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In the Matter of Arbitration Between*
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U.S. DEPARTMENT OF HEALTH AND *
HUMAN SERVICES *
*
*National Grievance
*ULP/FSIP
and *
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*
NATIONAL TREASURY EMPLOYEES UNION *
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OPINION AND AWARD OF
ROGER P. KAPLAN, ESQ., ARBITRATOR

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APPEARANCES:

For the Union: Frank Barczykowski, Esq.
M. Anna Gnadt, Esq.

For the Agency: Luis A. Diaz,
National Labor Relations Officer
Garfield Tavernier,
National Labor Relations Officer

STATEMENT OF THE CASE

On July 1, 2019, the U.S. Department of Health and Human Services (Agency or HHS) and the National Treasury Employees Union (Union or NTEU) (collectively, the parties) notified the undersigned that he had been selected as the Arbitrator in the above-captioned case. I conducted a hearing on Wednesday, September 11, 2019 in Washington, D.C. Both parties had the opportunity to examine and cross-examine witnesses as well as to present evidence and argument in support of their respective positions. The Agency did not call any witnesses. A verbatim transcript was made of the hearing. The parties filed written post-hearing briefs where were received by me on approximately November 18, 2019.

ISSUES

The parties could not agree on a statement of the issues. They each proposed a statement of the issues.

The Union proposed the issues as:

1. Whether the Agency committed an unfair labor practice in violation of 5 U.S.C. Section 7116(a)(1), (5) and/or (8), by unilaterally implementing the terms of the Federal Service Impasses Panel's April 1, 2019 order in case number 18-FSIP 077, before a complete successor collective bargaining agreement was in effect? If so, what shall be the remedy?

2. Whether the Agency violated Article 2, Section 2, of the parties' consolidated collective bargaining agreement effective October 1, 2010, as revised on March 6, 2014, by unilaterally implementing the terms of the Federal Service Impasses Panel's April 1, 2019 order, before a complete successor collective bargaining agreement was in effect? If so, what shall be the remedy?

3. Whether the Agency committed an unfair labor practice; that is, a clear and patent breach, in violation of 5 U.S.C. Section 7116(a)(1) and (5), by unilaterally implementing the terms of the Federal Service Impasses Panel's April 1, 2019 order, before a complete successor collective bargaining agreement was in effect? If so, what shall be the remedy?

The Agency proposed the issues as:

Whether the Agency committed an unfair labor practice in violation of 5 U.S.C. Section 7116(a)(1), (5) and/or (8) by implementing the terms of the Federal Service Impasses Panel's decision and order in Case 18 FSIP 077 on May 3, 2019, before completing the negotiations on the remaining six (6) articles of the contract? If so, what shall be the remedy?

Based on the record as a whole, I conclude that the Union's formulation of the issues is correct.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2
CONTRACT DURATION AND TERMINATION

SECTION 2

A. This Agreement shall remain in full force and effect until three (3) years from its effective date. It shall be automatically renewed from year to year thereafter unless reopened or terminated pursuant to the provisions of subsections B and C below. In addition, either Party may reopen up to four (4) articles of this Contract during the thirty (30) calendar days surrounding the 19th month anniversary of this Agreement.

B. Either Party may give written notice to the other Party, between sixty (60) calendar days and one hundred five (105) calendar days prior to the initial expiration date and each anniversary date thereafter, of its intention to reopen and amend or modify the Agreement.

C. If either Party gives written notice of intent to terminate, all negotiated conditions of employment contained in this Agreement continue in full force and effect until a successor agreement is in place, with the exception of any permissive subjects of bargaining. If either party elects to terminate any permissive subjects of bargaining contained within this Agreement, the party so

electing will notify the other party and identify the specific contract provisions that are being terminated.

RELEVANT PROVISIONS OF THE UNITED STATES CODE

5 U.S.C. Section 7114 Representation Rights and Duties

(c)

(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

5 U.S.C. Section 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;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. Section 7119 Negotiation Impasses; Federal Service Impasses Panel

(c)

(5)

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

FACTS

This grievance of the Union protests the alleged unilateral implementation of the terms of the Federal Service Impasses Panel's (FSIP or Panel) April 1, 2019 order in case number 18-FSIP 077, before a complete successor collective bargaining agreement was in effect. The crux of the Union's case is that the Agency wrongfully applied the terms of the FSIP's order to the Agency's employees and the Agency's operations despite the fact that the terms ordered by FSIP had not yet been properly incorporated into the parties' Collective Bargaining Agreement (CBA). As indicated, I held hearing on September 11, 2019. In the course of the hearing, I determined to bifurcate the case so as to decide the merits of the case in the current proceeding and to postpone a decision and possible further proceedings on remedy until I had made a determination on the merits. At that hearing, the following relevant evidence was adduced.

The Agency is a department of the executive branch of the Federal Government. The Union is the collective

bargaining representative for a unit of employees of the Agency.

In 2018, the CBA in force between the parties was the 2010 CBA, as revised in 2014 (the 2010 CBA). As found by FSIP (see below), the 2010 CBA had expired in September 2016 but, in the words of the FSIP Decision and Order, "continues to roll over until the parties enter into a new agreement." Insofar as the record indicated, the parties entered into bargaining for a successor CBA in the late spring of 2018. The undisputed testimony of Mr. Ken Moffett, NTEU Director of Negotiations, showed that the parties entered into bargaining on 34 articles of the 2010 CBA. According to Moffett's unchallenged testimony:

> . . . on the second day of bargaining [the] HHS truncated bargaining and requested [Federal Mediation and Conciliation Service (FMCS)] assistance, and submitted [Last Best Offers (LBOs)] and rushed the dispute to [FSIP]. (Tr. 30).

Moffett testified further, without contradiction, that the Union objected to submitting the dispute to FSIP

"based on the fact that we hadn't reached impasse in our view, because we hadn't talked about 32 of the 34 articles." (Tr. 31). The evidence indicated that, notwithstanding those objections and in accordance FSIP procedures, the Agency filed the case with FSIP in August 2018 and the parties then submitted their positions the Panel.

On cross-examination, Moffett made reference to the opening of negotiations in 2015. He specifically rejected the idea that the 2010 CBA had been terminated according to Article 2, Section 2.C. of the CBA by the opening of such negotiations. Moffett testified further that the Union opened the contract for the purpose of bargaining ground rules for a successor CBA. A dispute over ground rules developed and was eventually resolved in Department of Health and Human Services Washington, D.C. and National Treasury Employees Union, FSIP Case Number 16 FSIP 113 (Arbitrator Marvin E. Johnson, 2016).

The record showed that, on November 15, 2018, FSIP asserted jurisdiction over 28 of the 34 articles that the

parties had submitted to it. FSIP expressly declined to assert jurisdiction over the remaining six (6) articles and indicated it:

> . . . declines jurisdiction over these 6 Articles so that the parties may resolve the foregoing bargaining obligation disputes in the appropriate forum.

The November 15, 2018 FSIP assertion of jurisdiction directed the parties to resume negotiations with the assistance of an FMCS mediator over the 28 articles as to which FSIP had asserted jurisdiction. FSIP limited those negotiations to 30 days.

The evidence established that the parties met and negotiated over a period of several weeks during November and December 2018; they did so with the assistance and in the presence of an FMCS mediator. The record showed that the parties did not reach agreement on the articles at issue. There is no dispute that, following those negotiations, both parties timely submitted their LBOs and position statements (limited by the FSIP's November 15,

2018 assertion of jurisdiction to one (1) page of argument per article) to FSIP.

On April 1, 2019, FSIP issued a Decision and Order in the instant matter (Case Number 18 FSIP 077). In that Decision and Order, FSIP ordered contract language for the 19 articles that were submitted to it for decision. The record showed that, in the Agency's December LBO submission to FSIP, it also submitted six (6) "revised" articles to FSIP following FSIP's decline of jurisdiction over those articles. According to FSIP, the Agency later re-characterized this submission as a request for reconsideration by the Panel of its prior decision to refuse jurisdiction over those six (6) articles. The evidence indicated that the Union objected to the Agency's submission. FSIP declined to assert jurisdiction over the six (6) articles over which it had earlier declined jurisdiction, holding further that:

> To the extent that the Agency's submission may be considered a motion for reconsideration, the Panel denies it because: (1) It is inconsistent with the Panel's November 15-Order; and (2) the parties are

> not at impasse over the new proposals submitted by [the Agency].

Moffett testified, without dispute, that the six (6) articles that over which FSIP declined jurisdiction were still being negotiated between the parties. In its brief, the Agency acknowledged that the parties were still bargaining over at least five (5) of those six (6) articles.

FSIP's April 1, 2019 Decision and Order concluded with the following Order:

> Pursuant to the authority vested in the [FSIP] under 5 U.S.C. Section 7119, the Panel hereby orders the parties to adopt the provisions as stated above.

FSIP's Order did not expressly set forth a date of implementation and/or a date by which the parties were required to adopt the provisions stated in the Decision and Order.

On April 10, 2019, the Union emailed the Agency indicating that it had learned that the Agency had advised

employees that it was conducting Agency Head Review "on the language that was the subject of the recent [FSIP] order and that HHS would implement those articles following [Agency Head Review]." The Union pointed out that there were still six (6) outstanding articles of the existing CBA (i.e., the 2010 CBA) over which FSIP had declined to assert jurisdiction. Citing 5 U.S.C. Section 7114(c), the Union advised the Agency that it (HHS) lacked authority to subject a portion of the CBA to Agency Head Review and then to implement that portion of the CBA. In sum, the record showed that Union made clear its position that the Agency's action was premature because the FSIP order as to the 23 articles did not constitute a complete agreement and, therefore, the Agency would be in violation of the law if it implemented the FSIP April 1, 2019 Decision and Order before bargaining of the remaining articles was completed. In support of its position, the Union also cited Patent and Trademark Office 41 FLRA 795 (1991) (PTO). With respect to the email, Moffett explained:

> And the rest of the email goes on to say that our position is that there's no contract that can be implemented until there's a complete agreement.
>
> And we point out the case law and we point out the fact that [FSIP] declined to assert jurisdiction over six of the articles, and that type of thing." (Tr. 37).

The evidence showed that on April 19, 2019, the Agency advised the Union that it would implement the FSIP April 1, 2019 Decision and Order not earlier than 31 days after April 1, 2019 "pending internal review and processing." The Agency's April 19th letter further indicated that it (the Agency) had contacted FMCS in order to find dates to "discuss" the six (6) articles that were not covered by the FSIP April 1st Decision and Order.

By email dated April 23, 2019, the Union responded reiterating its position that the 2010 CBA was still in effect until it is superceded by a new CBA. The Union again argued that the Agency had no authority to impose the articles that were the subject of the April 1, 2019 FSIP Decision and Order until there is a complete CBA. The Union referred to its April 10, 2019 communication to the Agency

and repeated verbatim the text of the decisional authority cited therein. It also referred to Article 2 Section 2.C. of the 2010 CBA which requires that all conditions of employment in the CBA remain "in full force and effect" pending the parties' having a complete successor agreement in place.

The record showed that, on May 2, 2019, the Agency gave notice to the Union that it would implement the terms of the April 1, 2019 FSIP Decision and Order on May 3, 2019. As evidenced by a series of emails exchanged during August 2019 that were entered into the record, the Union requested a copy of the CBA that the Agency was implementing and the Agency responded by indicating that such a document was "not available". In addition, the Agency stated that the "FSIP order and its implications on the CBA" had been conveyed Executive Officers, Human Resource Directors and Labor Relations Offices. The Agency would not, however, acknowledge that it directed managers to implement the terms ordered by the FSIP Decision and Order and/or the

Agency's proposals that were submitted to FSIP in lieu of the 2010 CBA.

Union witnesses testified, without contradiction, that the Agency has applied the language embodied in the FSIP orders. The implementation of language in the articles addressed in the FSIP April 1, 2019 Decision and Order was confirmed by an email dated April 4, 2019 in which Senior Advisor at HHS, Mr. Darrell Hoffman, advised numerous Agency officials as follows:

> [The April 1, 2019 FSIP Decision and Order] resolves over twenty (20) disputes pending between HHS and NTEU. While the Order does not include all of the Articles to be included in a successor agreement, HHS will nevertheless comply with the provisions of the Order as directed, and will implement it as directed by [FSIP] while the resolution of the remaining Articles of the agreement proceeds.

The uncontradicted testimony of Union witnesses showed that the new language from the April 1, 2019 FSIP Decision and Order has affected a number of activities and operations within the Agency including but not limited to Official

Time, the telework program and the time within which a response to a proposed suspension must be made.

The Union filed the instant grievance on April 26, 2019. In the grievance, the Union alleged that the Agency violated 5 U.S.C. Section 7116(a)(1), (5) and (8) when the Agency unilaterally implemented the terms of FSIP's April 1, 2019 Decision and Order. The Union further alleged that the Agency's actions violated Article 2, Section 2 of the 2010 CBA and constituted a "clear and patent breach" of Article 2, Section 2 of the CBA thereby constituting an unfair labor practice according to the provisions of 5 U.S.C. 7116(a)(5). As a remedy, the Union seeks an order that the Agency cease and desist from committing the "unwarranted and unjustified personnel actions describe in the this grievance"; the restoration of the status quo ante; a make-whole remedy for every bargaining unit employee affected by the Agency's alleged improper personnel actions (including but not limited to back pay and restoration of leave; a public admission of violation of the statute by the Agency's Secretary; attorney fees and costs to NTEU and

any other appropriate remedy to which the Union might be entitled.

The grievance remained unresolved. On June 27, 2019, the Union invoked arbitration pursuant to the provisions of the 2010 CBA.

Based on the inability of the parties to resolve this matter at the lower stages of the grievance procedure, the case proceeded to arbitration as set forth earlier in this decision.

DISCUSSION AND ANALYSIS

In this dispute involving the Union's claim that the Agency violated the statute and/or the CBA by unilaterally implementing the provisions ordered by FSIP, the Union had the burden of proving that the Agency lacked the authority to implement those provisions. For the reasons that follow, I find that the Union sustained its burden of proof

and that the Agency lacked the authority to enforce those purported provisions of the CBA.

The analytic core of this present case is deciding the terms of the CBA that are in force. At the outset of the events that led to this grievance, the 2010 CBA was in force. Based on the record as a whole and for the reasons that follow, I conclude that 2010 CBA remained the only enforceable agreement between the parties.

In PTO, the FLRA found as follows:

> The Authority has held that it is "the agreement," not a portion thereof, that is subject to agency head approval under section 7114(c). For example, U.S. Department of the Army, Watervliet Arsenal, Watervliet, New York, 34 FLRA 98, 105 (1989) (Watervliet Arsenal); Department of the Interior, National Park Service, Colonial National Historical Park, Yorktown, Virginia, 20 FLRA 537, 541 (1985) (Colonial National Historical Park, Yorktown), aff'd sub nom. National Association of Government Employees, Local R4-68 v. FLRA, 802 F.2d 1484 (4th Cir. 1986). Where an agency head timely disapproves an agreement under section 7114(c) of the Statute, the agreement does not take effect and is not binding on the parties. Watervliet Arsenal, 34 FLRA at 105. Of course, parties may agree to implement all portions of the local agreement not specifically disapproved by the agency head. Id.

For the purposes of the agency head review process, we believe that section 7114(c) contemplates that an agreement generally will be treated as an integrated and complete document rather than as a collection of articles and sections. This principle is consistent with the Authority's precedent that "the agreement, not a portion thereof," is subject to agency head approval under section 7114(c). Watervliet Arsenal; Colonial National Historical Park, Yorktown. To hold otherwise would produce chaotic results. That is, if we were to [hold] that each individual provision was subject separately to the approval process a situation could result where some portions of the same agreement were approved, some were disapproved, and some went into effect automatically based on agency's failure to act within the 30-day time limit. Additionally, given the nature of negotiations, it could be very difficult to reliably ascertain the execution date of a particular provision. In this regard, we note that give and take is one of the cornerstones of collective bargaining. Thus, it would not be unusual for parties having reached tentative agreement on a particular provision to reconsider that agreement in efforts to come to an agreement on another provision. Moreover, one segment of an agreement may affect the meaning of another segment. For example, in this case, one of the last articles awarded by the arbitrator related to "definitions." Agency statement of position at 2, Case No. 0-NG-1287. It is not unreasonable to assume that the definitions could affect the meaning of previously awarded articles.

For these reasons we hold that the date of execution that triggers the time limits for agency head review under section 7114(c)(2) relates to the date on which no further action is necessary to finalize a complete agreement, not the dates on which agreement is reached as to individual pieces of that agreement. [Footnote 1] See Panama Canal

> Commission, 36 FLRA at 559-62 (in circumstances where an interest arbitrator's decision encompassed the parties' entire agreement, the date of the arbitrator's award constituted the date of execution for purposes of section 7114(c) review). . . . PTO at 802-803.
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> Footnote 1: We do not conclude that where, for instance, the parties become embroiled in litigation over certain subjects in the course of negotiations, they could not agree to sever those subjects and consummate an agreement consisting of those areas that are not in dispute, to be supplemented when their dispute is resolved. That question is not before us here and we do not reach it in this case. PTO at 803.

Title 5 U.S.C. Section 7114 lays out the process for approving an agreement between an agency and a union such as the parties herein. According to 5 U.S.C. Section 7114(c)(1), an agreement between an agency and a union is "subject to approval by the head of the agency." If the agreement is in accordance with all applicable law, 5 U.S.C. Section 7114(c)(2) mandates that the head of the agency approve the agreement within 30 days "from the date the agreement is executed". Should the head of the agency fail to approve the agreement, the agreement "shall take effect and shall be binding" on the parties, subject to other provisions of law, following the expiration of the 30 day

period provided for in 5 U.S.C. Section 7114(c)(2). Thus, on the 31st day after the execution of the agreement, even if the head of the agency has not approved of the agreement, the agreement goes into effect and is binding.

The FLRA's holding in PTO makes clear that "the agreement" that is subject to Agency Head Review and that is referred to in 5 U.S.C. Section 7114(c) means the whole agreement, not a portion of it. See PTO at 802. The FLRA has made clear that:

> For the purposes of the agency head review process, we believe that section 7114(c) contemplates that an agreement generally will be treated as an integrated and complete document rather than as a collection of articles and sections. PTO at 802.

Thus, whether the language of the agreement is negotiated by the parties or ordered by the FSIP, the new terms of a collective bargaining agreement must be go through Agency Head Review and be approved (one way or another) in order to become an enforceable agreement. Further, PTO makes clear that the review and approval must

occur as to all of the provisions of the intended new agreement. PTO references treating the agreement as "an integrated and complete document rather than as a collection of articles and sections". PTO at 802. The FLRA's reasoning is that otherwise, chaos and contradictions will ensue given the interrelation of contract provisions and the fact that negotiations often happen in stages.

The evidence made abundantly clear that at no time was there an "integrated and complete" agreement. An "integrated and complete" agreement is one that contains the language of all the articles that were not in dispute, all the articles that were negotiated and agreed upon by the parties, the provisions ordered by FSIP and agreed upon language for the articles that the parties had yet to be agreed upon. Indeed, the record showed that, even at the time of the hearing, some articles were still in negotiation. Therefore, an "integrated and complete" agreement was not yet in existence. Absent an "integrated and complete" agreement, there could be no valid Agency Head

Review. Absent Agency Head Review, there could be no new CBA. Absent a new CBA, there could be no new terms or articles of the CBA; the only terms of the CBA were those that were already in place in the 2010 CBA. Thus, the facts and the decisional authority make clear that there was no new CBA and no partially new or amended CBA. Therefore, the 2010 CBA was the agreement in force and effect.

The consequence of the conclusion that the 2010 CBA remained in full force and effect is that the Agency was required to conduct itself and its operations in accordance with the terms of the 2010 CBA and not with any of the terms either negotiated between the parties since the implementation of the 2010 CBA or ordered by FSIP. The evidence showed that the Agency took numerous actions consistent with the FSIP Decision and Order but inconsistent with the 2010 CBA. Therefore, those numerous actions described in the record that the Agency took based on the language ordered by FSIP that were not consistent with the 2010 CBA violated the 2010 CBA.

In consideration of the record, I find that the Agency's implementation of and acting on the language of the FSIP Decision and Order before a complete successor agreement was in place constituted a violation of 5 U.S.C. Section 7116(a)(1) because by applying terms that were not yet part of the CBA, the Agency "interfere[d] with, restrain[ed], or coerce[d]" employees in the exercise by the employees of any right under the chapter. On its face, the implementation of purported contract language that had not been incorporated into the CBA in a manner prescribed by 5 U.S.C. 7114 denied (a form of "interfer[ence]", "restrain[t]" or "coerc[ion]") employees the benefit of the collective bargaining process. Therefore, that unilateral action by the Agency violated 5 U.S.C. Section 7116(a)(1).

In consideration of the record, I find that the Agency's implementation and acting pursuant to the language in the FSIP Decision and Order does not constitute a refusal to consult or negotiate in good faith. Thus, the record

does not support a finding that the Agency violated 5 U.S.C. Section 7116(a)(5).

In consideration of the record, I find that the Union failed to present sufficient evidence to prove that the Agency "otherwise fail[ed] or refuse[ed] to comply with any provision of this chapter" in violation of 5 U.S.C. Section 7116(a)(8).

The record demonstrated that the Agency violated Article 2, Section 2.C. of the 2010 CBA by multiple instances by applying purported contract provisions that were not, in fact, incorporated into the CBA, as explained in detail above. In doing so, the Agency failed to abide by the 2010 CBA that "continue[d] in full force and effect until a successor agreement" was in place.

The record demonstrated that the Agency's unilateral implementation the FSIP Decision and Order created extensive purported changes to provisions of multiple articles of the 2010 CBA. As indicated above, these constituted repeated violations of 5 U.S.C. Section

7116(a)(1) and Article 2, Section 2.C. of the 2010 CBA. The Agency's actions go to the very essence of the collective bargaining process and the CBA itself. The purported CBA as the Agency was applying and enforcing it following the FSIP Decision and Order was significantly different from the 2010 CBA that, in fact, was still in full force and effect. In Department of Defense, Warner Robins Air Logistics Center, Warner Robins Air Force Base, Georgia, 40 FLRA 1211 (1991) (Warner Robins), the FLRA found that an agency's interference with the union's right to choose a specific employee to serve as its negotiator:

> . . . was not a mere breach of the parties' agreement. Rather, the nature and scope of the Respondent's refusal went to the heart of the agreement and the collective bargaining relationship itself and, therefore, amounted to a repudiation of the obligation imposed by the agreement's terms. Such refusal, therefore, constituted a violation of the Statute. Warner Robins at 1220.

The Agency's implementation of and acting on the language of the FSIP Decision and Order before a complete successor agreement was in place violated 5 U.S.C. Section

7116(a)(1) and Article 2, Section 2.C. of the 2010 CBA, as demonstrated above, and goes to the heart of the parties' agreement. Further, the shear scope of the Agency's action (i.e., unilaterally implementing and acting on 19 separate articles that were not part of the 2010 CBA that was still in force) demonstrated that its breach went to the heart of the parties' agreement and constituted a repudiation of the parties' agreement. In addition, the evidence established that the Union advised the Agency on at least several occasions that it (the Agency) was acting improperly and the Agency continued to do so. Thus, the nature and scope of the Agency's breach of the statute was "clear and patent". See Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858 (1996) and U.S. Department of Justice Federal Bureau of Prisons and AFGE Local 3935, AFL-CIO, 68 FLRA 786 (2015). Accordingly, the violations of 5 U.S.C. Section 7116(a)(1) constituted Unfair Labor Practices.

As indicated at the hearing, a finding in the Union's favor would likely require further proceedings to determine

the harm to bargaining unit employees that resulted from the Agency's actions.

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AWARD

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After carefully considering the evidence and arguments presented at the hearing and in the post-hearing briefs, I find that:

1. The Agency committed a clear and patent violation of 5 U.S.C. Section 7116(a)(1) and committed an Unfair Labor Practice by unilaterally implementing the terms of FSIP's April 1, 2019 Decision and Order before a complete successor CBA was in effect. The Agency did not violate 5 U.S.C. Section 7116(a)(5) or (8);

2. The Agency violated Article 2, Section 2.C. of the parties' 2010 CBA by unilaterally implementing the terms of FSIP's April 1, 2019 Decision and Order before a complete successor CBA was in effect;

3. The parties will meet, discuss and negotiate with respect to the harm caused to bargaining unit employees by the Agency's violation and the measure and allocation of make-whole relief. I will retain jurisdiction for 90 days from the date of this award to allow such consultations to occur. If at the end of that period, the parties have reached agreement, then no further proceedings will be necessary. If at the end of that period, the parties have not reach agreement, I will extend the retention of jurisdiction so as to allow for further proceedings on matters of remedy;

4. The grievance is sustained in part and denied in part.

DATED: DEC 12 2019

Roger P. Kaplan, Esq.
Arbitrator

Alexandria, Virginia