71 FLRA No. 16

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL JOINT COUNCIL OF FOOD
INSPECTION LOCALS, AFL-CIO
(Respondent)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
(Charging Party)

WA-CO-17-0402

DECISION AND ORDER

April 2, 2019

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member Abbott concurring)

I. Statement of the Case

In this case, we address whether the parties' collective-bargaining agreement excused the Respondent Union's (the Union's) refusal to bargain with the Agency over a new agreement.

Article 38, Section 3 (Article 38) of the parties' agreement governs the parties' process for negotiating a new collective-bargaining agreement. The Agency served the Union with a demand to bargain a new agreement along with proposed negotiation ground rules. Citing Article 38, the Union refused to bargain because the Agency had failed to submit all of its *substantive* proposals with its bargaining demand. Administrative Law Judge Charles R. Center (the Judge) found that the Agency satisfied Article 38's requirements and, consequently, that the Union violated § 7116(b)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain.[1]

The Union has filed exceptions, but because the record and the pertinent authorities support the Judge's interpretation of Article 38, we adopt his recommended decision and order to the extent consistent with our analysis below.

II. Background and Judge's Decision

In 2008, the parties ratified their existing collective-bargaining agreement. Article 38 of that agreement contains a reopener provision, which provides, as relevant here, that the parties will renegotiate the agreement if either party timely serves its written demand to bargain along with "initial written proposals, which may be supplemented during renegotiations."[2]

In 2017, the Agency served the Union with a demand to bargain a new agreement along with proposed negotiation ground rules. The Union responded that the Agency had failed to satisfy the terms of Article 38 because the Agency did not submit all of its substantive proposals with its demand to bargain, and the Union refused to bargain.

The Agency filed an unfair-labor-practice (ULP) charge against the Union, and Federal Labor Relations Authority (FLRA) Regional Director Jessica S. Bartlett issued a complaint alleging that the Union violated § 7116(b)(1) and (5) of the Statute by refusing to bargain.

At the hearing before the Judge, the FLRA's Office of the General Counsel (OGC) argued that the Agency's submission of proposed ground rules satisfied Article 38 and required the Union to engage in bargaining. In contrast, the Union claimed that only the submission of all of the Agency's substantive proposals could have satisfied Article 38. To support its position, the Union offered evidence concerning the parties' bargaining history. Specifically, Union witnesses testified that when the parties negotiated the agreement in 2008, they understood that the reopener provision required the submission of all substantive proposals. Further, the Union offered evidence that the Agency initiated renegotiation of the parties' earlier 2002 collective-bargaining agreement – which contained the same reopener provision as the 2008 agreement – by submitting proposed ground rules *and* all substantive proposals.

The Judge considered the Union witnesses' testimony, but he found it "self-serving" and inconsistent with the plain wording of Article 38.[3] He found that the phrase "initial written proposals" was ambiguous and did not expressly mandate the submission of all substantive proposals. Further, he noted that Article 38 expressly permitted the submission of *supplemental proposals* during later negotiations, which he found demonstrated that the parties did not intend to require that every proposal be submitted with the demand to bargain.

[1] 5 U.S.C. § 7116(b)(1), (5).

[2] Joint Ex. 1, Art. 38, § 3.

[3] Judge's Decision at 7.

Regarding the parties' past conduct, the Judge credited the evidence that, when the Agency initiated renegotiation of the 2002 collective-bargaining agreement, the Agency submitted all of its substantive proposals with its demand to bargain. But the Judge found that the Agency's past conduct merely "reflected [an] alternative method[] of pursuing negotiations"; it did not establish that the agreement "required" such an approach.[4] The Judge further found that, in the present dispute, the Agency chose not to submit substantive proposals with its demand to bargain "in part because th[at] method . . . proved ineffective in the [previous] negotiations."[5]

Accordingly, the Judge found that the parties did not intend to require the submission of all substantive proposals with a demand to bargain. Instead, he found that the Agency's submission of ground rules with its demand to bargain satisfied Article 38. And because the Union was contractually required to bargain over a new agreement, he held that the Union violated § 7116(b)(1) and (5) of the Statute by refusing to bargain.

On May 30, 2018, the Union filed exceptions to the Judge's decision and, on June 14, 2018, the OGC filed an opposition to the Union's exceptions.

III. Analysis and Conclusion: The Union has not established that Article 38 excuses its refusal to bargain.

A union violates § 7116(b)(1) and (5) of the Statute if it fails or refuses to bargain in good faith with an agency as required by the Statute.[6] The Union argues that the Judge erred in concluding that it violated § 7116(b)(1) and (5) because, according to the Union, Article 38 justified its refusal to bargain.[7]

When a party claims, as a defense to an alleged ULP, that a specific provision in a collective-bargaining agreement permitted the actions that allegedly constitute a ULP, the Authority, including its administrative law judges, must ascertain the meaning of the agreement.[8] Where, as here, a party challenges on exceptions a judge's interpretation of the parties' agreement, the Authority will determine whether the record and the standards and principles that arbitrators and federal courts apply when interpreting collective-bargaining agreements support the judge's interpretation.[9] In determining the meaning of the parties' agreement,[10] "[t]he focus will be on the interpretation of the express terms of the [agreement] . . . [and] on the intent of the contracting parties."[11]

The Union asserts that the Judge misinterpreted Article 38 by failing to consider the intent of the provision and the parties' bargaining history.[12] The Judge found that Article 38 does *not* expressly require the submission of all substantive proposals but *does* expressly authorize the submission of supplemental proposals during bargaining.[13] Given the express authorization for supplemental proposals, the Judge found that the parties did not intend to require the submission of all substantive proposals with the demand to bargain. Thus, he found that the Agency's submission of ground rules with its demand to bargain satisfied Article 38.[14] Based on the foregoing, we reject the Union's argument that the Judge failed to consider the provision's intent.[15]

We also reject the Union's assertion that the Judge failed to consider the parties' bargaining history in interpreting the reopener provision. The Judge carefully considered testimony concerning the parties' conduct when negotiating the predecessor agreement, but he found that testimony "self-serving" and inconsistent with the plain wording of Article 38.[16] Accordingly, the Judge found such evidence was not dispositive of whether the existing agreement mandated the submission of all substantive proposals.

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[4] *Id.*
[5] *Id.*
[6] 5 U.S.C. § 7116(b)(1), (5).
[7] Exceptions at 3-4.
[8] *See, e.g.*, *U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 60 FLRA 844, 849 (2005) (*Leavenworth*); *SSA*, 55 FLRA 374, 376 (1999) (*SSA*) (citing *U.S. DOJ, INS, Wash., D.C.*, 52 FLRA 256, 261 (1996) (*DOJ*); *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993) (*IRS*)).

[9] *E.g.*, *Leavenworth*, 60 FLRA at 849 (citing *U.S. Dep't of VA*, 57 FLRA 515, 519 (2001) (*VA*)); *DOJ*, 52 FLRA at 261; *IRS*, 47 FLRA at 1111; *see also U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 n.7 (2000) (applying standard to contract provisions underlying covered-by and contract-interpretation defenses).
[10] We disagree with the contention in the concurrence that we are conducting a "*de novo* review" of the Judge's contractual interpretation. Concurrence at 8. Rather, as stated above, our review depends on the standards and principles that arbitrators and federal courts apply when interpreting collective-bargaining agreements. Moreover, we disagree that this case requires addressing whether we should review a judge's factual findings using a preponderance or substantial-evidence standard. *Id.* at 8-9. Quite simply, the exceptions here have nothing to do with factual findings.
[11] *IRS*, 47 FLRA at 1110 (citation omitted).
[12] Exceptions at 2-3.
[13] Judge's Decision at 7-8.
[14] *Id.* at 8.
[15] *SSA*, 55 FLRA at 377 (noting that "basic principles of contract interpretation presume that the parties understood the import of their agreement and that they had the intention which its terms manifest" (citing Elkouri and Elkouri, *How Arbitration Works* 480 (5th ed. 1997)).
[16] Judge's Decision at 7.

In sum, we find that, in interpreting the agreement, the Judge properly considered the express terms of the agreement and the parties' intent, including evidence of bargaining history and past conduct. Therefore, based on the record and the standards and principles that arbitrators and the federal courts apply when interpreting collective-bargaining agreements,[17] we find that the Judge properly interpreted Article 38 as not requiring the submission of all substantive proposals with an initial demand to bargain. Consequently, we adopt the Judge's conclusion that the Agency satisfied Article 38's requirements for renegotiation by submitting proposed ground rules with its demand to bargain. And because the Union has not established that Article 38 excuses its refusal to bargain, we adopt the Judge's conclusion that the Union violated § 7116(b)(1) and (5) of the Statute by refusing to bargain.[18] Accordingly, we deny the Union's exceptions and adopt the Judge's recommended order.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations[19] and § 7118 of the Statute,[20] the American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (Union), shall:

1. Cease and desist from:

   (a) Failing and refusing to negotiate in good faith with the Department of Agriculture, Food Safety and Inspection Service (Agency) upon a successor Labor-Management Agreement.

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

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

   (a) Bargain upon a successor Labor-Management Agreement with the Agency.

   (b) Post at its business office and normal meeting places, including all places where notices to members and employees of the Agency are customarily posted, copies of the attached Notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the President of the Union, and shall be posted and maintained for sixty 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.

   (c) Disseminate a copy of the Notice signed by the Union President through any Agency email system to which the Union has access and send to all bargaining-unit employees.

   (d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations,[21] provide the Regional Director, Washington Region, FLRA, within thirty days from the date of this Order, a report regarding what compliance actions have been taken.

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[17] *E.g.*, *Leavenworth*, 60 FLRA at 849 (citing *VA*, 57 FLRA at 519 (2001)); *DOJ*, 52 FLRA at 261; *IRS*, 47 FLRA at 1111.
[18] *Compare SSA*, 55 FLRA at 376-77 (finding support for the judge's interpretation of the parties' agreement and adopting his conclusion that the respondent violated the Statute by refusing to bargain over transit subsidies), *and DOJ*, 52 FLRA at 261-63 (finding support for the judge's interpretation of the parties' agreement and adopting his conclusion that the respondent was not obligated to bargain over a proposal because it was not timely submitted under the parties' agreement), *with VA*, 57 FLRA at 519 (rejecting as unsupported the judge's finding that the parties' agreement did not permit an attorney to represent a grievant at a step-two grievance meeting where the agreement was silent on that issue and there was no relevant bargaining history).
[19] 5 C.F.R. § 2423.41(c).
[20] 5 U.S.C. § 7118.
[21] 5 C.F.R. § 2423.41(e).

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (Union) violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate with the Department of Agriculture, Food Safety and Inspection Service (Agency) upon a successor Labor-Management Agreement.

WE WILL NOT, in any like or related manner, fail and refuse to bargain in good faith with the Agency.

WE WILL bargain in good faith with the Agency upon a successor Labor-Management Agreement.

____
(Union)

Dated:_________ By:____________________________
(Signature) (Title)

This Notice must remain posted for sixty 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, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.

Member Abbott, concurring:

I agree with my colleagues that the record supports the Judge's findings and conclusion that the Union violated the Statute by refusing to bargain over proposed ground rules submitted by the Agency. I do not agree to the level of review − "whether the record . . . supports the judge's interpretation" – my colleagues subject the judge's findings.[1] That is, in any sense, a *de novo* review, a level of review we do not apply to arbitrator or regional director findings.

In *Sport Air Traffic Controllers Organization*,[2] I noted that factual determinations made by administrative law judges of the Authority should be reviewed using the deferential "substantial evidence" standard.[3] As Member Beck eloquently explained in *U.S. Department of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Texas* (*Air Force*), the historic and appropriate question to ask when reviewing the determinations of an administrative law judge is whether the findings "are supported by *substantial evidence* in the record as a whole."[4] Member Beck's position on this point (later reaffirmed by Member Pizzella[5] and me) is supported by decades of Authority precedent[6] which the immediate past majority of the Authority abruptly rejected in 2009[7] (over the repeated objections of Members Beck[8] and Pizzella[9]).

During the same timeframe (2009-2016), however, the past majority continued to give substantial deference to arbitrators on any number of matters, including interpretations of our Statute, on which they

[1] Majority at 3.
[2] 70 FLRA 554 (2018).
[3] *Id.* at 556 n.15.
[4] 63 FLRA 256, 262 (2009) (Concurring Opinion of Member Beck) (emphasis added).
[5] *U.S. Dep't of VA, William Jennings Bryan Dorn VA Med. Ctr., Columbia, S.C.*, 69 FLRA 644, 649 (2016) (*Dorn VAMC*) (Dissenting Opinion of Member Pizzella) ("As a federal quasi-judicial administrative review agency, the Authority should review decisions of our administrative law judges with the deferential 'substantial evidence' standard.").
[6] *See Air Force*, 63 FLRA at 262.
[7] *U.S. Dep't of the Air Force, Air Force Materiel Command, Space and Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 171-73 (2009) (*Kirtland AFB*) (Member Beck Concurring).
[8] *See, e.g.*, *id.* at 179-80.
[9] *See, e.g.*, *Dorn VAMC*, 69 FLRA at 649-50.

often have little or no expertise.[10] That majority then extended similar "excessive" deference to "recommended determination[s made by regional directors] pursuant to authority delegated in . . . clarification-of-unit dispute[s]."[11] Thus, for seven years, the Authority accorded greater deference to arbitrators and regional directors than they accorded to highly-experienced administrative law judges who have extensive experience in, and adjudicate only, unfair-labor-practice complaints arising under section 7116 of our Statute. This incongruous result can only be described as cognitively dissonant.

Chairman Kiko has joined me in rejecting the notion that arbitrators may escape *de novo* review when they make findings which are clearly erroneous.[12] In *U.S. EPA, Region 5*, we made clear that we will not accord arbitrators a level of deference that cannot be reconciled with "our statutory duty to review arbitration awards or our case law."[13] In similar fashion, we have clarified that we may not defer to erroneous factual determinations made by our regional directors.[14]

Just as it makes no sense to apply a greater degree of deference to arbitrators and regional directors than to administrative law judges, it also does not make sense that we would apply the same degree of deference. As Member Beck explained in *U.S. Department of the Air Force, Air Force Materiel Command, Space and Missile Systems Control, Detachment 12, Kirtland Air Force Base, New Mexico*:

> When a 3-member adjudicative body decides a legal dispute by reviewing the written record of a proceeding below in which live testimony and other evidence is introduced before a single judge, . . . most reasonable observers familiar with Anglo-American jurisprudence would say that adjudicative body is acting as an appellate tribunal.[15]

Thus, I would conclude, as did Member Beck, that "'substantial evidence' . . . is the appropriate standard to use when the Authority acts as an appellate tribunal . . . [and] review[s] the decisions of our Administrative Law Judges."[16]

Applying a substantial evidence standard of review, I agree that the record supports the judge's conclusion that the Union violated the statute by not engaging in bargaining over the ground rules.

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[10] *U.S. Dep't of Transp., FAA*, 71 FLRA 28, 31-32 (2019) (*FAA*) (Concurring Opinion of Member Abbott); *see U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Col.,* 70 FLRA 748, 749 n.24 (2018) (*BOP Florence*); *U.S. Small Bus. Admin.*, 70 FLRA 885, 887 n.18 (2018) (*SBA*). "In *BOP Florence* and *SBA*, I noted that the dissent's deference to arbitrators appears to have 'no end' (*SBA*, 70 FLRA at 749 n.24) and elevates arbitral awards to a "decisional pedestal" which effectively renders Authority review 'inconsequential' (*SBA*, 70 FLRA at 887 n.18)." *FAA*, 71 FLRA at 31 n.6.

[11] *FAA*, 71 FLRA at 31.

[12] *U.S. EPA, Region 5*, 70 FLRA 1033, 1034-35 (2018) (Member DuBester dissenting).

[13] *Id*. at 1034.

[14] *FAA*, 71 FLRA at 30 ("this is not an appropriate case for representative witnesses . . . [and we] remand this issue to the RD to reopen the record, obtain the necessary evidence . . .").

[15] *Kirtland AFB*, 64 FLRA at 179.

[16] *Id.*

Office of Administrative Law Judges

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AFL-CIO
RESPONDENT

AND

DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
CHARGING PARTY

Douglas A. Edwards
For the General Counsel

Martin R. Cohen
For the Respondent

Gretchen McMullen
For the Charging Party

Before: CHARLES R. CENTER
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On June 29, 2017, the Department of Agriculture, Food Safety and Inspection Service (Agency) filed an unfair labor practice (ULP) charge against the American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (Respondent/Union). GC Ex. 1(a). After conducting an investigation, the Regional Director of the Washington Region of the FLRA issued a Complaint and Notice of Hearing on November 15, 2017, alleging that the Respondent violated § 7116(b)(1) and (5) of the Statute by refusing to negotiate over a new successor master agreement. GC Ex. 1(b). In its Answer to the Complaint, dated November 29, 2017, the Respondent admitted some of the factual allegations, but denied that it violated the Statute. GC Ex. 1(c).

A hearing was conducted on February 22, 2018, in Washington D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Union violated § 7116(b)(1) and (5) of the Statute by refusing to participate in the negotiation of a new master agreement. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of Agriculture, Food Safety and Inspection Service is an agency within the meaning of § 7103(a)(3) of the Statute. GC Ex. 1(b), (c). The Respondent is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide bargaining unit consisting of employees working at the Agency's various locations throughout the United States. GC Ex. 1(b), (c). The Agency and the Union were parties to a master agreement that went into effect in June 2008, for a term of three years. Tr. 32. Pursuant to Section 3 of Article 38 of that master agreement, the agreement was automatically renewed on an annual basis if neither party had served the other with a written notice of intent to renegotiate. Tr. 33. Further, if a party wished to renegotiate after the master agreement had been extended pursuant to the automatic renewal provision, they had to provide written notice of their intent to renegotiate "no less than sixty (60) days or no more than one hundred and five (105) days prior to the termination of an extension year." Jt. Ex. 1, Art. 38. A written notice of intent to renegotiate had to "be accompanied by initial written proposals, which may be supplemented during negotiations." *Id*.

On April 11, 2017, the Agency sent a written demand to reopen the master agreement to the Union via overnight delivery, which was received on April 12, 2017. Jt. Ex. 2, 3. The written demand to bargain was accompanied the Agency's proposed ground rules for the negotiations. Jt. Ex. 2. The Agency indicated that the ground rules set forth in the Agency's initial proposals were subject to bargaining and included dates for the exchange of substantive proposals and counter-proposals. *Id*. On May 2, 2017, the Union sent a letter to Agency informing them that it believed the Agency had failed to meet the provisions and intent of Article 38, Section 3 by not providing initial proposals for the master agreement, therefore it had no obligation or desire to bargain. Jt. Ex. 3.

On May 8, 2017, the Agency responded to the Union's letter, explaining that it disagreed with the Union's assertion and that ground rule negotiations would begin on May 15, 2017. Jt. Ex. 4. The Union provided its response on May 10, 2017, again indicating that the Agency failed to meet the provisions and intent

of Article 38, Section 3 by not providing initial proposals for a new master agreement with the demand to bargain, and the Union was not obligated and did not desire to bargain over a new master agreement. Jt. Ex. 5.

On June 29, 2017, the Agency filed an unfair labor practice (ULP) charge against the Union, over the Union's refusal to negotiate a new master agreement that had automatically renewed six times after the initial three year term was completed in June 2011. GC Ex. 1(a). To date, the parties have not engaged in bargaining over ground rules or substantive articles because the Union has refused to participate in such bargaining.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that the Union engaged in bad faith bargaining when it refused to participate in negotiations because Authority precedent provides that upon 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. Dep't of the Air Force, Luke AFB, Ariz.*, 66 FLRA 159 (2011) (*Luke AFB*); *U.S. Border Patrol Livermore Sector, Dublin, Cal.*, 58 FLRA 231 (2002). The GC submits that bargaining over ground rules for negotiations is also a mandatory bargaining subject. *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703 (2004). It is the position of the GC that a labor organization which refuses to negotiate over mandatory subjects of bargaining upon a proper request engages in bad faith bargaining in violation of § 7116(b)(1) and (5) of the Statute.

The GC asserts that the Agency provided timely notice of its intent to renegotiate the master agreement and that the terms under which the notice was given do not provide the Union with a proper basis for refusing to engage in such negotiations. The GC argues that the proposed ground rules submitted with the notice of intent to renegotiate satisfied the requirement that initial written proposals accompany the written notice as required by the expired agreement. In support of this argument, the GC points to the language within the provision that indicates that the required initial written proposals could be supplemented during negotiations. In short, the GC concedes that the renewal provision of the agreement required more than a written notice of intent, but that submission of proposed ground rules satisfied the initial written proposals requirement of the provision.

Respondent

The Respondent contends that refusing to participate in negotiations over a new master agreement did not violate the Statute because the Agency failed to submit substantive proposals when it provided written notice of intent to renegotiate. The Respondent asserts that inclusion of the substantive articles over which the Agency wanted to negotiate was mandated by the renewal provision of the expired agreement and that the submission of proposed ground rules without inclusion of the substantive proposals did not satisfy the initial written proposals requirement of that provision.

In support of its position, the Respondent submits that bargaining history and prior behavior of the parties demonstrate that the parties agreed that the intent of the initial written proposals requirement was to mandate submission of substantive proposals when a written notice of intent to renegotiate was provided to the other party.

ANALYSIS

Paraphrasing the prison Captain in *Cool Hand Luke*, what we have here, is a failure to negotiate. The General Counsel and the Agency contend that the plain language in Article 38 of the expired master agreement demonstrates that all of the requirements set forth in Section 3 were satisfied and thus, renegotiation upon the expired agreement was required. The GC submits that when the Agency provided the Union with written notice of its intent to renegotiate and submitted with that notice, its initial written proposals for the negotiation of ground rules to be used in subsequent negotiations over the substantive proposals, all of the requirements of the expired agreement were met.

However, the Union asserts that the parties' intent when agreeing to the language of Section 3 was that all substantive proposals had to accompany the written notice of intent to renegotiate. The Union contends that submitting only an initial proposal for the negotiation of ground rules did not satisfy the agreed upon conditions. Thus, the Union argues that the Agency failed to properly invoke renegotiation during the designated period, and therefore waived the right to renegotiate the master agreement until another agreed upon period was available under the terms of Article 38.

The right of a recognized exclusive representative to bargain collectively on behalf of the federal employees it represents is the essential right granted by the Statute in furtherance of the public interest expressed by Congress in the Statute. Presumably, a union would pursue such a right at every opportunity rather than evading such responsibility when the chance

arose. However, such a presumption did not prove true in this case. While the exclusive representative has the right and an agency the duty to negotiate an initial collective bargaining agreement upon recognition of a representative, upon the expiration of that initial agreement, either party has the right to renegotiate its terms upon request. *Luke AFB*, 66 FLRA at 159.

In this case, the Union contends that the parties waived the right to renegotiate upon an expired agreement unless certain terms were met. It is well settled that a waiver of a statutory right may be negotiated, and when the parties agree to language that expressly waives the statutory right to bargain, the Authority will recognize the waiver. *Nat'l Treasury Employees Union*, 64 FLRA 982, 985 (2010). However, the waiver of a statutory right must be clear and unmistakable, whether waived by an agency or a union. *U.S. Dep't of the Navy, Indian Head, Md.*, 56 FLRA 848 (2000); *U.S. Army Corps of Engineers, Kansas City, Mo.*, 31 FLRA 1231 (1988); *Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9 (1981).

In determining whether a contract provision constitutes a clear and unmistakable waiver, the Authority examines the wording of the provision, as well as other relevant provisions of the contract, bargaining history, and prior practice. *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987).

The parties' 2008 agreement expired after the duration of three years. Under the terms of the agreement, upon expiration, the master agreement was renewed on an annual basis unless a written notice of intent to renegotiate was given to the other party during a specified period, and even then, the terms of the expired agreement remained in effect during the new negotiations. Thus, it is clear and unmistakable that in agreeing to Section 3 of Article 38, the parties waived their right to renegotiate the expired agreement unless: (1) a written notice of intent was made during a specified period; and (2) that notice was accompanied by initial written proposals. Once the specified window of time closed in each renewal year, the parties waived the right to renegotiate until the window opened again the following renewal year.

It is also clear and unmistakable that the parties intended that after the expired agreement entered the renewal process, the additional requirement of submitting initial writing proposals was part of invoking the right to renegotiate the expired agreement. When the terms of Section 3 are compared to the Duration provision in Section 2 of Article 38, it is clear that invoking new negotiations prior to the agreement's expiration required less. Under the terms of Section 2, if a party intended to renegotiate before the agreement had expired, they only had to provide written notice of their intent during the specified period. Thus, the parties agreed that an additional requirement of submitting initial written proposals with the written notice of intent applied only after an expired agreement remained in effect pursuant to the annual renewal provision of Section 3. This difference between Section 2 and Section 3 regarding renegotiation demonstrates that the parties intended to make invocation of renegotiation more onerous once the agreement had expired after three years.

While it is clear and unmistakable that the parties intended an additional condition necessary to the invocation of renegotiation upon an expired agreement, it is not clear and unmistakable what had to be submitted with the notice to satisfy that initial written proposals mandate. The GC contends that submission of written ground rule proposals satisfied the requirement, whereas the Union contends that substantive proposals had to be submitted. Given the ambiguity presented by language of the provision, legitimate arguments can be made for either interpretation. However, that legitimacy only demonstrates that the additional condition agreed to by the parties was not a clear and unmistakable waiver of the statutory right to renegotiate the expired agreement absent the satisfaction thereof.

In support of its contention, the GC points to the additional language in the final clause of Section 3, that provides that the initial written proposals submitted with the notice of intent could be supplemented during later negotiations. While that additional language does not make it clear and unmistakable that the initial written proposals requirement could be satisfied by submitting only proposed ground rules, at the very least, it demonstrates that additional proposals not submitted with the initial written submission could be brought forward in subsequent negotiations. Thus, contrary to the assertions made during the testimony of Respondent's witnesses, the parties did not intend to require that every proposed article be submitted initially with the notice. Tr. 58, 70-72. Given the language permitting supplementation of the initial written proposals, the parties did not clearly or unmistakably waive the right to bargain over any matters not included in the initial written proposals.

To bolster its position that the "initial written proposals" requirement of Section 3 mandated submission of substantive proposals, the Respondent relies upon bargaining history and the past behavior of the parties. The Respondent relies upon this extraneous evidence because it is clear and unmistakable that the plain language of the provision does not clearly indicate that substantive proposals are required. The parties could have agreed to use the term "substantive proposals" rather than "initial written proposals" and made the

matter clear and unmistakable upon the face of the agreement. However, less precise verbiage made its way into the agreement and the failure to incorporate words with greater clarity makes it difficult to conclude that the parties intended to waive their right to bargain unless they submitted substantive proposals with their notice of intent.

As to the bargaining history, Kenneth Ward testified that he was part of the Union's negotiating team for the 2008 agreement and that management and union presented identical proposed language for Article 38. Furthermore, the proposals contained language identical to that set forth in Article 36 in the 2002 agreement. Tr. 56-57. Ward indicated that because each party proposed the same language, there was "little discussion[]" about it. Tr. 57. In fact, he indicated that there was no detailed discussion other than an acknowledgement by the parties that it was the same language as that present in the 2002 agreement. Tr. 59. However, despite recalling no detailed discussion between the parties about the proposed language, he did offer that the parties agreed that the language meant more than one proposal had to be submitted and that "all the proposals that the parties wanted to bargain over were submitted originally." Tr. 58. Ward also admitted that he did not participate in the negotiation of the 2002 agreement. Tr. 59.

In his testimony, Union President Charles Painter indicated that his involvement with negotiation of the 2002 agreement came late in the process and that he participated in the negotiation of only about 10 articles of the 36 articles. Tr. 63. Painter did not recall if Article 36 was one of the articles negotiated while he was part of the 2002 negotiations. Tr. 80. With respect to the 2008 agreement, unlike Ward, Painter recalled more extensive and detailed discussion over Article 38. Tr. 69-71. Despite the fact that the parties submitted identical proposed language for Article 38, he asserted that like other contentious articles, Article 38 was the subject of a smaller breakout session with fewer negotiators to assist in resolution of the contention. Tr. 69-70. He testified that it was during a breakout session upon Article 38 that management told him and David Rodriguez that the language of Section 3 required submission of every article the party wished to negotiate upon when it provided written notice of intent. Tr. 70-71.

Given the fact that there was no difference in the language proposed by the two sides for Article 38, I find the testimony of Ward to be the more credible of the two. While the testimony of Painter supports the Respondent's position, it makes little sense to hold a breakout session to assist with the contentious nature of a proposal for which there was no disagreement from the start. Thus, I find Ward's recollection of minimal discussion to be the more believable of the two, and his recall of little discussion other than agreeing that the language was identical to that in the 2002 agreement most persuasive. The fact that Ward testified about the general use of breakout sessions during the negotiations but did not swear or confirm that such a session was necessary when the parties reviewed Article 38 also provides reason to question the accuracy of Painter's recall about that particular session.

Although Ward and Painter testified that the language agreed upon meant that the parties intended that all proposals that were going to be negotiated had to be submitted with the initial notice, that testimony is inconsistent with the language of the parties' agreement. While it is conveniently consistent with the Respondent's position that the submission of all substantive proposals was required, it is also self-serving. More importantly, it is entirely inconsistent with, and contradicted by the language adopted by the parties. Thus, their claims that the parties agreed that all proposals had to be submitted with written notice of intent are not credible. If the parties' intent had been to limit subsequent negotiations to only those proposals submitted with the notice, they could have clearly incorporated that simple concept in the agreement by stating that all proposals to be negotiated must be submitted with the notice. The failure to include that simple requirement indicates that the parties did not clearly and unmistakably waive their right to bargain over additional proposals at a later date. Quite the opposite, the parties agreed to include language indicating that they clearly and unmistakably reserved the right to supplement their initial written proposals in later negotiations. Furthermore, the idea that a party is required to place all plausible proposals to be negotiated in a single submission has been flatly rejected as contrary to the collective bargaining process. *Nat'l Ass'n of Gov't Employees, Local R5-136 v. FLRA*, 363 F.3d 468 (D.C. Cir. 2004). In this case, the collective bargaining process proposed in the Agency's ground rules submission included a schedule for the exchange of substantive proposals in blocks of five to seven proposals or counter-proposals as well as a schedule for negotiations over the proposals and that process is consistent with usual collective bargaining. Jt. Ex. 2.

As to prior behavior, Painter testified that when the Agency elected to initiate renegotiation of the expired 2002 agreement in 2005, it did so by submitting proposed ground rules and substantive proposals with the written notice of intent. Tr. 66-67. The Respondent contends that this indicates that the parties understood that identical language in the 2002 agreement required the submission of substantive proposals along with proposed ground rules. While that prior behavior could provide some evidence of what the parties understood the intent of that language to be when they agreed to it in 2002, it

provides no evidence of the parties' intent in 2008. None of the management representatives who negotiated the 2008 agreement were part of the 2002 negotiations. R. Ex. 1; Jt. Ex. 5. Furthermore, Painter was the only Union official who was part of both negotiations, and even he did not participate in all of the 2002 negotiations. Tr. 63. In fact, Painter could not recall if he participated in the negotiation of Article 36 in 2002. *Id.*

The fact that the Agency submitted substantive proposals with their notice of intent to renegotiate the 2002 agreement in 2005, does not establish that it was required by the contract. Neither side presented testimony from someone who stated affirmatively that they participated in the negotiation of Article 36. Thus, because the language of Article 36 contains the same ambiguous term "initial written proposals" present in Article 38 of the 2008 agreement, the only definitive conclusion that can be drawn from the testimony presented is that the Agency's actions in 2005, reflected alternate methods of pursing negotiations. Tr. 36-38. While the 2005 negotiations were managed by someone who wanted everything on the table from the start, the 2017 negotiations were managed by someone who elected a different course, in part because the method of presenting ground rules and substantive articles at the same time proved ineffective in the negotiations initiated in 2005 and not concluded until 2008. *Id.*

However, even if the parties discussed and intended to mandate submission of substantive proposals when they agreed to the ambiguous language of Article 36 in 2002, that intent cannot be unknowingly transferred to the parties negotiating the 2008 agreement simply because the same words were used, when the words are ambiguous and subject to interpretation. Absent a full and complete discussion reflecting the parties' agreement upon a meaning other than what was plainly stated, nothing other than the plain meaning can be ascribed to negotiators who agreed to the language with little discussion. Tr. 57. There is no credible evidence in the record demonstrating that the parties who negotiated the 2008 agreement, agreed upon anything other than the plain meaning of the provision before them, and Ward's recollection of little discussion other than recognition that the language of the parties' two proposals was the same is consistent with the behavior to be expected when parties bring identical proposals to the negotiating table.

Although the Respondent cites an administrative law judge (ALJ) decision in Case No. DA-CA-09-0109, and argues that it stands for the proposition that "written proposals" should be interpreted as requiring substantive proposals, the argument is not persuasive. First, as acknowledged by the Respondent, that ALJ decision is non-precedential under the Authority's rules and regulations. But more importantly, it is also distinguishable because the provision in question there referenced written proposals and ground rules in conjunction with each other. Thus, concluding that "written proposals" equated to substantive proposals was supported by the language present in the provision. Had the parties in this case discussed ground rules and "initial written proposals" within the same proposal, it would be clear that they intended the terms to mean different things, but those are not the facts present in this case.

In negotiating the 2008 agreement, the parties failed to incorporate clear and unmistakable language requiring the submission of substantive proposals when giving notice of their intent to renegotiate. Contrary to the assertions of the Respondent's witnesses, they also failed to adopt language that made it clear and unmistakable that all proposals to be negotiated had to be submitted with the notice. Despite being experienced negotiators familiar with the difference between ground rules and substantive proposals, the parties agreed to use the ambiguous term "initial written proposals", and based upon the plain meaning of that phrase, submission of any written proposal satisfied the requirements of the agreement necessary to exercise the submitting party's right to renegotiate the expired agreement, and preserved their right to provide additional proposals at a later date. Put another way, if parties wish to create a waiver of the right to bargain under Authority precedent, the terms required for a waiver to be valid must be clear and unmistakable and when there is legitimate question as to what was required of a party to avert a waiver, the right to bargain is not to be extinguished.

CONCLUSION

Because the Agency submitted written ground rules proposals with their written notice of intent to renegotiate during the valid period established by the agreement, I find that the Union's participation in the negotiation of a successor agreement was required under the terms of the expired agreement. Therefore, the Union's failure and refusal to engage in good faith bargaining upon a new successor agreement violated § 7116(b)(1) and (5) of the Statute.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (Union), shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate in good faith with the Department of Agriculture, Food Safety and Inspection Service (Agency) upon a successor Labor-Management Agreement.

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

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

(a) Bargain upon a successor Labor-Management Agreement with the Agency.

(b) Post at its business office and normal meeting places, including all places where notices to members and employees of the Agency are customarily posted, 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 President of the Union, and shall be posted and maintained for sixty (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.

(c) Disseminate a copy of the Notice signed by the Union President through any Agency email system to which the Union has access and send to all bargaining unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, provide the Regional Director, Washington Region, Federal Labor Relations Authority, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., April 30, 2018

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CHARLES R. CENTER
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 American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (Union), violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate with the Department of Agriculture, Food Safety and Inspection Service (Agency) upon a successor Labor-Management Agreement.

WE WILL NOT in any like or related manner, fail and refuse to bargain in good faith with the Agency.

WE WILL bargain in good faith with the Agency upon a successor Labor-Management Agreement.

____
(Union)

Dated:__________ By:___________________________
(Signature) (Title)

This Notice must remain posted for sixty (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, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.