FEDERAL LABOR RELATIONS AUTHORITY OALJ 11-12
Office of Administrative Law Judges
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UNITED STATES DEPARTMENT OF JUSTICE UNITED STATES MARSHALS SERVICE OKLAHOMA CITY, OKLAHOMA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2272, AFL-CIO CHARGING PARTY	Case No. DA-CA-09-0306

Charlotte A. Dye
For the General Counsel

Eugene Kim
For the Respondent

Jason M. Wilder
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On July 17, 2009, the American Federation of Government Employees, Local 2272, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge in Case No. DA-CA-09-0306 with the Dallas Region of the Authority against the United States Department of Justice, United States Marshals Service (Respondent/Marshals Service). (G.C. Ex. 1(a)). On

April 29, 2010, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating the ground rules agreement entered into on June 17, 2009 and by refusing to negotiate a new Master Agreement. (G.C. Ex. 1(c)). On May 18, 2010, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(d)).

A hearing was held in Oklahoma City, Oklahoma on August 13, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely Post-Hearing Briefs, which I have fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

STATEMENT OF THE FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(c), 1(d), 3). At all times material to this matter, Mitch Berkenkemper was Chief, Labor and Employee Relations and James A. Wachter was Human Resources Officer. (G.C. Ex. 1(c)). Berkenkemper and Wachter have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), 1(d)).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of section 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. AFGE, Local 2272, AFL-CIO (AFGE Local 2272 or Union) is an agent of AFGE for the purposes of representing employees. (G.C. Ex. 1(c); 1(d), 3; Tr. 24). Jason Wilder is President of AFGE Local 2272, and is located in Oklahoma City, Oklahoma. (Tr. 21). There are approximately 4000 bargaining unit employees located throughout the United States. (Tr. 76).

The Master Agreement (MA) between the United States Marshals Service and AFGE, AFL-CIO, International Council of U.S. Marshals Service Locals, C-210, was signed by the parties and has been in effect since April 23, 1996. Article 42, Duration of Agreement, states in Section 1:

> This NMA will remain in full force and effect three years from the date it has been signed by the National President of the AFGE, the Director of the USMS and reviewed by the DOJ. Either party may give written notice to the other, not more than 90 days nor less than 60 days, prior to the expiration date for the purpose of renegotiating or continuing this NMA. The present NMA is automatically extended

> and will remain in full force and effect during the renegotiation of said NMA and until such time as an NMA is approved….

(G.C. Ex. 2; Tr. 22-23).

On January 26, 2009,[1] Berkenkemper sent an e-mail to Wilder,[2] titled Notice to Open Master Agreement Negotiations. The attachment to the e-mail read, as follows:

> Subject: Renegotiation of the USMS Master Agreement
>
> In accordance with Article 42, Section 1 of the 1996 USMS Master Agreement, either party may give written notice to the other, not more than 90 days nor less than 60 days, prior to the expiration date of the Agreement for the purpose of renegotiating or continuing the Master Agreement. The Master Agreement was signed on April 23, 1996, which makes the expiration date April 23rd of each year, and the notice period 60-90 days prior to April 23, or January 23-Feburary 22 of each year.
>
> Accordingly, this memorandum serves as official notice that the US Marshals Service wishes to open negotiations with AFGE Local 2272 for a new Master Agreement.
>
> Please begin assembling the Union Negotiation Team, and Management will do the same. After the teams have been assembled and prior to negotiating the new Master Agreements, we'll need to set a time table for the negotiation of the Ground Rules.
>
> Please contact me if you have any questions concerning this notice.

(G.C. Ex. 4; Tr. 25).

On February 19, Wilder responded to Berkenkemper, notifying the Respondent of the number and size of the Union's bargaining team. Wilder also requested dates to begin bargaining on the ground rules and stated that the Union was willing to meet in Washington, D.C. (G.C. Ex. 5; Tr. 26).

On May 1, Darla K. Callaghan, Assistant Director, Human Resources Division, sent a memorandum to Wilder informing him that the Respondent had agreed with the Union to open negotiations for a new USMS Master Agreement. Mitch Berkenkemper, Chief, Employee and Labor Relations was named as Chief Negotiator for the Management Negotiations Team, along with five other members and subject matter experts as appropriate.

Gil Colston, Assistant Chief, Labor Relations, was named to serve as Alternate Chief

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[1] All dates are in 2009, unless otherwise specified.

[2] Wilder had earlier approached Berkenkemper about reopening the MA, but this was prior to the notice period set forth in the MA. (Tr. 65).

Negotiator. (G.C. Ex. 7 & 8).

The parties met in Washington, D.C. on June 16 and 17, to negotiate the ground rules agreement for the MA negotiations. (Tr. 76). The Union was represented by Derek Willingham of AFGE, Wilder and two other bargaining unit employees. (Tr. 31, 32). The Respondent was represented by Berkenkemper and three other management representatives. (Tr. 31, 192). ADA Callaghan opened the negotiations with some brief remarks and asked James Wachter to provide logistical support throughout the first morning. (Tr. 33, 34, 144, 184, 194).

As a result of the negotiations, the parties signed a Memorandum of Understanding Ground Rules USMS Master Agreement Negotiations on June 17, 2009. The MOU is a seven page document, that sets forth the parties' agreement over the following issues: Procedures, including the management and Union teams; Observers, Subject Matter Experts & Subcommittees; Proposals (when/how to exchange); Official Time; Negotiation Sessions; Services and Facilities; Mid-Term Negotiations; Dispute Resolution and Impasse; Negotiability Appeals Prior to Agency Head Review; Agency Head Review; Union ratification; Effective Date of the Agreement; Effective Date and Termination of the Ground Rules Memorandum.[3] The MOU was signed by Willingham for the Union and Berkenkemper for the Respondent. (G.C. Ex. 9; Tr. 79). Section N.1 of the ground rules agreement provides that the "Memorandum of Understanding shall become effective on the date that it is signed by a representative of each party." Section N.2 provides that the "terms of the MOU shall constitute the full and final agreement between the parties concerning Ground Rules." Section N.3 provides that the "parties may amend any provision of this Memorandum in writing by mutual agreement." (G.C. Ex. 9).

Section F of the MOU sets forth the Negotiation Sessions and reads as follows:

1. The following negotiation sessions are tentative for planning purposes,[4] and will be utilized as needed until the new Master Agreement is completed:

[3] During the negotiations, Berkenkemper and Willingham, as Chief Negotiators, caucused regarding the duration and frequency of the negotiations. (Tr. 36, 37, 81, 83, 84). After the caucuses, the Union proposed that the duration of the negotiation sessions be two weeks and Berkenkemper proposed that the parties meet six times. (Tr. 37, 38, 84, 85) Each party chose three locations from a list of approximately twelve to fourteen cities which was provided by Berkenkemper. (Tr. 38, 39, 84). Specifically, the Union chose New York City, Boston and San Diego; the Respondent chose New Orleans, Albuquerque and Miami. (Tr. 39, 196). All locations had Marshals Service facilities with conference space that could be used without cost. (Tr. 38).

[4] The Union witnesses testified without contradiction that the parties agreed that the dates of each session were tentative in that the next successive date would be used only if necessary to conclude negotiations. (Tr. 40, 41, 82, 83, 90).

a. The first negotiation session will commence in San Diego, CA on August 18, 2009 and conclude on August 27, 2009. Travel dates will be August 17 and 28, 2009.

b. The second negotiation session will commence in Boston, MA on September 22, 2009 and conclude on October 1, 2009. Travel dates will be September 21 and October 2, 2009.

c. The third negotiation session will commence in New York, NY on October 27, 2009 and conclude on November 5, 2009. Travel dates will be October 26 and November 6, 2009.

d. The fourth negotiation session will commence in New Orleans, LA on December 8, 2009 and conclude on December 17, 2009. Travel dates will be December 7 and 18, 2009.

e. The fifth negotiation session will commence in Albuquerque, NM on January 26, 2010 and conclude on February 4, 2010. Travel dates will be January 25 and February 5, 2010.

f. The sixth negotiation session will commence in Miami, FL on March 2, 2010 and conclude on March 11, 2010. Travel dates will be March 1 and 12, 2010.

(G.C. Ex. 9).

On June 23, Wachter sent Willingham a letter in which he stated that Section F.1 of the ground rules agreement, relating to the duration and location of the MA negotiations, would have to be revised. The letter stated:

> Thank you for the Union's recent participation in the negotiations leading to the Ground Rules Memorandum of Understanding (MOU) to the upcoming USMS Master Agreement negotiations. We appreciate the effort in arriving at this MOU. Unfortunately, after further Agency review, Section F.1 in connection with the duration and location of the Master Agreement negotiations will need to be revised. Section F.1, as currently written, would be contrary to the ethics and federal regulations applicable and would raise questions as to the fiscal propriety of the negotiation procedures. As a result,

the Agency is proposing a revision to Section F.1 (attached).[5] It is also noted that Section F.1 was not binding since the agreement specifically categorized the stated sessions as tentative for planning purposes. The Agency respectfully requests that the Union either provide its concurrence or comments in writing no later than July 1, 2009. If I have not heard from you in writing by this date, the Agency will assume that the Union concurs with this revision. Notwithstanding this revision, all other terms and conditions of the MOU will remain in full force and effect.

As the Union undoubtedly is aware, public service equals public trust. As federal employees, we are responsible for taking action of the utmost integrity and avoid even the appearance of impropriety. See 5 C.F.R. § 2635.101(b)(14). This responsibility is not to be taken lightly. Caution must be taken against holding conferences or meetings in tourist destinations. This is particularly true where the ethics regulations require federal employees to "conserve" federal resources and avoid "waste." See 5 C.F.R. § 2635.101(b)(9), (11). While the Agency understands Section F.1 in connection with the duration and locations of the negotiations was discussed in good faith, it raises an appearance of impropriety as to the expenses involved. The locations selected as reflected in Section F.1, are prime for vacationing and raise red flags particularly in light of today's economy. The locations selected are generally found in the upper echelon of GSA's provided per diem rates. The duration of two weeks for each negotiation session further compounds the appearance. It would therefore be difficult to withstand the

[5] The Respondent's attachment included the following revised schedule for negotiations, in part:

a. The first negotiation session will commence in Milwaukee, WI on August 18, 2009 and conclude on August 20, 2009.
b. The second negotiation session will commence in Charlotte, NC on September 22, 2009 and conclude on September 24, 2009.
c. The third negotiation session will commence in Dallas, TX on October 27, 2009 and conclude on October 29, 2009.
d. The fourth negotiation session will commence in Chicago, IL on December 8, 2009 and conclude on December 10, 2009.
e. The fifth negotiation session will commence in Atlanta, GA on January 26, 2010 and conclude on January 28, 2010.
f. The sixth negotiation session will commence in Salt Lake City, UT on March 2, 2010 and conclude on March 4, 2010.

(Attachment to G.C. Ex. 10).

myriad of potential allegations of fraud, waste, and abuse especially in today's environment where locations of conferences and the use of public funds are heavily scrutinized not only by the media, but by Congress and the Office of Inspector General. Simply put, it is not worth the distraction, or within either the Agency's or Union's interest, to respond to the inquiries that might arise if Section F.1 were to remain.

Moreover, the two-week negotiation sessions are not operationally feasible and detract from the mission of the Agency. Each member of both the Union and Agency are participants to their respective negotiation teams in a collateral capacity. While it may be acceptable for each member to be absent a week at a time to participate in the negotiation sessions, six separate two week sessions will create too much of a burden on each member's respective offices and duties. Not only is it unfair to the office for which they primarily work to be absent at a minimum of six separate two week occasions, the Agency will be severely impacted in a negative fashion. Six one week sessions, however, will provide for more efficient management during each member's absence and will minimize the burden each office will need to endure. The Agency is also fully aware of the prospect that negotiations might not be completed within six one week sessions to which it is open and willing to discuss the need for additional negotiation sessions at a later point in time. (footnote omitted).

Notwithstanding the revisions as indicated in the attachment, the specific issue of duration and location of each negotiation session is an ancillary issue. The Agency's intent to substantively bargain in good faith remains the same. Neither does the Agency expect that the particular location and/or duration of each session will impact the Union's willingness to bargain in good faith. The Agency understands that arriving at a full agreement on a new Master Agreement will require patience and will not occur overnight. The Agency remains willing to agree up front to six (6) negotiation sessions to which travel expenses as authorized will be paid. The difference however, is that the revised Section F.1 takes into full consideration the ethical, statutory, and regulatory responsibilities of the Agency without compromising the integrity and significance of the work that both the Union and Agency team will partake to formalize a new Master Agreement. Therefore, every location proposed in the revised Section F.1 are hub cities where the Government airfare is typically less expensive and where the GSA per diem rates fall within the realm of reasonableness.

> I trust that the Union will find the principles laid out in this letter agreeable. Nevertheless, as indicated previously, please find attached a revised Section F.1 to which the Union's concurrence and/or comments are respectfully requested in writing no later than July 1, 2009. Once this issue is settled, the Agency will distribute a conformed copy of the MOU reflecting the revisions to Section F.1. Thank you for your prompt attention to this matter.

(G.C. Ex. 10; Tr. 41, 42, 87).

On June 29, Willingham responded to Wachter, stating, as follows:

> The ground rules were mutually agreed upon by both parties, and is a product of good faith bargaining. We are notifying you that we are rejecting your offer to change the Ground Rules. Agency's team and the Union's team are bound by the signed agreement. An ex post facto revision shows bad faith. The Agency had an opportunity to negotiate and express its concerns, but chose not to do so at the bargaining of the Ground Rules….

The Union also responded to the specific concerns outlined by the Respondent, disagreeing with all. (G.C. Ex. 11 at 1; Tr. 43, 44, 88-90).

On July 6, Wachter informed Willingham:

> This is to notify you and the Union that the U.S. Marshals Service (USMS) is hereby withdrawing its notice dated January 26, 2009, to open renegotiations on the 1996 USMS Master Agreement. By this withdrawal, all provisions of the 1996 Master Agreement will continue in effect *status quo ante* prior to the notification being issued on January 26, 2009.
>
> After further deliberation and consideration, the Agency has determined it has not dedicated the sufficient or necessary amount of resources and personnel to ensure that the Agency's interests are well represented in any Master Agreement negotiations. Until such time as resources and personnel are identified and acquired, continued negotiations would compromise the Agency's mission and its operational requirements.
>
> I appreciate the Union's cooperation to this effort up to this point in time and apologize for any inconvenience that this may cause. Thank you for your prompt attention to this matter and the USMS looks forward to continued collaboration with the Union.

(G.C. Ex. 12; Tr. 44, 90, 188).

The Union did not respond in writing, but filed the unfair labor practice charge in this case on July 17, 2009. (G.C. Ex. 1(a)). No further negotiations have taken place on the parties' Master Agreement. (Tr. 45).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating a June 17, 2009, agreement regarding the ground rules for negotiating a new master agreement (MA). The GC further alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over a new master agreement in accordance with the signed June 17 ground rules agreement.

According to the GC, the evidence establishes that Respondent's actions represent both a clear and patent breach of the ground rules agreement and that the breach goes to the heart of the agreement. *See Army & Air Force Exchange Serv., McClellan Base Exchange, McClellan AFB, Cal.*, 35 FLRA 764 (1990). On July 6, the Respondent gave the Union notice that it was withdrawing its January 26 request to renegotiate the parties' master labor agreement. Since the ground rules agreement covered all the terms for the renegotiation of the parties' MA, the GC argues that the Respondent clearly and patently refused to comply with the ground rules agreement.

The GC also argues that the Respondent failed to present evidence demonstrating that Berkenkemper did not have authority to enter into the agreement regarding the locations where the negotiations would take place and the two-week duration of the negotiations. Respondent argued that the locations gave the appearance of impropriety because they were vacation destinations and that the two-week negotiation sessions were operationally not feasible because the respective offices of each negotiator could not afford to have them away from the office for more than one week. The above does not establish that Berkenkemper did not have the authority to negotiate or that the Union was ever so informed. The GC submits that the Respondent's subsequent objections to the locations and the duration of the MA negotiation sessions do not permit it to repudiate the ground rules agreement. If Berkenkemper had authority to enter into the ground rules agreement, real or apparent, then the agreement binds the Respondent. *AFGE, Local 2207 & VA, Birmingham, Ala.*, 52 FLRA 1477, 1479 (1997)(*AFGE Local 2207*); *Great Lakes Program Service Center, SSA, Chicago, Ill.*, 9 FLRA 499 (1982).

The record evidence clearly establishes that Berkenkemper had actual authority to negotiate the ground rules agreement. In this respect, Berkenkemper was the Chief of Labor and Employment Relations for the U.S. Marshals Service and, in that capacity, acted as the Chief Negotiator for the Respondent. (G.C. Ex. 4, 7, 8, 9). Berkenkemper was named as Respondent's Chief Negotiator in correspondence between the Respondent and the Union

prior to the ground rules negotiations and signed the ground rules agreement on behalf of the Agency. Respondent presented no evidence that would support a conclusion that Berkenkemper's authority to negotiate was limited in any way.

Berkenkemper also had apparent authority to negotiate the ground rules agreement. The Respondent never informed the Union that the negotiations over the ground rules were subject to approval by AD Callahan or that Berkenkemper did not have full authority to negotiate. (Tr. 33, 34, 80, 214). Berkenkemper was offered and held himself out as having the authority to negotiate the ground rules agreement. (G.C. Ex. 4, 7, 8 ,9). He acted as the chief spokesperson for Respondent during the negotiations and conducted separate caucuses with the Union's Chief Negotiator. (Tr. 81, 83, 194, 196, 212).

The GC also asserts that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over a new master agreement in accordance with the signed June 17, 2009 ground rules agreement. Upon the expiration of a collective bargaining agreement, either party may seek to renegotiate its terms and the parties have an obligation to engage in such negotiations upon request. *U.S. Border Patrol Livermore Sector, Dublin, Cal.*,
58 FLRA 231, 235 (2002); *U.S. Patent & Trademark Office*, 57 FLRA 185, 191-92 (2001). The obligation to negotiate over a new term agreement is limited only by any ground rules or procedures under which negotiations are to be conducted as agreed upon by the parties. *U.S. Dep't of the Air Force, 12th Flying Wing, Randolph AFB, San Antonio, Tex.*, 63 FLRA 256 (2009); *Dep't of the Interior, Nat'l Park Serv., Colonial Nat'l Historic Park, Yorktown, Va.*, 20 FLRA 537, 541 (1985).

Respondent asserts that it was entitled to refuse to negotiate a new collective bargaining agreement because it was the Respondent, and not the Union, which requested to renegotiate the master labor agreement. Respondent essentially argues it could change its mind about renegotiating the agreement, while citing what it considers legitimate reasons for this decision. Article 42, Section 1 of the MA only requires that the requests to renegotiate be in writing and submitted within a certain time frame. The Union's February 19 letter also meets the criteria of Article 42, Section 1. Further, nothing in the MA permits withdrawal after a request to renegotiate is made.

The GC argues that the Respondent's reasons for rescinding its request to renegotiate the MA should be rejected, i.e. that the two-week duration and locations gave the appearance of impropriety. The GC notes that where an agreement provision is contrary to law or unenforceable, an agency is not required to abide by that provision. *Office of the Adjutant Gen., Mo. Nat'l Guard, Jefferson City, Mo.*, 58 FLRA 418, 421 (2003); *GSA, Washington, D.C.*, 50 FLRA 136 (1995)(*GSA*); *Panama Canal Comm'n, Balboa, Republic of Pan.*,
45 FLRA 1075, 1086 (1992). In this case, Respondent has provided no evidence to demonstrate that the ground rules agreement is contrary to law or unenforceable. Therefore, its failure to implement the ground rules agreement constitutes a repudiation of the agreement and does not establish an adequate defense to its refusal to renegotiate the Master Agreement.

As a remedy, the GC seeks an order requiring the Respondent to cease and desist from repudiating the ground rules agreement, cease and desist from refusing to negotiate a new master labor agreement; to affirmatively adhere to all lawfully executed agreements with the Union including the June 17 ground rules agreement; and upon request of the Union, to negotiate a new master labor agreement.

Respondent

The Respondent asserts that its decision to withdraw from the MA negotiations was not a repudiation of the ground rules agreement, was conducted in good faith, and was not a violation of the Statute. In determining whether a party has fulfilled its bargaining responsibility, the totality of the circumstances must be considered. *U.S. Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990)(*Wright-Patterson AFB*). According to the Respondent, a fair and objective assessment of the reasons for its decision to withdraw demonstrates that the Respondent acted in a justifiable manner.

The Respondent first argues that Mitch Berkenkemper lacked the actual authority to agree to durations and locations as found in the ground rules agreement. It is well established that the United States is not bound by the unauthorized acts or representations of its agents. *U.S. Small Business Admin., Washington, D.C.*, 38 FLRA 386, 406 (1990) citing *Fed. Crop. Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *OPM v. Richmond*, 110 S. Ct. 2465, 2469-71 (1990)(in absence of proof that its agent had actual authority to agree to terms and conditions of a settlement agreement, the FLRA found that the agency could not be bound by the agreement entered into with the union.). A specific lack of authority provided to an agent of the federal government as just described is to be considered readily distinguishable and distinct from an agent that may have exercised questionable, but good faith, judgment that was within the agent's authority. *Cf. U.S. Patent & Trademark Office*, 18 FLRA 713, 724 (1985)(finding that the agency could not articulate how the agency's negotiator had "exceeded his bounds" and therefore was bound by the agreement at issue); *Great Lakes Program Serv. Ctr., SSA, Dep't of HHS, Chicago, Ill.*, 9 FLRA 499, 508 (1982)(finding that the agency was bound by an agreement entered into by its agent despite the allegation that the agent exceeded his authority where it was found that his judgment in agreeing to certain terms with the Union was within his implied rights to do so.).

The Respondent does not dispute that Berkenkemper was initially placed as Chief Negotiator for the Marshals Service and was provided general authority to head the effort toward reaching a new master agreement. The Respondent argues, however, that both AD Callaghan and DAD Jacobs strictly prohibited Berkenkemper from agreeing to MA negotiations that would last longer than one week in duration. He was clearly informed of the adverse operational impact an agreement to negotiate beyond one week at a time creates and therefore was unequivocally informed he was not to exceed such bounds. He blatantly disregarded the specific instructions he was provided and despite his lack of authority, agreed to negotiation sessions that would last two weeks at a time. With respect to the locations of

the negotiation sessions, Berkenkemper was clearly advised to avoid locations that would provide the appearance of impropriety. He should select locations that were hub cities where members of each team could travel with relative ease and that also did not provide an aura of extravagance, and could be justified in terms of relative ease of travel for all team members.

The Respondent next argues that the portion of the ground rules agreement that the Marshals Service sought to renegotiate did not go to the heart of the agreement. *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 862 (1996)(*Scott AFB*). The ground rules agreement covered issues related to the composition of the management and Union teams, the use of subject matter experts, how proposals would be submitted and exchanged, the amount of official time that would be granted, the minimum requirements of any facilities used, and other procedural aspects of how negotiations would be conducted. The Respondent did not request that any other portion of the agreement be renegotiated, and it remained consistent in its desire to continue bargaining and negotiations for a new MA. It was not proposing a withdrawal when it requested to renegotiate the duration and locations for the MA negotiations. It simply desired to set up meeting times and places that not only addressed the operational concerns of the Marshals Service, but also the potential appearance concerns that might adversely affect the Department of Justice, the Marshals Service and the Union.

The Respondent further argues that it had good cause to withdraw from the MA negotiations due to operational reasons. The location and duration for the MA negotiations created an adverse operational impact to the mission of the Marshals Service. The importance of obtaining a new MA needed to be balanced with the operational mission of the Marshals Service along with the personnel that would be supporting the effort.

In an attempt to remedy the problem, the June 23 letter expressly stated that the two-week negotiation sessions were not operationally feasible and detract from the mission of the agency. The Union rejected the Marshals Service rational. As a result, the Respondent was faced with the dilemma of complying with the ground rules agreement and adversely affecting its efficiency and primary mission. Since the primary law enforcement mission of the Marshals Service took precedence, the Respondent had no choice but to withdraw from the MA negotiations when the Union was not willing to work with it on this particular issue despite its attempts.

The Respondent held a reasonable concern that the locations and duration for the MA negotiations created an appearance of impropriety and could lead to viable allegations of fraud, waste and abuse. The Respondent was reasonably concerned that two week bargaining sessions, paid accommodations for the weekends without any expectation of work being conducted on such weekends, and negotiation sessions to take place at locations considered resort or vacationing areas would create an appearance of impropriety, and create an appearance of waste and abuse. The ground rules agreement failed to consider the requirement that negotiations shall take place at reasonable times and convenient places. *See* section 7114(b)(3) of the Statute. The Union's stance in not permitting a renegotiation of the provisions did not comply with section 7114(b)(3).

In the alternative, the Respondent argues that if a violation of the Statute is found, a *status quo* remedy, *i.e.* enforcing the duration and locations as set forth in the ground rules agreement (not the dates, of course), would be inappropriate and should not be granted. Such a remedy would seriously disrupt the accomplishment of the agency's mission and the efficiency of its operations. *Dep't of Transp., FAA*, 20 FLRA 486 (1985).

ANALYSIS AND CONCLUSIONS

In *Dep't of Def. Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211 (1991)(*Robins AFB*), the Authority considered whether an agency's failure or refusal to honor an agreement constituted a repudiation:

> We find that the nature and scope of the failure or refusal to honor an agreement must be considered, in the circumstances of each case, in order to determine whether the Statute has been violated. Because the breach of an agreement may only be a single instance, it does not necessarily follow that the breach does not violate the Statute . . . Rather, it is the nature and scope of the breach that are relevant. Where the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms, we will find that an unfair labor practice has occurred in violation of the Statute. *Id.* at 1218-19.

Additionally, in *Scott AFB*, 51 FLRA at 862, the Authority reasoned: [T]wo elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement, (*i.e.*, was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (*i.e.* did the provision go to the heart of the parties' agreement?). *FAA*, 55 FLRA 1271, 1282 (2000). Examination of either element may require an inquiry into the meaning of the agreement provision allegedly breached. *Id.*

The Respondent first argues that it cannot be found to have repudiated the ground rules agreement because Berkenkemper did not have the actual or apparent authority to enter into the agreement as it was negotiated. The authority of Berkenkemper to enter into the ground rules agreement is determined under the principles of agency law. The authority of an agent to act on behalf of the principal can be either actual or apparent. *See AFGE Local 2207*, 52 FLRA at 1480. Actual authority is authority that the principal has intentionally conferred upon the agent. *Id*. (citing *U.S. v. Schaltenbrand*, 930 F.2d 1554, 1560 (11th Cir. 1991). Apparent authority occurs where the principal has held out the agent as having such authority or has permitted the agent to represent that he has such authority. *Id*. (citation omitted). *United States Dep't of Def., Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735 (2010)(*Def. Language Institute*). Authority will be terminated if the agent is given sufficient notice. 3 Am. Jur. 2d Agency 51 (1986). Sufficient notice occurs if the agent actually knows, or has reason to know, facts indicating that the authority has been terminated. *Id.* However, the acts of an agent whose authority has been revoked may continue to bind a principal as against third persons, who, in the absence of notice of the revocation of the agent's authority, rely upon its continued existence. 3 Am. Jr. 2d Agency 52 (1986).

In this matter, the Respondent asserts that Berkenkemper was given specific instructions by AD Callaghan and ADA Jacobs that the negotiations sessions for the MA should not be more than a week at a time. (Tr. 150, 142). They also testified that Berkenkemper was also told that the locations of the negotiations sessions should be in HUB cities, making it easy for both management and union negotiators to travel. (Tr. 142, 146-147, 175, 176, 177).

However, although Respondent may have been surprised by the duration and locations negotiated into the grounds rules agreement, it is apparent to me that their directions to Berkenkemper were not as explicit as Respondent now argues. In that regard, the testimony indicates that Berkenkemper drafted proposed ground rules that included two week negotiation sessions as well as locations. Both Callaghan and Jacobs reviewed the proposals and Jacobs testified "Well, he had a lot of proposals in there [draft proposals]. And I - - what I explained to Mitch is that I thought that all these items needed to be negotiated, that he shouldn't just have something in the draft that, [y]ou should talk about the period of times, you should talk about the locations." (Tr. 175).

The transcript reveals that, in responding to the question:

Q: Okay. Now, in terms of what you directed or suggested, I mean, were they of durations of roughly one week at a time?

A: (Jacobs) It was one week at a time, locations to be determined and also, method of payment to be determined. Because he mentioned to me that we may have to pay for the Union's travel. And I told Mitch - - I said, well, why don't you sit down and talk about it first, let's not just put it into the proposal. (Tr. 176).

Jacobs testified that she and Berkenkemper had several conversations along this line prior to the ground rules negotiations. (Tr. 176).

It has been held that "when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *Metco Products, Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989)(*Metco*)(citing *University of Bridgeport*, 229 NLRB 1074 (1977)). In this matter, Berkenkemper was specifically named as the Respondent's chief negotiator for the collective bargaining agreement (including ground rules) negotiations. He met with other management officials to discuss the parameters of the negotiations. As chief negotiator he contacted various agency locations to discuss adequate facilities for the pending negotiations. He also drafted a proposed ground rules agreement, although certain subjects such as pay for Union travel, duration, frequency and locations of negotiations were eventually not included, since he was instructed that those were matters for actual negotiation. Although Callaghan and Jacobs certainly raised concerns about the duration and frequency of negotiations, I do not find that their instructions to Berkenkemper limited his authority in any way - - rather these were matters to be dealt with in the negotiations. Even though the final ground rules

agreement contained duration, frequency and locations the Respondent later determined to be unacceptable, I find that the evidence establishes that Berkenkemper had actual authority to negotiate as the Respondent's chief negotiator and that prior to the ground rules negotiations his authority was not limited in any way by the Respondent.

Further, even if I found that Berkenkemper's authority was limited by instructions regarding duration and location, it is equally clear that such limitations were never made known to the Union and its representatives. The Union, relying on its perception of Berkenkemper's authority, negotiated in good faith and reached agreement on the ground rules for the negotiations. There was never any indication that Berkenkemper's authority was diminished or limited in any way prior to or during the ground rules negotiations. Even the Respondent's negotiations team was unaware of any limitations on Berkenkemper's authority. (Tr. 198). Therefore, Berkenkemper continued to have, at a minimum, apparent authority to negotiate the ground rules agreement, which he signed as the Respondent's Chief Negotiator.

In *AFGE Local 2207*, the Authority found that a union's vice-president had apparent authority to negotiate a disputed agreement because he had been appointed to negotiate the agreement; such authority was not limited and had not been terminated; and he continued to exercise this authority. 52 FLRA at 1481. Similar to *AFGE Local 2207*, the evidence supports a finding that Berkenkemper had apparent authority like that of the union's vice-president in that case. In this regard, the record shows that Berkenkemper was the management official with whom the Union dealt regarding labor relations issues and the proposed negotiations for the new Master Agreement. Berkenkemper held the position of Labor Relations Officer and was specifically designated as the chief negotiator for the Respondent and he acted in that capacity throughout the ground rules negotiations. Further, during the ground rules negotiations, there was "no evidence that the Respondent ever discredited [his] authority, or even tried to lessen it." Therefore, I find that Berkenkemper had the apparent authority to negotiate the ground rules agreement and that his authority was not limited by Respondent's expectations regarding duration and location. Under these circumstances, the Respondent's argument that its repudiation of the ground rules agreement was not a violation since Berkenkemper did not have authority to negotiate is rejected. *Robins AFB*, 40 FLRA at 1220.

In evaluating the second element of repudiation, the Authority focuses on the importance of the provision that was breached, or allegedly breached, relative to the agreement in which it is contained. *See, e.g., U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Washington, D.C.*, 60 FLRA 943, 952 (2005)(then-Member Pope dissenting on other grounds)(*Bureau of Customs*)(provisions setting forth bargaining obligations on issue of firearm policy were sole purpose for, and therefore went to the heart of, a memorandum between the parties); *24th Combat Support Group, Howard AFB, Republic of Pan.*, 55 FLRA 273, 282 (1999)(*Howard AFB*)(provisions relating to availability of negotiated grievance procedure went to the heart of parties' agreement); *Robins AFB*, 40 FLRA at 1219-20 (provision related to shift scheduling and official time for union representatives went to the heart of the parties' negotiation ground rules agreement).

The Respondent's argument that it only refused to comply with the portion of the ground rules agreement relating to location and duration of the negotiations, and therefore did not completely reject the entire ground rules agreement, is completely inconsistent with its actual conduct in this matter. Although the location and duration section is only part of the ground rules agreement, it is impossible for the Respondent to reject this portion of the agreement without also rejecting the entire agreement. There can be no negotiations unless the parties have agreed to the location and duration of the negotiations. While it is true that this issue could have been resolved with further negotiations with the Union, the Union rejected such a compromise, relying on its already agreed to and signed ground rules agreement.[6] I therefore find that the nature and scope of the breach was such as to foreclose the requested renegotiation of the parties' Master Agreement. In these circumstances, the Respondent's refusal to comply with the duration and hours portion of the ground rules agreement, and accordingly with the entire ground rules agreement itself, went to the heart of the agreement and the collective bargaining relationship itself, and, therefore, amounted to a repudiation of the obligations imposed by the terms of the ground rules agreement. Such refusal, therefore, constituted a violation of the Statute. *See, Robins AFB,* 40 FLRA at 1220.[7]

With regard to the allegation that the Respondent violated section 7116(a)(1) and (5) by refusing to negotiate the new Master Agreement with the Union, the Respondent argues that its conduct was justified and that it had legitimate reasons for discontinuing negotiations. It argues that a fair assessment of its conduct shows that it had a sincere resolve to meet and negotiate in accordance with the Statute,[8] and that it was forced to discontinue the negotiations.

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[6] The ground rules agreement provided that changes to the agreement could be made by mutual consent, but here, there was no mutual consent. (G.C. Ex. 9).

[7] The Authority will not find an unlawful repudiation where the agreement allegedly repudiated is contrary to law. *See GSA*, 50 FLRA at 136; *U.S. Dep't of Transp., FAA, Atlanta, Ga.,* 60 FLRA 985 (2005). No such issue was raised in this matter.

[8] Section 7103(a)(12) of the Statute defines collective bargaining as 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[.]" Section 7114(b) (1) and (3) states that "[t]he 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;" and "(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]" *Wright-Patterson AFB*, 36 FLRA at 524; *Dep't of Def., Dep't of the Air Force, Armament Div., AFSC, Eglin AFB*, 13 FLRA 492, 505 (1983).

The MA, which was signed in 1996, and rolled over every year after that, sets forth the procedures for requesting negotiations for a new MA. Article 42 gives the time frame for requesting renewal; which time frames the Respondent met by requesting to bargain on January 26 (G.C. Ex. 4) and the Union affirmatively responding. (G.C. Ex. 5). The MA has no language regarding discontinuing negotiations once they have started and the Respondent cited no cases on this point.

The Respondent argues that it had a legitimate justification for discontinuing the negotiations and that it clearly explained its position to the Union regarding the duration and hours portion of the ground rules agreement. By not agreeing to amend the duration and location section of the ground rules, the Union acted in bad faith by not following the terms of section 7103(a)(12) of the Statute, and forced the Respondent to abandon the negotiations all together.

I find no evidence, however, that the Union failed to abide by the terms of section 7103(a)(12). The Union met in a timely manner to negotiate the ground rules for bargaining the new MA and after two days reached complete agreement and signed the written document that embodied the terms of that agreement. There is no evidence that the Union was not willing to meet at reasonable times and places in order to negotiate. The Respondent's argument that the Union's failure and refusal to acquiesce in its requested changes to a legitimately bargained ground rules agreement somehow excuses its own refusal to bargain is rejected.

Therefore, as stated above, I find that the Respondent abandoned the negotiations and refused to continue the MA negotiations once it could not get its way on the changes to the ground rules agreement. The Respondent asserted two main reasons to justify its actions. The Respondent argued that the locations and duration created an adverse operational impact to the mission of the Marshals Service and also created an appearance of impropriety. The Respondent expressed concern that employees serving on both the management and union negotiations teams would be away from their primary duties for extended periods of time. The Respondent argued that the two week duration of the negotiations would create an adverse impact on the operational mission of the agency. Other than speculation and a general concern about the inconvenience to both those employees directly involved in the MA negotiations and those employees left behind, the Respondent has presented no evidence of disruption to its mission. The Respondent also raised the issue that the Union had filed grievances about contractors being over-utilized to the detriment of full-time government employees (Tr. 208), and the absence of the union negotiators could give rise to situations which the union had previously objected to, *i.e.*, the over-use of contractors. However, as noted above, the Union rejected the Respondent's request to reduce the duration of the negotiations and there was no evidence that the Union was concerned about the issue of the use of contractors during the negotiations.

The Respondent's other concern was that the locations and duration of the MA negotiations created an appearance of impropriety and could result in allegations of fraud, waste, and abuse. There is no question that the government's fiduciary responsibility is a serious matter and that federal employees and federal agencies should refrain from conduct that might provide even the appearance of fraud, waste, or abuse. The Respondent referenced several Department of Justice and Office of Management and Budget documents regarding such responsibilities. (Agency Exs. 1 - 5). As stated by the GC, none of these documents support a conclusion that the terms of the ground rules agreement, even with regard to duration and location, were unlawful or unauthorized. Other than a repeated concern that some of the locations might be considered "vacation destinations", there was no evidence that conducting negotiations in the agreed-to locations would give rise to the appearance of impropriety. Although the two-week duration for the negotiations did require a weekend stay, the evidence reflects that the parties agreed to the provision, with the Union, at least, hoping that longer negotiation sessions would be more productive, and, in the end, allow fewer actual negotiations sessions.

Therefore, I do not find that the Respondent's justifications for its actions are adequate to overcome its refusal to bargain, and I find that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate on the new MA.

REMEDY

The General Counsel seeks a standard remedy, which would include resuming negotiations under the terms of the June 19 ground rules agreement. The Respondent asserts that such a *status quo ante* remedy would be detrimental to its mission. The Respondent has presented no actual evidence but merely speculates on possible ramifications. Apparently, the Respondent found it easier to abandon its Statutory obligations to bargain rather than to explain its decision-making process to any possible inquiries. The Respondent has failed to establish that a remedy requiring the negotiated ground rules agreement to be implemented would be detrimental or disruptive to its mission, and I therefore find such a remedy appropriate in this matter. *See Def. Language Institute*, 64 FLRA at 735.

Having found that the Respondent violated the Statute by refusing to comply with the ground rules agreement negotiated with the Union and by refusing to negotiate a new master labor agreement with the Union, in violation of section 7116(a)(1) and (5) of the Statute, I recommend that the Authority issue the following Order.

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the United States Department of Justice, United States Marshals Service, Oklahoma City, Oklahoma, shall:

1. Cease and desist from:

(a) Failing and refusing to implement the ground rules agreement between the United States Marshals Service and the American Federation of Government Employees, Local 2272, AFL-CIO signed on June 17, 2009, which governs how the parties will negotiate a new Master Agreement.

(b) Failing and refusing to bargain a new Master Agreement with the American Federation of Government Employees, Local 2272, AFL-CIO (the Union), the representative of employees.

(c) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Implement the ground rules agreement between the United States Marshals Service and the Union signed on June 17, 2009.

(b) Upon request, negotiate with the American Federation of Government Employees, Local 2272, AFL-CIO, a new Master Agreement.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, U.S. Marshals Service, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 2, 2011.

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Justice, United States Marshals Service, Oklahoma City, Oklahoma, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT repudiate any lawfully executed agreements with the American Federation of Government Employees, Local 2272, AFL-CIO (the Union), the exclusive representative, including the June 17, 2009, ground rules agreement governing how the parties will negotiate a new Master Agreement.

WE WILL NOT fail and refuse to bargain a new Master Agreement with the Union, the exclusive representative of its employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL adhere to all lawfully executed agreements with the Union, including the June 17, 2009, grounds rules agreement governing how the parties will negotiate a new Master Agreement.

WE WILL upon request, negotiate with the Union a new Master Agreement.

_____
(Agency/Activity)

Dated: _____ By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Region, Federal Labor Relations Authority, and whose address is: 525 S. Griffin Street, Suite 926, Dallas, Texas 75202 and whose telephone number is: (214) 767-6266.