of the Agency proposals were based upon statutory and case law updates versus the EOs.

There is no evidence that FEA was hindered in any way during the term negotiations from submitting and/or negotiating any proposal(s) related to topic(s) covered under EOs 13836, 13837, and/or 13839 that related to any mandatory (and/or even permissive for that matter) subject(s) of bargaining.

It is the Agency's position that the Union was afforded an opportunity to submit proposals and/or negotiate each and every article which it had presented for bargaining. There were several articles that the Agency deemed non-negotiable, some of which the Union pursued through FLRA negotiability appeals and some of which the Union simply did not pursue. It is the Agency's position that FEA has not been harmed in any way by the imposition of EOs 13836, 13837, and/or 13839 since DoDEA engaged FEA in full and fair negotiations on every article that was proposed, without exception.

There were numerous provisions that had no relation to the EOs, and the EOs were not mentioned in bargaining on those provisions. There was just simply the normal negotiation of the subjects in good faith.

In the Grievance Procedure proposal, much of the language proffered by the Union was language already in the current MLA. The Agency proposed language to exclude both the granting of, and the amount of, incentive pay. The Union did not submit a proposal to address this issue and had not filed grievances over incentive pay for several years. Although the Agency cited that its

proposal was consistent with EO 13839, it did not exclude the Union from submitting and/or addressing any proposal(s).

It was the Agency's intent to exclude issues from the negotiated grievance process for which other options for redress are available, specifically with regard to EEO, adverse, and debt collection actions. Additionally, the Agency's proposal addressed concerns involving "goodbye grievances" where the Union encouraged bargaining unit employees separating or retiring from Federal service to file a grievance for unknown future issues so the Union may represent these individuals who would no longer be within the unit or Federal service once they were separated. The Agency's proposals were simply the normal negotiation of a subject in good faith.

The Union supplemented language currently in the MLA requiring progressive discipline, and the Agency advised the Union that the additional language was outside its duty to bargain. The Union requested that the Agency provide a written statement of non-negotiability which the Agency did. The Union did not petition the FLRA on the issue of negotiability.

During negotiations on the Union's proposal, FEA representatives refused to engage in any discussions over the value or potential reimbursement of use of government property, facilities, and/or resources; the Union claimed to not have money. Although the Agency noted that its proposal was consistent with EO 13837, the Union refused to negotiate any further and the issue was referred to FSIP.

In conclusion, the Agency respectfully requests that FEA's grievance captioned as FEA Agency 20-02 be denied in its entirety as should any and all requested relief.

DISCUSSION AND FINDINGS

The Union claims that the Agency violated the Statute and committed ULPs during negotiations for a successor CBA in 2019 and 2020. The claimed

violations are that DoDEA insisted to impasse on permissive subjects of bargaining, and engaged in bad faith bargaining.

I discuss each below.

Insisting to Impasse on Permissive Subjects of Bargaining

The Union brief offered numerous example of claimed Agency insistence to impasse on non-mandatory subjects. I have mentioned only a few. The others cited, except for where there were mentions of §7106 (b)(1) and the MOUs, were not permissive subjects.

I now consider the question in terms of the undisputed permissive subjects in terms of §7106 (b)(1) and the MOUs.

The Statute does not contain the word "permissive" or the phrase "permissive subject of bargaining." What it does say, in §7106 (b)(1), is:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> > (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
> >
> > (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
> >
> > (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

For the purposes of this case, the key words in §7106 (b)(1) are "at the election of the agency." I accept the Union's assertion that there previously existed some 290 MOUs, many of which involved §7106 (b)(1) and perhaps other permissive matters. The Agency insisted on eliminating these MOUs to impasse and beyond. In doing so, the Agency was within its rights.

Bargaining on §7106 (b) (1) matters are "at the election of the agency."[31]

At one time, the Agency was willing to bargain on certain permissive matters. That decision was not forever binding on the Agency. If it wished to, at an appropriate time, it could refuse to negotiate on any matter covered by §7106 (b)(1), or any other permissive subject. By insisting on deleting MOUs with permissive items, it was saying it no longer wanted to negotiate on those permissive matters, that is, it did not want these permissive matters to be carried over to a new agreement. That was the DoDEA position and its refusal was not a violation of the Statute.[32] DoDEA was not forcing FEA to impasse on a permissive subject; it was refusing to accept a provision which would waive its statutory right "to elect." The fact that the decision was actually the result of an order from outside the Agency, the ultimate authority in the Executive Branch, does not lessen DoDEA's right to decide to no longer negotiate on permissive matters.

I have read the cases pertinent to "insisting to impasse" that the Union brief has cited. None provide support for the Union's position:

- AFGE Local 3937 and SSA.[33] In this case, it was the agency (SSA) that charged the union (AFGE) with failing to bargain in good faith by insisting on an MOU that SSA refused to accept, saying that the MOU contained items already covered in the parties National Agreement. The FLRA agreed that this was the case and found that "Respondent [AFGE] bargained in bad faith by insisting to impasse on matters covered by the parties' national agreement." As in the present case, the AFGE attempted to force SSA to bargain on a matter it was not obligated to bargain.

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[31] Similarly, if another matter is not covered by §7106 (b) (1), but is also permissive, it is also elective, but would be at the election of either party.
[32] With respect to the parties' proposals on management rights, the Panel noted in *2020 FSIP 042*, that the Union's proposal would commit DoDEA to bargain on 7106 (b)(1) matters. The Panel modified the proposal 'to allow the Agency to choose if they want to bargain over the permissive subjects. The Panel has repeatedly determined that it will not force parties to waive their statutory rights." As the Panel correctly observed, the Union proposal, taken to impasse, was a demand that DoDEA waive its statutory right "to elect."
[33] 64 FLRA 05, op. cit. (2010).

- *Federal Deposit Insurance Corporation (FDIC), HQ and NTEU*.[34] The issue was an FDIC proposal that would give FDIC the right, if no agreement was reached "after forty-five (45) calendar days from the date the UNION requested negotiations, the EMPLOYER has the right to implement the proposed change in conditions of employment even though the matter has been referred to a third party for resolution." FLRA found that the proposal was outside the required scope of bargaining. "While the Union may of course choose to bargain over the proposal, the Authority finds that it cannot be required to do so. The insistence to impasse on a proposal which does not concern a mandatory condition of employment is violative of 7116 (a)(1)and (5) of the Statute."

- *Social Security Administration and Association of Administrative Judges*.[35] The Union cited this case in its brief due to the fact that Arbitrator Nicholas ruled that SSA had committed an unfair labor practice when it insisted to impasse in the elimination of 26 existing MOUs that "undoubtedly contained permissive subjects of bargaining."

  Arbitrator Nicholas found that there were three ULPs by SSA in that regard. I disagree with his finding. If a matter is permissive, it cannot be required. SSA had the right to "elect," and it "elected" to eliminate matters that were permissive subject of bargaining. It had the right to make that decision and to maintain it to impasse.

  Refusal to Bargain Over Mandatory Subjects of Bargaining/Bad Faith Bargaining.

A presidential executive order is not a law. It has the force and effect of a law, except that it cannot violate a law. The legality of the three Trump EOs was never definitely decided due to the D.C. Circuit decision that the lower court did not have jurisdiction and "that the unions' claims fall within the exclusive statutory scheme, [i.e., negotiated grievance procedures] which the unions may not bypass by filing suit in the district court."[36]

The matter to be decided here is not the validity of the three Trump EOs. My job is to decide if the Agency's bargaining stances constituted bad faith

[34] 18 FLRA No. 92 (1985).
[35] 121 LRP 17751, op. cit.
[36] *See Am. Fed'n of Gov't Employees, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

bargaining, whether or not pertinent EO provisions were legal.

The Agency brief asserts that at no time during bargaining was the Union prevented from making proposals or counterproposals, including about matters covered by the three EOs. It further states that every Union proposal was reviewed and responded to by DoDeEA's chief negotiator; and that the parties were able to agree to 30 articles, or well over half of the articles presented by FEA during the 25 weeks of negotiations and mediation.

Except for the fact that that the parties reached agreement on 30 articles, this assertion is irrelevant. The Union does not claim it was prevented from making proposals or counterproposals. The Union cited specifics where it claimed DoDEA did not bargain in good faith.

I will not set out to discuss each of the specifics cited by the Union. Some of the Agency's positions can be attributed to "hard bargaining," which is not a ULP. However, there are some instances of DoDEA positions which are clearly hardline, unbending, followings of directions from one or more of the EOs, and where the Agency was not acting in good faith.

Whatever the legal validity of the three Trump EOs, it is clear that their intent was to limit union power and activity. With respect to the matters involved in this dispute:

> EO 13836 – Forbade agencies from negotiating any permissive matters under 5 U.S.C. §7106(b)(1).
>
> EO 13837 – Agencies are to authorize official time only in amounts that are reasonable, necessary, and in the public interest and to monitor its use to see that it is used efficiently. Agencies are not to cover union expenses to a greater extent than the law requires and they are to eliminate unrestricted grants of official time.
>
> The agency position in bargaining should be that official time is not ordinarily considered to be reasonable, necessary, in the public interest, or consistent with effective and efficient Government where the official time rate in any bargaining unit exceeds 1 hour per bargaining unit employee.

Agency heads are to report to the President through the Director of OPM when an agency agrees to authorize amounts of official time that would cause the union time rate to exceed one hour per bargaining unit employee (or proposes to do so in negotiation impasse proceedings). Such report shall explain why such expenditures are reasonable, necessary, and in the public interest, describe the benefit (if any) the public will receive from the activities conducted by employees on such official time, and identify the total cost of such time to the agency. This reporting duty cannot be delegated.

Employees are to spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary agency training. Unions may not receive free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. This includes office or meeting space, reserved parking spaces, phones, computers, and computer systems. Employees may not use official time to prepare or pursue grievances except where such use is otherwise authorized by law or regulation. Employees may use official time to prepare for, confer with their union representative regarding, or present a grievance brought on the employee's own behalf or to appear as a witness in any grievance proceeding. Employees may not, however, use official time to prepare or pursue grievances on another employee's behalf.

EO 13839 - Whenever reasonable in view of the circumstances, agencies are to endeavor to exclude from the negotiated grievance process any dispute concerning the decision to remove an employee from the Federal service for misconduct or unacceptable performance. This is to be done while also fulfilling the agency's obligation to bargain in good faith. Agencies are required to provide an explanation to the President, through the Director of OPM, within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal.

Also to be excluded from grievance and binding arbitration procedures are disputes over the assignment of ratings of record and awards of any form of incentive pay, use of Chapter 75 procedures to address unacceptable performance, any additional performance assistance periods, (e.g. PAP, etc.) or similar informal period to demonstrate improved performance. Agencies are to modify agreements that would require utilization of progressive discipline procedures. Agencies should take steps to include in agreements terms that that consideration of progressive discipline is not required or permitted when administering

> disciplinary action, that disciplinary actions should be calibrated to specific facts and circumstances of each situation, and that suspensions are not required before proposing an employee's removal if facts and circumstances warrant the proposal of a removal.

With the exception of banning negotiations on permissive subjects, the EO requirements shown above are not within the unilateral authority of agency management; they are matters that must be negotiated with the union.

The EOs contain the words "bargaining in good faith," and "reasonable, necessary, and in the public interest," but their sincerity can be doubted. It is clear that the President expected these things to be accomplished, despite agencies not having unilateral control. And if agency heads did not accomplish these objectives, they are to report this to the president, via OPM, and this duty cannot be delegated. One would have to be a very dim agency head, indeed, not to understand that what was expected was to hold fast to the EO demands all the way to the FSIP.

It may be, that at the presidential level, there was seen a need for these severe restrictions. But it is at the level of representation, where bargaining actually takes place, and where the obligation to bargain in good faith is the fundamental requirement for collective bargaining, that the need(s) must with demonstrated.

I will limit my review of the Union's charges to three items that are central to a Union's functioning and representation of employees, and which were the primary targets of the EOs: official time, scope of the negotiated grievance procedure, and agency provided services.

Official Time

The Statute has some provisions about official time: it is granted for time spent in negotiations, including impasse (7131(a)); the Authority is to decide whether employees involved in FLRA proceedings are to be on official time (7131(c)); and official time may not be used for and internal union business

(7131(b)). Beyond this, official time is largely negotiable. It is to be granted "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." (7131(d)).

I have reviewed the official time provision in the 1989 CBA, the Agency and Union opening proposals on official time, and their proposals submitted to the Panel. I have limited my analysis to the narrow, but extremely important, portions of these documents that speak to the amount of official time to be granted.

The 1989 CBA used a mixture of the statutory language of "reasonable, necessary, and in the public interest" and also specified the amounts of official time to be granted at various schools. In addition, the contractual provision for the Union's president and regional representatives was that they would be half-time in duty status and half-time on LWOP per school year.

FEA's opening proposal was to keep the specified amounts at the school levels, but to expand official time for certain Union officials as follows:

> Full-time: President and one Human and Civil Rights (HCR) Coordinator;
> Full-time: two area representatives;
> Half-time: two Area-level HCR Coordinators :
> Half-time: six district representatives

In addition, it asked for 500 hours of bank time, respectively, for representational duties "by Association official(s), representative(s)/designee(s), in addition to any other official time hours" in the Pacific and Europe Areas.

The FEA proposal that went to the Panel maintained the original school level amounts and kept the full-time request for the president. It abandoned the requests for HCR Coordinators and the 500 hours of bank time for the Pacific and Europe Areas, asked for half official time and half LWOP for two area representatives, and maintained the request for half-time official time for six

district representatives.

The DoDEA opening proposal was that it would give the FEA an official time bank equal to one hour per unit employee. FEA would:

> . . . notify the Agency of how it wishes to distribute those hours over the course of the coming school year among its representatives, e.g., its national president, other national officers, regional and school-based faculty representatives.

The DoDEA proposal at impasse was largely the same, albeit with somewhat different wording. One hour per bargaining unit employee, to be used among all Union officials and representatives. But it added a new requirement. Agency employees would all "spend at a minimum three-quarters (75%) of their paid time, each fiscal year, performing Agency business or attending necessary training required by DoDEA."

Thus, at impasse, key changes the Agency wished to make regarding official time in the CBA were to: (1) put all official time in one bank time pot, based on one hour per bargaining unit employee, and (2) require that employees representing the Union would spend at least 75% of their time on Agency business or Agency training.

Many Federal labor agreements provide official time as bank time, and many have percentage limits on individual time devoted to Union representation. In fact the 1989 CBA had both. There was specified bank time at certain school levels, and percentages for the president and regional representatives. However, DoDEA's opening proposal was a steep change from what was in the CBA.

The DoDEA proposal was to move from an arrangement that had been in existence for more than 30 years when the proposals went to impasse. Longevity implies acceptability, or, at the least, that the language "can be lived with."

But that may change. A party may feel the language no longer works; it now

causes problems. It is the job of the party that wants to change contract language, especially longstanding contract language, to show the problems or abuses that exist and that its proposal is designed to fix. What is the reason for the proposed change?

There is only one reason the record provides. It is that the one hour per bargaining unit employee bank time, and the three-quarters requirement, came directly from EO 13837. DoDEA had its marching orders. It was to insist on these provisions to impasse, and that is what it did.

The Agency did not engage in good faith bargaining. It came into bargaining with pre-determined, strict official time requirements, and it did not deviate from those requirements. Those requirements were imposed by President Trump. Nothing in the record, including EO 13837 itself, gives any indication of the need for this "one-size-fits-all" approach – other than that that was the way the President wanted it.

Admittedly, the Agency was in a difficult position. EO 13837 gave it little room to maneuver (or bargain). It defined "reasonable, necessary, and in the public interest" as one hour per bargaining unit employee and it demanded that employees spend at least 75% of their time on Agency business or training. The Agency could, theoretically, stray from these requirements, but that meant the Agency would have to personally report any deviation to the president via OPM. As a practical matter, DoDEA's hands were tied.

Notwithstanding this, the statutory mandate is that agencies are to bargain in good faith, have an open mind and a sincere desire to reach an agreement. The fact that the highest authority in the Executive Branch was demanding a different approach did not negate or limit DoDEA's obligation. DoDEA did not live up to this obligation. It did not have an open mind and a sincere desire to reach an agreement. It wanted to maintain its position, the position dictated by EO 13837, and get the matter decided by the Panel.

In addition, the DoDEA closing proposal was retrograde. It contained the 75% requirement, which was not in its opening proposal. This is not bad faith bargaining in itself, but it is certainly not a sign of a desire to reach agreement. Why did it move back? There is no explanation in the record.

Grievance Procedure

The 1989 CBA defined "grievance" almost exactly as it is defined in §7103 (a)(9). It contains the same exclusions as in §7121 (c), plus:

- (6) an advance notice as provided in Articles 13 and 14 until a decision has been issued.
- (7) termination of trial period employees;
- (8) termination or expiration of temporary appointments;
- (9) nonselection for promotion or transfer from lists of properly ranked eligibles; and
- (10) oral admonishments.

The Union's opening proposal contained the same provisions, except that it deleted (9), above. It also proposed certain changes to time limits. Most significantly, it proposed that:

> If a final written decision is not issued within thirty (30) days, the grievance will be considered to be sustained and the relief sought will be granted, and the party that failed to respond will be responsible for all costs incurred.

The Union proposals that went to impasse continued the same grievance definition and exclusions, again without (9); it backed off some of the changed time limits it had originally proposed, and it deleted the indented paragraph above.

The EO that is relevant to the grievance issue is EO 13839. It required that:

> Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from

> Federal service for misconduct or unacceptable performance. Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. . . . Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head shall provide an explanation to the President, through the Director of the Office of Personnel Management (OPM Director).
> In addition, to the extent consistent with law, no agency shall:
>
> (a) subject to grievance procedures or binding arbitration disputes concerning:
>
> (i) the assignment of ratings of record; or
> (ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments;
>
> (b) make any agreement, including a collective bargaining agreement:
>
> (i) that limits the agency's discretion to employ Chapter 75 procedures to address unacceptable performance of an employee;
> (ii) that requires the use of procedures under chapter 43 of title 5, United States Code (including any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under section 4302(c)(6) of title 5, United States Code), before removing an employee for unacceptable performance; or
> (iii) that limits the agency's discretion to remove an employee from Federal service without first engaging in progressive discipline; or
>
> (c) generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance.

The Agency opening proposal contained the same grievance definition as in the CBA and additional exclusions:

> 11. granting or failing to grant an award or the amount of an award;
>
> 12. alleged violations of law, rule, or regulation for which options for redress are otherwise provided in statute or government-wide regulations (e.g., EEO, adverse actions, debt collections, etc.);
>
> 13. anticipatory grievances (e.g., "Goodbye" grievances); and

> 14. performance ratings, except when used by the Employer to support disciplinary actions or adverse actions.

The Agency opening proposal retained most of the time limits in the 1989 CBA, but proposed that the time limit for initiating arbitration be reduced from 60 to 30 calendar days. Its closing proposal maintained the exclusions and time limits in its opening proposal. Under the Agency's proposed exclusions, adverse actions (removal; suspension for more than 14 days; reduction in pay or grade; and a furlough of 30 days or less) are not subject to the negotiated grievance procedure and cannot go to arbitration. The proposal explains that these are matters that can be appealed to the Merit System Protection Board (MSPB). That is true, but that does not negate the fact that the resolution of discipline disputes, most definitely including discharge and suspensions for more than 14 days, are at the heart of any negotiated grievance and arbitration procedure, whether federal, state, municipal, or private sector. Nor does it negate the fact that arbitrators are private parties, jointly selected by the agency and the union, while MSPB members are federal officials appointed by the President.

There is nothing wrong, or unusual, in a party seeking to establish a situation favorable to it, but this was an extreme position and taking it to impasse showed fidelity to EO 13839, not a desire to reach agreement on this matter. Similarly, the other new exclusions proposed in the Agency's opening and closing proposals came right out of EO 13839.

The matter of scope of the negotiated grievance procedure in federal labor agreements was examined by then DC Circuit Judge Ruth Bader Ginsburg in *Am. Fed'n of Gov't Emps., Locals 225, 1504, & 3723 v. Fed. Labor Relations Auth.*[37] She wrote:

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[37] 712 F.2d 640, 644 (D.C. Cir. 1983) 2d 640, 644 (D.C. Cir. 1983)

> The FLRA has correctly recognized that section 7121(a) singles out grievance procedures for special attention. The first part of the section indicates a broad scope grievance procedure as the standard arrangement, but the second part permits the parties to negotiate limited scope agreements in the course of bargaining. The FLRA's reading of section 7121(a) is an acceptable attempt to formulate an approach consistent with the section's two-part structure, and with the House-Senate differences that appear to account for it. Under the Authority's construction, scope is a mandatory subject of bargaining, but if impasse is reached on this subject the Federal Service Impasses Panel is to impose a broad scope grievance procedure unless the limited-scope proponent can persuade it to do otherwise. We would expect the Panel, in view of the FLRA's decision and the foregoing analysis, to rule against a proponent of a limited procedure who fails to establish convincingly that, in the particular setting, its position is the more reasonable one.

Citing Judge Ginsberg's decision, the Panel wrote in *2020 FSIP 042*:

> The party moving to exclude matters from the negotiated grievance procedure should be prepared to establish persuasively the reasonableness of the exclusion narrowing the scope because Congress has expressed a preference for "broad scope" grievance procedures.

It then said:

> The Agency has failed to demonstrate persuasively the reasonableness of the proposed exclusions. Absent that demonstration, the Panel orders the parties to maintain the following matters as grievable in the current CBA:
>
> - final decisions regarding adverse actions;
> - granting or failing to grant incentive pay or the amount of the incentive pay (including cash awards, and recruitment, retention or relocation payments)
> - alleged violations of law, rule, or regulation for which options for redress are otherwise provided in statute or Government- wide regulations (e.g., EEO, adverse actions, debt collections, etc.)
> - anticipatory grievances (e.g., "Goodbye" grievances); and,
> - performance ratings

<u>Agency Provided Facilities/Services</u>

The 1989 CBA provided the FEA with certain official facilities and services.

Most notably among these:

> The Employer shall ensure that the Faculty Representative Spokesperson

> is provided reserved parking near his/her working area in the same manner as the school supervisor when not prohibited by the Installation Commander.
>
> The Association shall be provided an area not to exceed 6' X 8' in a location convenient to a majority of the unit employees for posting Association material. Such area shall be for the exclusive use of the Association.
>
> Also, "Upon request of the Association, the use of school facilities, equipment, and/or services not specifically mentioned in this Agreement shall be subject to consultations at the school level. The use of such facilities, equipment and/or services shall normally be provided when the Employer determines [certain] conditions are met."[38]

The Union's opening proposal was much the same as what was in the CBA, as was its proposal at impasse. The DoDEA opening also followed the CBA with the notable exception that there was no mention of reserved parking for the Faculty Representative Spokesperson. The DoDEA impasse proposal additionally eliminated the space for posting FEA material and no longer assured that school facilities, etc., not specifically mentioned in the CBA "shall be subject to consultations at the school level . . . [and] shall normally be provided." Instead, such school facilities, equipment, and/or services "may be provided" if they are "generally available for non-agency business by individuals when acting on behalf of non-Federal organizations."

Here again, the Agency closing proposal was retrograde. First, posting is an important means for the Union to communicate with members. Second, the DoDEA closing proposal changed from services "shall normally be provided" in the CBA, to services "may be provided."

That language came from EO 13839:

> No employee, when acting on behalf of a Federal labor organization,

[38]The conditions were that the use of the facilities, etc., would: promote effective labor-management dealings: no additional identifiable costs to the Employer; not degrade or interfere with the educational process or the administration of the school office; not violate applicable policies and/or regulations.

> may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems.

Use of Agency facilities is important, but it does not have the central place in the Federal labor/management universe as do official time and grievance and arbitration. Nevertheless, the bargaining over this matter follows the same pattern of rigid adherence to the presidential decree in EO 13839. It also exhibited a certain disdain for the Union in its role as the exclusive bargaining representative of bargaining unit employees.

There was a message implicit in the Agency's move from "shall normally be provided" to services "may be provided." The message was that there was nothing special about being the chosen exclusive representative of bargaining unit employees. The Agency may provide facilities, etc., to the Union, but only if they were also generally available to representatives acting on behalf of non-federal organizations.

That message did not originate at DoDEA; it came from outside, from the President, from EO 13839. As stated previously, EO 13839 and the two other Trump EOs gave the Agency very little room for good faith bargaining. But it is at the Agency level where FEA is recognized as the exclusive bargaining agent, and it is the Agency that is responsible for bargaining with FEA in good faith.

At least with respect to these three mandatory subjects of bargaining – official time, grievance procedures, and Agency provision of facilities, equipment and services – the Agency did not bargain in good faith. Instead, it relied determinedly on the presidential directives in EOs 13836, 13837, and 13839, and offered no rationale for its bargaining posture other than the EOs themselves. In doing so it violated 5 U.S.C. §§7103(a)(12), 7114 (a)(4), and 7116 (a)(1) and (5).

The Union has asked that I issue a *status quo ante* remedy, ordering the parties to begin bargaining again. It further seeks an order requiring the posting of a notice reflecting my findings that the Agency violated the Statute, signed by the Agency Director, and an order for the Agency to cease and desist from further violations of law. The Union notes that all of these things are within the power of the FLRA under §7118 and, citing *NTEU and Federal Deposit Insurance Corporation*,[39] argues that as the Arbitrator, I am similarly empowered.

In that case, an arbitrator found that the Agency had violated §§7116(a)(1) and (5) of the Statute. The Authority found that the arbitrator's award was:

> . . . deficient to the extent that the Arbitrator refused to consider whether he should direct certain remedies because of his view that he was not empowered to order such relief. Specifically, we find that the Arbitrator's determination that he was not authorized to award a retroactive bargaining order is deficient as contrary to the Statute. In addition, we are persuaded that the Arbitrator likewise refused to award a cease and desist order and the posting of a notice based on his view that he was not empowered to award such relief. We find that the refusal to consider those remedies also conflicts with the Statute.
>
> In Internal Revenue Service v. FLRA, 963 F.2d 429 (D.C. Cir. 1992), the U.S. Court of Appeals for the D.C. Circuit recently addressed the choice of forums granted in section 7116(d) of the Statute where the aggrieved party has the option of raising an issue as an unfair labor practice or as a grievance. The court found that "[b]y providing for a choice of forum, section 7116(d) assumes that a similar analytical approach would be followed--if not the same result reached--by both the arbitrator and the Authority with respect to matters over which there is concurrent jurisdiction." 963 F.2d at 438 (emphasis in original). The court further indicated that if the approaches were not required to be similar the promise of a choice of forums under section 7116(d) would be illusory. Id. Consequently, we conclude that an arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of an unfair labor practice as those authorized under section 7118 of the Statute. For arbitrators to refuse to consider the remedies authorized by section 7118 of the Statute because they determine that they are not empowered to grant such relief is not consistent

[39] 48 FLRA No. 56 (1993).

> with the framework of the Statute, and we will find that such determinations are deficient. In our view, to find otherwise would destroy the promise of a choice of forums with similar--if not identical--remedial authority, as was intended by Congress. [Underlining supplied.]
>
> Clearly, a retroactive bargaining order is a remedy authorized under section 7118 to remedy unfair labor practices. See NTEU v. FLRA, 910 F.2d 964 (D.C. Cir. 1990) (en banc). Accordingly, we find that the award is deficient to the extent that the Arbitrator refused to consider a retroactive bargaining order as relief because, in his view, he was not empowered to do so. Similarly, an order directing that a respondent cease and desist from violating the Statute and post a notice of its commission of an unfair labor practice and the action it will take to remedy the violation are routine elements of any relief ordered by the Authority to remedy an unfair labor practice. Although the Arbitrator did not specifically state, as he did with respect to retroactive bargaining orders, that he was not empowered to order the Agency to cease and desist and post a notice, we believe that his statement that he was "not the Authority" expressed his view that he was not authorized to order such relief. Award at 7. Accordingly, we find that the award is also deficient to the extent that he erroneously concluded that he could not award such relief.

It is clear that I have §7118 authority to fashion an appropriate remedy and I do so below.

AWARD

I have found that DoDEA has violated the 5 U.S.C. Chapter 7100 requirement to bargain collectively in good faith (§§7103(a)(12), and 7114 (a)(4)), and has committed an unfair labor practice under 5 U.S.C. §§7116 (a)(1) and (5). As remedy, I order:

- The Agency shall post physical notices in places that are customarily used by the Agency to post such notices, as well as notices to be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Agency customarily communicates with employees by such means.

- The notices shall state that, during contract negotiations in 2019 and 2020, the Agency did not bargain in good faith as required by 5 U.S.C. Chapter 7100, and thereby committed Unfair Labor Practices under 5 U.S.C. §§7116 (a)(1) and (5).

- The parties shall return to the *status quo ante* with respect to negotiations for a successor CBA to the 1989 CBA.

- The Agency shall henceforth cease and desist from failing to bargain in good faith with the Union.

The Arbitrator will retain jurisdiction for 60 calendar days for the sole purpose of resolving any disputes that may arise out of the implementation of this Award.

Charles Feigenbaum

April 25, 2022
Date