IN THE MATTER OF ARBITRATION: **OPINION**

SOCIAL SECURITY ADMINISTRATION **AND**

AND **AWARD**

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES **MAY 17, 2021**
I.F.P.T.E.
AFL-CIO **F.M.C.S. CASE NO. 190827-10408**

Arbitrator: John T. Nicholas, Arbitrator
Representatives: Agency – Daniel Hutman, Esq. – Office of the General Counsel
Christina Kelley, Esq. – Office of the General Counsel
Union – Daniel M. Benjamin, Esq. – AALJ National Grievance Chair

OPINION

I.

The Social Security Administration ("Agency"), ("Management"), ("SSA") and the Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO ("Union"), ("AALJ") bring on to arbitration the instant grievance filed by the Union on the behalf of its bargaining unit employees ("BUEs"). The grievance contends that Agency bargained in bad faith throughout the 2019 contractual bargaining sessions over a new Collective Bargaining Agreement ("CBA"), ("Agreement"), and as a result, violated the Federal Service Labor – Management relations Statute.[1]

For contextual clarity – the Bargaining Unit consists of approximately 1,200 non-management Administrative Law Judges ("ALJs") assigned to over 160 offices spread across ten Regions, the BUEs hold non-adversarial hearings for the Social Security Administration, subject to the Administrative Procedures Act. Each individual office is managed by a Hearing Office Chief ALJ ("HOCALJ"). A Regional Chief Judge ("RCALJ") is assigned to one of the ten

[1] Joint Exhibit 15

Regions and is responsible for overseeing and managing his or her respective Region. The Office of the Chief Judge ("OCALJ") effectively supervises the ten Regions. And the Office of the Deputy Commissioner for the Office of Hearing Operations oversees the Office of the Chief Judge.

The ALJs perform their duties under the purview of the Agency's Office of Hearings Operations ("OHO"). ALJs are expected to perform the following duties: conduct hearings, thoroughly review records, draft instructions for case writers, and edit final dispositions. Furthermore, ALJs hear approximately fifty hearings per month and issue between 500 to 700 dispositions on a yearly basis.

The current Collective Bargaining Agreement was finalized in 2013 yet was not signed by the parties until 2016. The CBA is recognized as a national agreement, covering all ALJs. On June 18, 2018, the Agency provided the Union with a formal written notice, stating the intention to terminate the 2013 CBA, and negotiate a new Agreement.[2] In addition, the Notice also informed the Union of the Agency's proposed desire to terminate all Memoranda of Understanding ("MOUs") that were put into practice between September 30, 2013 and September 30, 2018.[3]

Moreover, the Notice declared that the Agency, as of September 30, 2018, would no longer be bound to specific provisions of the 2013 Agreement, which in the Agency's eyes', impeded the rights bestowed upon Management by way of 5 U.S.C § 7106(a)(1) and 5 U.S.C. § 7106(a)(2), due to the position that the contractual provisions were either in conflict with the Statute, external law, or other government regulations.[4] The Notice concluded by emphasizing

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[2] Joint Exhibit 2, p. 1
[3] *Id.*
[4] *Id.* at p. 2

Agency's willingness to engage in term negotiations with the Union over all contents of a new Agreement, while also referencing the Agency's statutory duty to negotiate in good faith over any and all Union proposals that are deemed negotiable.[5]

An MOU was drafted and executed on October 18, 2018 that established parameters and guidelines for the upcoming bargaining sessions.[6] The MOU stipulated that bargaining sessions were to begin on March 12, 2019 and conclude on June 4, 2019.[7] The bargaining sessions between the respective Management and Union teams were scheduled to be held at Agency Headquarters in Woodlawn, Maryland on March 12, 2019 – March 21, 2019; April 9, 2019 – April 18, 2019; May 7, 2019 – May 9, 2019; June 4, 2019 – June 6, 2019; and if needed, June 18, 2019 – June 20, 2019. If negotiations did not result in a new CBA, the MOU stipulated that a Federal Mediation and Conciliation Service mediator be brought in to facilitate a resolution to the negotiation process.[8]

The bargaining sessions were held in accordance with the stipulations set forth in the MOU. The parties met on five separate occasions, as referenced above, over a period of twenty-eight days, culminating in mediation sessions between the parties and the Mediator in late June of 2019. During the mediation sessions, the parties exchanged last and best offers ("LBO"), ("LBOs") pertaining to the nine Articles upon which the parties could not agree. The nine Articles at impasse were Article 1 (Duration), Article 5 (Employee Rights), Article 9 (Official Time), Article 13 (Judicial Function), Article 14 (Hours of Work), Article 15 (Telework), Article 18 (Leave), Article 20 (Reassignments and Hardships), and Article 29 (Facilities and Services).

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[5] Joint Exhibit 2, p. 2
[6] Joint Exhibit 3
[7] *Id.* at p. 2
[8] *Id.*

On June 28, 2019, the Mediator certified that an impasse between the parties had been reached, and that the parties were "released from mediation".[9]

In response to the federal Mediator's determination that the parties had reached impasse over the nine Articles, the Agency requested that the Federal Service Impasse Panel ("FSIP"), ("the Panel") assert jurisdiction over the impasse in an effort to resolve the matter. The Union objected to the FSIP's involvement and pursued a stay from the Federal Labor Relations Authority ("FLRA"), ("the Authority") that would have temporarily enjoined the FSIP from asserting its jurisdiction.[10] The Union President, ALJ Melissa McIntosh, attempted to convince the FLRA that when a party seeks an order enjoining an FSIP involvement and jurisdiction implementation, it should be interpreted as a temporary stay, prohibiting the FSIP's involvement until the FLRA officially rules on the motion.[11]

Despite the stay request brought forth by the Union, protesting the Federal Service Impasse Panel's involvement in the proceedings, the Panel chose to take up the matter to provide a resolution to the impasse. In reference to the nine contested Articles, the Panel requested statements of position from the parties, as well as rebuttal arguments.[12] The Panel informed the parties that upon "considering the entire record, the Panel shall take whatever action it deems appropriate to resolve the dispute, which *may* include the issuance of a binding decision utilizing an article-by-article selection process."[13]

On April 15, 2020, FSIP Chairman, Mark A. Carter, issued the Panel's ruling, directing the parties to adopt specified language pertaining to the contested nine Articles.[14] The

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[9] Joint Exhibit 14
[10] Joint Exhibit 20, p. 8
[11] *Id.*
[12] Joint Exhibit 21, pp. 2-3
[13] *Id.* at p. 3
[14] Joint Exhibit 23

determination that the Panel and Mr. Carter reached is not substantively relevant to the matter at hand, given the fact that the issue before your arbitrator concerns bad faith negotiation charges, not whether the language in the CBA was drafted in accordance with the parties' desires. Thus, the Panel's specified directives will not be addressed in the discussion portion the Arbitrator's Opinion.

As to the grievance proceedings, the grievance was filed by the Union on July 8, 2019, and expedited to Step 3 of the parties' established grievance procedure in accordance with Article 10 of the parties' 2013 CBA.[15] The Agency did not formally respond in writing to the grievance within the 20-day time frame allotted by Article 10; and, thus, arbitration was invoked by the Union on August 19, 2019.[16]

The grievance concerns the proposed practice of negotiating in bad faith on the part of the Agency throughout the bargaining process of a new Agreement to supersede the 2013 Agreement, and alleges multiple statutory violations were committed by the Agency in its dealings with the Union throughout the negotiation process, constituting unfair labor practices ("ULPs"), as defined by 5 U.S.C. § 7116(a)(1) and 5 U.S.C. § 7116 (a)(5).

Moreover, the grievance argues that two proposals that the Agency took to impasse would have forced the Union to waive its statutory right to bargain; and, thus, in turn, violated 5 U.S.C. § 7116(a)(1) and (5). The first pertains to Agency's proposal regarding Duration and Termination; wherein the Agency refused to entertain the notion of retaining six Memoranda of Understanding that the Union brought forward, insisting that no existing Memoranda of Understanding shall be included in the new CBA. The second proposal, according to the Union,

[15] Joint Exhibit 15
[16] Joint Exhibit 17

was the Agency's proposal regarding Article 29 Facilities and Services, which effectively waived the Union's right to negotiate on office relocations, i.e., conditions of employment.

In addition, the grievance proposes that the Agency's actions were representative of the pre-conditioned determination to act in bad faith during all negotiation proceedings. The Union, in its grievance, insists that the Agency by way of its proposals, actions and overall demeanor, is evidence that the Agency "failed to come to the table with an open mind and sincere resolve to reach agreement, pursuant to 5 U.S.C. § 7114(b)(1)".[17]

As for a remedy, the Union's grievance seeks that the following be granted: 1) Agency cease and desist from engaging in bad faith bargaining practices in violation of 5 U.S.C. § 7116(a)(1) and (5); 2) Agency rescind its last best offers and return to the bargaining table with the Union on mutually agreeable dates; 3) Agency bargain in good faith; 4) Agency post a notice of a violation of the statute(s), signed by the Commissioner, for a period of sixty days, with the notice being displayed on all SSA bulletin boards (physical and electronic), and mailed to all Bargaining Unit ALJ's; and 5) grant any form of additional relief to which the Union is entitled to under law, rule or regulation.

II.

The issues pertaining to the grievance when framed in the form of a question ask whether the Agency violated 5 U.S.C. § 7116(a)(1) and (5), any portions of the 2013 Collective Bargaining Agreement, the Telework Enhancement Act of 2010, or any other applicable statues or regulations by engaging in bad faith negotiations during the collective bargaining process. If it is determined that any of the aforesaid violations did occur, what shall be the appropriate remedy?

[17] Joint Exhibit 15, p. 2

III.

The following provisions of the Agreement and statutes are deemed relevant to the instant dispute:

2013 NATIONAL AGREEMENT

* * *

ARTICLE 10 – GRIEVANCE PROCEDURE

* * *

Section 2

A grievance is defined as any complaint:

* * *

B. By the AALJ concerning any matter relating to the employment of any Judge; or,

C. By any Judge, the AALJ, or the Employer concerning:

1. The effect or interpretation, or a claim of a breach, of this Agreement; or,

2. Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.[18]

Section 3

The AALJ has the right to file, as a grievance under this contract, any alleged unfair labor practices (ULP). When it does so, however, it waives its right to file an unfair labor practice charge over the same issue with the appropriate authorities under law and regulation.[19]

Section 4

A. The AALJ has a right on its own behalf or on behalf of any Judge(s) in the bargaining unit to present and process grievances:

* * *

2. Any grievance not satisfactorily settled under the negotiated grievance procedure set forth below shall be subject to binding arbitration which may be invoked by the AALJ or the Employer.

3. As provided by 5 U.S.C. §7121(b)(2)(A), the provisions of this negotiated grievance procedure which result in binding arbitration shall, to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order:

a. A stay of any personnel action in a manner similar to the manner described in 5 U.S.C. §1221(c) with respect to the Merit Systems Protection Board (MSPB); and

b. The taking, by an Agency, of any disciplinary action identified under 5 U.S.C. §1215(a)(3) that is otherwise within the authority of such Agency to take.[20]

* * *

Section 6

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[18] Joint Exhibit 1, p. 35

[19] *Id.*

[20] Joint Exhibit 1, p. 36

The grievance shall be filed at the Step at which the subject matter of the grievance arose. In the event that the grievant or the AALJ wants an oral presentation at any Step, such request must be in writing in that Step of the grievance at the time of submission, or the right to an oral presentation is waived.[21]

A. The grievance procedure shall consist of the following steps:

* * *

STEP THREE.

Absent resolution of the grievance at Step Two, the Judge and/or his or her representative may present the grievance at Step Three. The Step Three grievance must be in writing as described above, signed by the Judge and/or his or her representative, and received by the Chief Administrative Law Judge or his or her designee, within fifteen (15) working days of the issuance of the Step Two answer. The grievant or their representative may request an oral presentation in the Step Three grievance. If requested, the oral presentation will take place within five (5) working days following the date the grievance was received at Step Three unless the parties mutually agree otherwise. The Step Three answer must be in writing and will be issued by the Chief Administrative Law Judge, or his or her designee within twenty (20) working days after receipt of the Step Three grievance or the oral presentation made.[22]

* * *

ARTICLE 11 – ARBITRATION

A. If the answer at the final step of the grievance procedure does not resolve the grievance, only the AALJ or the Employer may refer the grievance to arbitration by mailing or otherwise transmitting written notice to the other Party within thirty (30) working days after receipt of the last answer. If the Employer fails to issue an answer at the last step of the grievance procedure, or fails to deliver the answer to the AALJ, the AALJ may invoke arbitration without regard to the time limits contained herein, and the Employer may not raise lack of timeliness as a bar to arbitration.[23]

* * *

5 U.S. Code Title 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

* * *

§ 6131 – Criteria and review

* * *

(b)

For purposes of this section, "adverse agency impact" means –

1. a reduction of the productivity of the agency;
2. a diminished level of services delivered to the public by the agency; or
3. an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).

* * *

§ 6502 – Executive agencies telework requirement

(a) Telework Eligibility –

1. IN GENERAL.– Not later than 180 days after the date of enactment of this chapter, the head of each executive agency shall–
   (A) Establish a policy under which eligible employees of the agency may be authorized to telework;
   (B) determine the eligibility for all employees of the agency to participate in telework; and
   (C) notify all employees of the agency of their eligibility to telework.
2. LIMITATION.– An employee may not telework under a policy established under this section if–
   (A) the employee has been officially disciplined for being absent without permission for more than 5 days in any calendar year; or

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[21] *Id.* at p. 37
[22] *Id.* at p. 38
[23] *Id.* at p. 41

(B) the employee has been officially disciplined for violations of subpart G of the Standards of Ethical Conduct for Employees of the Executive Branch for viewing, downloading, or exchanging pornography, including child pornography, on a Federal Government computer or while performing official Federal Government duties.

(b) Participation.– the policy described under subsection (a) shall-
1. ensure that telework does not diminish employee performance or agency operations;
2. require a written agreement that–
   (A) is entered into between an agency manager and an employee authorized to telework, that outlines the specific work arrangement that is agreed to; and
   (B) is mandatory for any employee to participate in telework;
3. provide that an employee may not be authorized to telework if the performance of that employee does not comply with the terms of the written agreement between the agency manager and that employee;
4. except in emergency situations as determined by the head of an agency, not apply to any employee of the agency whose official duties require on a daily basis (every work day)—
   (A) direct handling of secure materials determined to be inappropriate for telework by the agency head; or
   (B) on-site activity that cannot be handled remotely or at an alternate worksite; and
5. be incorporated as part of the continuity of operations plans of the agency in the event of an emergency.

(c) Required Telework.– If an agency places an employee in investigative leave under section 6329b, the agency may require the employee to, through telework, perform duties similar to the duties that the employee performs on-site if—
1. The agency determines that such a requirement would not–
   (A) pose a threat to the employee or others;
   (B) result in the destruction of evidence relevant to an investigation;
   (C) result in the loss of or damage to Government property; or
   (D) otherwise jeopardize legitimate government interests;
2. the employee is eligible to telework under subsections (a) and (b) of this section; and
3. the agency determines that it would be appropriate for the employee to perform the duties of the employee through telework.

§ 7102 – Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

* * *

2. to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

* * *

§ 7103 – Definitions; application

(a) For the purpose of this chapter—

* * *

12. "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * *

14. "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

* * *

(C) to the extent such matters are specifically provided for by Federal statute;

* * *

§ 7111 – Exclusive recognition of labor organizations

* * *

(f) Exclusive recognition shall not be accorded to a labor organization—

* * *

3. if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—
   (A) the collective bargaining agreement has been in effect for more than 3 years, or
   (B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement...

* * *

§ 7114 – Representation rights and duties

* * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
   1. to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
   2. to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

* * *

§ 7116 – Unfair labor practices

(a) for the purpose of this chapter, it shall be an unfair labor practice for an agency—
   1. to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * *

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

* * *

§ 7118 – Prevention of unfair labor practices

(a)

* * *

7. If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—
   (A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;
   (B) 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;

* * *

8. If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

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§ 7131 – Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

* * *

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d)Except as provided in the preceding subsections of this section—

1. any employee representing an exclusive representative, or
2. in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

* * *

IV.

The parties' positions are summarized as follows:

Union

The grievance that the Union filed on July 8, 2019 was in response to what the Union interpreted as bad faith bargaining practices on behalf of the Agency's representatives throughout the collective bargaining process. To be sure, the Union wages that the Agency's actions violated numerous federal statutes that were enacted to prevent these very types of actions from occurring. The crux of the Union's grievance alleges that the Agency committed bad faith bargaining on two fronts: 1) repeatedly took permissive subject of bargaining, in particular the waiver of statutory rights, to impasse; and 2) the Agency acted in bad faith throughout the bargaining process *in toto*, which is evident given the Agency's continual decision to engage in surface bargaining, as well as maintaining a closed mindset throughout the bargaining process.[24]

By its insistence to impasse, the Union implores that the Agency not only caused harm to the Union, but it also caused harm to the collective bargaining process by which the parties are bound to abide. As defined by the Statute, an an unfair labor practice will have been committed

[24] The Union insists that it is important for the Arbitrator keep in mind that each instance of forcing to impasse permissive subject s of bargaining must be recognized as individual bad faith bargaining offenses.

if a party on its own volition chooses to, "refuse to consult or negotiate in good faith with a labor organization as required by this chapter".[25]

The Union relies in part upon the Federal Labor Relation Authority's position on forcing permissible issues to impasse as a standard bearer for what constitutes bad faith bargaining. The FLRA found that a party must be able to establish one the following to prove that bad faith bargaining occurred: "1) the Respondent insisted to impasse over the disputed proposals; and (2) at least one of the disputed proposals concerns a permissive subject of bargaining."[26] The Union attempts to support its claim by referencing the fact that of the nine Articles that were forced to impasse by the Agency, four (Article 1 – Duration, Article 9 – Official Time, Article 15 – Telework, and Article 29 – Facilities and Services), resulted in statutory waivers since they were permissive subjects of bargaining. To be sure, the Union argues that not just one of these Articles were improperly forced to impasse, but all four of them were. Therefore, the forced statutory waivers, in turn, violated 5 U.S.C. § 7114(b)(2) due to the Agency's refusal to discuss or negotiate on any condition of employment.

As to the first Article that the Union claims was forced to impasse, Article 1 – Duration, the substance of the Agency's LBO would have created a seven-year CBA and eliminated six MOUs in their entirety. Each proposal by itself effectively forced the Union to waive its statutory right to bargain. Regarding the seven-year proposal, the Union's objection is focally based on the concept known as the contract bar rule, which effectively prohibits a recognized labor organization in place from being raided by another labor organization if the collective bargaining agreement is for a duration of three years or less.[27] While the Statute does allow for a

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[25] 5 U.S.C. § 7116(a)(5)
[26] *AFGE local 3937*, 64 F.L.R.A. at p. 21
[27] 5 U.S.C. § 7111(f)(3)(A)

union to be raided that is party to a collective bargaining agreement with a duration that is less than three years, the time window for such a raid significantly limits the scope of opportunity.[28] To be sure, the Union insists that forcing to impasse a duration proposal of seven years effectively waived the Union's statutory right to bargain over the issue.

As to the Union's claim concerning the MOUs that the Agency required elimination of, the proposal by the Agency in effect changed the nature and conditions of employment without attempting to negotiate on the issues, all under the guise of the desire to operate solely under one contract. Any claim made by the Agency that its representatives were indeed willing to negotiate over the fundamental concepts of what the MOUs entailed is erroneous, argues the Union. If that had been the case, there would surely had been some form of paper trail signifying that the retention of concepts set forth in the MOUs was indeed attainable. However, the only evidence that exists, insists the Union, are the proposals established in the Agency's initial proposal, interim proposal, and LBO; all of which fail to address the substantive issues that are within the MOUs. Such a position was in direct contrast to the Union's willingness to bargain and negotiate on the proposed elimination. The Union's initial response was to retain all MOUs unless the language was contradicted by the CBA. The Union's second proposal conceded that certain MOUs be superseded. And Union's LBO position allowed for the elimination of twenty of the twenty-six MOUs that had been incorporated into the 2013 Agreement. The Union maintains that if the Agency wished to eliminate these recognized MOUs, then its representatives were with the inherent burden to bargain over such changes, rather than making the conscientious decision to advance to impasse without attempting to negotiate change.

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[28] 5 U.S.C. § 7111(f)(3)(B) allows for the raiding of an in-place labor organization if the petition for recognition is not filed in excess of 105 days, nor less than 60 days of the expiration of the agreement that is in place between the employer and labor organization.

Article 9 – Official Time, which was also taken to impasse, required the Union to waive statutory rights. Regarding the Executive Order implemented by President Trump, which had called for a one-hour to one-bargaining unit member ratio for official time usage, the Union insists that the Agency must not be allowed to use the implementation of the EO as a basis for its proposal. Despite the fact that the EO was stayed after its implementation by a federal judge and has now been repealed since President Biden was elected, the Union implores that executive orders cannot supersede federal statutes. Further, the FLRA recently ruled against an agency argument pertaining to bargaining and contract compliance regarding official time. The agency, the Environmental Protection Agency, attempted to argue that President Trump's EO concerning official time should be interpreted as a justifiable basis for its conduct because the EO was implemented after the EPA's specified action. The Authority rejected this argument and found that it must decide the substantive merits of a case by applying the current law.[29]

The Union argues that the Federal Service Labor-Management Relations Statute clearly provides the requirement for all parties to adhere to the notion that official time is a mandatory subject of bargaining, as established by 5 U.S.C § 7131(d). Thus, the Agency should have negotiated with the Union regarding official time proposals; a position that was supported by the D.C. Circuit Court in its overruling of the FLRA's contrary decision.[30]

The Agency initially proposed a bank of 1,500 official time hours and raised that figure to 2,000 hours in the LBO; a far cry from the 14,000 hours the AALJ used over the past five years on average. It is the Union's contention that had the Union accepted such a proposal, then the Union would have undoubtedly exhausted its hours on the § 7131(a) and (c) activities alone and would have been required to start draining its allotted hours for the following year and so on.

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[29] *U.S. EPA*, 72 FLRA No. 22

[30] *AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA*, 798 F.2d 1525 (D.C. Cir. 1986)

To be sure, the Agency's LBO proposal of just 14.3% of the average amount of official time that the Union had used over the past five years is evidence that the Agency did not desire to realistically bargain with the Union regarding Article 9; and thus, forced a permissible subject of bargaining to impasse, which, as the Union argues, in turn, is clear evidence in itself of an unfair labor practice.

As to Article 15 – Telework, the Agency's LBO pertaining to Telework in effect forced to impasse statutory waivers of the Union's right to bargaining the scope of Agency discretion, so says the Union. The Union makes the claim in the grievance that the Agency's LBO proposal regarding Article 15 would have effectively bestowed upon Agency the sole discretionary authority to strip a BUE of his or her right to telework, or even worse – the Bargaining Unit as a whole, absent any profound or meaningful restrictions.

Furthermore, the Union argues that the Agency's chief spokesperson, Mr. Eddie Taylor, plainly admitted that Agency was aware of its statutory mandate to bargain over telework conditions.[31] However, the Agency's LBO did not reflect this acknowledgment. The Agency's LBO, in reference to Article 15, attempted to secure the Agency with unquestioned authority over all telework issues, which is evident by proposing that the Agency reserves the right to suspend or terminate telework without notice; the discretionary authority to determine a judge's eligibility to telework, as well as the time limitations that judge is allowed to telework; the right to deny telework to judges that may require close supervision; and retain the sole discretion to alter telework days for any judge in the manner Agency so chooses.[32]

The Union implores that the Agency's unwillingness to negotiate any potential outcome surrounding telework that did not provide the Agency with complete control over the parameters

[31] Transcript, Vol.4, pp. 67-68
[32] Joint Exhibit 13, pp. 53-57

of the practice, is evidence that the Agency failed to adhere to its duty to negotiate the general scope of its discretion, which forced the issue to impasse.

The last proposal forced to impasse by the Agency was Article 29 – Facilities and Services. By doing so, the Agency required the Union to waive its statutory rights to bargain over the subject matter. The subject of office space bargaining unquestionably affects the condition of a judge's employment. The Union does not argue or contest the fact that the Agency has the right to move a judge from one office to another or renovate a specific office. However, these decisions remain conditions of employment; thus, must be treated as mandatory subjects of bargaining, which did not occur.

The Agency, in its LBO, offered that the Agency will provide the Union with information regarding office moves and renovation plans, and that the actions will be taken in accordance with applicable policy. Moreover, the proposal stated that such a position satisfies the Agency's inherent duty to bargain over the matter as required by Title 5.[33] To be sure, such a position flies in the face of the requirement set forth by the Statute. As supported by an FLRA decision, the Union implores that there is no requirement for a party to show intent to establish that bad faith bargaining occurred.[34] Thus, any argument that the Agency should be allowed to make unilateral decisions on space without first consulting the Union simply runs afoul with the statutory requirement, argues the Union.

Even though the Agency came to acknowledge the fact that its LBO proposal forced the Union to waive its right to bargain, the Union insists that such an acknowledgement does not excuse the Agency from initially committing the action. The bad faith occurred in June 2019. The language was removed from Agency's LBO in October 2019. Thus, the Agency, according

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[33] Joint Exhibit 13, p. 162
[34] *SPORT*, 52 F.L.R.A. at 347

to the Union, deprived the Union of a fair opportunity to bargain over the terms during the bargaining process.

In addition to the specific proposals that the Agency forced to impasse, the Union claims that under the totality of the circumstances concerning bargaining, the Agency acted in bad faith. The FLRA employs a standard that weighs the "totality of the circumstances", which of course simply attempts to ascertain as to whether a party acted in bad faith during the entirety of negotiations.[35] The Union strongly asserts that such behavior did occur, and the Agency consistently refused to bargain in good faith with the Union on a broad range of issues throughout the negotiations.

The Union argues that for a party to refute a bad faith bargaining accusation, the responding party must be able to substantiate the counter claim in defense of its position. To be sure, the Union emphatically maintains that the Agency has failed to prove that its actions in fact did not meet the acceptable definition of bad faith bargaining.

The Union argues that the Agency routinely and regularly participated in the bargaining process with a closed mind, lacking an inspired effort to reach an agreement; committed numerous statutory waiver violations; attempted to surface bargain by proposing to cut official time by roughly 90%; and refused to acquiesce the Union's request to negotiate over the issue pertaining to judicial function. Therefore, the claim that the Agency refused to bargain in good faith is quite evident, so says the Union.

As a form of remedy in response to the Agency's actions, the Union requests that the Arbitrator issue an award granting 1) a status quo ante, which would return the parties to the bargaining table and start anew while bargaining in good faith; 2) a cease and desist order be

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[35] *U.S. Department of the Air Force Headquarters, Air Logistics Command Wright-Patterson Air Force Base*, 36 F.L.R.A. 524, 531 (Aug. 3, 1990)

issued for deterring such conduct from occurring in the future; and 3) a posting requirement, acknowledged and signed by the Deputy Commissioner of the Office of Hearing Operations, serving to emphasize and acknowledgement that the Agency's actions were inappropriate and in violation of the Statute.

Agency

The argument that the Agency acted in bad faith throughout the negotiation process is a falsity that is not supported by factual evidence, claims the Agency in its defense. The fact that the Union refuses to acknowledge the Federal Service Impasse Panel's directives, and further delays the implementation of the nine contested Articles, is evidence that Union is simply dissatisfied with the basic language or principles of the Articles in which it has agreed to implement. Moreover, the Agency attempts to convey that the Union's complaints regarding the proposed policy language should not be addressed before the Arbitrator; rather, the appropriate setting and time for such presentation and discussion was when the parties went to impasse before the FSIP. To be sure, the Union made such claims to the Panel, which were received and interpreted with mixed levels of success, yet arguments that run counter to another party's do not constitute instances of bad faith bargaining.

In defense of the Union's claim that the Agency forced to impasse a statutory waiver pertaining to the duration proposal, the Agency implores the Arbitrator not to consider this argument, given the fact that it was not properly presented in the Union's grievance. And if the Arbitrator were to decide to entertain the Union's claim, then the Agency insists that the argument must be rejected. The Statute, 5 U.S.C. § 7111 – Exclusive Recognition of Labor Organizations, provides many statutory requirements pertaining to the recognition of labor organizations, yet is absent any language that mandating that a labor organization is entitled to be

recognized under a three-year term collective bargaining agreement. Any notion that the "contract bar" establishes such a requirement must be rejected in its entirety. Furthermore, the FSIP has routinely imposed seven-year term agreements, which undercuts the Union's argument that the mere proposal of a three-year agreement would create a statutory waiver.[36] In light thereof, the Agency requests that the Union's claim that a statutory waiver was forced to impasse be rejected.

The Agency refutes the Union's assertion that the Agency forced to impasse six MOUs that had been in place, thereby waiving its statutory rights to bargain over the MOUs. As the testimony of Chief Spokesperson Eddie Taylor conveyed in the arbitration hearing, the Agency continuously informed the Union throughout negotiations that it was Agency's goal to consolidate all MOUs and incorporate them into the new CBA.[37] The purpose of such a move would cause less confusion and misinterpretation regarding policy language, and hopefully eliminate inadvertent contract violations by both parties, argued Mr. Taylor.[38]

In an effort to comply with the Union's desire to retain the substantive provisionary language from the MOUs by incorporating them into the the new CBA, the Agency informed the Union that it understood the Union's concern, however, the Union ultimately failed to respond in earnest to repeated Management requests regarding which specific provisions that it wished to retain via the CBA. The Agency contends that the Union's failure to effectively negotiate over the MOU provisions should eliminate any consideration of legitimacy pertaining to such a claim of impropriety. The statutory definition of collective bargaining does not require a party to agree

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[36] *National Labor Relations Board and National Labor Relations Board Professional Association*, 20 FSIP 072 at 43 (2020)
[37] Transcript, Vol. 3, pp. 234, 236, 238; Transcript, Vol. 4, p. 28
[38] *Id.* at Vol. 3 pp. 234-235

to a proposal or make a concession; rather, the parties must engage in negotiations.[39] To be sure, Agency insists that it was the Union's insistence not to negotiate that led to the absolution of the MOUs.

As to Article 15 – Telework LBO, the Agency denies the that claim that its proposal forced the Union to waive its bargaining rights. The Agency's LBO simply afforded Management the right to retain sole discretion to change or eliminate approved telework days in response to certain operational needs if they were to arise. The proposal in no way forced a waiver of Union's bargaining rights over the impact of Agency's proposed changes. Furthermore, the Agency claims that its argument is strengthened by the fact that The FLRA recently ruled that establishing the number of telework days is an inherent management right that does not require an agency bargain over its implementation.[40] Therefore, the substantive change was never a bargainable issue; it was the implementation process; an issue over which the Agency was always willing to bargain.

Prior to the FLRA's ruling, in January of 2020 the Agency withdrew the language in its LBO that granted Management the right to retain sole discretion in changes to the number of telework days to which a judge is assigned.[41] This decision further portrays the Agency's willingness to accommodate the Union's concerns.

Furthermore, the Panel's decision stated that the Agency did not act in bad faith, nor was the Union harmed by the Agency's LBO proposal, or required to waive statutory rights, given the basic fact that the Agency agrees with the Union that impact and implementation changes to telework are mandatory issues that must be bargained.

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[39] 5 U.S.C. § 7103(a)(12)
[40] *NTEU and United States Dep't of Agriculture, Food and Nutrition Service*, 71 F.L.R.A. 133 (2020)
[41] Joint Exhibit 22, p. 1

The Union's argument that Agency's actions during the negotiation process forced to impasse a statutory waiver of Union's rights to bargain over portions of Article 29 – Facilities and Services, specifically office moves and renovations, is without merit, insists the Agency. The Agency argues that the "covered by" doctrine, which precludes an issue previously agreed upon from being bargained over in the future, was employed to negotiate the terms and conditions that would affect future events and must not been interpreted by the Arbitrator as a formal waiver request or imposition. The Agency made no attempt to deprive the Union of its right to negotiate office moves; rather, the Agency sought to initiate term negotiation pertaining to office moves on the national scale, not a local level.

Additionally, similar to its previous failure to act when ordered by the FSIP, the Union should be viewed as the party who failed to bargain over issues that had been decided by the Panel. After the Panel had issued its decision, it was the Agency that offered immediate dates to resume the bargaining process, while the Union offered unrealistic dates months in the future as a form of protest.

The Agency remedied any purported wrong that had been proposed in its LBO. And after the Agency decided to withdraw the language requiring the Union to waive its future rights to bargain, the Panel adopted the Union's initial position, referencing the Agency's withdrawal of the contested language. Thus, any argument that bad faith bargaining was committed by the Agency in its dealings over Article 29 throughout the negotiation process must not be afforded legitimacy.

The Union implores that contrary to the Union's assertions, the Agency bargained in good faith throughout the entirety of the negotiation process. The Agency's actions complied with the requirements set forth in the Statute, specifically 5 U.S.C. § 7114(b)(1) and (3), which

states that parties must, "approach the negotiations with a sincere resolve to reach a collective bargaining agreement" and, "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delay." These expectations are also similarly mandated by 5 U.S.C. § 7103(a)(12). While the Agency implores that it irrefutably adhered to these demands, throughout negotiations, it refused to agree to proposals just for the sake of preserving the spirit of bargaining. As the Agency has argued, the concept of collective bargaining does not require a party to accept or agree to terms that it finds unfavorable; a stand that the Agency contends was taken during negotiations.

As to the Union's claim that the Agency failed to bargain in good faith over maxi-flex scheduling issues, the Agency decries such a notion, and contends that intensive negotiations between the parties occurred. The basis for its denial of the Union's proposal was because its implementation would not have added any operational benefit, and it could have possibly caused staff collaboration issues, as well as affecting office morale. The Union failed to convince the Agency that an additional 2.5-hour flex band for judges would have been productive or added to the efficiency of the Service. And since the Agency was and remains under no obligation to accept a bargained for demand, no evidence of bad faith bargaining exists.

The claim that the Agency engaged in bad faith bargaining over Article 13 – Judicial Function, must also be denied, so says the Agency. The Agency's LBO attempted to address the fact that the language in Article 13 was expansive and unnecessary at times; thus, the Agency sought to eliminate it, especially since it did not address the judges' terms of employment. The Union wished to add language that would have addressed the scheduling of hearings and allowing for the determination assessments of necessary evidence, which the Agency was unwilling to grant, since such a proposal could have potentially conflicted with the Agency's

regulatory scheme, sub-regulatory policy, and additional expectations that the Agency maintained of the BUE's. Therefore, in an effort to reach a compromise, the Agency made an offer to maintain the existing language that stated a judge's role in the accomplishment of the organization's overall mission, and their significant impact. The Union declined to accept such a compromise and responded with an offer that cited judges as inferior officers. The parties went back and forth, negotiating, bargaining, yet failed to reach an agreement. The Panel chose not to side with the Union and imposed that the following language be adopted: "ALJs are appointed consistent with applicable law and regulation."[42] The fact that the Panel did not adopt the Union's proposal is notable, because a split decision by the Panel is evidence that the parties did indeed negotiate.

Moreover, the claim made by the Union that the Administrative Procedures Act ("APA") defines the judges' terms and conditions of employment is inconsistent, argues the Agency, with 5 U.S.C. § 7103(a)(14)(c), which states that specific conditions of employment do not include policies and practices references; rather, those specificities are proved by Federal statute. The APA exists and remains separate from the parties' CBA, and all collective bargaining agreements, claims the Agency. Therefore, the rights, judicial statutory function, and privileges that the judges maintain are codified within the APA. As such, the Agency insists that there is no need to reference the APA in the CBA itself.

Given the Agency's documented attempt to negotiate over Article 13, the Agency requests that the Arbitrator not afford credence to the argument that the Agency committed bad faith bargaining due to the manner in which it negotiated with the Union.

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[42] Joint Exhibit 23, pp. 17-18

In regards to Article 9 – Official Time, the Agency urges the Arbitrator to reject the Union's argument that the Agency's decision to reduce the number of official time hours that the Union was to be afforded on a yearly basis was tantamount to bad faith or surface bargaining, nor was it consistent with Executive Order 13837. First, the Agency implores the number of hours that the Agency proposed was for 2,000 hours, and its initial proposal was for 1,500, so it is evident that Agency chose to bargain and negotiate over the issue. The EO that is referenced in the Union's grievance called for an official time cap of one hour per one bargaining unit member ratio; the Agency's LBO exceeded this suggested limitation. The Bargaining Unit consists of approximately 1,200 judges, and the EO stated that any official time allotment in excess of one-hour per bargaining unit member should not be considered reasonable, necessary or in the public interest.[43] Therefore, it is clear that the Agency's LBO deviated from the suggested requirements set forth in the EO. As such, the premise of the Union's claim in its grievance is not based on fact.

The basis for the sought-after reduction by the Agency was to help better focus its resources on serving the American people and accomplishing its directives and goals. Thus, by eliminating unneeded official time hours, which totaled approximately $1.5 million in FYE 2019, the Agency saw an opportunity to reign in excess spending in an effort by reducing AALJ official time hours to comparative numbers of other bargaining units, as Mr. Taylor attested to during the hearing.[44] The other two bargaining units affiliated with the Agency were allotted approximately 4.5 hours per bargaining unit member, while the ALJ's were used to receiving and using in excess of 11 hours per judge.

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[43] Union Exhibit B, p. 8
[44] Transcript, Vol. 4, p. 105

Furthermore, any notion that the Agency's proposal constituted bad faith or surface bargaining must be seen as incredulous, in light of the fact that the Panel's decision imposed that 1,200 total official time hours be allotted to the Union each fiscal year, which of course was 800 fewer hours than the Agency's offer in its LBO.

And lastly, the Agency's LBO even contained a provision that allowed for the Union to deduct hours from the following year's bank if the current bank hours had been depleted. Therefore, it should be clear to the Arbitrator that the Agency's actions and proposals throughout the Article 9 bargaining sessions in no way constituted what the Union claims was an unfair labor practice. As a result, the Agency requests that the Arbitrator reject such an argument in its entirety.

The Agency proposes that contrary to its contention regarding the Agency's behavior and demeanor, it was the Union that routinely and without regard practiced bad faith bargaining during its dealings with the Union. As summarized below, the Agency insists that the following actions clearly constituted bad faith bargaining when applied to the applicable standards set forth in the Statute: attempting to delay the negotiation process because the acting SSA Commissioner was not senate-confirmed; taking excessively long caucuses during negotiations, yet failing to produce significant proposal change upon returning to the bargaining table; requesting frivolous information, rather than a sincere document discovery request, that in turn further delayed the negotiation process; and its refusal to engage in continued bargaining sessions at the Panel's urging.

Moreover, the Union's failed attempt to prove that the Agency committed any unfair labor practice in the form of bad faith bargaining is undeniable, argues the Agency, and as a result, the Agency implores the Arbitrator to deny the grievance in its entirety.

No remedy in the form of a *status quo ante* would be appropriate if the Arbitrator finds that the Agency erred in a technical or substantive manner; all that would do is eliminate the hard time spent and resources both parties have exhausted in an effort to agree upon twenty contractual articles through the collective bargaining process. To be sure, the Agency urges the Arbitrator to find no fault at the hands of the Agency and deny the instant grievance in its entirety.

V.

The claims laid out in the grievance by the Union were rooted in the Agency's June 18, 2018 decision to terminate the 2013 Collective Bargaining Agreement, which was set to expire on September 30, 2018.[45] In its termination letter, the Agency informed the Union that it was, "prepared to engage in term negotiations in an expeditious manner and to fulfill its statutory bargaining obligation, and to negotiate, in good faith, over the full range of Union proposals that are negotiable under the Statute."[46] As stated in its termination notification, the Agency was well aware of its obligation under Title 5 to fully participate in bargaining sessions over a new CBA, and to do so in an earnest manner.

The Union's assertions as referenced in the July 8, 2019 grievance include the following: Agency violations of the Telework Enhancement Act of 2010 (Article 15 – Telework) by forcing to impasse and thereby requiring the Union waive its statutory rights to bargain over the ramifications of the Agency's proposals; the forced waiver of the Union's statutory right to bargain all current MOUs (Article 1 – Duration and Termination); the forced waiver of the Union's statutory right to bargain office relocations (Article 29 – Facilities and Services); bargained in bad faith in violation of 5 U.S.C. § 7114(b)(1) over Article 14 – Hours of Work,

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[45] Joint Exhibit 2
[46] *Id.* at p. 1

specifically the implementation of the Maxi-flex scheduling; bargained in bad faith during negotiations over Article 13 – Judicial Function; and consistently attempted to force the Union negotiators to reach the understanding that the AALJ was not exceptional, and the terms of the new CBA should be more in line with the parameters set forth in the collective bargaining agreements that exist between the American Federation of Government Employees and the National Treasury Employees Union.[47]

The Union's grievance can be broken down into two sections: 1) the forcing to impasse of permissive subjects of bargaining; a violation of §7115(a)(5); and 2) conducting negotiations in a bad faith manner, which precluded the parties from being able to reach agreements over fundamental disagreements pertaining to specific contractual proposals. The Union's bad faith claim covers a broad front, including maintaining a closed mindset and surface bargaining over issues with no intention of reaching an agreement; simply going through the motions if you will.

The parties are well aware that bad faith bargaining claims are difficult for parties to prove, given often times the lack of evidence or a paper trail showing that a party acted in a manner inconsistent with that statutory requirements established by Title 5 of the United States Code. It is evident that the parties enjoy a discourteous relationship at best, as was evident from the four-day arbitration hearing. Not to say that Counsel nor the parties' witnesses behaved unprofessionally during the hearing; quite the contrary. The parties treated each other with respect throughout the entire four-day hearing process, which is evident from the record, and the Arbitrator commends both the Union and the Agency representatives and witnesses on their

[47] It should be noted that while the Union's grievance does not specifically spell out the claim in detail that the Agency forced to impasse the proposals in Article 9 – Official Time, as it did with Article 1, 15 and 29, the Union clearly alleges that the Agency was guilty of "radically reducing the number of official time".[47] While it is your Arbitrator's practice to only consider issues brought forth in the official grievance, it is undeniable that the Union Counsel's arguments pertaining to the Agency's official time reduction was derived from the basic claim that was broadly established in the grievance.

participation and willingness to help facilitate a functional four-day virtual hearings; a difficult accomplishment for obvious reasons. However, with that being said, the testimony of the Agency and Union witnesses painted a vivid portrait of a relationship that is in significant need of repair. Thus, the notion that the Agency committed the aforesaid acts is not inconceivable; however, such claims must still be proven beyond a preponderance of the evidence that was submitted into the record.

Absent a clear paper trail that supports the Agency's defense that its behavior did not constitute bad faith negotiations as defined by §7114 and §7116, your Arbitrator must closely examine the conditions set forth by the Agency's preliminary and last and best offers. Given the fact that no emails exist that plainly convey the Agency's intentions to participate in bad faith dealing, the Agency's willingness to compromise, while observing its statutory right not to concede to proposals and demands, shall be also evaluated.

The Union's assertion that the Agency forced to impasse the issue over Teleworking, which effectively waived the Union's right to bargain over the conditions of Article 15, insists that the Agency was attempting to secure unparalleled discretionary control over the administration and implementation of telework assignments. The Agency's LBO provided that, "[t]he Agency retains sole discretion to change, reduce, suspend, or eliminate approved telework days for any Judge, office, or agency-wide due to operational needs."[48] Such a proposal is undeniably broad and creates a scenario in which the Agency could make any discretionary decision regarding telework on the basis of operational needs.

The FLRA issued a recent decision that addressed an agency's discretionary authority concerning the administration of telework assignments, and in it, the Authority states that,

[48] Joint Exhibit 13, p. 57

"[u]pon review of our prior caselaw and the arguments presented here, we determine that the frequency of telework—the "when" an eligible employee may perform his or her duties away from the duty station and "when" that eligible employee must report to the duty station—is inherent to management's right to assign work."[49] It is apparent that the Authority is of the opinion that agencies must be afforded broad discretion regarding employee assignments, given the nature of the Act, and the duty an agency possesses in addressing an employee's work assignments. However, the Authority, in the same ruling, also stated, "[t]he plain wording of the Act does not support a conclusion that the Agency has sole and exclusive discretion."[50]

The Agency's LBO would create a scenario that would diminish the Union of any bargaining power; thereby, granting the Agency unfettered and exclusive authority to administer the Act in the way in which it sees fit. And as the Authority stated in NTEU, such a premise was not the design intentions of Congress. 5 U.S.C. 6502(a)(1)(A) allows for an agency to establish a policy for its employees to perform employment obligations via telework. However, an agency is not bestowed with the authority to, "retain sole discretion to change, reduce, suspend, or eliminate approved telework days for any Judge, office, or agency-wide due to operational needs", such a power grab is excessive and contrary to the spirit of the Act and the Statute.[51]

The Agency's refusal to retract its hardline position regarding the control it desired is indeed evidence in itself of forcing a permissible subject of bargaining to impasse. The FLRA has consistently held that parties, whether they be labor organizations or agencies, are not free to force permissive subjects of bargaining to impasse; rather, they must participate in the bargaining

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[49] *NTEU* 71 F.L.R.A. 706 (April 21, 2020)
[50] *Id.* at p. 705
[51] Joint Exhibit 13, p. 57

process over such issues.[52] Therefore, in light of the language prescribed to the parties in § 7114(b), which states that the parties must, "approach negotiations with a sincere resolve to reach a collective bargaining agreement", and that each party be represented by individuals at the bargaining table whom are, "prepared to discuss and negotiate on any condition of employment", it is quite apparent that the Union's actions by way of its LBO constituted an unfair labor practice as defined by 5 U.S.C. § 7116(a)(5) in its decision to force to impasse Article 15 during the negotiation process.[53]

The second issue brought forth by the Union in its grievance alleges impropriety on the Agency's behalf by 1) forcing to impasse proposed statutory waivers by the Union as a result of the Agency LBO pertaining to Article1 – Duration; and 2) the Agency's reported refusal to bargain over the retention of six established MOUs.

The Union's claim that the Agency forced to impasse on a statutory waiver by declining to agree to a three-year CBA term fails, because despite the fact that 5 U.S.C. § 7111(f)(3) provides protection to a labor union from being raided if the CBA duration is for a period of three years or less, the statutory language is absent as to the notion that either an agency or a labor organization is entitled to a three-year term. The predecessor CBA was for a period of five years; thus, an effort to impose a seven-year CBA is not seen by your Arbitrator as excessive nor extraordinary, especially given the parties' undeniable shortcomings when it comes to harmonious relations and evident lack of ability to reach mutual agreements on issues that govern the parties relationship.

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[52] *AFGE Local 3937*, 64 F.L.R.A. 17, 21 (August 31, 2009). *SPORT Air Traffic Controllers org.*, 52 FLRA (Sept. 30, 1996). *U.S. Dept. Of Agric., Food Safety & Inspection Serv.*, 22 FLRA (July 15, 1986)
[53] 5 U.S.C. § 7114(b)(1)(2)

As to the second ULP claim surrounding Article 1, pertaining to the elimination of the MOUs, the Agency admits that its intentions were to eliminate the specific MOUs in an effort to, as Agency Chief Spokesperson Eddie Taylor stated, consolidate the governing language that bound the parties into one whole document, absent of "straggler MOUs".[54] Taylor went on to attest that often times people are unaware of MOUs, which often can cause confusion and inadvertent contract violations, and, "so as a practice at SSA we certainly like negotiating contracts that when we have a new term its everything is in that agreement."[55]

The Agency's position is certainly understandable, yet the proposed elimination of all MOUs rightfully gave the Union pause as to whether the agreed upon stipulations within those MOUs would ultimately be added to the CBA. Given the parties' inability to come to agreement on approximately one third of the Articles in the proposed CBA, it is reasonable to conclude that the Agency would be unwilling to adopt a blanket policy on the incorporation of the MOUs into the new Agreement.

While the Union made considerable concessions by initially agreeing to eliminate all MOUs that were in direct contradiction of provisions in the CBA, and eventually agreeing to eliminate twenty of the twenty-six MOUs that were in existence, the Agency refused to move off its original proposal and required the elimination of all existing MOUs as a prerequisite for the agreement to a new CBA. Rather than attempting to bargain over the contents of the MOUs, the Agency's initial, interim and final offers remained the same. To be sure, §7116(a)(5) prohibits a party from refusing, "to consult or negotiate in good faith with a labor organization as required by this chapter". As previously stated, a party's unwillingness to adopt the negotiating party's proposal does not constitute an unfair labor practice; neither does a refusal to make concessions;

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[54] Transcript, Vol. 3, p. 234
[55] *Id.* at p. 234

however, 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.

In addition to Article 1 and Article 15, the Union, in its grievance, claimed that the Agency forced to impasse the waiver of the Union's right to bargain over Article 9 – Official Time. As stated, while not officially identified in the grievance in detail, it was referenced in the grievance as an example of the Agency's improper conduct, which will suffice, especially since it was covered in depth throughout the four-day hearing. The idea of Official Time, and the Union's past use thereof, was an issue of contention given the allotted amount of time that the Union had received prior to the proposed reduction.

To be sure, your Arbitrator is not in the position to make the determination whether the proposed 2,000 hours by the Agency is enough time for Union officials to satisfy their mandated requirements regarding representation in a calendar year. Your Arbitrator is charged with determining whether the Agency's initial and final proposals were valid attempts to negotiate on the permissive subject or were they simply examples of surface bargaining that just skimmed the waterfront. The Agency, while it does not base its proposal on Executive Order 13837, and actually refutes such a claim, did in fact propose a reduction during negotiations consistent with the suggested total of one-hour per bargaining unit member contained within the MOU. This in itself does not sufficiently prove that the Agency forced to impasse Article 9, especially when taking into consideration the fact that the Agency came off its original number of 1,500 hours.

Regardless as to whether the proposal was related to the EO or not, it is your Arbitrator's opinion that such a factor is irrelevant. The fact that the EO was stayed upon its execution, and later overturned in its entirety is insignificant in the instant grievance. The driving factor that must be addressed is whether the Agency was actively attempting to negotiate with the Union or guilty of participating in surface bargaining.

The reduction from a 22,000 hour allotment to 2,000 is excessive. One must ask why would the Union even entertain such an offer when in the past, its usage of official time far exceeded the Agency's proposed allotment.[56] While technically the Agency negotiated with the Union and participated in the bargaining process, which is evident from the 500 hour addition in its LBO, the extremely low proposal is a cleat example of surface bargaining; thereby, violating 5 U.S.C § 7116(a)(5).

The last Article that was taken to impasse was Article 29 – Facilities and Services. The Union acknowledges the fact that the Agency is bestowed with the authority to determine whether an office move is necessary or if an office requires renovation. However, your Arbitrator contends that the implementation of such changes must be negotiated.

The pertinent portion of the Agency's LBO as to Article 29 stated, "The Agency will provide the Union with advance information related to any office opening, consolidation, relocation, expansion, or renovation. These actions will be accomplished in accordance with applicable Agency policies. This Article fulfills the Parties' obligation to negotiate in accordance with 5 U.S.C. Chapter 71."[57] The offer simply states that it will provide advance information to the Union, which your Arbitrator interprets to mean that notice will be provided. Notice in this instance is not required in this particular situation, what is required is for the agency to bargain

[56] Union Exhibit 9
[57] Joint Exhibit 13, p. 162

over permissible issues that affect the conditions of employment, which this Article undoubtedly does. Agency's refusal to allow for the Union to take place in the bargaining process over the parameters of Article 29 clearly constituted a violation of 5 U.S.C. § 7116(a)(5); thus, the Union's contention that such behavior was tantamount to bad faith and constituted an unfair labor practice is affirmed.

As to the bad faith claims that were specifically associated with the Agency's alleged failure to bargain in accordance with 5 U.S.C. § 7114(B), requiring a party to negotiate in good faith at the bargaining table, the Union points to two Articles: Article 13 – Judicial Function and Article 14 – Hours of Work.

In reference to alternative work schedules, in this case, maxi-flex schedules, the Agency did not see the benefit in terms of promoting the mission of the Agency by adopting such a policy. The Union references Authority language that prescribes to the notion that agency's must negotiate over alternative work schedules ("AWS"), as long as the AWS does not pose the threat of an "adverse agency impact".[58] And rest assure, your Arbitrator believes that this notion is highly on-point.

While this phrase is certainly broad on its face, Mr. Taylor provided testimony that served well to support the basis for the Agency's denial of engaging in bargaining of maxi-flex hours. Mr. Taylor stated for instance that it was important to the Agency for the BUEs to be working hours that were consistent with the hours of the other employees with which they were in regular collaboration, such as decision writers, etc.[59] Moreover, the Mr. Taylor signaled that the Agency was concerned about the potential for tension between the AALJ BUEs and the other BUEs that belonged to the NTEU and AFGE, given the fact that the NTEU and AFGE did not

[58] *AFGE, Local 1934*, 23 F.L.R.A. at 874
[59] Transcript, Vol. 3, 260-261

have maxi-flex schedules.[60] Furthermore, because judges work in such close proximity with the support employees, affording one group the ability to work in a manner that was inconsistent with another was perceived as a risk that was simply not worth the reward for the Agency to pursue. Therefore, given the Agency's basis for its legitimate hesitation to implement the proposal, its refusal to counter with a written proposal did not violate 5 U.S.C. § 7114(b).

The Article 13 claim alleged by the Union states that the Agency refused to negotiate over the implementation of a judicial function Article, which would specifically define the role of ALJs. As such, the Union takes exception to the fact that the Agency refused to include language in the Article that refers to the connection between the Administrative Procedures Act and the duties and obligations of the ALJ, despite the fact that the previous two Contracts had direct references to the APA in the Judicial Function Articles.

The APA defines the role of ALJs and maybe most importantly, establishes their judicial Independence. Thus, one must ask why the Agency would be so adamant to refuse its acceptance into Article 13, or why the Union chose to eliminate the Article in its entirety. Agency Chief Negotiatior Judge Brian Saame testified at the hearing that the reference to the APA was struck due to the belief that, "ALJs hold hearings that are pursuant to the regulatory scheme promulgated by the Commissioner in accordance with the Social Security Act."[61] And when asked whether there were specific references in the previous Contracts to the APA, Judge Saame states, "it doesn't really matter because the law is the law…if there is anything in a federal statute it automatically trumps contract language."[62]

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[60] *Id.* at p. 261
[61] Transcript, Vol. 4, p. 146
[62] *Id.* at p. 147

The Agency ended up striking the entire Article from its LBO based on the fact that the Union continually resisted to the Agency's "offers of compromise", and that all employees play a vital role to the mission of the Agency, not just judges.[63] Such is true, however, the parties were negotiating over a collective bargaining agreement that solely affected administrative law judges, not support staff or personnel. Moreover, the argument made by the Agency that the inclusion of the APA is unnecessary because the APA is in effect controlling does not excuse the Agency from its duty to bargain over an issue that clearly affects the conditions of employment. It is apparent to your Arbitrator that Agency's decision to simply refuse to provide a last and best offer during negotiations as a form of protest to the back and forth negotiations is tantamount to saying, "I'm taking my ball and going home", which is an inexcusable position to take when negotiating a National Agreement. Therefore, the Agency's refusal to bargain over the definition of a judge's employment functions is in your Arbitrator's opinion a clear violation of 5 U.S.C. § 7114(b) and constitutes an unfair labor practice in accordance with 5 U.S.C. § 7116(a)(5).

[63] Agency Post-Hearing Brief, p. 48

VI.

AWARD

Pursuant to 5 U.S.C. § 7118(a)(7(A)(B), the Arbitrator, acting in place of the Authority, has the right to issue a decision that serves to remedy the effects of an unfair labor practice(s). The Agency's following actions constituted unfair labor practices, as defined by 5 U.S.C. § 7116(5), in its dealings with the Union during negotiations. The affirmed ULPs are listed as follows:

1. Article 15 – Telework: forced to impasse a waiver of the Union's right to bargain over a permissible subject in its LBO.
2. Memoranda of Understanding – forced to impasse a waiver of the Union's right to bargain over permissible subjects.
3. Article 9 – Official Time: surfaced bargained over its proposed official time hour allotment in its LBO.
4. Article 29 – Facilities and Services: forced to impasse a waiver of the Union's rights to bargain over a permissible subject in its LBO.
5. Article 13 – Judicial Function: showed bad faith bargaining in its dealings with the Union over inclusions.

A status quo ante remedy is hereby granted, which requires the parties to return to the bargaining table to re-start negotiations, making the agreed upon twenty articles null and void. The negotiations will proceed under the ground rules of a new MOU, which must be drafted and agreed upon forthwith. Similar to the October 18, 2018 MOU, the parties will agree to dates to resume bargaining in addition to other terms that will set the parameters of the bargaining session(s).

In an effort to prohibit future instances of bad faith bargaining by the Agency and its negotiators, a cease-and-desist Order is attached to the Award. The Order will serve as acknowledgement by the Agency of the unfair labor practices that were committed during negotiations, and reassurance that the Agency will cease from committing any unfair labor practices in the future during negotiation proceedings. The Order shall be signed by the Deputy Commissioner of the Office of Hearing Operations and distributed via official SSA email to all bargaining unit members, as well as posted on all bulletin boards in common areas in all SSA hearing offices for personnel to view for sixty consecutive days.

John T. Nicholas
Arbitrator
May 17, 2021