
In the Matter of Arbitration)	
between)	
)	NATIONAL GRIEVANCE, AUGUST 7, 2018
DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES (HHS))	
)	RE: BAD FAITH BARGAINING
AGENCY)	
and)	
)	Companion Award
NATIONAL TREASURY EMPLOYEES)	National Grievance September 12, 2018
UNION (NTEU))	Issued Separately
UNION)	

BEFORE: Robert A. Creo, Arbitrator

For the Employer: Luis A. Diaz, National Labor Relations Officer
Aster Patel, Esq.

For the Union: Frank Barczykowski, Esq., Deputy Director
M. Anna Gnadt, Esq., National Negotiator

Type of Grievance: Bad Faith Collective Bargaining Allegation

Place of Hearing: NTEU Offices, Washington, DC

Date of Hearing: February 21, 2019

Date Record Closed: May 10, 2019

Date of Award: September 30, 2019

Award: The Agency's Motion to dismiss is denied with prejudice. The Grievance is arbitrable. The Agency committed an Unfair Labor Practice by bargaining in bad faith. The Agency must Cease and Desist from bad faith bargaining. The matter shall be remanded to the Parties until November 19, 2019 for them to negotiate a resolution consistent with this Opinion and Award. The Arbitrator retains jurisdiction. The Arbitrator is prepared to order the *status quo ante* remedy sought by the Union by defers issuance of it since there may have been consensus reached on a number of contested Articles since the date of the Record of this proceeding was closed. If both Parties are satisfied with any tentative agreement reached on any Article, then by mutual agreement these can be eliminated as a contested matter upon any return to the bargaining table pursuant to an arbitral remedial *status quo ante* remedy. The Agency may be required to post an appropriate notice of the statutory violations with proposed drafts submitted by each of the Parties to the Arbitrator. Either Party may Petition the Arbitrator to conduct an oral or electronic hearing, or otherwise to introduce evidence or make arguments that may affect the terms and conditions of any final remedy after November 19, 2019, or upon agreement of both Parties prior to that date.

APPEARANCES

For The Employer

Luis A. Diaz, National Labor Relations Officer
Aster Patel, Esq., Senior Attorney Advisor

Also Present

Darrell R. Hoffman, Sr., Advisor, Assistant Secretary for Administration
Steven David Novy, Deputy Director for Operations and Resources, Office of Civil Rights

For the Union

Frank Barczykowski, Esq., Deputy Director, Negotiations Department
M. Anna Gnadt, Esq., National Negotiator

Also Present

Kenneth E. Moffett, Jr., Esq., Director, Negotiations Department
Jennifer Harling, Esq., Negotiations Department

PRELIMINARY STATEMENT

The Parties, the Department of Health and Human Services (“HHS”, “Agency” or “Employer”) and the National Treasury Employees Union (“NTEU” or “Union”), having failed to resolve a dispute involving allegations by the Union that the Agency engaged in bad faith bargaining resulting in an unfair labor practice, proceeded to final and binding arbitration pursuant to the terms of their Collective Bargaining Agreement (“Agreement”). Robert A. Creo was appointed as impartial arbitrator for the Grievance from a roster of arbitrators created by the Parties. The first National Grievance was filed on August 7, 2018 alleging bad faith bargaining and was heard on February 21, 2019. The second National Grievance was filed on September 12, 2018 focusing on information requests from the Union. An oral hearing was held for each of the two separate, but related, National Grievances at NTEU Offices, 1750 H. Street, Washington, DC. The cases were not consolidated. The Agency filed a Motion to Dismiss on both National Grievances on February 1, 2019 with responses from NTEU and Reply arguments being filed. At a teleconference call with the counsel for the Parties on February 14, 2019 the Motions to Dismiss were not granted. Although there would be two separate Opinions and Awards, the Parties agreed to perpetuate the Record between the two hearings with allegations, contentions, findings, and conclusions from one case subject to being part of either case. All witnesses were sworn and sequestered. Transcripts were made for each day of hearing. All parties were given full opportunity to present evidence, to cross-examine the witnesses, and to argue their respective positions. Both Parties closed by filing one Brief addressing both of the National Grievances. The Briefs were received electronically by May 10, 2019, and delivered within a few days to the Arbitrator with a copy of all of the cited authority.

BACKGROUND AND SUMMARY OF EVIDENCE

NTEU represents federal sector employees in 32 different agencies. On July 2015 NTEU reopened the Parties' master collective bargaining agreement ("term agreement") for renegotiation. In the fall of 2015, the Parties began negotiating ground rules to govern the negotiation of a successor agreement. The Parties eventually reached an impasse on ground rules and NTEU requested Panel assistance. Panel Member Marvin Johnson issued a Decision on the ground rules on December 31, 2016. After the FSIP issued its decision, the Agency disapproved the Panel's order on Agency head review. On June 23, 2017, NTEU filed an Unfair Labor Practice (ULP) charge with the FLRA challenging the disapproval of the Agency Head.

On May 10, 2018, the Agency notified the NTEU that it wanted to resume negotiation consistent with the Panel's direction. The Union agreed to proceed with bargaining and requested some modifications of the calendar dates presented by the Agency. NTEU proposed an exchange date of June 29, 2018 for the proposals. The Agency insisted on June 11, 2018 as the date to exchange bargaining proposals per the thirty (30) day timeline specified in Arbitrator Johnson's 2016 Decision. On June 8, 2018, the Union filed a grievance asserting that the Agency committed ULPs "by unilaterally imposing a ground rules agreement that was disapproved on Agency Head Review and by engaging in bad faith bargaining." On June 25, 2018, the Union invoked arbitration pursuant to the terms of the Consolidated Collective Bargaining. The Union informed the Agency it would proceed with bargaining "under protest" including noting the protest on the proposals submitted on June 11, 2018.

The Agency summarized in its Brief the processing and resolution of the June 8th Grievance in its Brief. An oral hearing was held on September 24, 2018, before Arbitrator David Clark. The Agency attached a copy of the Decision and Award issued on March 31, 2019 by Arbitrator David P. Clark to its Brief. This June 8th 2018 grievance was found arbitrable despite the concurrent jurisdiction of the FLRA on the 2017 ULP. Arbitrator Clark rejected the Agency's arbitrability argument and stated:

However, the FSIP's jurisdiction over textual proposals for a new CBA bears little relation to the Union's complaint that the Agency committed ULPs by seeking to impose ground rules without bargaining with the Union. The Arbitrator acknowledges that the FSIP's jurisdiction over specific articles would, upon a finding of a ULP, affect the Arbitrator's authority to order a remedy; but the merits of the Union's grievance are not removed from the Arbitrators's review merely because the FSIP has asserted jurisdiction over some of the articles put forward by the Parties.

Arbitrator Clark found that the "Agency's non-negotiable stance that it communicated on May 25 could not be construed as bad faith bargaining at that moment in time, as the Union had not yet provided any reason of fact that June 11 would be an inappropriate date for exchanging proposals." Arbitrator Clark ruled that it was not unreasonable for the Agency to insist on the 30-day time frame for exchanging proposals established by the FSIP Decision and held that the Agency's position that it communicated on May 25 was not in itself bad faith bargaining. The

Parties had exchanged proposals on June 11, 2018 so he concluded that date was not an undue hardship for the Union in the absence of evidence showing otherwise. Arbitrator Clark did not find that June 29 was any better for exchanging proposals than June 11. Arbitrator Clark concluded that “the Agency did not engage in bad faith bargaining by insisting on June 11 as the date for exchanging proposals.”

Johnson FSIP Decision

The Marvin E. Johnson Decision, Case No. 16 FSIP 113 (12.31.2016), detailing the ground rules for negotiations, includes the following:

6.B. If the total number of articles that will be negotiated is thirty-one (31) or greater (inclusive of new articles), the parties will conduct eighteen (18) weeks of bargaining. If the parties have not fully addressed all of the issues after eighteen (18) weeks of bargaining, either party may unilaterally extend bargaining for two additional (2) weeks, which will begin on the alternative week immediately following the eighteen (18th) week of bargaining. The parties may mutually agree to schedule additional bargaining sessions beyond the unilateral two (2) weeks of extended bargaining.

7. If needed, either party may solicit mediation assistance from the Federal Mediation and Conciliation Service at any time during the negotiations.

17. The parties agree to make every reasonable effort to reach resolution and to avoid impasse. However, any specific provisions of the articles which remain in dispute will be resolved pursuant to 5 U.S.C. § 7119 or other appropriate provisions of 5 U.S.C. § 7101. et seq.

Two key issues were identified as remaining in dispute which required imposition of language by Arbitrator Johnson in his Decision. These were the portion of Union representatives travel costs being paid for by the Agency and the amount of time to be scheduled for the bargaining sessions. The Union initially advocated a compressed schedule of seven weeks with fixed days while the Agency sought an open-ended schedule. The Decision notes that the Agency “suggests a period of one (1) week to two (2) weeks of bargaining on each article would be reasonable.” The Agency expected that “bargaining would conclude one (1) year from the date of commencement.” Member Johnson noted that the Parties agreed upon certain provisions in an MOU which incorporated provisions from the Union’s Last Best Offer and which were also identified as Employer’s Exhibits 1 and 4 of its November 4, 2016 submissions.

Negotiations at the Table

The negotiations began on July 9, 2018. During this first meeting the Parties discussed housekeeping matters and agreed that the opened articles would be considered in chronological order. The Parties only substantive discussion on day 1 involved Article 2, Contract Durations and Termination. The Parties met for a second time on July 10, 2018. The Union wanted to continue a discussion on Article 2, while the Agency wanted to move forward to Article 3. At

9:02 a.m. on July 10th the Agency sent an email to NTEU with a redlined version of its Article 2 proposal.

The Agency indicated that all of its proposals were for achieving three goals: (1) to reduce cost; (2) to reduce administrative burden; and (3) to simplify the contract agency-wide. The Agency proposed seven years duration which NTEU as “harsh” and “punitive” according to HSS. NTEU did not make a counterproposal on the duration issue. After a back and forth exchange, which was characterized as heated, the Agency caucused for the rest of the day. Chief Negotiator Harling testified that there was only about 10 minutes of direct negotiations between the teams on the morning of July 10th. NTEU wanted to have a detailed discussion about the HHS Article 2 proposal while the Agency wanted to defer discussion until after NTEU made a counterproposal. NTEU declined to make a counterproposal and wanted to ask questions first before formulating its response. During the HHS caucus, it decided to contact the FMCS for mediation assistance based upon the Parties’ stances at the table and the difficulties in communicating directly with each other. The Union objected to FMCS involvement since the Parties were not at impasse. Negotiations then broke-off.

FMCS Assisted Negotiations & Impasse

On July 30, 2018, the Parties resumed negotiation with the assistance of FMCS mediator Larry Passwaters. At the meeting, NTEU presented its counter proposal on Article 2. The Parties discussed Article 3 with NTEU making its proposal. The Agency decided not to present on Article 3 and wanted to move onto Articles 9 and 10. NTEU asserted it was not prepared to discuss those two Articles since they had agreed that the articles be addressed in chronological order. The Agency decided to leave the table to caucus. The Agency contends the negotiations were at an impasse and submitted its Last Best Offer to the Union the following day on July 31, 2018. The Union filed its first National Grievance on August 7, 2018.

By email, the mediator released the parties to the FSIP on August 8, 2018. A Letter from Kenneth E. Moffett Jr. to David Mansdoerfer, August 28, 2019 requested that HHS comply with the orders from U.S. District Court Judge Ketanji Brown Jackson in AFGE et al v. Trump, issued August 25, 2018. Her Memorandum Opinion found that nine Executive Orders issued by President Trump on May 25, 2018 were invalid because these “Orders effectively take subjects off the table that are mandatory subjects of bargaining, do not permit discussion of permissive subjects or bargaining, and require an inflexible exchange of written proposals as an approach to bargaining.” The letter states that HHS failed to follow the 18-week bargaining schedule and proposed outright termination of articles addressing important terms and conditions of employment. The NTEU letter also noted that HHS demanded that FMCS intervene after only one day of bargaining, that the mediator release the Parties to FSIP after only one day of mediation, and filed a request for FSIP assistance after only two days of bargaining. The letter contends that the Agency’s “bargaining conduct beginning on May 25, 2018 and continuing to date has been in furtherance of the Orders.” The Agency responded in a letter from its General Counsel, Robert P. Charrow. The letter states in part:

You base your demand on the recent court decision which invalidated portions of Executive Orders 13,836, 13,837, and 13,839. See *AFGE v. Trump*, No. 18-cv-1261 (D.D.C. Aug. 25, 2018).

Your assertion that the HHS' bargaining conduct since May 25 is "in furtherance of the Orders" is also legally and factually incorrect. HHS' bargaining positions did not reference any of the three Executive Orders at issue in the above litigation and were developed before those Executive Orders were issued.

The letter is dated September 4, 2018.

On August 31, 2018, the Parties submitted their statements of position to FSIP. FSIP asserted partial jurisdiction over term bargaining on November 15, 2018 in Case No. 18 FSIP 077 with the exception of Articles 2, 3, 8, 25, 45, and 46. FSIP ordered the parties to return to the bargaining table for thirty (30) days and appointed Commissioner Dan Duran to oversee the negotiations. If no agreement was reached within the 30 day period, the Parties would have to submit their best and final offers to the FSIP for final determination. The Parties did not resolve any of the Articles at issue in the negotiations despite further assistance of FMCS. The Agency submitted its final offer to the FSIP on December 21, 2018, including a resubmission of Articles 2, 3, 8, 25, 45, and 46. The Parties were waiting for the Panel's final determination in accordance with Section 7119 (c) (1) and (5) at the time of the oral hearing. A Panel Decision was issued on April 1, 2019 and referenced by the Agency in its Brief submitted in May, 2019 although the Decision itself was not submitted as an Exhibit by either Party to be part of the Record of either of the two National Grievances.

National Grievances

The NTEU filed two national grievances alleging bad faith bargaining. The first grievance was filed on August 7, 2018, alleging that the Agency engaged in bad faith bargaining when it requested FMCS assistance after only two days of bargaining, and for failure to provide information to the Union's information request dated July 2, 2018. The second grievance was filed on September 12, 2018, alleging that the Agency requested FSIP assistance only after two days of bargaining with the FMCS mediator, and for failure to provide information requested on July 10, 2018.

The National Grievance dated August 7, 2018 is addressed in this Award. The Arbitrator addresses the September 12, 2018 National Grievance in a separate opinion and award document. Both Awards are issued on the same date. Both Opinions contain substantially the same content for background, argument, and positions of the Parties.

August 7, 2018 National Grievance

The August 7, 2018 National Grievance is a five page letter which states, in part, as follows:

The National Treasury Union (NTEU or union) hereby files the national grievance pursuant to Article 45, Sections 2.A and 8.C and D. of the parties' Consolidated Collective Bargaining Agreement (CBA). By this grievance, NTEU alleges that the Department of Health and Human Services (HHS or agency) has

violated 5. U.S.C § 7116(a)(1)(5) and (8), be engaging in bad faith bargaining during term bargaining over the parties successor agreement.

During the first day of bargaining, the parties agreed to a specific schedule for the next five weeks of bargaining in July, August, and September, and also agreed to discuss future dates during the second week of bargaining to begin on July 31st. In addition, during the first bargaining session, the parties agreed to discuss the opened articles in chronological order with the hosting party presenting first. Each party opened 20 articles and introduced two new articles, totaling 34 articles open for discussion. The agency struck 13 articles from the CBA and drafted proposed language on seven existing articles and two new articles. NTEU drafted proposals on 20 existing articles and two new articles.

Pursuant to the agreement as to the order of bargaining, the parties began with Article 2 (Contract Duration and Termination) which was opened by the agency. *** NTEU also asked about the impact and meaning of the agency's proposal in Article 2, Section 6, which would invalidate any article in conflict with Article 2. NTEU pointed to similar language in the other articles in the contract that were not opened. The agency explained that the provision was meant to override articles in the contract that were not opened. NTEU asserted that by inserting such a clause, the agency was reaching into unopened articles and opening more than the 20 articles permitted per party by the ground rules. The agency denied this.

On July 10, 2018, the second day of bargaining, the agency provided a revised copy of its proposals on Article 2. NTEU asked for clarification regarding the revisions and for an explanation so the union could determine the purpose and impact of the revisions. The agency refused and said the reversions were self-explanatory and that it considered Article 2 closed for further discussion. NTEU disagreed and continued to ask clarifying questions on the revisions until the agency provided an explanation. After less than 10 minutes of discussion, at approximately 10:09 a.m., the agency asked to caucus for 10 to 15 minutes. The agency then asked twice more for additional time and that the parties reconvene after lunch. Later that afternoon, the agency notified NTEU that it had contacted the Federal Mediation and Conciliation Service (FMCS) for mediation assistance due to NTEU's "tone and tenor" during the bargaining sessions. It stated that it would not bargain further without FMCS assistance and unilaterally ended bargaining for that week. At this time, the parties had not even completed discussing two articles much less reached an impasse on any articles or even specific issues within those articles. NTEU submitted an information request regarding the agency's proposals on Article 2 later that afternoon. NTEU submitted a counterproposal on Article 2 on July 23, 2018, and notified the agency that it would like to walk through the counterproposal before moving on to Article 3.

On July 30th, the parties resumed negotiations during a second week with the presence of FMCS Commissioner Larry Passwaters. NTEU reiterated for the mediator that it was bargaining under protest and objected to the involvement of

FMCS at that time since the parties had concluded only one full day of bargaining and had discussed only one article of 34 open articles. ***

*** The agency responded that all of its proposals were written for the purpose of achieving three goals: 1) cost efficiency; 2) reducing administrative burden; and 3) simplification and consistency of the contract across HHS. ***
The mediator asked for a caucus at approximately 3:20 p.m., and the parties broke for the rest of the day.

The following morning, without any solicitation from NTEU, HHS submitted what it characterized as its last best and final offers and then unilaterally ended term bargaining.

HHS further violated the ground rules by contacting the FMCS after only one full day of bargaining and discussion of only one of 34 outstanding articles to be negotiated. The ground rules permitted either party to contact FMCS for assistance at any point during bargaining "if needed." However, HHS called FMCS on the second day after refusing to answer NTEU's questions about its proposals. Clearly, FMCS assistance was not needed at that point in the process. Additionally, HHS submitted last best offers and unilaterally ended bargaining after only two, full-day bargaining sessions, one of which included an FMCS mediator. The ground rules set forth an 18-week bargaining schedule if more than 31 articles were opened between the parties. The parties had also reached agreement on dates for five weeks of bargaining through September 2018, with agreement to schedule future dates into 2019. Because HHS ended bargaining after only two days, parties never discussed 32 of 34 opened articles, and NTEU had no opportunity to provide counterproposals on 21 of the agency's proposed articles. The agency's repeated violations of the very ground rules it unilaterally imposed on NTEU shows the agency used the ground rules to compel term bargaining, but it had no intention of complying with the terms set forth in the ground rules or bargaining in good faith.

HHS came to the table with absolutely no intention of engaging in good faith bargaining. HHS negotiators would not even discuss their proposals much less negotiate over them. Its actions evince an intent to bypass the bargaining process and declare the parties to be at impasse. Perhaps most telling is that the HHS proposals are copied almost word-for-word from the Department of Education contract that was illegally imposed by the Department of Education upon AFGE Council 252 on March 12, 2018. HHS is essentially attempting to do the same thing, which demonstrates it had no intention of bargaining with NTEU in good faith.

This Grievance seeks a number of remedies, including ordering the agency to comply with an 18-week minimum bargaining schedule and an Arbitrator declaration that the parties were not at impasse, therefore, the FSIP should be ordered that it cannot assert jurisdiction. NTEU seeks a *status quo ante* remedy to cure all bad faith bargaining by the Agency.

Federal Services Impasses Panel

On August 13, 2018, the Agency requested FSIP assistance. NTEU responded on August 31, 2018. The Agency responded to NTEU's Statement of Position on September 27, 2018. NTEU filed its reply to the Agency's response with the Panel on October 11, 2018. On November 15, 2018, the Panel asserted jurisdiction over the parties' dispute, but specifically declined to assert jurisdiction over the 5 articles in which NTEU identified the Agency's proposals contained permissive subjects of bargaining, and Article 25 (Alternate Work Schedules) which NTEU asserted was a mandatory subject of bargaining over which the Agency failed and refused to bargain. NTEU asserted that the Agency refused to bargain over this mandatory subject of bargaining because the Agency proposed to strike the entire article, including alternate work schedules, from the parties contract without bargaining, without demonstrating an adverse agency impact, and in violation of the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §6121, *et seq.*

The Panel stated in its order, "[a]ccordingly, the Panel declines jurisdiction over these 6 Articles so that the parties may resolve the foregoing bargaining obligation disputes in the appropriate forum." With respect only to the remaining 28 articles over which it did assert jurisdiction, the Panel directed the Parties to resume bargaining, with the assistance of a mediator from FMCS, for a period not to exceed 30 calendar days from the date of the appointment of the mediator. At the conclusion of that 30 day period, the Panel ordered the Parties to submit their final written offers on all outstanding articles, along with a statement of position in support, to the Panel for a final decision.

The Parties met pursuant to the Panel order for only 2 weeks out of the 30-day period, convening the week after Thanksgiving 2018 and the second week in December 2018, based on the mediator's availability. At 11:32 p.m. on the evening before the last day of scheduled mediation, the Agency submitted proposals to NTEU on those 6 articles indicating they were submitted "for discussion tomorrow" during the Panel mediation. Because the Panel had declined to assert jurisdiction over those 6 articles, NTEU objected to discussing them during the limited time it had to mediate the 28 articles that were under the Panel's jurisdiction. The Parties were unable to reach agreement on 22 of the 28 articles over which the Panel asserted jurisdiction. On December 21, 2018 made their final submissions to the Panel

The FSIP issued a Decision and Order on April 1, 2019 which was attached to both Briefs submitted by the Parties. The Panel asserted jurisdiction to resolve 23 contract provisions and 6 others were not resolved by the Panel when the Panel declined to assert jurisdiction over them. NTEU asserts they still contain permissive subjects of bargaining which must be resolved in the appropriate forum which is via a petition for review of negotiability filed with the FLRA. The Union asserts that there can be no agency head review approvals/disapprovals nor implementation of any new provisions until the bargaining is completed for the entire contract.

2018 EVENT CHRONOLOGY SUMMARIZED BY ARBITRATOR

DATE	EVENT	NOTES(Arbitrator Summary or Characterization)
Dec 31, 2016	FSIP Decision	Ground Rules issued by Marvin Johnson
Jan 31, 2017	HHS letter/email	Agency Head Disapproval FSIP Johnson Decision
May 10, 2018	HHS CM letter	Re: bargaining starting; June 11 proposal exchange
May 22, 2018	NTEU JH letter	Re: resolving NTEU pending ULP & bargaining
May 25 2018 10:07 am	HHS CM email	Letter attached re: proposals & timelines
June 1, 2018 12:11 pm	NTEU JH email	NTEU seeks to extend HHS timelines
June 1, 2018 2:38 pm	HHS JM email	To J Harling declining NTEU request
June 8, 2018	NTEU Grievance	National UPL grievance ground rules (not at issue)
June 11, 2018 3:59 pm	NTEU JH email	NTEU Proposals submitted under protest
June 11, 2018 3:55 pm	HHS CB email	HHS Articles Proposals: delete 13, revise 7, add 2
July 9, & 10, 2018	At Table	34 Open Articles; Articles 2 & 3 discussed
July 10, 2018 9:02 am	HHS JM email	Article 2 HHS redlined; proposed schedule
July 10, 2018 3:00 pm	HHS email	Invokes ground rule to request FMCS mediation
July 10, 2018 4:14 pm	NTEU JH mail	Information Request Letter MOUs & ground rules
July 11, 2018 5:38 pm	NTEU JH email	Requests HHS return to table and keep 18 week schedule
July 17, 2018	NTEU email	Negotiation follow-up
July 23, 2018 4:45 pm	NTEU email	NTEU counterproposal re: Article 2
July 26, 2018 10:21 am	HHS JM email	Response to Information Request; Ground rules
July 30, 2018	Mediation	Session with FMCS L. Passwaters.
July 31, 2018	Mediation	Session with FMCS L. Passwaters.
July 31, 2019	HHS	Final Offer
Aug 2, 2018 8:45 am	HHS JM email	Interim Response Information Request; Ground Rules; MOUs
Aug 2, 2018 5:16 pm	NTEU JH email	Requesting 7 prior CBA Ground Rule & Reopeners
Aug 2, 2018 6:09 pm	NTEU JH email	Re: Clarification & Information Request
Aug 2, 2018 6:15 pm	NTEU JH email	HHS not bargaining; clarifications; info requests
Aug 3, 2018	D. Hoffman	Darrell Hoffman returns to Agency
Aug 7, 2018	NTEU Grievance	National Grievance alleges bad faith bargaining
Aug 8, 2018 8:08 pm	FMCS Email	FMCS Passwaters releases to FSIP
Aug 9, 2018 7:44 am	NTEU Email	Re: NTEU team travel approval issue
Aug 9, 2018 12:59 pm	HHS CB email	Re: Impasse & FSIP; programs not eliminated
Aug 9, 2018 5:02 pm	NTEU JH email	Re: Clarification & Confirm HHS not meeting
Aug 10, 2018 5:41 am	HHS JM email	Re: Not approving team travel
Aug 10, 2018 11:53 am	HHS DK email	HHS states it met NTEU requests for MOUs
Aug 13, 2018 2:38 pm	NTEU JH email	Re: HHS not complied for 7 CBA prior to 2010
Aug 13, 2018	HHS FSIP Filing	HHS Requests Panel Assistance
Aug 22, 2018 8:09 am	HHS DK email	Re: 7 MOUs on CBAs prior to 2010
Aug 24, 2018 1:42 pm	NTEU JH email	Particularized Need for prior ground rules MOUs
Aug 25, 2018	Court Order	Judge K. Brown Jackson, AFGE et al, v. Trump
Aug 28, 2018	NTEU to HHS	Moffett demand to return to unassisted bargaining
Aug 31, 2018	NTEU to FSIP	NTEU Statement of Position to HHS filing
Sept 4, 2018	HHS Letter	General Counsel declining NTEU demand
Sept 5, 2018 1:27 pm	HHS DH email	Response to Information Request & Objections
Sept 12, 2018	NTEU Grievance	National Grievance alleges bad faith & ULP
Sept 13, 2018 10:09 am	NTEU JH email	Invokes arbitration for National Grievance
Sept 27, 2018	HHS Letter to FSIP	Supplemental Submission re: impasse, permissive articles; Executive Orders
Oct 11, 2018 1:12 pm	NTEU to FSIP	Reply to HHS Supplemental Submission
Nov 15, 2018	FSIP Decision	Partial jurisdiction; return to table for 30 days
Nov 20, 2018 3:11 pm	NTEU FB email	NTEU invokes arbitration 9.12.2018 Grievance
Dec 13, 2018 11:32 pm	HHS email	HHS proposals 2,3, 8, 25, 45, & 46 attachments
Dec 14, 2018 10:25 am	NTEU email	NTEU re: 6 articles, counters, & information
Dec 14, 2018 1:51 pm	HHS DM email	HHS re: Articles 3, 10, 25, 26, 31 and 45.
Dec 14, 2018	HHS Email	HHS Statement & Submission LBFO 12.16.2018; Resubmits 6 articles
Dec 16, 2018	HHS Proposals	HHS New Proposals Articles 2, 3, 8, 25, 45 & 46
Dec 21, 2018 4:37 pm	HHS to FSIP	Submits Revised Last Best & Final Offer
Dec 21, 2018 5:00 pm	FSIP email	Request NTEU reply to resubmission 6 articles
Dec 21, 2018 5:35 pm	NTEU KM email	Objection to FSIP re: jurisdiction over 6 articles

EMAIL COMMUNICATIONS EXCERPTS

The Arbitrator includes relevant language from some of the emails which were exchanged between the Parties, noting the author, addressee, date and time of the email.

HHS Julie Murphy, Tuesday, July 10, 2018 9:02 a.m to Jennifer Harling, NTEU

Good Morning,

Per our negotiations yesterday, the agency revised its proposal for Article 2 to address NTEU's concerns. The redline version of Article 2 is attached.

In addition, the agency is confirming its commitment to provide counter proposals to NTEU initiated articles within 3 business days following completion of the negotiation week to ensure that the negotiations continue to be effective and productive. The agency asked NTEU to also agree to a specific timeframe for submitting proposals. After the agency offered 3 business days, NTEU objected, and the agency offered 5 business days. NTEU still objected and has refused to agree to a specific timeframe. The agency continues to believe it is important to develop counter proposals while the matter is fresh on the minds of the team, rather than having to potentially discuss again ground covered previously.

Lastly, the Parties agreed to the following schedule:

HHS David Mansdoerfer, Chief Negotiator, Tuesday, July 10, 2018, 3:00 pm to Jennifer Harling

Good afternoon Jennifer,

This is notice that today HHS requested the services of the Federal Mediation and Conciliation Service (FMCS) to facilitate productive negotiations between HHS and the NTEU, pursuant to number 7 of the FSIP ordered ground rules.

Given the tone and tenor of the NTEU during this week's negotiations, we feel it best to continue bargaining with the help of a mediator.

NTEU J. Harling, Chief Negotiator, Wednesday, July 11, 2018 5:38 pm to J. Murphy, HHS

Julie

I want to clarify that NTEU did not refuse to submit counter-proposals. *** It wouldn't make sense for the parties to submit proposals back and forth without fully understanding the meaning, intent, or impact of the proposed language. ***

I want to remind you that while discussing the first article of term bargaining, the Agency repeatedly refused to answer NTEU's questions about its proposals and instructed NTEU to submit counters. The Agency also declared Article 2 "closed" until NTEU submits a "valid" counter proposal. Those actions only contribute to arguments and delay, as evidenced by what happened this week. The parties would be both best served, and the negotiations would progress, if we engage in an open and honest discussion of proposals.

With regard to the bargaining schedule, NTEU is still willing to meet with the Agency during the agreed upon weeks as set forth (through the week of Sept 10th), although it is unclear how the involvement of FMCS will impact those dates and the schedule beyond that. Thank you.

HHS Julie Murphy, Tuesday, July 17, 2018 8:03 am to Jennifer Harling, NTEU

Dear Jennifer,

We fully dispute your account of the proceedings as described in your email below. We also affirm that it was and remains the intention of HHS to engage in productive negotiations with NTEU.

When we opened negotiations the next day, having finished our presentation on Article 2 the previous day, we asked that if you had a counter-proposal to Article 2. You did not have one prepared yet. We then attempted to begin our presentation and open discussion of Article 2. We never, at any time, declared Article 2 "closed." We simply stated that our presentation of our proposal for Article 2 had finished, which you acknowledged on Monday. We had already answered all of your questions presented the previous day.

At that point, we were subjected to a coordinated line of questioning that involved all of the members of the NTEU's team repeatedly asking the same questions in what appeared to be a strategic effort to stall negotiations. Upon our protest to continuing to answer the same questions repeatedly, we were charged by NTEU with, "so you are refusing to answer the question," and "so you are saying this [Article 2] is closed!" – accusations you repeated in your email, which remain false.

It was with great joy that we read that you have begun working on a counter proposal to Article 2. Hopefully, this is indicative of a willingness to proceed in good faith negotiations.

It remains HHS's position that the most productive course to further that goal, which we have emphasized at the table and in this email, would be for the parties to collectively deliberate on one proposal, to acknowledge any concerns, then postpone discussion on that particular article (yet continuing discussions on other articles) while the other party contemplates a counter-proposal, and then return to the article after the other party has been afforded the opportunity to thoughtfully and succinctly respond.

NTEU Jennifer Harling, Thursday, August 2, 2018 6:15 pm to Catherine Bird, HHS

Catherine

Since the HHS bargaining team did not show up for term bargaining yesterday or today at NTEU, we assume HHS is no longer willing to meet on the scheduled weeks and dates the parties agreed upon on July 9th. We are, of course still willing to uphold our commitment to bargaining the weeks of August 13th, 27th, and September 10th, as well as the additional weeks we offered to you on Monday that would set dates through January 2019. We are also willing to bargain the full eighteen weeks as set forth in the ground rules that HHS unilaterally implemented in May. Because there are 34 opened term articles, 32 of which the parties have not yet discussed, NTEU believes that the parties should continue meeting as agreed until bargaining is complete and the parties have reached an actual impasse.

On Tuesday, July 31, 2018, HHS presented NTEU with its last best and final offers for all 34 opened term contract articles. Until that point, the parties had engaged in two full days of term bargaining and discussed only Article 2 (Contract Duration and Termination) and NTEU's proposals for Article 3 (Mid-term Bargaining). *** On Tuesday, July 10th, after fewer than 10 minutes of bargaining, the Agency contacted FMCS for mediation assistance and unilaterally put an end to bargaining for that week, and refused to bargain further without mediation assistance. On Monday, July 30th, the parties resumed bargaining with an FMCS mediator present.

***When it came time for HHS to present its proposals for Article 3, it refused. It said that it

had already explained that its proposals were drafted for the purposes of achieving its three stated goals. NTEU responded it has specific questions about the language and how it would achieve the agency's goals, among other questions. The Agency said it was unwilling to discuss Article 3 or any of the opened Articles any further, other than Article 9 (Union Access of Employer Services), Article 10 (Official Time) and two new articles it proposed (Employee Space and Facilities, and Interpretation). NTEU reminded the Agency that the parties had, on the first day of bargaining, already agreed to go through the articles in chronological order and that it was unwilling to deviate from the agreement. The Agency then took a caucus and left for the day. It presented its last best and final offers the next morning.

Because the parties have not engaged in any discussion of 32 opened articles, and the Agency refused to answer NTEU's questions regarding Articles 2 and 3, we have many outstanding questions including how specifically, the Agency's last best offer achieves its three goals of 1) cost efficiency; 2) reducing administrative burden; and 3) simplifying the contact across the department. What metrics did the Agency use to assess whether the proposals achieve these goals? Also, what is the Agency's rationale for copying its proposals word-for-word from the illegal Department of Education contract that the agency unilaterally implemented in March 2018, and the FLRA has determined violates the Statute? Did the Agency give any consideration to the differences in workforce between DOE and HHS or that fact that the contract contains many provisions that conflict with the law?

Additionally, NTEU requests clarification regarding several of the articles the Agency proposed to strike entirely in its last best offer dated July 31, 2018:

- Does the Agency intend to eliminate performance and incentive awards programs?
- Does the Agency intend to eliminate Alternative Work Schedules?
- Does the Agency intend to eliminate or restrict telework for BUEs?
- Does the Agency intend to eliminate public transportation subsidies?

NTEU submits the attached information requests to better understand the Agency's proposals, to inform the bargaining process, and enable NTEU to respond to the Agency's proposals. We request that the Agency provide a response to these requests by Thursday, August 9th prior to our next scheduled bargaining session at HHS on Monday, August 13th. Thank you.

HHS Catherine Bird, Tuesday, August 9, 2018 12:59 pm to Jennifer Harling, NTEU

Hi Jennifer

Notwithstanding the Union's representations of the factual situation – much of it inaccurate – as indicated in Mr. Passwater's email to the parties yesterday, the mediator has found the parties properly be at impasse. Accordingly, the Agency will be availing itself of the services of the Federal Services Impasse Panel.

In response to your questions regarding whether the Agency intends to eliminate those programs affected by the Articles it proposes to strike entirely (as identified in your email, specifically performance and incentive awards, Alternative Work Schedules, telework for BUEs, and public transit subsidies), contrary to representations made by the Union in some of its public pronouncements, the Agency has no intention to eliminate these programs. Instead, the Agency's position is that administration of these programs should be handled by management discretion, rather than dictated by the CBA.

Finally, we have received our information requests and are processing them.

FMCS Commissioner Larry Passwaters, 08 August 2018 20:08 (in full)

Everyone,

Good evening. At our last session I said I would give you a week for further communication prior releasing you to the FSIP. Tomorrow will be nine days since our last contact so I hereby release you to the FSIP. The FMCS case number is 2018N10002169. You will use this number when addressing your concerns to the panel.

Thank you and have a nice evening.

Larry

NTEU Jennifer Harling, Thursday, August 9, 2018 5:02 pm to Catherine Bird, HHS

Hi Catherine

I called just a few minutes ago to get clarity on your email statement below regarding management discretion in administering programs that are currently in the CBA. As I mentioned, the CBA language already allows for management discretion with regards to these programs and there is nothing in the CBA that automatically entitles employees to these benefits. I pointed out that NTEU has not had an opportunity to provide counter proposals for any of the articles that the Agency proposed to strike (AWS, telework, awards, etc.) and that we believe further bargaining is needed, and that we would like the opportunity to bargain further, to include submitting counter proposals. I asked if there was any counter proposal that the Agency would be willing to consider or if HHS is unwilling to bargain any aspect of these programs. You replied that HHS has provided its Last Best Offer (LBO) last week and were standing by it, and were prepared to proceed to FSIP. Based upon our conversation, I take it that HHS will not consider any further proposals submitted by NTEU and does not plan to meet with us next week or for our scheduled term bargaining session at HHS. If I am mistaken in my interpretation or if the Agency reconsiders its position, please let me know. Thank you.

NTEU Contentions

NTEU asserted that the Federal Services Impasse Panel should have declined to assert jurisdiction since the parties had never bargained over or even discussed any of the Agency's last best offers on all 34 articles, with the exception of some discussion over Article 2 prior to the Agency's submission of its last best offers. In addition, NTEU asserted that the Agency's Panel request was an attempt to force permissive subjects of bargaining to impasse. Specifically, NTEU asserted that the Agency submitted to impasse permissive subjects of bargaining in its July 31, 2018 last best offers on the following articles:

- Articles 2 (Contract Duration and Termination) because the Agency's proposals waive NTEU's statutory right to bargain changes to conditions of employment of bargaining unit employees;
- Article 3 (Mid-Term Bargaining) because the Agency's proposals waive NTEU's statutory right to bargaining changes to conditions of employment of bargaining unit employees, and interfere with NTEU's right to delegate bargaining and appoint its bargaining representatives;

- Article 8 (Dues Withholding) because the Agency's proposals violate the statutory right of employees to have their Union dues automatically deducted from their pay and places illegal conditions on dues withholding assignments;
- Article 45 (Grievance Procedures) because the Agency's proposals violate the right of individual employees to file grievances in violation of the Statute; and
- Article 46 (Arbitration) because the Agency's proposals on the Union's/grievant's burden of proof are contrary to law (UE 28 at p. 12).

NTEU asserts in its September 12th National Grievance that the Agency engaged in bad faith bargaining by insisting on impasse on at least six different permissive subjects and failing to respond to information requests. These are both Unfair Labor Practices. Permissive subjects include those that are outside the scope of the bargaining process. They involve proposals that a party negotiates to limit a right granted to it by statute. NTEU contends that it is acceptable for the Agency to make proposals on permissive subjects but it is unlawful for move them to impasse. NTEU contends that the Agency's Last Best Offer of August 13, 2018 submitted to FSIP contains no less than six permissive topic proposals. These include contract duration, termination, midterm bargaining, dues withholding, grievances, arbitration and AWS. The Agency proposals demand that the Union waive significant statutory rights. In its November 15, 2018 Decision the Panel expressly declined jurisdiction over permissive articles noting that the Parties may resolve the foregoing bargaining obligation disputes in the appropriate forum." The Union contends the appropriate forum is the arbitration proceeding which involves the Union's unfair practice National Grievance of September 2018 and the August 2018 National Grievance.

Specifically, NTEU alleges via its August 2018 National Grievance that the Agency engaged in bad faith bargaining by:

- (1) refusing to negotiate new ground rules,
- (2) refusing to discuss its proposals and their meaning, and answer NTEU's questions about them during bargaining and mediation in July 2018,
- (3) demanding that NTEU submit counter-proposals without first bargaining and discussing the Agency's proposals,
- (4) refusing to bargain without mediation assistance after a single day of bargaining and without even discussing at least 33 of the 34 open contract articles,
- (5) repeating the failure to discuss or bargain over proposals during mediation before a Federal mediator,
- (6) unilaterally declaring impasse after a single day of mediation and without discussing at least 32 of the 34 open contract articles,
- (7) not bargaining in good faith, i.e., coming to the bargaining table with an open mind and a sincere resolve to reach agreement.

The Union seeks a *status quo ante* remedy to recreate the conditions and relationships that would have been in existence had there been no bad faith bargaining. The Union, among other relief, requests that notices be issued to employees informing them of their rights and the ULP violations.

HHS Contentions

The Agency contends that the issues presented in the Grievances are under the jurisdiction of the Federal Services Impasse Panel (FSIP or Panel) since November 15, 2018. The Parties have submitted their Last Best Offer in December 2018. A final Decision was issued by FSIP after the close of the oral hearing but prior to the filing of Briefs. This makes the Grievances moot. There is no evidence that the Agency insisted to impasse on permissive subjects, but rather the FMCS mediator who released the Parties to FSIP on August 8, 2018. NTEU mischaracterizes the difference between hard bargaining and bad faith bargaining. The Record shows that the intransigency of both Parties caused the impasse.

Summary of Testimony of Jennifer Harling

Jennifer Harling is an employee of NTEU since July of 2014. She is an Assistant Counsel in the Negotiations Department responsible for administering the HHS contract with the Union. She served as the Chief Negotiator for term bargaining beginning in July 2015. In 2018 it was her second time as the Chief Negotiator. She testified that the Parties were unable to obtain agreement on the ground rules, so the Union requested assistance from the Federal Services Impasses Panel. Panel Member Marvin Johnson issued a decision on the ground rules on December 31, 2016. The Agency Head disapproved the Panel Order upon review. An email was sent from Darrell Hoffman dated January 31, 2017 stating that law, rule, and regulation was violated.

Over a year later, she received a letter dated May 22, 2018, from Christine Major, Deputy Assistant Secretary of the Agency that it had reconsidered and now wanted to commence term bargaining pursuant to the FSIP ground rules Order. Witness Harling responded by letter dated May 23rd noting that the change in Agency position did not remedy the pending Unfair Labor Practice charge. The Agency responded by letter dated May 25, 2018 from Ms. Majors indicating that the Parties must exchange proposals by June 11th since there is 30 days specified in the December 2016 Order. Witness Harling testified that she now reinterpreted the correspondence from the Agency as a demand rather than a proposal on how to conduct the bargaining. Witness Harling testified that she then attempted to reach out to Julie Murphy, Director of Workplace Relations at HHS to discuss the negotiation process. She was pregnant at that time and was going to be on maternity leave so her bargaining team would have new people on it. Julie Murphy declined to extend deadlines and responded that the June 11th date was operative based upon the FSIP Panel Order. NTEU filed an Unfair Labor Practice. An arbitration hearing was held before Arbitrator Clark on September 24, 2018.

The Union exchanged proposals on June 11th under protest, and later started face-to-face bargaining, also under protest. Witness Harling sent an email to Catherine Bird on June 11th with the Union proposals attached to it. The Agency proposals were attached to a June 11th email. Witness Harling testified that "it was quite a shock" to see that the Agency wanted to eliminate 13 Articles entirely from the collective bargaining agreement.

The first session at the bargaining table was held on July 9, 2018, where the teams started with Article 2, which was the first Article in chronological contract order that the Agency raised

in its proposals. Since Article 2 was placed on the table by the Agency, the NTEU team asked that they walk through the proposal. Witness Harling testified that the Agency refused and asked if there was a counter-proposal. NTEU responded that they were not prepared to submit a counter-proposal before there had been any explanation, discussion, or questions. She testified that the Agency proposals were "extremely punitive, waiving bargaining rights, just very harsh proposals." Witness Harling testified about discussion on one proposal by the Agency for a 7-year contract duration which, at first, they were unwilling to explain before noting that there was one contract of this length with the Department of Education. She testified that the Agency "otherwise, really wouldn't answer our questions" and instead asked a counter-proposal. The NTEU team responded that they were unable to offer a counter when they don't fully understand what the Agency proposals mean and why they were on the table. The entire day was spent on Article 2. Witness Harling testified that it would be inefficient for the Union to make counter-proposals on Articles that had not been fully discussed because they would not know the specific reasons or the impact of a change in language. The Union should not be required to speculate and the teams should be able to ask and answer questions about any proposals. She testified that the goal is to reach a meeting of the minds to fashion an agreement that works for both Parties.

Witness Harling testified about a follow-up email on July 10th from Julie Murphy the day after the first bargaining meeting of July 9th, which attached a revised, red-lined version of Article 2. It was the Agency response to what NTEU had identified as problematic language. She testified that there were a number of other concerns with the Agency new Article 2 proposal, including elimination of MOUs, and ground rule issues. She testified on July 10th there was about 10 minutes of bargaining which started with NTEU asking questions about the Article 2 proposal with the Agency responding that "they were not going to answer any more questions." The Agency considered the Article 2 discussion closed until NTEU submitted a valid counter-proposal. She testified that there was some heated discussion and NTEU reminded the Agency team that they had a duty to answer questions and to bargain in good faith. The Agency asked for a caucus which lasted for hours, so the teams just spent the day in caucus. Later that day, David Mansdoerfer, the Agency Chief Negotiator, emailed her to notify her that he had contacted FMCS for mediation assistance because the Agency was no longer willing to meet with NTEU without a mediator being there too. He sent an email on July 10th at 3:00 p.m. noting that it was best to proceed with a mediator because of the tone and tenor of the NTEU team. At this point, only Article 2 had been considered with 33 more that had not been discussed. Witness Harling testified that at some point the Union made a counter-proposal on Article 2.

The Julie Murphy email of July 10th confirmed the Agency's commitment to providing counter-proposals within three business days to Union proposals. NTEU declined to commit to submitting counter-proposals on all Articles within three business days, or even five days, on matters that were not even discussed. The Parties did agree to a schedule of sessions over a five week period.

The Union submitted an Information Request on July 10th regarding the proposal on Article 2 made by the Agency. The Agency had proposed eliminating MOUs. Witness Harling testified that during discussions, the Agency was unable to identify how many MOUs existed

because it had not gone through any process but would do so during bargaining. The Union sought all existing understandings and supplements, national MOUs, ground rules for term and midterm re-openers back to October 2010. She testified that there was a particularized need statement for each request. She testified that she never got complete responses from the Agency on a number of items. She testified that she was personally involved with an MOU for ORA in 2017 and that document was not included by the Agency in its information response.

Witness Harling testified about an email from Julie Murphy dated July 26, 2018 responding to the NTEU request for information filed on July 10th. A clarification was provided in an email response dated August 2, 2018. She clarified that they did not seek the information in Item 2 about Agency head review approvals and disapprovals. She testified that the Agency provided a partial response to Items 1 and 2 of the request and not all the existing MOUs or ground rules midterm reopeners were provided to NTEU. Witness Harling was aware that some MOUs she had been involved with were missing from the packet supplied by the Agency. Also, NTEU does not maintain local records from all the chapters and the National does not have access to all the local documents.

Witness Harling testified about her response dated August 13th to an email from Donna Kramer where the Agency stated that it had fully complied with the information request. Witness Harling was certain that there were additional existing MOUs negotiated by chapter presidents plus some ground rules. The Agency did respond by email dated August 22nd but did not provide anything more. Donna Kramer asked for NTEU to identify any other MOUs in effect. Witness Harling testified that it was not the duty of NTEU to do so since the Agency has that duty by statute. Caselaw was provided by NTEU to support the contention that the Agency had the duty even if NTEU could obtain the information from another source. This was by an email dated August 24th from the Witness. A response came from Darrell Hoffman dated September 5th stating that bargaining had been moved to the FSIP and that the Agency was unable to find any additional MOUs.

Witness Harling testified about an email dated July 10th she sent to Julie Murphy and the HHS team following up on the prior day of bargaining. The Agency responded on July 17th disagreeing with her characterization of the bargaining session.

Witness Harling testified that the Union objected to the FMCS mediator becoming involved because it was too early in the bargaining process. She testified that the Parties could not possibly be at impasse, or even close, when nothing had been discussed and the Agency had not responded to the information request. The Parties had not discussed 33 of the 34 open Articles. She was informed by the mediator that it was mandatory for him to mediate. Mediation started on July 30th with the teams meeting face-to-face with Larry Passwaters of FMCS at NTEU offices. NTEU noted its objection to the participation of the mediator. The Union proposed that it start with the counter-proposal to Article 2 and walk through it. The Agency responded that it was self-explanatory so there was no need to hear the Union presentation on it. NTEU gave it anyway.

The Parties then moved to Article 3, the midterm bargaining article, which both Parties had opened. The Union made its presentation on it. Witness Harling testified that the Union was

seeking lots of changes, and in her opinion, their team showed no interest in hearing or understanding the Union proposals. Participants said that the proposals were self-explanatory and that the Union should "wrap it up." The Union asked the Agency for its presentation and David Mansdoerfer stated it would not be presenting on Article 3. There would be no presentations on any of the HHS proposals. The Union was informed that all Agency proposals were for the purpose of furthering one of its three stated objectives of reducing costs, reducing administrative burden, and simplifying the contract, and that was all they needed to know or tell the Union. Witness Harling testified that the Union told the Agency team that there can't be any progress made without a back and forth dialogue, including on some of the proposals met any of the three objectives. She testified that there were proposals which appeared to undermine the Agency goals so the specifics of these should be talked about across the table.

Witness Harling testified that she has heard the phrase "hard bargaining" and that it is not an unfair labor practice to engage in hard bargaining. This could involve submitting a proposal and be unwilling to concede or compromise on it. She testified that a "take-it-or-leave it" proposal could be considered to be "hard bargaining" and also an unfair labor practice as bad faith bargaining. If a party is not willing to discuss it, explain it, or consider a back and forth on it, then that is acting in bad faith. In her opinion, you do not have to compromise but you must at least explain the proposal, answer questions, and engage with each other. Although the Agency stated its three goals, for example, there were no explanations how a specific proposal would achieve cost-efficiency. On July 30th the Union presented on its proposal on Article 3 explaining the Union revisions to address problems which have arisen repeatedly in litigation. The Agency refused to discuss Article 3 beyond repeating its three objectives.

The Agency wanted discussion on Articles 9 and 10 at the mediated session, which were opened by the Agency and not the Union, after the Agency said it would not talk about Article 3. The Union responded that the Parties agreed to take the Articles in chronological order so they were prepared to talk about Article 3 and so they were not ready to talk about Article 9 or 10. There were Articles 5 and 8 to address before Article 9. There would have been no harm talking about #9 and #10 out of order, but the Union was not prepared to do so since the process was to discuss the Articles in chronological order. The Agency then had a caucus and left. The only thing that was discussed on the first day of mediation was Article 2 and the Union presentation on its Article 3 proposal. The next day, July 31st, the mediator and Agency team arrived and the Agency submitted its last best and final offers on the contract. Witness Harling testified that there was no discussion during the 10 minutes or so the Agency was at the bargaining table. Although the session was scheduled for 9:00 a.m., the Agency was late and arrived between 10 and 10:30 that morning. There was an email sent to the Union after the Agency team left with the attachments of the proposals. The time of this email was 11:43 a.m. and was for the purpose of sending documents where the word "draft" was deleted.

The document of Tuesday, July 31st with the Last Best Offers included a new counter-proposal to delete all of the Articles that the Union had opened in its proposals. The Agency wanted to expand its list of proposed deleted Articles to include anything opened by the Union. Witness Harling sent an email to the mediator, Catherine Bird, Office of General Counsel, and

David Mansdoerfer indicating that NTEU wanted to continue meeting and bargaining. They had been scheduled to bargain almost the full week. The email also attached several information requests on some of the Articles, such as #9, Union Access to Employer Services, #10, Official Time, #25, Hours of Work, #26, Telework, and #44, Grievance. There were a total of 34 Articles opened between the two Parties. At the time the Agency submitted its Last Best Offers, the Parties had addressed at the table Article 2 and part of Article 3.

Catherine Bird sent an email dated Thursday, August 9th contending the Parties were at impasse and they had received the information requests to process. The Agency did not agree to any further negotiations. Witness Harling sent an email on August 9th at 5:02 p.m. to Catherine summarizing a phone call she had with her to explore if there could be progress on any of the Articles. The Union had only countered on Article 2 and there was no discussion on the remaining Articles. The Agency indicated it was standing by its Last Best Offers. The Grievance at issue here had already been filed on August 7, 2018. Witness Harling had communications with Julie Murphy regarding if the Agency was going to approve travel requests for the NTEU bargaining team for the sessions which had previously been scheduled to begin on August 13, 2018. The Agency did not approve travel contending that it was now outside the appropriate process to resolve the current impasse.

About a week after the last session of July 31st, Larry Passwaters released the Parties and the Agency requested Panel assistance. Dan Duran was assigned by the Panel as the fact-finder. He met with the Witness and NTEU counsel Anna Gnadt. NTEU submitted its statement of position on August 31, 2018. The Agency submitted its statement and a response to the NTEU statement. NTEU filed a supplemental position statement. On November 15, 2018, the Panel ordered the Parties to enter mediation for a period of thirty days.

The Panel asserted jurisdiction on all articles submitted except for six that NTEU contended were permissive subjects of bargaining. These Articles were 2, 3, 8, 25, 45, and 46.

Summary of Testimony of Steven David Novy

Steven Novy, has been the Deputy Director for Operations and Resources, Office of Civil Rights for about four years. He is a member of the Agency negotiating team who was involved in the bargaining since July of 2018. Other team members included Darrell Hoffman, Catherine Bird, Nikki Bracher Bowman, and David Mansdoerfer. He testified that the July 9th bargaining session was held in the Humphrey Building with a 9:30 or 10:00 a.m. start time. He testified that the atmosphere was "very tense" that day with loud volume and people talking over each other. The Agency team explained that it was not going to answer deliberative process questions posed by the Union. He testified that he thought the initial joint session lasted about 45 minutes before the teams went into caucus. The teams reconvened several more times that day. No progress was made that day. He was present again during caucus by his team on July 10th. He did not draft any of the proposals or later revisions submitted by the Agency.

There was no mediator present on July 9th but at one point in his testimony he thought that the mediator recommended that the Union present its last offer on July 10th. The Agency

sought the help of a mediator. Witness Novy testified that after two days of bargaining, July 30th and July 31st, no progress was being made so the mediator called a halt in the bargaining process before releasing the Parties. The Agency requested FSIP jurisdiction, which was granted on November 15, 2018, with the Parties being ordered to negotiate in mediation for 30 days. He was present during bargaining with the mediator participating during the weeks of November 25, and December 9th of 2018. The FSIP asserted jurisdiction over everything except six articles. There were five articles which were ultimately resubmitted at a later time. They were given to NTEU on December 13th, 16th, and 21st, of 2018.

Summary of Testimony of Kenneth E. Moffett, Jr. (perpetuated from February 22, 2019)

Kenneth E. Moffett, Jr., has been Director of Negotiations for about five years and started with NTEU in February of 2003. He now reports directly to the President and Vice President. His Department of the Union negotiates all national and midterm contracts and polices contractual and statutory violations. He supervised the two negotiators, Jennifer Harling and Anna Gnadit handling the HHS contract. He was involved in the ground rules bargaining and with matters brought to FSIP, and in negotiations after the Panel asserted jurisdiction. He testified that the Parties had never discussed about 32 of the 24 opened articles. FSIP struck down a number of executive orders on subjects such as performance improvement time periods, shortening the collective bargaining period, official time.

Witness Moffett testified that the Agency had proposed to eliminate articles without any supported demonstrated need which was “a wholesale assault on the entire collective bargaining agreement on just about every subject matter.” The Agency had proposed to strike about 21 or more articles without negotiating over them. Witness Moffett testified he “had never seen that tactic . . . as a bargaining tactic in the past 16 years that I was at NTEU.” The Agency wanted to eliminate the right of an employee to file a grievance despite this being in Section 7121 of the statute. The Agency position on dues withholding was not consistent with Section 7115. The Work Schedules Act mandates that AWS involving flexibility or compression be contained in the collective bargaining agreement. The Agency was proposing waiver of the rights of the employees. He wrote a letter containing his concerns which was responded to by the General Counsel of HHS dated September 4, 2018.

Witness Moffett testified about his understanding and application of the Carswell framework which holds that the FSIP can rule on negotiability if the FLRA previously held language was negotiable that is substantially identical to what a party is proposing to the Panel. The Panel can rule on negotiability. The Panel declined jurisdiction over six Articles. Witness Moffett testified that although the Panel declined to assert jurisdiction over 6 of the contract articles, the Agency nevertheless attempted to insert those articles into the Panel-ordered mediation process.

Witness Moffett testified that Scott Blake, Director of the Philadelphia FMCS office, the mediator informed him that he was only available for two weeks during the mandated 30-day mediation period. The Parties met for the week after Thanksgiving and December 9th to 13th.

Witness Moffett testified that on the evening before the last day of FMCS facilitated negotiations, David Mansdoerfer of the Agency sent an email to him and Anna Gnadt with HHS proposals for the six Articles that FSIP had declined jurisdiction over. The Agency wanted to bargain over these six the next day. NTEU responded that these six were not part of the mediation process which had already been shortened from 30 days to two weeks. NTEU contended that there was not time or a legal basis to address them the next day. The mediator agreed with NTEU and they were not addressed.

Witness Moffett also repeated the prior request for information even though there was only one day left in mediation, for the data the Union was entitled to under Section 7114. Witness Moffett testified that the Union never go any official time or awards data. The Union did receive some information on leave policy, health and safety and worker's compensation.

Both Parties submitted Last Best Offers on December 21, 2018 and added a Last Best Offer on the contested six articles which the Agency contended had been redrafted to cure outstanding issues to allow the Panel to reconsider jurisdiction. Witness Moffett testified that there was no direct bargaining or mediation for these six articles. These were submitted at 11:30 p.m. on the night before the last mediation session. Witness Moffett sent an email at 5:35 p.m. to Dan Duran of FSIP stating there was no Panel jurisdiction over these six issues and that NTEU objected to the submission by the Agency.

Witness Moffett testified that when a collective bargaining agreement expires a party could give notice and bargain to terminate the permissive subjects. Witness Moffett testified to his understanding that a party is obligated to bargain over permissive subjects in good faith but they can't be forced to go to the FSIP on a permissive subject. Witness Moffett testified that the Agency is obligated to bargain over permissive subjects that are already in the 2010 Agreement. The Agency did not notify the Union that they were terminating permissive subjects under a terminated collective bargaining agreement. Witness Moffett testified that here the permissive subjects are statutory rights and NTEU does not have an obligation to bargain over an Agency seeking to terminate statutory rights because the proposal to terminate a statutory right is permissive. Witness Moffett testified that it is permissive for an agency to ask unions to waive statutory rights. The union could agree to it but the agency cannot force a union to waive its rights under the statute. It is permissive on the part of unions whether to waive a statutory right. The statute gives a right which can be voluntarily bargained over or waived by the Union. If contractual rights are greater than in the statute, they can be reduced to what is in the statute once the collective bargaining agreement expires but anything less has to be by an affirmative reduction, consent, or waiver by the union itself.

Summary of Testimony of Jennifer Harling (February 22, 2019, perpetuated)

Jennifer Harling testified that the Agency request for assistance from FSIP included all 34 open Articles including the six permissive subjects of bargaining, including Articles 2, 8, 25, 45 and 46. The Agency responded on September 27th and NTEU filed a supplemental submission to the assertions made by the Agency in that September 27th filing.

Witness Harling testified about the August 2, 2018 Information Request made by NTEU and the Agency response. A December 14th document was provided by the Agency which contained a number of responses to specific items that the Agency does not normally maintain the information requested by the Union. The Agency also responded that NTEU could survey its members or that items had been discussed at the bargaining table in July, 2018. Witness Harling testified that there were no substantive discussions or answers to questions of the Union except for Article 2. Witness Harling testified that the Agency and NTEU never bargained over Article 45. She testified that even if it had happened, this was not a legal basis to deny the Union information request on these items. The Agency also responded to some requests denying them as being overly burdensome.

Witness Harling testified about the request for Article 26, Telework, which addresses the responsibility of the Agency to provide data on workers engaged in Telework. Section 10 of the Article 26, requires that the Union be provided with copies of any reports on telework usage provided to OPM and information broken down by OpDiv, including the number of employees eligible to participate and the actual employees participating, location, series, grade and type of telework arrangements. Witness Harling testified that she had been provided this type of information in the past, in 2015, 2016, and by Office of Regulatory Affairs, FDA. She has not been provided the information specified in Article 26, Section 10. There are additional requirements for the Operating Divisions to compile data on the telework program, including variations, and reasons, in participation, and if goals were met.

Summary of Testimony of Darrell R. Hoffman (February 22, 2019, perpetuated)

Darrell Hoffman is the senior advisor to the Assistant Secretary for Administration. He has been a United States government employee for over 36 years before retiring in 2017, and then he was asked to return as a full time employee as of August 3, 2018.. His entire career was in labor and employee relations for both labor and management. He oversees 12 or 13 different programs, one of them being Labor Employee Relations. He is also a deputy ethics counselor and works on a number of projects. He was part of the negotiation committee. He had participated in the ground rules aspect of the term bargaining.

Witness Hoffman stated that Julie Murphy is currently the Acting Deputy Assistant Secretary of Human Resources but during 2018 she was the Workforce Relations Director. Prior to his retirement, Ms. Murphy reported to him. He is currently above the HR functions and is one of seven senior executives that report to the Assistant Secretary as part of the leadership team.

Witness Hoffman testified that his understanding of bad faith bargaining is entering into bargaining with never expecting a conclusion. Hard bargaining is making substantial changes to a contract that has been place for a long period of time. He testified that in the federal sector the FMCS makes the final determination whether parties are at impasse.

Witness Hoffman gave the final response to the Union on Information Requested on September 5, 2018. Witness Hoffman testified about information provided in the response of the

Agency dated August 2, 2018 which contained four MOUs as attachments that were submitted to NTEU. Witness Hoffman testified that the Agency typically maintains four years of historical documents under NARA and he checked with the everyone in the group who reviewed boxes of documents. He testified that if there is nothing in the files, there is nothing the Agency can give to NTEU. Managers reached out to all the operating divisions in a "data call" to try to find anything requested by the Union. The National Office does not maintain records of the day-to-day settlements that are done in the regional offices. Witness Hoffman testified that starting in 2014 he required all regional offices to forward for Agency Head Review all MOUs and MOAs, which impacted the NTEU national agreement.

Witness Hoffman responded to the Union Information Request of December 14, 2018 by checking if the information was available and how much time it would take to obtain it if it existed. Witness Hoffman testified that they do not compile information on use of official time by individual NTEU officers. There are 21 different bargaining units across HHS with a total of seven different unions. There are about 14,000 FTE bargaining unit members of NTEU. Some entities within HHS have access to the ITAS system which tracks time and attendance where official time might be able to be extracted from the system. Other organizations use paper documents, so in his opinion they would have to extract info for some of the requests from DFAs on 14,000 people for the time and attendance records of Union officials. Witness Hoffman testified about the Union request for a "per capita official time usage by NTEU employee representatives from fiscal year 2010 to 2018." They do not maintain records going back eight years nor have the ability to recreate it in this format.

Witness Hoffman testified about the Union request designated as Article 3, Request 2, which also sought information going back to October of 2010 to the present, including operating divisions, on midterm changes in conditions of employment of bargaining unit employees "implemented before completion of the bargaining due to operational need or other situations exigencies permitted by law, including a copy of the bargaining notice provided to NTEU, and a copy of any notice from the Agency that the Agency would implement the change prior to the completion of bargaining, or any reasons for that implementation." Witness Hoffman testified that he would not even know how to obtain this information within the Agency. It is not maintained. There might be records for the last few years but it would take hundreds of hours to try to compile the information which would be unreasonable given the "enormous amount of time, effort and government money."

Witness Hoffman testified regarding the request for Article 25 information that the data might be extractable from the time and attendance system but the Agency does not maintain it in an accessible format. Witness Hoffman testified that the information for the first four requests are not maintained by the Agency. On the fifth request they could construct the approved telework by reaching out to the operating and staff divisions for paper documents of employees who are on approved telework arrangements from the 90,000 employees throughout the country. The information provided to OPM on telework is a compilation that includes all bargaining units and non-unit employees. The information for Request #6 for Article 26 is not maintained. He testified that the Information for Union Request #7 was provided to Mr. Moffett of NTEU.

Witness Hoffman testified about Article 45 stating that the information for #1 was not maintained for the requested time period and that #2 was not maintained by the Agency. The same is true for Articles 31, 35, 43, and 44.

Witness Hoffman testified about the process of resubmitting the six Articles that the FSIP declined to assert jurisdiction over on the basis of them being permissive subjects of bargaining. The Agency revised their proposals to withdraw content that was permissive. It sought bargaining with NTEU over them. When NTEU refused to bargain, these were resubmitted to the FSIP. Witness Hoffman testified to his understanding of what happens when a collective bargaining agreement expires containing permissive subjects of bargaining. He stated that either party during term negotiations withdraw from permissive subjects before the signing of the final agreement documents. He testified that neither Party is obligated to bargain over permissive subjects.

Witness Hoffman testified that he stated in his September 5th email that the Agency provided the documents which were "reasonably available" that were in Agency files. This involves a search that does not cause an undue hardship or undue cost to the taxpayer. If the Agency has a document, it has to provide it. This is true even if a union has the document from another source. After his August return to work he communicated with Julie Murphy and Donna Kramer regarding the status of the response to the information requests made by NTEU. The Office of Workforce Management sent out a data call; he does not know the dates, the details or the responses. He discussed the search with Donna Kramer. The conclusion was it would take hundreds, perhaps thousands, of manhours to manually extract and compile the data to respond to the information requests. The requests involved almost ten years of data on 90,000 employees with a focus on 14,000 NTEU members. He testified that they searched to see "if there was anything we could get and provide to NTEU prior to the end of the 30 day FSIP order. He communicated with his ERLR personnel about obtaining the data could be obtained prior to the end of the FSIP period. Witness Hoffman testified that he did not reach out to NTEU to attempt to negotiate reduced information requests or relevant time periods. They maintain some records less than four years but they did not include that specific information in the response to NTEU.

Witness Hoffman testified that it is not the Agency contention that if a particular type of document is not maintained in the regular course of business that there is never an obligation to create a document containing the data or information. Witness Hoffman testified the Agency does not have to maintain information in a format requested by the unions; if it is reasonably obtainable and there is no undue hardship or excessive cost to the public, the Agency will try to provide it. Hypothetically, if there was an electronic data base which could be searched to compile specific information and issue a summary or report, this would be reasonable to provide to the union even if it was not a standard report normally produced by the Agency. The Agency would consider its ability to obtain the data, how many organizations are involved, how the data can be consolidated, how information can be extracted from the data, and at what total cost. He testified that some of the Union requests were "an algebraic equation, not a submission for information, [s]o we have to figure out who, what, when, where, and why and what you're asking for, where we could obtain that information and how much time." He testified that if

there was “unlimited resources and time” the Agency “could tell the Union every single thing in the process.”

Witness Hoffman testified the Agency was not going to eliminate the AWS and he was unaware of any studies done while he was gone. The Agency responded to the Union Information Request on PIP for each fiscal year 2011 to 2018, including the total number, duration and other details. The Agency responded that this information is not normally compiled by the Agency since it is the individual supervisors and managers that maintain performance plans for their own employees. These are not submitted to the Secretary of HHS to maintain the records. It would be a voluminous endeavor to ask for and maintain these records. Witness Hoffman testified that he recalls making contact with the Defense Finance and Accounting Service about payroll records and if the 14,000 NTEU employees could be separated from the over 90,000 total employees, and then evaluate which were union officials. He testified that he reached out to the HHS organizations on every information request that was submitted to NTEU. This was done via the Workforce Relations function and not by him personally calling regional offices. He does not have personal knowledge of what Workforce managers did or did not do. It is common for that function to gather information for the Agency and OPM.

Witness Hoffman testified that although he is familiar with the Douglas factors, he does not know if how similarly situated employees have been treated is part of it. He does not that unions request information on prior adverse actions and discipline in preparation for arbitration cases. The Union requested all proposed adverse actions against bargaining unit employees from 2011 to 2018. The Agency responded that it does not normally maintain this information in the regular course of business. He does not have knowledge of anyone contacting the local managers to compile information on adverse actions for the 7-year period.

Witness Hoffman testified that he participated in the last week of negotiations with the federal mediator in December, 2018. There were 20 Articles which were considered during these meetings. He recalls the Union official time counter-proposal submitted by NTEU and does not recall other specific articles under discussion in joint session.

EXHIBITS

Joint Exhibits

1. Collective Bargaining Agreement, Effective 10/1/2010 as Revised 3/6/2014.
2. NTEU August 7, 2018 National Grievance
3. September 13, 2018 Invocation of Arbitration, August 7, 2018 National Grievance.
4. FMCS Mediator Larry Passwaters, August 8, 2018 Email.
5. Federal Services Impasse Panel, 18 FSIP 077, November 15, 2018.
6. Grievance Letter to Julie Murphy from NTEU dated September 12, 2018. (Perpetuated)
7. Email to Julie Murphy Invoking Arbitration dated November 20, 2018. (Perpetuated)

Union Exhibits

1. Arbitrator Award December 31, 2016.
2. Garfield Tavnier Email, January 31, 2018.
3. Christine Major Letter, May 10, 2018.
4. Jennifer Harling Response Letter, May 22, 2019.
5. Christine Major Letter, May 10, 2018.
6. Julie Murphy Emails, June 1, 2018.
7. Julie Murphy Emails, June 1, 2018.
8. Grievance for Unfair Labor Practices, June 13, 2018.
9. Jennifer Harling Proposal Email, June 11, 2018.
10. Catherine Bird Proposal Email, June 11, 2018.
11. Article 2 Redline Email, July 10, 2018.
12. Request for FMCS Services Email, July 10, 2018.
13. NTEU Request for Information Email, July 10, 2018.
14. MOU Email, August 10, 2018.
15. HHS Response to Information Request, September 6, 2018.
16. Negotiation Email, July 17, 2018.
17. Article 2 Counters Email, July 23, 2018.
18. HHS Management's Final Offer, July 31, 2018.
19. NTEU Information Requests.
20. Term Bargaining Email, August 9, 2018.
21. Harling Email August 9, 2018.
22. Travel Email, August 10, 2018.
23. Letter & Email to D. Mansdoerfer from K. Moffett, Jr., August 28, 2018. (perpetuated)
24. Letter from R. Charrow to K. Moffett, Jr., September 4, 2018. (perpetuated)
25. Email from K. Moffett to D. Mansdoerfer, December 14, 2019. (perpetuated)
26. Email from K. Moffett to Duran and Mansdoerfer, December 21, 2018. (perpetuated)
27. Request for Panel Assistance, & Final HHS Offer, August 13, 2018. (perpetuated)
28. Email from J. Harling to D. Duran w/Position Statement, August 31, 2018. (perpetuated)
29. Letter to NTEU from D. Mansdoerfer, September 27, 2018. (perpetuated)
30. Email from A. Gnadt to D. Duran, w/Reply, October 11, 2018. (perpetuated)
31. Email D. Mansdoerfer to K. Moffett and A. Gnadt December 14, 2018. (perpetuated)
32. HHS Telework Program Policy, September 18, 2011. (perpetuated)

Employer Exhibits

1. Subchapter D Federal Service Impasses Panel
2. HHS Revised Last Best and Final Offer, December 21, 2018.
3. Position Justification Statement, December 21, 2018.
4. Email from J. Harling to J. Murphy, July 10, 2018. (perpetuated)
5. Email from J. Murphy to J. Harling, August 2, 2018. (perpetuated)
6. Email from J. Harling to J. Murphy, August 2, 2018. (perpetuated)
7. Email from J. Harling to D. Kramer, August 24, 2018. (perpetuated)
8. Email from D. Hoffman to J. Harling, September 5, 2018. (perpetuated)

The Arbitrator also accepted into the record the prehearing submissions on the Agency's February 11, 2019 motions to dismiss both grievances, the NTEU February 14, 2019 response to those motions, and the Agency's reply. Any decisions or case law attached to either of the Briefs, including documents dated after the close of the oral hearing but before the filing of Briefs was also deemed to be part of the Record subject to consideration by the Arbitrator.

PERTINENT AGREEMENT & STATUTORY PROVISIONS

ARTICLE 45 GRIEVANCE PROCEDURES

Section 2

A. A grievance is defined as any complaint:

1. By any employee in the bargaining unit concerning any matter relating to the employment of the employee;
2. By the Union concerning any matter relating to the employment of any employee in the bargaining unit.
3. By an employee in the bargaining unit, the Union, or the Employer concerning:
 - a. The effect or interpretation, or a claim of breach, of the Agreement;
or
 - b. Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Section 8

C. Institutional Grievances

Grievances against the Employer concerning the Union's institutional rights, not presented by or on behalf of an employee or a group of employees, shall be filed with the designated management official within thirty (30) calendar days of the time the Union became aware, or should have become aware, of the matter grieved. The designated management official will submit each such grievance to the proper official with authority to resolve the grievance, who shall not be the official responsible for the matter grieved and provide the union with his/her name. Either party may request, within ten (10) workdays of the submission of the grievance, that a grievance meeting be held. If requested, a meeting will be held within fourteen (14) calendar days at the local office of the Employer. The Union may have the same number of representatives from the bargaining unit present on official time as management representatives. The Employer will provide a written decision within twenty (20) workdays of the meeting, or, if no meeting was requested, within twenty (20) workdays of the submission of the grievance. This will be a final grievance decision, subject to arbitration at the election of the Union.

D. National Grievances

The Union may file a national grievance over issues affecting bargaining unit employees covered by this Agreement from more than one chapter by filing the grievance with the designated management official within thirty (30) calendar days of the time the Union became aware, or should have become aware, of the matter grieved. The management officials shall submit it to

the proper official with authority to resolve the grievance, who shall not be the official responsible for the matter grieved, and provide the Union with the name of that official. Either party may request, within ten (10) workdays of the submission of the grievance, that a grievance meeting be held. If requested, a meeting will be held within fourteen (14) calendar days at the headquarters offices of the Employer. The Union shall have the right to have two (2) bargaining unit employees participate and attend any such meeting on official time. The Employer will provide a written decision within twenty (20) workdays of the submission of the grievance. This will be a final grievance decision, subject to arbitration at the election of the Union. The Union must invoke arbitration within thirty (30) calendar days of receipt of the Employer's decision. If the Employer fails to issue a decision within the required time limits, the Union may, at its option, treat it as a denial of the grievance at that step, at which point the Union may elect to appeal to arbitration.

ARTICLE 46 ARBITRATION

Section 1

- A. Any unresolved grievances processed under Article 45, Grievance Procedures, may be appealed to binding arbitration upon written notification by the Union or by the Employer, as appropriate, unless otherwise provided in this Agreement. Arbitration must be invoked within thirty (30) calendar days after of the receipt of the final decision in the grievance procedure by the designated NTEU representative. If no final decision is issued, the arbitration may be invoked no more than forty-five (45) days from the date the decision should have been issued.
- B. Invocation must be served on the designated management official, if filed by the Union, or on the National President of the NTEU, if filed by the Employer. Invocation notices may be transmitted via email, facsimile, hand delivery, first class mail, or by any other commercial delivery. Arbitration is deemed to be invoked upon email or fax transmittal, hand delivery, or date of postmark, if mailed, to the appropriate party.

Sections 15

- C. The Arbitrator's decision shall be final and binding for that grievance.
- D. The Arbitrator shall possess the authority to make an aggrieved employee whole to the extent such remedy is not limited by law, including the authority to award back pay, interest, and attorney's fees in accordance with 5 CFR 550.801(a), reinstatement, retroactive promotion where appropriate, and to issue an order to expunge the record of all references to a disciplinary, adverse, or unacceptable performance action, if appropriate.

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE EXCERPTS

5 U.S. Code § 7105. Powers and duties of the Authority

§7105 (a)(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

- (E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7117(c) of this title;

(g)(3) In order to carry out its functions under this chapter, the Authority may—

- (1) hold hearings;
- (2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and
- (3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

§ 7114. Representation rights and duties

(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

- (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
- (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
- (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
- (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
 - (A) which is normally maintained by the agency in the regular course of business;
 - (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

- (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
- (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
- (3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;
- (4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;
- (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
- (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
- (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or
- (8) to otherwise fail or refuse to comply with any provision of this chapter.

- (5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;
- (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
- (7)
- (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
- (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or
- (8) to otherwise fail or refuse to comply with any provision of this chapter.

§ 7119—Negotiation Impasses; Federal Services Impasses Panel

- (a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.
- (b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse —
 - (1) either party may request the Federal Services Impasse Panel to consider the matter, or

- (2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.
- (c) (1) The Federal Services Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

SUBCHAPTER D – FEDERAL SERVICE IMPASSES PANEL

Authority: 3 U.S.C. 431, 5 U.S.C. 7119, 7134

Subpart A – Purpose

The regulations in this subchapter are intended to implement the provisions of section 7119 of title 5 and, where applicable, section 431 of title 3 of the United States Code. *** It is the policy of the Panel to encourage labor and management to resolve disputes on terms that are mutually agreeable at any stage of the Panel's procedures.

Subpart B – Definitions

2470.2 Definitions.

- (e) The term impasse means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

ISSUES

Each of the Parties submitted comparable proposed Issues. NTEU proposed the following issue for the August 7, 2018 National Grievance:

Whether the Agency engaged in bad faith bargaining during the Parties' negotiations over a successor term agreement and therefore committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (5), and/or (8)? If so, what shall be the remedy?

The Agency's Statement of the Issues for the August 7, 2018 Grievance was:

Issue 1: Whether the Arbitrator can assert jurisdiction over the grievance that is pending before the FSIP for final determination, and if so, what is the remedy?

Issue 2: Whether the Agency engaged in bad-faith bargaining with the Union during the negotiation? If so, what is the remedy?

Arbitrator Statement of the Issues for the August 7, 2018 National Grievance

1. Is the National Grievance arbitrable?

If not, what shall the remedy be?

2. Did the Agency engage in bad faith bargaining resulting in a violation of 5 U.S.C 7116(a)?

If yes, what shall the remedy be?

POSITIONS OF THE PARTIES

The following is incorporated from the Briefs submitted by the Parties with format, style or non-substantive or minor edits, and with the omission of emphasis and exhibit citations.

THE EMPLOYER

The Grievances are not arbitrable because they are out of the Arbitrator's jurisdiction. The record is clear, and the facts are undisputable, that the FSIP asserted jurisdiction of the negotiations on November 15, 2018. Pursuant to 5 U.S.C 7119 (c) (1), "the Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives". On December 21, 2018, the parties submitted their LBO to the FSIP for final determination including Articles 2, 3, 8, 35, 45, and 46 which the Panel initially declined to assert jurisdiction. Section 7119 (5)(c) states that notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

The NTEU previously argued that the FLRA has the authority to resolve unfair labor practice issues and not the FSIP, but the FSIP the entity that has the authority to resolve impasse, which is the issue at hand. In its response to the Agency's Motion to Dismiss, the Union indicated that the FLRA has the authority to issue a stay on an FSIP order, however, it is important to note that the only case in which the Authority has granted a request for a stay of a Panel proceeding, is where "unusual" and "unique" circumstances were present. *NTEU*, 32 FLRA at 1132, 1139 (see also *AFSCME*, 59 FLRA at 802; *Customs Serv.*, 34 FLRA at 137, where the Authority rejected reliance on *NTEU* and summarily denied the requests for a stay). The denials of these requests demonstrate how narrowly the Authority has applied *NTEU*. (Emphasis added). In fact, in *Customs and Border Protection*, 63 FLRA 183 (2009), cited by the Union in its response to our Motion to Dismiss, the Authority also declined to warrant the Union a request to stay the case.

The two grievances mentioned above involve the resolution by the Panel of a negotiation impasse under the statutory authority of § 7119(c) (1). In this regard, § 7119 establishes the Panel as an independent entity within the Authority and commits to the Panel the broad authority to make decisions to resolve negotiation impasses. *Council of Prison Locals v. Brewer*, 735 F.2d at 1499. That broad authority denies direct review of Panel orders by either the Authority or the courts. *Id.* at 1499-1500. The Authority states that to grant the stay in the circumstances presented would undermine the framework of the Statute for the resolution of impasses and would interject the Authority prematurely into the carefully developed system of review. See *NATCA, AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1265 (D.C. Cir. 2006). Similarly, the Arbitrator will be stepping out of his jurisdiction and exceeding his authority if he orders a status quo ante, orders the withdraw of proposals, and orders the parties to return to the bargaining table. These are all remedies that directly conflict with the Panel's authority to resolve negotiation impasses.

The evidence demonstrates how the NTEU has attempted to manipulate the facts in this case in an effort to mischaracterize the difference between hard bargaining and bad faith bargaining in order to pursue an unfair labor practice. The NTEU alleges that the Agency engaged in bad faith during the negotiation period from July 9 through July 31, 2018, for the following reasons: (1) refusing to fully discuss the proposals, while providing only a blanket response; (2) asking the NTEU to provide counter proposals, which the Union refused to provide claiming they were not prepared to do so; (3) proposing to move to discuss Articles 9 and 10 which the NTEU claims the Agency was violating a verbal agreement to discuss articles only in chronological order; and (4) the NTEU found it shocking that the Agency proposed to strike 21 permissive articles from the contract. Moreover, the NTEU alleges that the Agency forced to impasse on permissive subjects of bargaining, however, the evidence shows that it was the intransigency of both parties that caused the impasse.

5 U.S.C. 7103(a)(2) provides for the parties 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.” Similarly, Section 8(d) of the National Labor Relations Act (NLRA) also states that neither party is required to make concessions or agree to a proposal. As a result, hard bargaining by itself is legal. Even regressive economic proposals that would leave employees worse off than before the contract is not per se illegal, but may be illegal when reinforced by bad faith behavior away from the bargaining table. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002). *See, also, Clarke Mfg., Inc.*, 352 NLRB No. 25 (2008).

In *Bureau of Prisons*, 11 FLRA 639, 642 (1983), the Authority concluded that contrary to the Judge, that the Agency was willing to meet and negotiate in good faith over the impact and implementation of its decision to reorganize the mailroom and records office, and the mere fact that the Agency was not persuaded to change its position during the negotiations does not constitute a showing of bad faith. *See Norfolk Naval Shipyard*, 9 FLRA No. 6 (1982), appeal docketed, No. 82-1876 (D.C. Cir. July 30, 1982); *Division of Military and Naval Affairs, State of New York, (Albany, New York)*, 7 FLRA No. 51 (1981).

The Agency did not insist to impasse over permissive subjects. The Union makes the strained argument that the Agency's proposals on Article 2, 3, 8, 45, and 46 involve permissive subjects of bargaining. The fact is that the Agency never insisted on an impasse over these articles, but rather, submitted its LBO on July 31, 2018, only after the NTEU refused to fulfill the quid pro quo aspect of the bargain process by refusing to submit counter proposals.

It is important to note that the LBO submitted by the Agency on July 31, 2018, was on the entire contract and not just on articles 2, 3, 8, 35, 45, and 46. In fact, the Agency proposed changes on those six articles, and also on articles 9, 10, and 56. In addition, the Agency proposed the elimination of Articles 5, 7, 13, 15, 16, 18, 21, 22, 25, 26, 27, 30, 31, 34, 35, 36, 43, 50, 53, and 59. Although, the Panel declined to assert jurisdiction over the six (6) articles mentioned above, that does not mean that the Agency insisted to impasse over these articles. The fact is that

FMCS mediator Larry Passwarters determined that the parties were at impasse and released them to the FSIP on August 8, 2018.

The evidence revealed that the impasse was triggered by the intransigency of both parties' unwillingness to move forward in the negotiations. In *U. S. Department of Justice, Immigration and Naturalization*, 52 FLRA 256 (1996) the Authority determined that since the Union did not present the proposal at issue, the Agency had no obligation to bargain over it. In that case, the Authority made a distinction between one's views and proposals. Using the Websters Third New International Dictionary (1986) the Authority defined "view" as a "mode or manner of looking at or regarding something," and gives as a synonym "opinion." It defines "proposal" as "something put forward for consideration or acceptance," or as "an offer to perform or undertake something." The Authority goes to say that a Union may hold general views about what is or is not desirable in conditions of employment without offering a proposal to implement those views, but it cannot express its views without making a proposal. This is exactly what the Agency encountered while trying to negotiate with the Union in the instant case. Instead of making proposals, the Union insisted in just discussing the articles and giving their opinion on what the Agency had proposed.

Response to Information Request

Under Section 7114(b)(4) an Agency must provide information to a Union, upon request and "to the extent not prohibited by law," if that information is: (1) normally maintained by the agency in the regular course of business; (2) reasonably available; (3) necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and (4) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining".

To assess the parties' rights and obligations with respect to information requests, the General Counsel is guided by the Authority's emphasis on the importance of effective communication to minimize areas of dispute. For example, in *IRS, Kansas City, and 50 FLRA at 670-71 (1995)* the Authority said:

We conclude that applying a standard which requires parties to articulate and exchange their respective interests in disclosing information serves several important purposes. It "facilitates and encourages the amicable settlements of disputes . . . and, thereby, effectuates the purposes and policies of the Statute. 5 U.S.C. § 7101(a)(1)(C). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.

An agency has certain statutory responsibilities even if a union has not established particularized need for the data sought. If management fails to perform any of these responsibilities, a violation of Section 7116(a)(1), (5) and (8) of the Statute may be found, even if a union has not shown a particularized need: (1) An agency is required to respond to a data request. *U.S. Naval Supply Ctr*, 26 FLRA 324 (1987), and an Agency is also required to inform a Union that the requested data does not exist. *Soc. Sec. Admin., Balt., Md.* 39 FLRA 659 (1991).

In this case, the Agency provided the information that was reasonably available and that was normally maintained in its regular course of business. Moreover, it advised the Union of that information that was not available and/or was not normally maintained in Agency systems as was the case of the MOUs the Union requested. At the present time there is no particularized need for the Union's information request because the negotiations came to a closure once the FSIP asserted jurisdiction over the negotiations. Since the parties submitted their LBO to the Panel on December 21, 2018, the Panel has issued a final decision on what the contract will be, and therefore there is no particularized need for the information. Thus, the issue becomes academic.

Conclusion

The evidence revealed that the Panel asserted jurisdiction over the negotiations on November 15, 2018, due to the party's inability to move forward through the negotiations therefore reaching an impasse. There is no evidence that the Agency insisted to impasse on permissive subjects as the NTEU alleges, but rather, was the FMCS determined that there was an impasse and released the parties to the FSIP. Also, the record shows that the Agency complied with its statutory responsibility to respond to the information request. Additionally, it is important to recognize that once the FSIP assumed jurisdiction over the negotiations the information request was consumed by the FSIP and there is no particularized need to provide the information. Moreover, the evidence revealed how the NTEU mischaracterize the difference between hard bargaining and bad faith bargaining in an effort to imply that the Agency committed an unfair labor practice. It is an undisputed fact that the FSIP asserted jurisdiction over the negotiations, and that the Panel will issue a final determination over the contract that is final and binding. Therefore, we respectfully request that the Arbitrator dismiss both grievances with prejudice.

Table of Authority Cited by the Employer

5 C.F.R. 2470 Subchapter D; 5 U.S.C 7119; 5 U.S.C. 7103(a)(2).

AFSCME, 59 FLRA at 802.

AFGE Lcoal 148 v. Bureau of Prisons, 11 FLRA 639, 642 (1983).

Customs Service and NTE., 34 FLRA at 137 (1990).

Custom and Border Protection and NTEU, 63 FLRA 183 (2009).

Council of Prison Locals v. Brewer, 735 F.2d 1497 (1984).

Clarke Mfg., Inc. and United States Steelworkers, 352 NLRB No. 25 (2008).
Division of Military and Naval Affairs, State of New York, (Albany, New York), 7 FLRA No. 51 (1981).
IRS, Kansas City and NTEU, 50 FLRA at 670-71 (1995).
NATCA, AFL-CIO v. Fed. Serv. Impasses Panel, 437 F.3d 1256 (D.C. Cir. 2006).
NLRB v. Hardesty Co., 308 F.3d 859 (8th Cir. 2002).
Norfolk Naval Shipyard v. TVFEMTC, 9 FLRA No. 6 (1982), appeal docketed, No. 82-1876 (D.C. Cir. July 30, 1982).
NTEU and FDIC, Chicago, 32 FLRA at 1132 (1988).
Soc. Sec. Admin. and AFGE Local 1164, 39 FLRA 659 (1991).
U. S. Department of Justice, Immigration and Naturalization and AFGE Border Council, 52 FLRA 256 (1996).
U.S. Naval Supply Ctr., San Diego and AFGE, Local 1399, 26 FLRA 324 (1987).
HHS & NTEU, FSIP Decision and Order Case No. FSIP 077 (April 1, 2019).
HHS & NTEU, June 8, 2018 National Grievance, (Arb David Clark, March 31, 2019).

THE UNION

Arbitrability

The National Grievances are arbitrable. The Agency filed identical motions to dismiss both of NTEU's grievances filed on August 7, 2018 and September 12, 2018. In these two motions, the Agency challenges whether the national grievances are arbitrable. It mistakenly argues that because the Panel asserted jurisdiction over 28 of the 34 open articles, declining to assert jurisdiction over the remaining 6 articles, that the jurisdiction over the national grievances lies with the Panel and not the arbitrator. It suggests that the same set of facts are applicable in both the Panel proceedings and the instant grievances, and that the Panel's assertion of jurisdiction somehow provides appropriate and complete relief for the allegations in the grievances. As discussed more fully below, because the Agency's motions improperly conflate the statutory jurisdiction of the Panel with the statutory jurisdiction granted by Congress to the FLRA to resolve unfair labor practices, and the Agency has presented no evidence to support its motions, the motions must be denied.

The Federal Service Impasses Panel does not have jurisdiction to resolve unfair labor practice charges. It is well-established under the law that it is the Authority and not the Panel that has jurisdiction under the Statute to resolve unfair labor practice charges, and that arbitrators are empowered to order the same remedies as the Authority in arbitrating grievances alleging agencies committed an unfair labor practice. 5 U.S.C. §7105; NTEU and Federal Deposit

Insurance Corporation, 48 FLRA 566 (1993); Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP, 437 F.3d 1256, 1265 (2006) ("It is also clear that any alleged unfair labor practices must be addressed in the first instance by the FLRA – not the FSIP, the District Court, or this court."). 5 U.S.C. 7119(c) specifically defines the Panel's limited role as follows:

The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

Accordingly, the form that federal agencies and labor unions utilize to request assistance from the Panel (OMB No. 3070-0007) does not even contain an option for requesting assistance from the Panel for resolving unfair labor practices. In AFGE v. FLRA, the DC Circuit explained it as follows:

[L]ike the National Labor Relations Board . . . the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act. Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983). This court as well, announced in American Federation of Government Employees, Locals 225, 1504, and 3723, AFL-CIO v. FLRA, 229 App. D.C. 326, 712 F.2d 640 (D.C. Cir. 1983): Congress has entrusted to the FLRA primary responsibility for administering and enforcing the Federal Service Labor-Management Relations Act. 778 F.2d 850, 856 (D.C. Cir. 1985). In this regard, the Act provides that "the Authority shall . . . resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title." 5 U.S.C. §7105(a)(2)(E). Id. at 854.

The Panel's decision to take jurisdiction over the parties' term bargaining dispute is not relevant or material to the jurisdiction the arbitrator has in the instant grievances. The only authority the FLRA has granted to the Panel over and above impasse resolution is the narrow authority to apply existing FLRA case law to rule on the negotiability of specific proposals, which is irrelevant in this case as the Panel declined jurisdiction over the articles over which NTEU asserted it had no duty to bargain. Id.; Commander Carswell Air Force Base, Texas and AFGE, Local 1364, 31 FLRA 620, 623-624 (1988).

Moreover, Panel precedent supports that the Panel has no jurisdiction over matters where one party has alleged there is no duty to bargain and related "bad faith" bargaining unfair labor practices in violation of the Statute, as NTEU has alleged here. In Federal Deposit Insurance Corporation, Washington, D.C. and NTEU, 81 FSIP 60 (1981), the Panel ruled as follows:

[T]he Union has raised a threshold question concerning its duty to bargain to impasse over the Employer's proposal, alleging that its adoption would constitute a waiver of the Union's statutory rights. *The Panel is without jurisdiction to resolve the question.* Until it is resolved in an appropriate forum and further assistance, if necessary, is rendered by the Panel, we conclude that the parties

should withdraw their proposals with respect to this article and rely on the applicable sections of the Statute. (emphasis added).

In Department of Justice, Federal Prison System, Federal Correctional Institution, Morgantown, WV and AFGE, Local 2441, 86 FSIP 130 (1987), the Panel ruled:

[T]here is a legitimate question about the Employer's obligation to bargain over the Union's proposal concerning uniforms. That issue was the subject of a recent hearing in the Authority's ULP proceedings *and a decision is pending*. Consistent with the policy that the Panel has no authority to resolve such questions, we find that jurisdiction should be declined until the matter has been resolved in an appropriate forum. If it is found that the Employer must bargain over the issue of uniforms, the parties will be free to request Panel assistance should such negotiations fail to produce a voluntary agreement. (emphasis added).

In Department of the Navy, Navy Public Works Center, Norfolk, VA and Tidewater Virginia Federal Employees, MTC, 92 FSIP 72 (1992), the Panel held:

Since in this case it is unclear whether there is an obligation to bargain on the Union's part, under Authority precedent, it is free to withdraw from the bargaining table at any time short of an agreement. It has chosen to do so. Thus, while we regret to relinquish jurisdiction over the parties' proposals at this late stage in the proceedings, after the parties and the Panel spent considerable resources convening their representatives and witnesses at a fact-finding hearing in Norfolk and Washington, D.C., to resolve the issue, *the record before us permits no other conclusion*. (emphasis added).

In Department of Justice, Immigration and Naturalization Service, Washington, DC and National Border Patrol Council, AFGE, 94 FSIP 21 (1994), the Panel held,

[W]e shall order the parties to withdraw their proposals. On the one hand, the first sentence of the Employer's proposal is unnecessary, while the second amounts to an unwarranted waiver of the Union's bargaining rights. On the other, the Union's proposal would *require us to pass judgment on the legality of previous Employer actions which is beyond the Panel's purview*. For these reasons, we are persuaded that the parties should rely on the appropriate statutory and contractual mechanisms to resolve the matters raised. (emphasis added).

Both of the Union's grievances allege that the Agency has engaged in continuing, serious bad faith bargaining conduct during the parties' bargaining over a successor term agreement, including insisting to impasse on permissive subjects of bargaining, which constitutes an unfair labor practice in violation of the Statute. Panel precedent clearly recognizes that it has no jurisdiction to decide duty to bargain issues or unfair labor practices. Pursuant to 5 U.S.C. §7105, it is the FLRA that has the authority to "resolve issues relating to the duty to bargain in

good faith,” (5 U.S.C. §7105(a)(2)(E)) and “conduct hearings and resolve complaints of unfair labor practices” (5 U.S.C. §7105 (a)(2)(G)). Moreover, 5 U.S.C. §7105 (g)(3) of the Statute specifically authorizes the FLRA to “require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.”

Similarly, 5 U.S.C. §7116(d) provides the parties two options to resolve an unfair labor practice allegation—through a grievance or a charge filed with the FLRA General Counsel. The FSIP has no role in determining whether the Agency engaged in bad faith bargaining (a ULP) (as more explicitly alleged in the grievances themselves), or in determining an appropriate remedy for an unfair labor practice. The FLRA even has the authority to issue a stay of an FSIP order. NTEU and Department of Homeland Security, Customs and Border Protection, 63 FLRA 183 (2009); NTEU and Federal Deposit Insurance Corporation, 32 FLRA 1131 (1988).

With all of this in mind, it is important to note that it is well-established that arbitrators are empowered to order the same remedies as the FLRA in arbitrating a grievance alleging the commission of an unfair labor practice. NTEU and Federal Deposit Insurance Corporation, 48 FLRA 566 (1993). Several sections of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C.S. §§ 7101-7135, define the remedial authority and responsibility of the FLRA. These provisions grant broad discretion to the Authority to fashion remedies for violations of the Statute. 5 U.S.C. §7105(g)(3) provides that the Authority may require an agency to take any remedial action it considers appropriate to carry out the policies of the Statute. Moreover, under 5 U.S.C. §7118(a)(7), if the Authority determines that the agency has engaged in or is engaging in an unfair labor practice, then the Authority shall issue an order requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect; or including such other action as will carry out the purpose of the chapter. National Treasury Employees Union v. Federal Labor Relations Authority, 856 F.2d 293, 295 (D.C. Cir. 1998). The Panel’s November 15, 2018 Decision to take jurisdiction over some of the articles the parties are negotiating at the term table does not, and could not, have any effect on the broad arbitral discretion to issue an appropriate “make whole” remedy for a violation of the Statute.

In its Motions to Dismiss, the Agency also raises the following primary contentions, each of which will be addressed in order:

- 1) *“FSIP asserted jurisdiction over term bargaining in Case No. 18 FSIP 077. The same set of facts covers the case before FSIP and the grievance before you. The remedy sought by the Union has been consumed by the FSIP Order.”* Agency’s Motion to Dismiss Union’s August 7, 2018 Grievance at 1. (A similar argument is raised in the Agency’s Motion to Dismiss Union’s September 12, 2018 grievance).

As stated above, there is no legal or factual basis for the Agency’s assertion that the FSIP’s decision to take jurisdiction over the parties’ term bargaining “involves the same facts” underlying the Union’s bad faith bargaining ULP grievances in the matters before you. The

Panel has not, will not, and has absolutely no authority to make a determination about whether the Agency has committed the unfair labor practice(s) as alleged in the Union's grievances, or to provide the Union any of the remedies requested. 5 U.S.C. §7119(c).

- 2) *"On December 21, 2018, the Agency submitted its best and final offer to the Panel, and thus we are waiting on the Panel to issue a determination. Therefore, the issues outlined by the Union in this grievance have been remedied by the order issued by the FSIP on November 15, 2018".* Agency's Motion to Dismiss Union's August 7, 2018 Grievance at 2. (A similar argument is raised in the Agency's Motion to Dismiss Union's September 12, 2018 grievance).

The FSIP has no authority to order remedies for unfair labor practice grievances (5 U.S.C. §7119(c)), and, nothing in the November 15, 2018 Panel decision purports to do any such thing. While the Agency helpfully lists the remedies requested in the Union's grievances in its motions, it has not identified any language in the Panel's decision in which any of the requested remedies have been granted. That is to be expected, since the issue of whether the Agency violated the Statute and committed an unfair labor practice is not before the Panel.

- 3) *"To resort to a contractual grievance arbitration process at this point is not only inappropriate, but also premature. Since this is an ongoing process before the FSIP, and the underlying issues of this grievance are under FSIP jurisdiction, it is not plausible to hold an arbitration on the same issues that are before the Panel."* Agency's Motion to Dismiss Union's August 7, 2018 Grievance at 2. (A similar argument is raised in the Agency's Motion to Dismiss Union's September 12, 2018 grievance).

As explained in more detail above, the Panel only has the authority to "provide assistance in resolving negotiation impasses between agencies and exclusive representatives." 5 U.S.C. §7119(c). It has absolutely no jurisdiction over unfair labor practices or grievances generally, and accordingly, will never issue a decision on any of the unfair labor practice charges contained in the Union's grievance, nor will it ever order the remedies requested by the Union, because it has no authority to do so. The Panel has never heard evidence or argument from the parties regarding the allegations contained in the Union's grievance, nor will it ever hear any such evidence, because, again, it has no such authority. The Union's unfair labor practice grievances are properly before the arbitrator for resolution under the terms of the parties' agreement.

- 3) *"With regard to the information requested by the NTEU, the Agency responded in a timely manner to the union's information request. . . . Moreover, the information request is moot because the information requested by the Union was to support their bargaining proposals that are presently under review by the FSIP, and therefore, this is also under the jurisdiction of the FSIP Order."* Agency's Motion to Dismiss Union's September 12, 2018 Grievance at 2.

Notably, the Agency provides no support for the claim that this would be a valid basis for dismissing the Union's grievance. In fact, this claim is, by its very nature, an assertion by the Agency on the merits of the Union's allegations. The Agency even provides an argument that it "complied" with the law here, and claims the allegation is "moot". As a result, the Agency's argument on this issue only serves to support the Union's position that the parties have a valid dispute over whether the Agency complied with 5 U.S.C. §7114(b)(4) of the Statute as it regards the Union's information requests, and a hearing on the merits is necessary to resolve that factual and legal dispute. The Agency provides absolutely no basis for dismissing the Union's claim without a hearing on the merits. See, e.g., Dep't of the Treasury, Customs, SW Region and NTEU, 43 FLRA 1362, 1374-75 (1992) (An agency violates the Statute when it fails to timely respond to an information request, even if it later provides the requested information.); DOJ, Exec. Office for Immigration Review and AFGE Local 286, 61 FLRA 460, 467 (2006) (Post-charge conduct is not relevant to the determination of whether the Agency violated the Statute).

- 4) *"With regard to the Unions contention that the Agency has forced to impasse permissive subjects of bargaining regarding Articles 2, 3, 8, 35, 45, and 46, this issue is before the FSIP for reconsideration at the present time."* Agency's Motion to Dismiss Union's September 12, 2018 Grievance at 3.

As is the case with the Agency's contentions regarding the Union's information requests, the Agency's contentions regarding the permissive subjects issue in the Union's grievance are really just about the merits. Accordingly, the Agency provides further support for the conclusion that the parties require a hearing to resolve the merits of this dispute. To the extent the Agency is again making the claim that the Panel somehow has special jurisdiction over allegations that an Agency has engaged in bad faith bargaining by insisting on bargaining to impasse on permissive subjects, the law provides for no such jurisdiction. Like any other allegation of bad faith bargaining, the FLRA possesses jurisdiction over such an allegation (under 5 U.S.C. §7105), and, in this case, to the party's mutually selected Arbitrator. In fact, the Panel recognized its limited authority in this area in the November 15, 2018 decision itself, where it declined jurisdiction over these 6 articles "so that the parties may resolve the foregoing bargaining obligation disputes in the appropriate forum." Agency's Motion to Dismiss, Exhibit 1 at p. 2. Subsequent to this arbitration hearing, the Panel once again declined to assert jurisdiction over these 6 articles, determining that the parties are not at impasse. HHS and NTEU, 18 FSIP 077, at pp. 3-4 (April 1, 2019).

The Arbitrator is not divested of jurisdiction to hear and decide the grievances alleging statutory violations merely because the facts at issue might be linked to impasse proceedings before the Panel, as the Agency suggests. The Agency has provided no legal authority for its arguments that these grievances are not arbitrable, and accordingly its motions should be denied.

The Agency failed to meet its burden of proof to establish its affirmative defense of arbitrability. It has long been recognized that there is a rebuttable presumption that the subject matter of a grievance is substantively arbitrable. United Steelworkers of America v. Warrior &

Gulf Navigation Co., 363 US 574, 582-583 (1960). Arbitrability is an affirmative defense, and the party raising it has the burden of proof. U.S. Department of Veterans Affairs Canteen Service and American Federation of Government Employees AFL-CIO, 66 FLRA 944, 960-961 (2012). Here, the Agency presented absolutely no evidence in support of its motions to dismiss. The Agency's two witness did not address arbitrability, nor did the Agency present any other evidence to support its motions. As a legal matter, discussed more fully above, it is firmly established that it is the Authority and arbitrators who have jurisdiction to decide and remedy statutory violations, not the Panel. As such, the Agency has not met its burden of proof on arbitrability and its motions must be denied.

The Agency violated the Statute and committed an Unfair Labor Practice when it violated its Duty to Bargain in Good Faith with NTEU and failed to respond to Information Requests. The statutory definition of collective bargaining includes the obligation to "bargain in a good faith effort to reach agreement". 5 U.S.C. § 7013(12). Further, the duty to negotiate in good faith requires the parties "to approach the negotiations with a sincere resolve to reach a collective bargaining agreement" and to "*discuss* (emphasis added) and negotiate on any condition of employment." 5 U.S.C. § 7114(b)(1) and (2). The Statute further provides that it is an unfair labor practice for a party to "refuse to consult or negotiate in good faith." 5 U.S.C. § 7116(a)(5). The Authority applies a "totality of the circumstances" test to determine whether a party fulfilled its obligation to bargain in good faith. U.S. Department of the Air Force Headquarters, Air Force Logistics Command Wright-Patterson Air Force Base and American Federation of Government Employees Council 214, 36 FLRA 524, 531 (1990 (Wright-Patterson)). This entails assessing the Agency's conduct throughout the course of the negotiations. *Id.*; U.S. Geological Survey, Caribbean District Office, San Juan, P.R. and AFGE, Local 1503, 53 FLRA 1006, 1037 (1997) (Bad faith is based on the totality of a party's conduct during the relevant time period.).

While not precedential, National Labor Relations Board ("NLRB" or "Board") precedent is instructive with respect to the duty to bargain in good faith. The U.S. Supreme Court, and long-standing Board precedent, holds that the duty to bargain in good faith requires a party to substantiate the claims it makes in the bargaining process. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-153 (1956) ("[R]efusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith."). Good faith is "inconsistent with a predetermined resolve not to budge from an initial position." *Id.* at 154. Good faith bargaining requires more than formal meetings or a "take it or leave it" approach. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485 (1960). A party demonstrates bad faith by rigid adherence to proposals that undermine the ability of a union to act as the exclusive bargaining representative of employees by forcing employees to give up statutory rights. Public Serv. Co. v. NLRB, 318 F.3d 1173, 1177 (2003). The duty to bargain in good faith is determined based on the totality of a party's conduct. General Electric Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO, 150 NLRB 192, 197 (1964).

The evidence in the record concerning the Agency's actions from the inception of bargaining through the Panel-imposed impasse proceedings overwhelmingly demonstrate that HHS repeatedly acted in bad faith in violation of 5 U.S.C. §§ 7114(b) and 7116 (a)(1), (5),

and/or (8). Specifically, as it relates to the August 2018 grievance, those actions included refusing to bargain over ground rules for term negotiations with NTEU after having disapproved the Panel ground rules order on agency head review, repeatedly refusing to answer NTEU's questions about the Agency's proposals during bargaining on July 9-10, 2018 (Tr. Vol. 1 at pp. 52-53), repeatedly demanding that NTEU submit counter-proposals without first discussing the Agency's proposals, unilaterally declaring discussion of Article 2 closed until the submission of written counter-proposals by the Union, unilaterally cancelling bargaining on day 2 and prematurely requesting mediation assistance, refusing to discuss or negotiate over its proposals with NTEU during mediation on July 30-31, 2018, unilaterally terminating mediation and submitting last best offers on all open articles without having discussed, negotiated or mediated them, striking 21 articles from the parties contract without ever discussing or bargaining over them with NTEU, and refusing to return to the bargaining table to fulfill the duty to bargain in good faith despite NTEU's repeated requests.

With respect to the September 2018 grievance, the Agency continued to demonstrate its bad faith by additionally submitting permissive subjects of bargaining in 5 separate articles to the impasse process and refusing to negotiate over its proposals to terminate the alternate work schedules article from the contract, resubmitting those same 6 articles to the Panel after it had declined to assert jurisdiction over them, failing to respond fully to NTEU's July 10, 2018 information requests concerning the Agency's Article 2 term bargaining proposals, and failing to respond to NTEU's August 2, 2018 information requests.

The Agency violated the Statute and acted in bad faith during term bargaining and mediation regarding the August 7, 2018 Grievance. The totality of the circumstances from May 10, 2018, through the filing of this national grievance on August 7, 2018, demonstrate that throughout the bargaining process the Agency acted in bad faith in violation of 5 U.S.C. §7114(b), and that such conduct constitutes an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (5), and (8). As discussed more fully below, the testimony and record evidence demonstrate that the Agency refused to bargain over ground rules, repeatedly refused to discuss or bargain over its proposals while simultaneously demanding NTEU submit counter-proposals, unilaterally terminated bargaining, and submitted proposals on a "take it or leave it" basis that would force NTEU to waive its statutory rights

Notably, the Agency witness, Steve Novey, did not provide credible testimony of the events that transpired during bargaining on July 9-10, 2018 or during mediation on July 30-31, 2018. In fact, he could not recall if he was even in the bargaining room on July 10, 2018, and admitted he was not present during the mediation on July 30-31, 2018. He also demonstrated that his memory of the events in question is not credible when, for example, he testified that a mediator was present during the July 9, 2018 bargaining, when the mediation was actually conducted on July 30-31, 2018 and he was not present on either of those dates. He went so far as to testify that on July 10, 2018 the mediator, who had not even been contacted yet, recommended to the Agency that it should submit its last best offers to the Union that day. (Although, as NTEU witness Jennifer Harling testified based on her personal knowledge, the only article the parties addressed in any fashion on July 9, 2018 was Article 2, Mr. Novey could not even recall

which article was discussed on the only day he was actually present for bargaining in July 2018. The Agency could have called its Chief Negotiator, David Mansdoerfer, or its representative from the Agency's General Counsel, Catherine Bird, or any of its other bargaining team members who were actually present and could have testified based on personal knowledge. Inexplicably, instead the Agency decided the best witness was Mr. Novey who was not even present for the vast majority of the bargaining and none of the mediation in July 2018 and could not accurately recall what occurred. NTEU witness Jennifer Harling was the NTEU Chief Negotiator and, as discussed more fully below, testified concerning her personal knowledge of the acts and events which form the bad faith conduct alleged in the August grievance.

The Agency's refusal to bargain ground rules constitutes bad faith bargaining. The Agency's bad faith conduct manifested itself early on in the parties' term bargaining process, starting with the Agency's refusal to negotiate new ground rules with NTEU after the Agency disapproved the December 31, 2016 Panel ground rules order. Although the question of whether the Agency's refusal to bargain ground rules independently constitutes bad faith under the Statute is the subject of exceptions currently pending before the FLRA, irrespective of the outcome of that matter, those actions are still factually relevant to determine whether the "totality of the circumstances" from the inception of the parties' bargaining demonstrates that the Agency violated its statutory duty to bargain in good faith as alleged in the August and September 2018 grievances. As discussed below, once the Agency disapproved the ground rules Panel order on agency head review, there was no enforceable agreement and the Agency was required to renegotiate ground rules with NTEU. The Agency refused to do so, and that fact is relevant to NTEU's assertion that under the totality of the circumstances, the Agency bargained in bad faith in violation of the Statute.

The Authority has long held that when the FSIP provides impasse assistance under 5 U.S.C. §7119(b)(1), the resulting order from the Panel, or a Panel designee, is subject to agency head review under 5 U.S.C. §7114(c). U.S. Department of Justice Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 37 FLRA 1346, 1354-1355 (1990), citing, Department of Defense Dependents Schools v. Federal Labor Relations Authority, 852 F.2d 779, 784 (4th Cir. 1988); Department of Defense Dependents Schools and Overseas Federation of Teachers, AFT, AFL-CIO, 33 FLRA 659, 662 (1988); AFGE v. FLRA, 778 F.2d at 857 (Federal agencies have the right to disapprove Panel-imposed agreements on agency head review under 5 U.S.C. §7114(c)).

Once disapproved on agency head review, the agreement or Panel order does not take effect and is not binding on the parties. Indeed, Authority precedent establishes that when an agreement, or Panel order imposing terms of an agreement on the parties, is disapproved on agency head review under 5 U.S.C. §7114(c), it is the entire agreement that is disapproved, not merely the provisions that the agency asserts are contrary to law. U.S. Department of the Army, Watervliet Arsenal, Watervliet, New York and National Federation of Federal Employees, Local 2019, et. al., 34 FLRA 98, 105 (1989) (Watervliet Arsenal); Department of the Interior, National Park Service, Colonial National Historical Park, Yorktown, Virginia and National Association of

Government Employees, R4-68, 20 FLRA 537, 541 (1985), *aff'd sub nom. FLRA v. National Association of Government Employees, Local R4-68*, 802 F.2d 1484 (4th Cir. 1986).

In Nat'l Treasury Employees Union, Chapter 251 and IRS, for example, the Authority held an arbitrator's enforcement of a contract provision that had been disapproved on agency head review was contrary to law under 5 U.S.C. §7114(c). Nat'l Treasury Employees Union, Chapter 251 and IRS, 40 FLRA 985, 991 (1991). In that case, the agency disapproved a negotiated provision of a term agreement pertaining to career ladder promotions. The union filed a negotiability appeal of the disapproved provision, while the parties implemented the remainder of the contract. While that was pending, a number of competitive service employees filed grievances alleging they should have been granted career ladder promotions based on the disapproved provision. The Union argued, based on the agency's assertion in its brief in the negotiability appeal, that the disapproved provision only applied to excepted service positions, therefore the agency had violated that provision in denying career ladder promotions to the competitive service grievants. The agency argued that it was the entire provision that was disapproved, therefore there was no enforceable contract provision upon which the grievants could rely. The issue in the arbitration was whether there was an enforceable contract provision concerning career ladder promotions. *Id.* at 985-987. The arbitrator found that the provision was in effect and enforceable as to competitive service employees, because in its brief to the FLRA in the negotiability appeal the agency had modified its prior disapproval of contract language such that it was only disapproved with respect to excepted service employees. The arbitrator concluded that the language was in effect for the competitive service grievants, and there was no need to renegotiate the language. *Id.* at 987-988. On exceptions to the Authority, the Agency argued that because it had disapproved the language in its entirety, it did not and could not modify the disapproval which precluded the language from becoming enforceable because *only an express agreement of the parties*, which did not exist in this case, could have reinstated the disapproved agreement. *Id.* (emphasis added). The Authority agreed and found that the award was contrary to 5 U.S.C. §7114(c) because the contract provision was disapproved and "was not subject to any subsequent agreement or renegotiation by the parties;" therefore, "by operation of section 7114(c) of the Statute" that provision "never took effect." *Id.* at 989-990. The Authority's decision in Nat'l Treasury Employees Union, Chapter 251 makes it clear that once any contract provision is disapproved on agency head review, there is no enforceable contract and the parties must either agree to implement those terms or renegotiate them.

Agency head review under section 7114(c) only permits the Agency to either approve, disapprove, or take no action with respect to an agreement. 5 U.S.C. §7114(c)(1), (2) and (3). The Agency made its election on January 31, 2017, when it disapproved the ground rules Panel order. That decision was final and not subject to unilateral rescission by the Agency. Moreover, the Statute sets a finite 30-day period for agency head review. Once the 30-day statutory period is over, the agreement is either approved and enforceable or it is disapproved and unenforceable. There is nothing in the Statute that authorizes the agency head to take any action subsequent to the approval or disapproval of the agreement, or subsequent to the expiration of the 30-day

review period. Here, the Agency's rescission of its disapproval of the Panel order some 15 months later is contrary to that express statutory timeframe.

Ground rules have long been held to be within the duty to bargain under the Statute. Association of Civilian Technicians v. FLRA, 353 F.3d 46, 51 (D.C. Cir. 2004) (ACT); AFGE Local 12 and U.S. Department of Labor, 60 FLRA 533, 539 (2004) (*citing AFGE, AFL-CIO and EPA*, 15 FLRA 461, 462 (1984)). Indeed, bargaining over ground rules for the conduct of negotiations is a mandatory subject of bargaining. U.S. Dep't of the Treasury, Customs Serv., Wash., D.C. and National Treasury Employees Union, 59 FLRA 703, 709 (2004). In this regard, negotiating a ground rules agreement is an inherent aspect of the obligation to bargain in good faith. Veterans Admin., Wash., D.C. and American Federation of Government Employees, AFL-CIO, 22 FLRA 612 (1986) (VA). The Authority has held that a party's refusal to bargain over a mandatory subject of bargaining constitutes a violation of Section 7116(a)(5). AFGE, Local 3723 and U.S. Dept. of Navy, Fleet Combat Training Center, 9 FLRA 744 (1982). Specifically, where an agency has a duty to bargain over ground rules, the refusal of an agency to do so constitutes an unfair labor practice. U.S. Dep't of the Treasury, Customs Serv., Wash., D.C. and National Treasury Employees Union, 59 FLRA at 708; Internal Revenue Service, Denver District and NTEU, Chapter 32, 17 FLRA 192, 212-213 (1985); Harry S. Truman Memorial Veterans Hospital and American Federation of Government Employees, AFL-CIO, Local 3399, 16 FLRA 944, 945 (1984) (A refusal to bargain over ground rules proposals violates 5 U.S.C. §7116(a)(1) and (5)).

Where an agency makes it clear, as HHS did here, that any attempt to negotiate would be futile, it acts in bad faith in violation of the Statute. Federal Bureau of Prisons Federal Correctional Institution Bastrop, Texas and American Federation of Government Employees, Local 3828, AFL-CIO, 55 FLRA 848, 855 (1999). Unilaterally setting dates for negotiations has been held by the Authority to be an indicia of bad faith bargaining. U.S. Geological Survey, Caribbean District Office, San Juan, Puerto Rico and American Federation of Government Employees AFL-CIO Local 1503, 53 FLRA 1006, 1012 (1997). The Agency's unwillingness to even discuss NTEU's ground rules proposal of an alternate date for the exchange of initial proposals, and dictating June 11, 2018 as the required date, is indicative of the Agency's bad faith. Federal Aviation Administration Nw. Mountain Region Seattle, WA and Professional Airways Systems Specialists, 14 FLRA 644, 672 (1984) ("Respondent's unwillingness to discuss the issues with an open mind, and to engage in a "give and take" relationship foreclosed any possibility of meaningful collective bargaining."); Blue Grass Army Depot, Richmond, Kentucky and International Association of Machinists and Aerospace Workers, Local Lodge 859, 50 FLRA 643, 651 (1995) (The Agency acted in bad faith in violation of the Statute where it indicated it would not entertain the union's proposals.). The Agency's refusal to negotiate over the date for the exchange initial proposals was also unreasonable, and thus is an indicium of bad faith, because it did not permit NTEU sufficient time to fully vet and prepare its initial proposals. IRS and NTEU, 64 FLRA 426, 432 (2010) (The Authority deferred to the arbitrator's finding that "to satisfy the requirements of good-faith bargaining, the time proposed for bargaining must afford the parties sufficient time to engage in the consideration of proposals.").

Here, because the Agency had previously disapproved the Panel order on ground rules and NTEU demanded to bargain over new ground rules, the Agency had a duty to bargain over ground rules with NTEU. Instead, it acted in bad faith by repeatedly and unlawfully refusing to bargain over new dates for the exchange of initial bargaining proposals, failing to respond to NTEU's specific ground rules proposals submitted on June 1, 2018, insisting on implementing the terms of the Panel order which it had disapproved on agency head review 15 months earlier, and unilaterally and unreasonably imposing a date for the exchange of initial proposals.

The Agency's refusal to discuss its proposals on July 9-10, 2018 constitutes bad faith bargaining. The duty to bargain in good faith under the Statute requires that an agency be "willing to discuss the issues with an open mind, and to engage in a 'give and take' relationship", otherwise meaningful bargaining is foreclosed. Fed. Aviation Admin. Nw. Mountain Region, Seattle, WA and Professional Airways Systems Specialists, 14 FLRA at 672. This duty requires a party to "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement". Amalgamated Transit Union Int'l AFL-CIO v. Donovan, 767 F.2d 939, 949 (D.C. Cir. 1985). Moreover, to comply with this duty, agencies "must proceed to collective bargaining discussions ready to listen and consider what the workers are proposing, with an open mind and with every intention of coming to a mutually acceptable result." AFGE, et al., v. Trump, 318 F. Supp. 3d at 422. Refusing to discuss matters raised by the Union constitutes bad faith. Veterans Administration Medical Center, Leavenworth, Kansas and AFGE, Local 85, 32 FLRA 855, 873 (1988).

NTEU Chief Negotiator Jennifer Harling testified that the Agency repeatedly refused to answer NTEU's questions about the Agency's Article 2 proposals during bargaining on July 9-10, 2018 (Tr. Vol. 1 at pp. 52-53). At best, on July 9, 2018 the Agency engaged in limited discussion that was not responsive to the questions the Union asked in order for it to understand and respond to the Agency's Article 2 proposals.

The Agency's refusal to discuss its proposals continued into the bargaining on July 10, 2018 when it submitted revised Article 2 proposals to NTEU with some minor changes. (UE 11). Ms. Harling testified that the parties met the morning of July 10, 2018 and when the Union began asking questions about the Agency's revised Article 2 proposals the Agency again refused and stated that discussion on Article 2 was closed until the Union submitted a counter-proposal. Notably, Agency witness Darrell Hoffmann testified that at the end of the Obama administration and again during the Trump administration, prior to the July 2018 bargaining under protest, the Agency had meetings to "deliberate on the collective bargaining agreement and the problems we've seen with it and what we wanted to do to correct it." This demonstrates that the Agency did have reasons for the changes it was proposing, but that it acted in bad faith when it willfully refused to discuss those reasons with NTEU upon request during bargaining.

The Agency's actions demonstrate an unwillingness to discuss or actively participate in the deliberative process, and thus fail to meet the requirement for good faith bargaining required by 5 U.S.C. §7114(b) and Authority precedent.

The Agency's demand that NTEU submit written counter-proposals constitutes bad faith bargaining. The collective bargaining process requires more than the exchange of written

proposals. 5 U.S.C. §7114(b)(1) and (3). An agency may not insist that a union negotiate in a particular manner or demand that a union respond to the agency's proposals with written proposals from the union. EPA and AFGE, 16 FLRA 602, 613 (1984) (ALJ Decision). Attempting to impose demands or time limits on the exchange of written proposals is indicative of bad faith. SSA and AFGE, 18 FLRA 511, 525 (1985) (ALJ Decision).

In AFGE, et al. v. Trump, 318 F. Supp. 3d at 440, the court enjoined the administration and its subordinate agencies from "implementing or giving effect to" certain provisions of Executive Order 13836, including section 5(e). That provision required agencies to request the exchange of written proposals from unions during bargaining, and to eliminate any "bargaining approach other than the exchange of written proposals." EO 13836, Sec. 5(e), 83 Fed. Reg. 25329 (May 25, 2018). In its decision to enjoin provision 5(e) of EO 13836, the court recognized that the limitations imposed by that provision "create a new series of norms and default bargaining positions" which "prevent federal agency representatives from bargaining with labor organizations in "good faith", consistent with their duty to do so" under 5 U.S.C. §§7102(a)(12) and 7114(b). AFGE, et al. v. Trump, 318 F. Supp. 3d at 430. A "robotic exchange of written proposals" conflicts with the duty to bargain in good faith, and further implies that the agency representative does not have the authority to "commit or to comment about union proposals" which is a separate violation of the duty to bargain in good faith under 5 U.S.C. §7114(b)(2). Id. at 432.

Ms. Harling's un rebutted testimony at the hearing established that when the parties started the negotiations on July 9, 2018 NTEU asked the Agency to walk them through its Article 2 proposals and the Agency refused. Instead it demanded that NTEU submit counter-proposals on that Article within three business days. When NTEU objected to doing so without first discussing the proposals, the Agency demanded NTEU submit counter-proposals within five business days, to which NTEU also objected. NTEU attempted to continue asking questions which the Agency largely refused to answer, and then the Agency proceeded to demand several dozen times that NTEU submit counter-proposals in the face of its own refusal to first discuss its proposals with NTEU.

[The Agency] really wouldn't answer our questions. They also asked us for counter-proposals several dozen times. If we asked what does this mean or there's problems with this language as it reads, they would say do you have a counter-proposal? Are you prepared to offer a counter-proposal? We responded repeatedly that we can't offer a counter when we don't fully understand what your proposals mean or why you've proposed them. That's how the day went. It didn't go great the first day.

Based on the record evidence, it is clear that the Agency's repeated insistence that NTEU submit written counter-proposals by a date certain, compounded by its refusal to even discuss its proposals first with NTEU to enable NTEU to formulate a response, violates the Agency's statutory duty under 5 U.S.C. §7114(b) to bargain in good faith.

The Agency's unilateral termination of bargaining on July 10, 2018 constitutes bad faith bargaining. Refusing to discuss matters raised in bargaining and discontinuing negotiations

constitutes bad faith. Veterans Administration Medical Center, Leavenworth, Kansas and AFGE, Local 85, 32 FLRA at 873. That is precisely what the Agency did on July 10, 2018 when it unilaterally declared discussion of Article 2 closed until the submission of counter-proposals by the Union and unilaterally cancelled bargaining for the remainder of the week. DOJ, INS and AFGE Nat'l Border Patrol Council, 55 FLRA 892, 900-902 (1999) (Management may not decline to bargain because the union does not immediately submit proposals, as long as the union indicates its intent to bargain.).

Ms. Harling testified that the Union began the day by asking questions about the Agency's revised Article 2 proposals, the Agency refused to answer those questions, declared Article 2 discussion closed, and approximately ten minutes into the bargaining session the Agency called a caucus and never returned. Later that same day the Agency notified Ms. Harling via email that it had contacted FMCS and would not meet with the Union from that point forward without a mediator. At this juncture there had been absolutely no discussion of 33 of the 34 articles open for negotiation, and a paucity of discussion on Article 2. On July 10, 2018 NTEU submitted information requests to the Agency to obtain the information it was unable to get the Agency to disclose during bargaining, so that the Union could negotiate and respond to the Agency's proposals. The Agency's unilateral termination of bargaining on July 10, 2018 without having discussed Article 2 in good faith and without ever having discussed any of the other 33 open articles with NTEU constitutes bad faith in violation of the Statute.

The Agency's refusal to discuss its proposals during mediation on July 30-31, 2018, and its unilateral termination of mediation, constitutes bad faith bargaining. Under the totality of the circumstances test, the Authority has stated that a party fails to bargain in good faith when it is unwilling to meet, inflexible in discussing proposals, and presents the other party with ultimatums. U.S. Geological Survey, Caribbean District Office, San Juan, P.R. and AFGE, Local 1503, 53 FLRA at 1045. The duty to bargain in good faith requires a party to actively participate in the deliberations. Amalgamated Transit Union Int'l v. Donovan, 767 F.2d at 949. An unwillingness to participate in discussion of the issues and engage in a 'give and take' demonstrates bad faith. Fed. Aviation Admin. Nw. Mountain Region, Seattle, WA and Professional Airways Systems Specialists, 14 FLRA at 672.

Here, the Agency again refused to discuss or negotiate over its proposals with NTEU during mediation on July 30-31, 2018. Ms. Harling testified that when mediation began on July 30, 2018 the Union started by presenting its counter-proposals on Article 2. Next, since both parties had opened Article 3, the Union presented its proposals on that article. When the Union concluded, it asked the Agency to present its Article 3 proposals and the Agency refused. Following a very brief discussion over the term bargaining procedures, the Agency's Chief Negotiator David Mansdoerfer informed the Union at that point that that there would be no further discussion on *any* of the Agency's proposals. He further stated that all of the Agency's proposals on all of the articles were for the three global purposes the Agency had identified on the first day of bargaining - (1) reducing cost, (2) reducing administrative burden, and (3) simplifying the contract - and that was all the Union needed to know. The parties ultimately caucused for the remainder of the day without any further substantive discussion on any of the 34

open articles. When the parties reconvened the mediation on July 31, 2018 the Agency immediately submitted its last best offers on all 34 articles. It refused to have any discussion over them, requested the mediator release the parties to seek assistance from the Panel and promptly left, thus unilaterally ending mediation.

The Agency's actions during mediation on July 30-31, 2018 demonstrate it acted in bad faith in violation of the Statute. The Agency's July 31, 2018 last best offers demonstrate it acted in bad faith. The nature of an agency's proposals can demonstrate bad faith, particularly where they waive a party's statutory rights. U.S. Dept. of the Air Force Headquarters, Air Force Logistics Command Wright-Patterson Air Force Base and AFGE Council 214, 36 FLRA at 533-534 (Proposals offered by the agency were not designed to fulfill the obligation to bargain in good faith where the nature of the proposals would have relieved the agency of its obligation to bargain with the union.).

The Agency's July 31, 2018 last best offers demonstrate it acted in bad faith by proposing changes to the parties' contract which would waive NTEU's statutory bargaining rights. For example, in Article 2 (Contract Duration and Termination), Section 1.B.1, the Agency's proposal expressly and unabashedly waived the Union's right to bargain future changes to conditions of employment by requiring those changes to be administered in accordance with applicable laws and agency policies, thus "negating the need for bargaining under 5 U.S.C. §7106(a) and 7106(b)." Other Agency proposals in Article 2 Sections 1.B.2, 1.C, and 1.D similarly operated to waive NTEU's statutory bargaining rights. In Article 3 (Mid-Term Bargaining), the Agency again proposed to waive NTEU's statutory bargaining rights under 5 U.S.C. §7106(b)(2) and (3) by proposing in Section 2.B.1 that the Agency may change conditions of employment without first bargaining with NTEU where "basic management rights are involved" and there is an "operational need". In Section 3.A, the Agency proposed that when changes to conditions of employment are more than *de minimis*, the Union's statutory right to bargain is limited to mere "comment" and that will "completely satisfy" any substantive as well as impact bargaining rights. (UE 18 at pp. 7-8; UE 27 at p. 13; UE 8 at p. 10). These proposals clearly demonstrate the Agency's willful and unapologetic attempt to waive NTEU's statutory substantive and impact bargaining rights, and that conduct violates the duty to bargain in good faith.

The court in AFGE, et al., v. Trump, 318 F. Supp. 3d at 422, cautioned that taking mandatory subjects of bargaining off the negotiating table violates an agency's duty to bargain in good faith with the exclusive representative of the bargaining unit. Referring to duty to bargain in good faith under 5 U.S.C. §7101, et seq., the court stated,

[I]n order to act consistently with that statute, agency management must not remove covered matters from the bargaining table indiscriminately, and must proceed to collective bargaining discussions ready to listen and consider what the workers are proposing, with an open mind and every intention of coming to a mutually acceptable result. Citing NTEU v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006), the court found that taking matters over which the employees and their exclusive representative have the right to bargain off the table violates the Statute. Id. The court concluded,

[A]gency efforts to remove from the bargaining table otherwise negotiable topics of discussion arbitrarily and in a manner that impacts a unions' ability to engage in effective collective bargaining negotiations moving forward impermissibly jeopardizes the right to bargain that the FSLMRS assiduously protects... *Id.* at 423.

Here, the Agency engaged in the very conduct the D.C. Circuit warned against in AFGE, et al., v. Trump and NTEU v. Chertoff. Specifically, in its last best offers submitted on July 31, 2018, the Agency struck 21 articles in their entirety from the parties' contract, including the articles on Alternate Work Schedules, Telework, Awards, Performance Management Appraisal Program, Employee Rights, Union Rights, and Disciplinary Actions, without ever bargaining over them with NTEU. The articles the Agency struck are all subjects that strike at the core of the statutory bargaining rights afforded to federal employees and their exclusive representative, and contain mandatory subjects of bargaining. AFGE, et al., v. Trump, 318 F. Supp. 3d at 422 (Agency actions undermine the right to bargain where they "strike at "core elements" of collective bargaining."), citing, NTEU v. Chertoff, 452 F.3d at 861; National Treasury Employees Union and U.S. Customs Service, 64 FLRA 156, 157 (2009) (The Authority held that there is a presumption that matters relating to conditions of employment of bargaining unit employees "are mandatory subjects of bargaining unless the Statute explicitly or by unambiguous implication vests in a party an unqualified or "unilateral" right."). The Statute (5 U.S.C. 7101, *et seq.*) does not vest a unilateral right in either party to establish alternate work schedules (The establishment and termination of alternate work schedules is a mandatory subject of bargaining under the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §6130, *et seq.*), telework programs (Aspects of telework include mandatory subject of bargaining. For example, the Authority has held that the location where union representative perform representational activities is a mandatory subject of bargaining. [United States Dep't of the Air Force, HQ Air Force Materiel Command and AFGE Council 214, 49 FLRA 1111 , 1119 (1994).], or with regard to employee rights, union rights, health and safety, transportation subsidies, or any of the 21 articles the Agency struck entirely from the contract in its July 31, 2018 last best offer. Moreover, at no time did the Agency assert that it had no duty to bargain over the articles it struck. Quite to the contrary, it acknowledged that duty to bargain when it requested that the Panel assert jurisdiction over all of the articles the parties opened for negotiation, including each of these articles the Agency proposed to strike from the parties' contract.

Perhaps the most egregious example that the Agency acted in bad faith by removing mandatory subjects of bargaining from the parties' negotiations is its proposal striking Article 25 (Alternate Work Schedules) from the contract in its entirety and refusing to bargain at all with NTEU over that decision. U.S. Dept. of Energy, Western Area Power Administration, Golden, Colorado and AFGE Local 3824, 56 FLRA 9, 13 (2000) (An agency's belief that it did not have a legal obligation to bargain does not detract from the willful nature of the refusal to bargain.). By striking the article from the contract, Agency representative Catherine Bird asserted that any alternate work schedule would be administered by "management discretion, rather than dictated by the CBA", which is wholly inconsistent with the law governing alternate work schedules. Alternate Work Schedules are expressly governed by the Federal Employees Flexible and Compressed Work Schedules Act. 5 U.S.C. §6120, *et seq.* (the "Act"). It is firmly established under Authority precedent that "matters concerning alternative work schedules are fully

negotiable, subject only to the Act or laws superseding it.” National Treasury Employees Union, Chapter 41 and U.S. Department of the Treasury, Internal Revenue Service, 57 FLRA 640, 643-644 (2001); NAGE, Local R1-109 and U.S. Department of Veterans Affairs, Connecticut Healthcare System, 56 FLRA 1043, 1045 (2001); National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 32 FLRA 879, 882 (1988); AFGE, Local 1934 and Department of the Air Force, Lowry Air Force Base, 23 FLRA 872, 873-874 (1986). The Act requires that before an Agency may terminate an alternate work schedule, it must demonstrate that schedule has an adverse agency impact, and it must substantively bargain over that decision with the exclusive representative. 5 U.S.C §6131(b) and (c). The Authority has held that termination of an AWS must be in accordance with the Work Schedules Act and the agency must first demonstrate “adverse agency impact.” EPA Research Triangle Park, 43 FLRA 87, 93 (1991). The legislative history of the Work Schedules Act sets forth “[i]t is expected that the agency will consider a less drastic alternative to termination if that is possible.” See Senate Committee on Governmental Affairs, Federal Employees Flexible and Compressed Work Schedules Act of 1982, S. Rep. No. 365, 97th Cong., 2d Sess. 16 (1982).

Finally, there can be no alternate work schedules program under the Act *unless* it is embodied in a collective bargaining agreement. AFGE Local 1709 and US Dept. of the Air Force, 57 FLRA 453, 455-456 (2001) (The express language set forth in §6130(a)(1) of the Act provides, “[i]n the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule, *and the establishment and termination of any such schedule*, shall be subject to the provisions of this subchapter.”). In holding that an agency may not impose an AWS program that has not been negotiated with the Union, the Authority found that §6130(a)(2) provides that bargaining unit employees “shall not be included within any program under this subchapter except to the extent *expressly provided* under a collective bargaining agreement”, and that the purpose of this section is to prohibit an agency from placing employees in a flexible or compressed work schedule without bargaining with a union. *Id.* The rationale asserted by Agency representative Catherine Bird for striking alternate work schedules from the CBA in favor of management discretion over that program, does not relieve the Agency of its duty to bargain. The Agency’s ignorance of its legal duty under the Act to bargain over both the substance and impact of alternate work schedules demonstrates the willfulness of its refusal to bargain and bad faith. U.S. Dept. of Energy, Western Area Power Administration, Golden, Colorado and AFGE Local 3824, 56 FLRA at 13.

By striking these 21 articles from the parties’ contract the Agency removed mandatory subjects of bargaining from the negotiations table, in violation of its duty to bargain in good faith, as well as in violation of the Work Schedules Act.

The Agency’s conduct as alleged in the August grievance, including its repeated refusal to discuss its proposals with NTEU; its unilateral termination of both bargaining and mediation its submission of last best offers on all open articles without having discussed, negotiated or mediated them; striking 21 articles containing mandatory subjects of bargaining from the parties contract without ever discussing or bargaining over them with NTEU; and refusing to return to the bargaining table to fulfill the duty to bargain in good faith despite NTEU’s repeated requests, demonstrates that the Agency acted willfully, acted in bad faith in violation of 5 U.S.C. §7114(b), and thus committed an unfair labor practice under 5 U.S.C. §7116(a)(5).

The Agency continued to violate its statutory duty to bargain in good faith when it insisted to impasse on permissive subjects of bargaining (The September 12, 2018 grievance). It is well-established that insisting to impasse on permissive subjects of bargaining violates the duty to bargain in good faith under 5 U.S.C. 7114(b) and constitutes an unfair labor practice under 5 U.S.C. §7116(a)(1) and (5). AFGE Local 3937 and SSA Balt., Md., (SSA Baltimore) 64 FLRA 17, 21 (2009) (Insisting to impasse on matters that are outside the duty to bargain constitutes bad faith and violates the Statute.), citing U.S. FDA, Ne. & Mid-Atlantic Regions and AFGE, 53 FLRA 1269, 1273-74 (1998) (FDA); FDIC, Headquarters and NTEU, 18 FLRA 768, 771-771 (1985) (FDIC) (A party has no duty to bargain over permissive subjects of bargaining, therefore a party may not insist to impasse over such matters.). Permissive subjects include those that are outside the scope of bargaining because they involve “proposals that a party negotiate to limit a right granted to it by the Statute.” FDA, 53 FLRA at 1273-74 (1998); FDIC, 18 FLRA at 771 (Proposals that require a party to waive a statutory right are permissive). That statutory right may be express, or it may be based on general statutory or policy considerations. FDA, 53 FLRA at 1275, citing, SPORT Air Traffic Controllers Org. and Air Force Flight Test Center Edwards Air Force Base, 52 FLRA 339, 345-346 (1996) (Finding that recording bargaining sessions is permissive because a party has a unilateral right to refuse such recording.).

Insistence to impasse on permissive subjects of bargaining also violates the Statute “without regard to whether such insistence was in good or bad faith.” SPORT Air Traffic Controllers Org. and Air Force Flight Test Center Edwards Air Force Base, 52 FLRA at 347, citing, Bartlett-Collins Co. and American Flint Glass Workers of North America, 237 NLRB 770, 772-773 (1978). Where a party insists to impasse on a permissive subject, it is not necessary to apply the totality of the circumstances test to determine whether the Statute was violated. SSA Baltimore, 64 FLRA at 21 (In cases alleging insistence to impasse on permissive subjects, “there is no need to apply a “totality of the circumstances analysis”.”). Insistence to impasse on even a single proposal that is permissive constitutes a violation of the Statute. Id. (“Rather, if the GC establishes that a respondent insisted to impasse on a single proposal that concerned a permissive subject of bargaining, then the respondent will be found to have violated the Statute.”); FDIC, 18 FLRA at 772-774.

The Agency independently and repeatedly violated the Statute, and also acted in bad faith, by insisting to impasse on permissive subjects of bargaining in 5 of the articles it submitted to mediation and in its Request for Assistance to the Panel. The Agency’s last best offers on Article 2 (Contract Duration and Termination), Article 3 (Mid-Term Bargaining), Article 8 (Dues Withholding), Article 45 (Grievance Procedures), and Article 46 (Arbitration) contain permissive subjects of bargaining. As NTEU asserted in its Statement of Position to the Panel on those articles, they contain Agency proposals that constitute permissive subjects of bargaining because they waive statutory rights granted to NTEU, and NTEU therefore has no duty to bargain over those proposals and lawfully declined to do so. Notwithstanding NTEU’s clear notice that it declined to bargain over those permissive subjects, the Agency continued to insist to impasse over them during the pendency of its request for assistance to the Panel. In fact, the Agency specifically opposed NTEU’s argument to the Panel that the matters were permissive,

and advocated for the Panel to assert jurisdiction over them in its Supplemental Response filed with the Panel on September 27, 2018. The Panel declined to assert jurisdiction over these articles “so that the parties may resolve the foregoing bargaining obligation disputes in the appropriate forum.” Thereafter, in the face of the Panel’s clear declination of jurisdiction over those articles, the Agency continued its efforts to force those permissive subjects to be addressed during the Panel-ordered mediation, and re-submitted them for the Panel’s consideration on December 21, 2018.

A violation of the Statute is established where (1) the agency insists to impasse over a proposal, and (2) the proposal concerns a permissive subject of bargaining. SSA Baltimore, 64 FLRA at 21. The first element is met here because it is undisputed that the Agency insisted to impasse on Articles 2, 3, 8, 45 and 46 when it invoked the mediation assistance of FMCS (UE 12; UE 18), again when it requested Panel assistance, and when it doubled-down on its insistence that these 5 articles be addressed in the Panel-ordered mediation and by the Panel as part of its final decision. As explained below, the second element is met because the Agency’s proposals on these articles included permissive subjects of bargaining. The Agency committed multiple, separate statutory violations of 5 U.S.C. §7116(a)(1) and (5) each time it insisted to impasse on each permissive proposal in Articles 2, 3, 8, 45 and 46. The Agency’s actions also separately constitute bad faith bargaining in violation of 5 U.S.C. §§ 7114(b) and 7116(a)(1) and (5).

In Article 2, the Agency submitted permissive proposals to impasse. The Agency’s proposals submitted to the Panel in Article 2, Section 1.B.1 waive the Union’s right to bargain future changes to conditions of employment by requiring those changes to be administered in accordance with applicable laws and agency policies, thus “negating the need for bargaining under 5 U.S.C. §7106(a) and 7106(b).” As the exclusive bargaining representative, where there is a legal duty to bargain over changes to conditions of employment of bargaining unit employees, NTEU has the right to advance, specific notice of those changes and an opportunity to bargain before they are implemented. 5 U.S.C. §§7103(a)(12), 7114(a)(1); U.S. Army Corps of Engineers Memphis District and NFFE Local 259, 53 FLRA 79, 81 (1997). Here, the Agency’s proposal is permissive because it waives NTEU’s right to bargain both substantively over the decision itself, where appropriate, as well as the impact and implementation of that decision concerning *all* future changes to conditions of employment, including those changes over which the Agency would otherwise have a statutory duty to bargain.

The Agency proposals in Article 2 Section 1.B.2 waive NTEU’s statutory right to bargain over the termination of past practices “which concern mandatory subjects of bargaining”. United States Dep’t of Justice, Executive Office for Immigration Review, Bd. of Immigration Appeals and AFGE Local 3525, 55 FLRA 454, 456-57 (1999) (Agencies have a duty to bargain in good faith prior to changing conditions of employment established by past practice.); IRS and NTEU, 27 FLRA 322, 324 (1987) (“Where a condition of employment has become established for particular bargaining unit employees through past practice or agreement of the parties then changes may not be made by the agency involved without fulfilling its bargaining obligations.”); U.S. Geological Survey and AFGE Local 3457, 9 FLRA 543, 545-546 (1982).

The Agency's Article 2, Section 1.C proposal is permissive because it waives NTEU's right to bargain over Agency decisions to invalidate any provisions in the term contract that become inconsistent with "law, government wide rule, executive order/memoranda, regulation, etc.", and that decisions on these matters would become effective "upon notification to the Union" but without any bargaining over either the substance or impact and implementation of those changes. The Authority has held that subsequently issued rules or regulations, with the exception of government-wide rules or regulations concerning prohibited personnel practices issued under 5 U.S.C. §2302, cannot nullify the terms of the parties' collective bargaining agreement. NTEU and IRS, 13 FLRA 554, 556 (1983). The Agency's proposal would expressly deprive NTEU of its statutory bargaining rights in any instance where a duty to bargain is otherwise present, and is thus permissive.

Article 2, Section 1.D would similarly operate to waive NTEU's statutory bargaining rights by terminating all past practices and agreements that are not merged into the term contract without first bargaining over their termination with NTEU. IRS and NTEU, 27 FLRA at 324; U.S. Geological Survey and AFGE Local 3457, 9 FLRA at 545-546. The Agency's Article 2 proposals waive statutory bargaining rights granted to NTEU, and are therefore permissive. FDA, 53 FLRA at 1273-74. NTEU clearly rejected the Agency's permissive proposals when it submitted its own Article 2 counter-proposals on July 23, 2018 eliminating those provisions. Because the Agency's proposals are permissive, the Agency violated its duty to bargain in good faith under 5 U.S.C. 7114(b) and committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1) and (5) by insisting to impasse on these proposals. SSA Baltimore, 64 FLRA at 21; FDA, 53 FLRA at 1273-74.

In Article 3, the Agency submitted permissive proposals to impasse. In Article 3 (Mid-Term Bargaining), Section 2.A.1 the Agency's insistence to impasse on its proposal that NTEU National is responsible for all mid-term negotiations impermissibly restricts NTEU's right to delegate bargaining to a representative of its choice, and is therefore permissive. (The Authority has held that proposals requiring a union to designate its representatives from prescribed organizational levels infringes on its right to designate its own representatives and is therefore outside the duty to bargain. AFGE and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, 4 FLRA 272, 274 (1980); Dept. of Transportation, Federal Aviation Administration and Professional Airways Systems Specialists, 15 FLRA 407, 409 (1984) (Proposals limiting a union's right to designate its representatives are permissive.); Dept. of Defense, Dept. of the Army Headquarters, XVIII, Airborne Corps, and Fort Bragg and AFGE, Local 1770, 15 FLRA 790, 792 (1984) (Because a union has a statutory right to designate its representatives, refusal to deal with a union's designated representatives constitutes interference with the rights granted to employees under 5 U.S.C. §7102); Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C. and Professional Airways Systems Specialists, 14 FLRA 644 (1984).

In Article 3, Section 2.B.1 the Agency again proposed to waive NTEU's statutory right to bargain procedures and arrangements under 5 U.S.C. §7106(b)(2) and (3) by proposing that the Agency may change conditions of employment without first bargaining with NTEU where

“basic management rights are involved” and there is an “operational need” or “other situation” that requires it to act “without undue delay”. First, 5 U.S.C. §7106(b)(2) and (3) grants the exclusive representative the right to bargain over procedures and arrangements that affect the exercise of a management right under 5 U.S.C. 7106(a). The Agency’s proposal would impermissibly waive NTEU’s statutory right to bargain over those matters. Pension Benefit Guarantee Corp. and NAGE, Local R3-77, 59 FLRA 48, 50 (2003) (The duty to bargain extends to bargaining over the impact and implementation, or effects, of a decision to exercise a management right enumerated in 5 U.S.C. §7106(a).). Second, “operational need” and “other situations” are not a recognized basis for relieving an agency of its statutory duty to bargain prior to implementing a change to conditions of employment. The Statute does recognize an agency’s right to “take whatever actions may be necessary to carry out the agency mission during emergencies.” 5 U.S.C. §7106(a)(2)(D). However, an agency is not “free to label any particular set of circumstances an emergency and act unilaterally”, and it must support any claim invoking that provision. Dept. of Veterans Affairs and AFGE Local 1594, 58 FLRA 549, 551 (2003). Where a duty to bargain exists, an agency may also defend against an unfair labor practice based on unilateral implementation of a change before completing bargaining if doing so is required for the ‘necessary functioning’ of the agency. Department of Health and Human Services, Social Security Administration, and Social Security Administration, Field Operations, Region II and American Federation of Government Employees, AFL-CIO, 35 FLRA 940, 950 (1990). The Authority has held that the ‘necessary functioning’ defense requires an agency to establish *by evidence* that implementation is necessary to the functioning of the agency, and *also* that delaying implementation would impede “the agency’s ability to effectively and efficiently carry out its mission.” Dept. of Justice, INS and AFGE, National Border Patrol Council, 55 FLRA at 904. Here, the Agency’s proposal in Section 2.B.1 constitutes a blanket waiver of NTEU’s statutory bargaining rights, without regard to whether there is an emergency under 5 U.S.C. §7106(a)(2)(D), and without any evidentiary support that implementation in all circumstances involving “operational need” or “other situation[s]” would meet the very limited ‘necessary functioning’ defense.

In Article 3, Section 3.A, the Agency proposed that when changes to conditions of employment are more than *de minimis*, the Union’s statutory right to bargain is limited to mere “comment” and that will “completely satisfy” any substantive as well as impact bargaining rights. Because the Agency has a duty under 5 U.S.C. §7106(b)(2) and (3) to bargain with NTEU over procedures and arrangements prior to changing conditions of employment of bargaining unit employees, its proposals forcing a waiver of those rights are permissive at the election of NTEU. FDA, 53 FLRA at 1273-74. The proposal also impermissibly operates as a blanket waiver of NTEU’s statutory right to bargain over substantively negotiable matters, and is permissive.

Because these Article 3 proposals are permissive, the Agency’s insistence on forcing each such permissive proposal to impasse is a separate violation of 5 U.S.C. §7116(a)(1) and (5), and also constitutes bad faith in violation of 5 U.S.C. §§7114(b) and 7116(a)(1) and (5). SSA Baltimore, 64 FLRA at 21; FDA, 53 FLRA at 1273-74.

In Article 8, the Agency submitted permissive proposals to impasse. The Agency's July 31, 2018 proposals on Article 8 (Dues Withholding) that were submitted to the Panel for impasse resolution impermissibly alter the statutory dues withholding provisions of 5 U.S.C. §7115. The Agency proposed in Section 5.B that bargaining unit employees voluntary dues deductions will automatically expire at the first pay period after the anniversary date of the first deduction unless the employee submits a new SF-1187 for voluntary dues withholding assignment. This proposal violates employees' statutory right to have their union dues automatically deducted from their pay, and the Agency's statutory obligation to honor those assignments, under 5 U.S.C. §7115(a). "[T]he agency shall honor the assignment and make an appropriate allotment pursuant to the assignment... Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year." *Id.* The Agency's attempt to alter the mandatory statutory language is outside the duty to bargain and thus permissive because employees have a statutory right to maintain their automatic dues withholding under 5 U.S.C. §7115. The Agency's insistence to impasse on this proposal constitutes a violation of 5 U.S.C. §7116(a)(1) and (5), as well as bad faith in violation of 5 U.S.C. §§7114(b) and 7116(a)(1) and (5). SSA Baltimore, 64 FLRA at 21; FDA, 53 FLRA at 1273-74.

In Article 45, the Agency submitted permissive proposals to impasse. In Article 45 (Grievance Procedures), Section 6.A the Agency proposed that grievances may only be filed "at the National level of recognition" and "by the Union President or designee." This proposal is permissive because it waives the statutory right of individual employees to file grievances under 5 U.S.C. §7121(b)(1). "Any negotiated grievance procedure referred to in subsection (a) of this section shall...assure such an employee the right to present a grievance on the employee's own behalf." 5 U.S.C. §7121(b)(1)(c)(ii). Insistence to impasse on this proposal violates 5 U.S.C. §7116(a)(1) and (5), and is also bad faith in violation of 5 U.S.C. §§7114(b) and 7116(a)(1) and (5).

In Article 46, the Agency submitted permissive proposals to impasse. The Agency's proposals in Article 46 (Arbitration), Section 4.B places the burden of proof for all grievances on the grievant, requiring that proof to be established by a preponderance of the evidence. This proposal is contrary to law with respect to the standards of proof for cases involving discipline, adverse action, and performance. For appeals of actions under 5 U.S.C. §4303 involving performance, a lower burden of proof by substantial evidence is mandated by law, and it is the agency not the grievant who bears that burden. 5 C.F.R. §§1201.4 (p) and 1201.56(b); 5 U.S.C. §7701(c). Accordingly, the Agency's proposal impermissibly shifts the burden of proof to employees in all grievances, and is contrary to law and outside the scope of bargaining. Because the proposal is permissive, insisting on it to impasse violates 5 U.S.C. §7116(a)(1) and (5) and constitutes bad faith in violation of 5 U.S.C. §§7114(b) and 7116(a)(1) and (5).

The Agency's multiple proposals in all five of these articles contain permissive subjects of bargaining. Its extensive and repeated insistence to impasse on each one of these permissive subject proposals is evidence that it has repeatedly and willfully violated 5 U.S.C. §7116(a)(1) and (5), and additionally establishes that it breached its duty to bargain in good faith with NTEU

in violation of 5 U.S.C. §7114(b) which constitutes a separate unfair labor practice in violation of 5 U.S.C. §7116(a)(1) and (5).

The Agency continued to violate its statutory duty to bargain in good faith when it failed to respond to NTEU's information requests (The September 12, 2018 grievance). The duty to bargain in good faith under 5 U.S.C. §7114(b) includes the obligation of an agency to furnish to a union, upon request, and to the extent not prohibited by law, data (A) which is normally maintained by the agency in the regular course of business; (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (C) which does not constitute guidance, advise, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

5 U.S.C. §7114(b)(4).

Failure of an agency to respond to a union's request for information pursuant to 5 U.S.C. §7114(b)(4) constitutes a failure to bargain in good faith, and violates 5 U.S.C. 7116(a)(1), (5) and (8). Dept. of Transportation, FAA New England Region and National Association of Air Traffic Specialists, 38 FLRA 1623, 1632-1633 (1991). When responding to information requests, agencies have a duty to provide any countervailing anti-disclosure interests at or near the time the information request is made. Pension Benefit Guaranty Corp. and Independent Union of Pension Employees for Democracy and Justice, 69 FLRA 323, 330 (2016); U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fort Dix, N.J. and AFGE Local 2001, 64 FLRA 106, 109 (2009). Conclusory allegations of anti-disclosure interests are insufficient to satisfy this duty. Dept. of Justice, Federal Bureau of Prisons Ray Brook and AFGE Local 3882, 68 FLRA 492, 496 (2015). Agencies have the burden of proving any asserted countervailing anti-disclosure interests. IRS Kansas City Service Center and NTEU, Chapter 66, 50 FLRA 661, 671 (1995); Federal Bureau of Prisons and AFGE Local 171, 55 FLRA 1250, 1255 (2000). Here, the Agency violated the Statute by failing to meet its obligation to respond to NTEU's July 10, 2018 and August 2, 2018 information requests.

The Agency failed to fully respond to the July 10, 2018 information requests. NTEU submitted three specific information requests on July 10, 2018 concerning the Agency's Article 2 proposals, seeking (1) copies of all written agreement between the parties since October 1, 2010, (2) all term contract and term contract reopener ground rules agreements between the parties for the October 1, 2010 Consolidated CBA and the OS, FDA, ACF, HRSA, HIS, SAMHSA and CDC contract immediately preceding the Consolidated CBA, and (3) the Agency Head Review approvals and disapprovals for agreements executed on or after October 1, 2010. The particularized need identified for each request indicated the information was necessary to understand, bargain over and respond to specific Article 2 proposals made by the Agency.

On August 10, 2018 the Agency produced some but not all of the mid-term MOUs requested by NTEU in request 1. Ms. Harling testified based on her review of the responsive documents she became aware that the response was incomplete and did not include agreements she knew had been negotiated during the timeframe in the request. She notified the Agency on August 13, 2018 that the response to request 1 was incomplete because it did not contain

agreements both she and local NTEU chapters had negotiated since October 1, 2010. The HHS Deputy Director of Workforce Relations, Donna Kramer, responded on August 22, 2018 that the Agency produced only the MOUs “currently in effect” and that it did so as a result of discussions it had with the mediator on July 30, 2018. Ms. Kramer did not explain what those discussions were with the mediator or how they affected the Agency duty under 5 U.S.C. 7114(b)(4) to fully respond to the Union’s information request. Nor did she explain why the Agency limited its response to MOUs “currently in effect” when the request was not thus limited. Ms. Harling notified Ms. Kramer again via email on August 24, 2018 that the response was incomplete.

On September 5, 2018, HHS Senior Advisor Darrell Hoffmann emailed Ms. Harling objecting to her “continued request” for MOUs, and asserted that since NTEU was a signatory to those documents it should already have them. As Ms. Harling testified, she was aware of the existence of certain MOUs but because she did not have copies of them she was seeking to have the Agency produce them. Moreover, some of the MOUs were negotiated by the local NTEU chapters and Ms. Harling testified that NTEU National does not maintain that information and is not involved in the local negotiation process with the Agency. Under Authority precedent, the Agency is not relieved of its duty to fully respond to NTEU’s information request on the basis of its belief that NTEU should already possess the MOUs requested since it was a signatory to them, as Mr. Hoffmann suggested in his September 5, 2018 response. NFFE Local 1655 and Dept. of Defense Dept. of Military Affairs, 39 FLRA 1087, 1097 (1991) (“Nothing in the language of section 7114(b) of the Statute or its legislative history indicates that Congress intended a union’s right to information under that provision to be dependent on whether the information is reasonably available from an alternative source.”).

In the September 5, 2018 email, Mr. Hoffmann stated that the Agency had produced the documents he deemed “reasonably available” and “that were in our historical files”. The Authority has held that information is not reasonably available if it is only available through extreme and excessive means. Dept. of Health and Human Services, SSA and AFGE Local 3302, 36 FLRA 943, 951-952 (1990). The agency has the burden to prove that requested information is not “reasonably available”. Federal Bureau of Prisons and AFGE Local 171, 55 FLRA at 1255. Mr. Hoffman’s email did not explain why he believed the information was not “reasonably available”, and did not explain what the Agency did to search for the requested MOUs. He testified at the hearing that he merely “talked to our senior leadership, and I asked them did they exhaust all remedies in trying to find these documents.” He testified that they went through their “grievance records” to search for MOUs, although he did not explain what grievance records have to do with MOUs. He admitted that he did not conduct any search for electronic documents or electronic files in his search for documents responsive to the request. He also admitted that Workforce Management sent out a data call, but he doesn’t know when, doesn’t know what information was requested in the data call, or what the response was to the data call. There is absolutely no record evidence that anyone ever responded to the data call.

Ms. Harling testified that after the partial response on August 10, 2018, the Agency never produced any additional MOUs responsive to the request. Mr. Hoffmann also testified on behalf of the Agency, confirming that his September 5, 2018 email to Ms. Harling objecting to her

continued requests for the MOUs in request 2 constituted the Agency's final response to the July 10, 2018 information request. Because the Agency failed to fully respond to NTEU's July 10, 2018 information request number 1, and did not produce any record evidence that the requested MOUs were not reasonably available, it violated 5 U.S.C. 7114(b)(4), acted in bad faith, and committed an unfair labor practice under 5 U.S.C. 7116(a)(1), (5) and (8).

With respect to the ground rules agreements requested in request number 2, NTEU indicated in its particularized need statement that it wanted those documents in order to "understand the parties' history of ground rules agreements" and how they have applied them to term negotiations so NTEU could respond to the Agency's specific Article 2 proposals on ground rules. The Agency produced an interim response on August 2, 2016 in which it provided two ground rules agreements for the 2010 Consolidated CBA and its 2012 mid-term reopener negotiations under information request number 2, but failed to produce the ground rules agreements for the requested OS, FDA, ACF, HRSA, HIS, SAMHSA and CDC agreements. NTEU even provided additional clarification on its particular need for the ground rules MOUs on August 24, 2018. Ms. Harling testified that she clarified on August 2, 2018 that the request had nothing to do with *mid-term* bargaining agreements under Article 3 (Mid-Term Bargaining), as the Agency apparently misunderstood, but instead sought the *term* contract ground rules for the seven specifically identified term CBAs. However, despite NTEU's detailed particularized need statement and further clarification of that need, the Agency never produced the requested documents. Because the Agency never produced the term bargaining ground rules agreements requested for the OS, FDA, ACF, HRSA, HIS, SAMHSA and CDC term agreements, it violated 5 U.S.C. 7114(b)(4), acted in bad faith, and committed an unfair labor practice under 5 U.S.C. 7116(a)(1), (5) and (8) by failing to fully respond to NTEU's July 10, 2018 information request number 2.

The Agency failed to respond to the August 2, 2018 information requests. On August 2, 2018 NTEU submitted 7 separate documents containing information requests pursuant to 5 U.S.C. §7114(b)(4) to the Agency seeking information specifically related to the Agency's proposals in its July 31, 2018 last best offers on 10 of the open articles in the term contract negotiations. NTEU provided a particularized need statement for each request, which included that the information was necessary to enable NTEU to prepare counter-proposals and bargain with the Agency, including *through impasse procedures*. The Agency acknowledged receipt of the requests on August 9, 2018 and advised that it was processing them. On August 13, 2018 the Agency filed a Request for Assistance with the Panel asking it to assert jurisdiction to resolve the parties' bargaining impasse on all 34 open contract articles, including the 10 articles that were the subject of the Union's August 2, 2018 information request. Having received no further response to its August 2, 2018 information request, and because the Agency had filed for Panel assistance, on September 12, 2018 NTEU filed a national grievance which alleged, in part, that the Agency violated 5 U.S.C. §7114(b)(4), acted in bad faith, and committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (5) and (8) by failing to respond to the August 2, 2018 information requests.

The Panel asserted jurisdiction over 28 of the 34 open contract articles (including 7 which were the subject of the information requests) on November 15, 2018 and ordered the parties to mediation for a period of 30 days, after which they were to submit final offers and positions on all open articles for the Panel to issue a final decision. Multiple times during the course of the Panel-ordered mediation NTEU inquired about the Agency's failure to respond to the August 2, 2018 information requests and articulated NTEU's need for that information for the negotiations as well as for use in the Panel-ordered impasse proceedings. The Agency repeatedly failed to provide the information or any response to the August 2, 2018 requests until the last day of Panel-ordered mediation on December 14, 2018 when it overwhelmingly denied every request except for request number 7 in Article 26 concerning telework policies.

The Agency violated 5 U.S.C. 7114(b)(4) and committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (5) and (8) by failing to respond and/or timely respond to the August 2, 2018 information requests and failing to produce the requested information.

The Agency's December 14, 2018 denial of the August 2, 2018 information requests was untimely. A timely response to an information request made pursuant to 5 U.S.C. §7114(b)(4) is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. Dept. of Justice, Office of Justice Programs and AFSME Local 2830, 45 FLRA 1022 (1992). Therefore, an agency also violates the Statute when it fails to *timely* respond to an information request, even if it later provides a response. Dept. of Treasury, U.S. Customs Service SW Region and NTEU, 43 FLRA at 1734; Dept. of Health and Human Services, SSA New York Region and AFGE Local 3369, 52 FLRA 1133, 1150 (1997). Whether a response is timely depends on the circumstances. Dept. of Justice Federal Bureau of Prisons Federal Correctional Institution Fort Dix and AFGE Local 2001, 64 FLRA 106 (2009); Dept. of Defense Dependent Schools and North Germany Area Council, Overseas Education Ass'n, 19 FLRA 790, 791 (1985) (A two month delay responding to information requests violated the Statute); Dept. of Justice, INS, US Border Patrol and AFGE National Border Patrol Council, 43 FLRA 697 (1991) (A six week delay responding to information requests was unreasonable and violated 5 U.S.C. §7116(a)); Dept. of Justice, Office of Justice Programs and AFSME Local 2830, 45 FLRA 1022 (1992) (A delay responding to information requests for five months was unreasonable.).

Here, the Agency's response denying NTEU's information requests was submitted more than 4 months after the August 2, 2018 date of the requests and 3 months after the filing of the Union's September 12, 2018 grievance. The denial was produced so late in the parties' term contract negotiations that it ensured NTEU would not receive any information at all to use in the Panel proceedings, and that NTEU's grievance over the failure to respond would not be resolved in time to obtain any relief or order for the production of the information it needed for its final submission to the Panel on December 21, 2018.

There is absolutely no record evidence to demonstrate that the Agency took any action to respond to NTEU's information request in a timely manner. The testimony of Agency's only witness for the September 2018 grievance, Darrell Hoffmann, establishes that the Agency did not even make an effort to timely respond. Mr. Hoffman could not recall when he first became

aware of the August 2, 2018 information requests. Nor could he recall specifically when he took action to respond to the requests, testifying it was “probably” prior to the Panel’s November 15, 2018 order, but he could not even approximate the timeframe. What he was able to recall was that the Agency looked at whether it could provide any of the information “prior to the end of the 30 day FSIP order” and that the search for the information occurred after the Panel asserted jurisdiction, but he could not specifically recall when the search occurred. Thus, by admission, the Agency failed to even search for the requested information until sometime after November 15, 2018, more than 3 months after the request was made. Nor did Mr. Hoffman have any personal knowledge of whether anyone else from the Agency conducted a search to determine if the requested information was available. He further testified that he never reached out to NTEU concerning the information request prior to the Agency’s blanket denial of the requests on December 14, 2018, and instead he incorrectly assumed the Agency could satisfy the request by discussing the issues at the bargaining table. Based on Mr. Hoffmann’s testimony, it is clear that the Agency did not even attempt to respond to NTEU’s August 2, 2018 information request until sometime after the Panel’s November 15, 2018 order, and most probably even then not until NTEU specifically reminded the Agency in writing the morning of December 14, 2018 that it had failed to respond to those requests for the past four months. The Agency’s response later that same day summarily denying the requests and not producing a single document is further evidence that it did not undertake to respond to NTEU’s information requests in a timely manner, and made no good faith effort to respond at all.

Under the circumstances, it was not reasonable for the Agency to delay providing its wholesale denial of NTEU’s information request more than 4 months after it was submitted. Because the Agency’s December 14, 2018 denial of NTEU’s August 2, 2018 information requests was untimely, the belated response denying those information requests does not provide a defense to the unfair labor practice charge for failure to respond to them. Dept. of Justice Executive Office for Immigration Review and AFGE Local 286, 61 FLRA at 467 (“Post charge conduct is irrelevant in determining whether or not the Statute has been violated.”). The Agency’s conduct amounts to bad faith, violates 5 U.S.C. 7114(b)(4), and constitutes an unfair labor practice under 5 U.S.C. 7116(a)(1), (5), and (8).

The Agency’s untimely assertion of anti-disclosure interests did not satisfy its duty to timely respond to the information requests. The Agency asserted various anti-disclosure interests for the very first time in its belated December 14, 2018 denial of NTEU’s August 2, 2018 information requests. Authority precedent holds that an agency is required to assert any anti-disclosure interests at or near the time the information request is made. Pension Benefit Guaranty Corp. and Independent Union of Pension Employees for Democracy and Justice, 69 FLRA 323, 330 (2016). Here, the Agency’s attempt on December 14, 2018 to assert a variety of anti-disclosure interests does not satisfy this burden because it was submitted more than 4 months after the information request was made, and on the last day of Panel-ordered mediation, thus ensuring that NTEU would not have the information it needed to submit its final position to the Panel on December 21, 2018.

An agency must explain its anti-disclosure interests to the union requesting the information. Conclusory or bare assertions do not satisfy this burden, which extends beyond simply denying the request. Dept. of Justice, Federal Bureau of Prisons Ray Brook and AFGE Local 3882, 48 FLRA 492, 496 (2015). Here, the Agency made no attempt to explain its anti-disclosure interests in anything other than a conclusory fashion in its December 14, 2018 denial.

The overarching anti-disclosure interest identified by the Agency in its December 14, 2018 denial of the information requests was the unsupported, conclusory statement that the information was not normally maintained by the Agency in the regular course of business (Article 3, requests 1-2; Article 10, requests 1-3; Article 25, requests 1-2; Article 26, 1-4 and 6; Article 31, request 1; Article 35, request 1; Article 43, requests 1-2; and Article 45, requests 1-2). (UE 31). The Authority has held that data is normally maintained by an agency “if the agency possesses and maintains the information.” Dept. of Health and Human Services, SSA Balt., Md. and AFGE Local 1164, 37 FLRA 1277, 1285 (1990). Agencies may be required to create documents that do not exist in the exact format requested, if they have the information that was requested. Dept. of Navy, Naval Submarine Base, New London, Conn. And NAGE, Local R1-100, 27 FLRA 785, 797 (1987); Dept. of the Air Force, Tactical Air Command, Langley AFB and AFGE Local 2308, 37 FLRA 1160, 1272 (1990) (Information sought by the union was reasonably available “even though it would [be] necessary to compile [it] by reconciling computer data or by extracting them from personnel files.”). The record evidence establishes that the Agency maintains the requested information but failed to produce any of it, or did not even attempt to ascertain whether the information exists.

Mr. Hoffmann was asked on cross-examination about whether the requested information was normally maintained by the Agency. With respect to Article 3, request 1 for travel data spanning the last eight fiscal years, he testified that the Agency doesn’t maintain the data for over four years, yet never produced any of the data for any of the years, even the four the Agency maintains.

In response to request 1 in Article 10 for annual official time usage by NTEU representatives, the Agency asserted the information is not normally maintained. However, the form for employees representatives to request official time is included as Appendix 2 to the parties’ 2010 Consolidated CBA, and includes the dates and actual official time used by the employee representative. The Agency’s own witness, Darrel Hoffman testified that the Agency does maintain the official time information in request 1 for 2016-2018 but he was unsure about the prior years. The Agency also asserted that it does not maintain the information requested in Article 10 request 3 for reports on official time that HHS submits to various government entities for fiscal years 2010-2018. Mr. Hoffmann testified that the Agency *does* submit official time reports to OPM and Congress on a yearly basis, yet never produced any of those reports. Instead, he relied on the conclusory assertion that they are not normally maintained, which conflicted with his own testimony. In fact, with respect to the Article 10 official time requests, he testified that he did not know if the information exists.

Yet again, with respect to Agency adverse impact studies on alternate work schedules in Article 25, request 1, the Agency asserted that the information is not normally maintained. Mr.

Hoffmann testified once again that he does not know if the Agency conducted any adverse impact studies, which contradicts the assertion that the information does not exist. In Article 25, request 2, NTEU asked for information concerning employees on the various alternate work schedules authorized by the parties' CBA, including the type of alternate work schedule. Again, the Agency asserted the information is not normally maintained and the information does not exist. However, this assertion is contradicted by the AWS form employees are required to use, and which is contained in Appendix 3 of the parties' CBA. That form clearly identifies the employees on alternate work schedules, the type of work schedule, and specific information about those schedules.

The Agency denied NTEU's Article 26 (Telework) requests 1 through 6 seeking information which included employees approved as eligible for telework, lists of employees on recurring and episodic telework, and employees who had their telework agreements suspended or terminated, again asserting it doesn't normally maintain the information. The record evidence establishes that assertion is false. The Agency's own Human Resources Manual mandates that each Operating Division ("OpDiv") in the Agency maintain records "related to the administration of their Telework program", including the number of participating employees, number and percentage of employees eligible to telework, the number of days per pay period they telework, and a host of other data. The Agency's assertion that it doesn't maintain the requested information is also directly contradicted by Article 26, Section 10 of the parties' CBA in which they negotiated the *requirement* that the Agency provide NTEU with copies of "any reports on telework usage provided to OPM", "the number of employees eligible to participate in the telework program" in each OpDiv, and the "name, location, series, grade and type of telework arrangement" for all employees participating in telework in each OpDiv. The required telework agreement is contained in Appendix 3.2 of the parties' CBA, and each such agreement identifies the type of telework, the employee's telework location, the employee's specific telework schedule, and other terms. Moreover, the Telework Enhancement Act of 2010 ("TEA") requires all Federal agencies to determine the eligibility of all employees to telework, and to notify employees of their eligibility. 5 U.S.C. §6502(a)(1)(B) and (C). Thus, the Agency is required by law to maintain the information requested in Article 26 request 1. The TEA also requires agencies to have written telework agreements for all employees who telework that outlines the employee's specific telework arrangement. 5 U.S.C. §6502(b)(2)(A). NTEU requested lists of employees on telework agreements in requests 2, 3 and 5. Additionally, the Agency's witness Darrell Hoffmann admitted in his testimony that the Agency could ask the Operating and Staff Divisions for paper copies of employee telework agreements. It is clear that the Agency is required by law and contract to maintain much of the telework information requested by NTEU (specifically requests 1-5), that it does maintain that information, and that its response to the contrary is not credible.

The Agency denied NTEU's Article 31 request asking for information on performance improvement plans from fiscal years 2011 through 2018, on the basis that the information is not normally maintained. Mr. Hoffmann testified that this information actually is maintained by individual managers, yet the Agency failed to provide any responsive information. Evidently,

the Agency does not believe that it has to produce information maintained by individual Agency managers, unless that information is also submitted to the Secretary of HHS. Contrary to the Agency's apparent belief, Authority precedent establishes that information that is readily available to an agency, or otherwise within control of an agency, is considered to be "normally maintained" such that it falls under the production requirements of 5 U.S.C. §7114(b)(4). Dept. of Commerce, NOAA, Nat'l Weather Serv. and Nat'l Weather Serv. Employees Org., 38 FLRA 120, 129 (1990) (Where records were not physically maintained by the agency, but could be requested when needed, they were considered normally maintained.). Here, that information is maintained by Agency managers and there is no valid reason why it was not produced. Moreover, performance improvement plans are required by Agency policy to be given to employees in writing, and that policy is memorialized in Appendix 4 of the parties' CBA.

NTEU requested information concerning proposed disciplinary (Article 44) and adverse actions (Article 43) for fiscal years 2011 through 2018, which the Agency asserted is not normally maintained. Mr. Hoffmann's own testimony again proved the assertion of that anti-disclosure interest to be false. He could not explain how the Agency would be able to address progressive discipline or tell the deciding official what discipline previous employees received for similar misconduct (both of which it is required to do under Section 3 of Article 43 and Section 3A of Article 44), if it does not maintain the requested disciplinary and adverse action information. He also testified that he has no personal knowledge of whether anyone in the Agency does maintain this information. Mr. Hoffman testified that it was his role to do the leg work to respond to the requests, yet it is clear from his testimony that he failed to even determine whether the requested information existed, only made preliminary inquiries within Workforce Relations, has no personal knowledge of any actions taken by anyone in Workforce Relations with respect to the information requests, and never inquired whether the information existed in any of the regional offices. Mr. Hoffmann's testimony clearly and unmistakably establishes that the Agency did not and cannot explain its untimely anti-disclosure interest asserting the requested information is not normally maintained, because Mr. Hoffmann admitted that some of the information is maintained and the Agency never made a good faith attempt to determine if the rest of the information existed. Its assertion that the information is not normally maintained is conclusory, is contradicted by the record evidence, and amounts to a failure to respond in violation of 5 U.S.C. §7114(b)(4) and constitutes an unfair labor practice under 5 U.S.C. §7116(a)(1), (5), and (8).

The Agency also made the purely conclusory assertion that some of the requested information was not reasonably available. The Authority has held that information is not reasonably available if it is only available through extreme and excessive means. Dept. of Health and Human Services, SSA and AFGE Local 3302, 36 FLRA at 951-952. ("A finding that complying with a request is somewhat onerous, does not, without more, constitute a finding that compliance would require the use of extreme or excessive means, so as to render the information not reasonably available."). The agency has the burden to prove that requested information is not reasonably available because providing the information would be unduly burdensome. Federal Bureau of Prisons and AFGE Local 171, 55 FLRA at 1255 (An agency objecting to

information requested on the basis that it is not reasonably available is required “to produce evidence of the costs and burdens required to retrieve the data in question.”). Moreover, “vague and conclusory opinions” that do not “illuminate how much time and resources would be required to locate the data” are not sufficient to establish that the requested information was not reasonably available. *Id.*

Assuming that the Agency’s assertion that some of the requests were overly burdensome means that it contends information is not reasonable available, it made that belated assertion with respect to Article 3, request 1 seeking information on travel and per diem costs incurred by HHS employees to engage in mid-term bargaining; and in Article 10, requests 1 and 2 concerning official time usage by NTEU employee representatives. In Article 25, request 2 concerning information on employees who worked alternate work schedules since October 1, 2000, the Agency responded on December 14, 2018 that “it is not reasonable for employees to maintain work schedules for eight years”, and that it would be overly burdensome to identify the information for that time period. It also asserted that Article 26, requests 1-6 seeking information on employees currently deemed eligible for telework, a list of those who have teleworked and how frequently in fiscal years 2017 and 2018, information on employees working episodic telework, employees suspended from telework, the average number of hours employees teleworked, and the names and organizational information about managers who teleworked and supervised employees remotely was not reasonably available or was unduly burdensome. As discussed above, much of this telework information is required to be maintained by the HHS Operating Divisions pursuant to the Agency’s Human Resources Manual, the parties’ CBA, and the Telework Enhancement Act of 2010, 5 U.S.C. §6501, *et seq.* The Agency asserted that the Article 31 request for information on employees placed on performance improvement plans from fiscal year 2011 through 2018 was not reasonably available, that the Article 35 request for vacancies filled by hardship reassignments from fiscal year 2011 through fiscal year 2018 was overly burdensome, and that information requesting the proposed disciplinary and adverse actions from fiscal year 2011 through 2018 was overly burdensome. The Agency presented no evidence to demonstrate that any of the requested information was not reasonably available. It relied solely on the conclusory allegations in its untimely assertion of anti-disclosure interests on December 14, 2018 and the testimony of Darrell Hoffmann. Mr. Hoffmann testified, astonishingly, that he did not recall whether or not he drafted the December 14, 2018 response to the August 2, 2018 information requests or when he first saw those requests. With respect to determining whether any of the requested information was reasonably available, he testified that the specific actions he took were to ask Donna Kramer in Workforce Relations how much time she thought it would take; that he “just looked at” the data and it “caught his attention” that some of the data spanned ten years and 14,000 employees so he advised it would “cost a lot of money”; and that his search consisted of talking to Employee Relations and Labor Relations employees to ask their opinion on what it would take to get the requested data but that he has no personal knowledge of any other actions taken by anyone at the Agency to search for or find out what information was available or reasonably available. This is clearly insufficient to meet the Agency’s evidentiary burden under the Statute.

In Dep't of Health and Human Services, SSA and AFGE Local 3302, 36 FLRA at 951-952, the Authority found that 3 weeks to obtain the requested information did not render the request not reasonably available. The Authority also found that HHS' choice of the methods by which it maintained the requested information and comingled it with other data did not render the information not reasonably available.

Indeed, it appears that some of the time necessary to retrieve the information results from the fact that the requested records of the Respondent's employees are intermingled with records of other employees of the Department of Health and Human Services. The Respondent does not assert, and it is not otherwise apparent, that the Respondent or the Department is required to employ this method of recordkeeping. Accordingly, to some extent, the amount of time necessary to retrieve the requested information is attributable to a matter within the sole control of the Respondent -- the manner in which the Respondent keeps its records. *Id.* The Agency was on notice based on this 1990 Authority decision that commingling data, such as data for multiple bargaining units, does not provide it with a reason to deny information requested under 5 U.S.C. §7114(b)(4) on the basis that the information is not reasonably available or that it would be unduly burdensome to retrieve it. Yet, it is making that assertion again here. The Agency has chosen to maintain its records in a way that frustrates its ability to respond to information requests from NTEU about the employees in the bargaining unit it represents. It cannot rely on that choice to deny those requests. Moreover, it is apparent the Agency had no intention to ascertain whether the information was reasonably available because, as Mr. Hoffman testified, his expectation was "that we would answer the questions to the best of our availability at the [bargaining] table." He testified that he personally analyzed how much work it would take to respond to the August 2, 2018 requests and he summarily concluded without any evidentiary support that "it would have taken many hours of work".

With respect to the performance improvement plan information requested for Article 31, Mr. Hoffmann testified that he could have asked the local managers for the information but that doing so "would be a voluminous endeavor." He also testified that he has no personal knowledge of whether anyone in the Agency ever contacted local managers to obtain the disciplinary and adverse action information requested for Articles 43 and 44, or any of the other NTEU information requests. In fact, the only Agency employees he asked about any of the information requests were the employees in Workforce Relations, and even then he has absolutely no idea if they did anything in furtherance of ascertaining the existence or availability of the information requested.

The Authority has held that that conclusory allegations without supporting evidence does not establish that information is not reasonably available, and thus does not relieve an agency of its duty to provide the requested information under 5 U.S.C. §7114(b)(4). Pension Benefit Guaranty Corporation and Independent Union of Pension Employees for Democracy and Justice, 69 FLRA at 342 ("Although the Respondent contends it would take an enormous amount of time and effort to produce the information, the Respondent did not produce evidence demonstrating how much time and/or resources would be required to attain the requested call data. Given its superior knowledge of the costs and burdens required to retrieve the data in question, the

Respondent should have produced evidence of the costs and burdens required to retrieve this data.”). Mr. Hoffman’s testimony establishes that the Agency did virtually nothing to determine whether the requested information was reasonably available. Given the utter lack of evidence to support the conclusory and belated anti-disclosure assertion that the information was not reasonably available or was unduly burdensome, the Agency’s actions demonstrate it violated 5 U.S.C. §7114(b)(4) and constitutes an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (5) and (8).

The Agency asserted additional untimely anti-disclosure interests in its December 14, 2018 response to NTEU’s August 2, 2018 information requests. It denied Article 3, request 1 on the basis that “NTEU could survey their members to determine this information”), and request 2 on the basis that “NTEU would have been copied on any such notices thus has these documents in their possession.” It is well-established that an agency is not relieved of its duty to respond to information requests submitted under 5 U.S.C. §7114(b)(4) on the basis that the information is available to the union by other means or from other sources, therefore the Agency’s objection is without merit. NFFE Local 1655 and Dept. of Defense Dept. of Military Affairs, 39 FLRA at 1097.

The Agency asserted as a basis for denying multiple information requests (Article 3, requests 1-2; Article 10, requests 1-2; Article 25, request 2; Article 35, request 1; Articles 43 and 44, requests 1-2; and Article 45, requests 1-2) that the requested information was “open to discussion” with NTEU at term bargaining sessions in mediation. First, there is no statutory basis or Authority precedent that holds that a discussion at bargaining or mediation relieves an agency from its duty to respond to information requests submitted pursuant to 5 U.S.C. 7114(b)(4). Second, the Agency’s assertion that the information requested for Article 3 and Article 45 was “open to discussion with NTEU at term bargaining sessions and through mediation” is false. Similarly, its assertion that the Article 25 information request 2 “was discussed with NTEU at the bargaining table” is also false. As Ms. Harling testified, the parties never discussed Articles 3, 25 or 45 in bargaining or mediation in July 2018 because the only articles discussed were Article 2 and the Union’s proposal on Article 3, the Agency refused any discussion of its Article 3 proposals, and the parties never bargained over Article 25.

Articles 3, 25 and 45 were also not discussed during the Panel-ordered mediation in November and December 2018 because the Panel declined to assert jurisdiction over them. The Panel order refers to Article 35. As the parties made clear during the arbitration, the reference to Article 35 was a typographical error and actually refers to Article 25. Although the Agency attempted to interject these articles into the Panel-ordered mediation by submitting counter-proposals on those articles on December 13, 2018, the record evidence makes it clear that the mediator declined to entertain them because they were not part of the Panel proceedings therefore the parties never discussed them, never bargained over them, and never mediated them. The fact that the Agency was willing to make false assertions that these three articles were discussed during any part of the bargaining, mediation or Panel proceedings in its December 14, 2018 denial of NTEU’s information requests calls into question the veracity of its entire response, including all of its untimely purported anti-disclosure interests.

The Agency's refusal to provide NTEU with the information it sought forced NTEU to bargain in a total vacuum, without any knowledge of general evidence of the conditions of employment of bargaining unit employees. The lack of this information precluded NTEU from making modifications to its proposals, and from using the requested information as evidence in the Panel proceedings to support its last best offers or to argue against the Agency's last best offers submitted to the Panel for decision. Thus, in the absence of any facts the Panel was able to support its imposition of new contract language primarily adopting the Agency's proposals.

The Agency's failure to respond fully and timely to NTEU's July 10, 2108 and August 2, 2018 information requests violates its statutory duty under 5 U.S.C. §7114(b)(4), demonstrates it acted in bad faith, and constitutes an unfair labor practice under 5 U.S.C. §7116(a)(1), (5), and (8).

Relief Sought By Union

It is well established in the federal sector that arbitrators have broad authority and latitude to fashion remedies for unfair labor practices. National Treasury Employees Union v. FLRA, 910 F.2d 964, 967 (D.C. Cir. 1990) (*en banc*) (The Authority is granted broad authority under the Statute to remedy unfair labor practices.); AFGE Local 1138 and Defense Commissary Agency, 49 FLRA 1211, 1212-1213 (1994); Department of Health and Human Services Region V and National Treasury Employees Union Chapter 230, 45 FLRA 737, 743 (1992) (Arbitrators have the authority to determine whether agencies have committed unfair labor practices in violation of the Statute.), citing Social Security Administration, Office of Hearings and Appeals, Kansas City, Missouri and American Federation of Government Employees, Local 1336, 29 FLRA 1285, 1287 (1987). Arbitrators are empowered to order the same remedies as the Authority in arbitrating grievances involving unfair labor practice allegations. NTEU and Federal Deposit Insurance Corporation, 48 FLRA at 570 ("[A]n arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of an unfair labor practice as those authorized under section 7118 of the Statute."). The arbitrator's remedial authority is limited only by the grounds for exceptions contained in 5 U.S.C. §7122. The remedy must not violate federal law or regulations, nor can it be deficient on the limited grounds applied by federal courts in the private sector.

NTEU has established that HHS violated §7114(b) and (c), and committed unfair labor practices in violation of 5 U.S.C. §7116(a)(1), (5) and (8) by refusing to bargain with NTEU over ground rules proposals, bargaining in bad faith, forcing permissive subjects of bargaining to impasse, and failing to respond or timely respond to NTEU's information requests. The Arbitrator should order the Agency to return to the *status quo ante*, post a notice of the Arbitrator's findings and order reflecting that the Agency violated the Statute, order the Agency to cease and desist from further violations of law, and any other appropriate remedy, as set forth more fully below.

The Union respectfully requests that the Arbitrator sustain the Grievance and order the following remedies:

- (1) The Agency Ordered to Restore the *Status Quo Ante*;

- (2) A Cease and Desist Order and Posting;
- (3) An Order Compelling Responses to NTEU's Information Requests; and
- (4) Arbitrator retain jurisdiction.

The Agency should be ordered to return to the *status quo ante* with respect to bargaining with NTEU over a successor term agreement.

It is well established that when an agency makes unilateral changes and refuses to bargain over them, a typical remedy is to return the parties to the *status quo ante*. FDIC v. FLRA, 977 F.2d 1493 (D.C. Cir. 1992). Indeed, where the agency has a duty to bargain substantively, as it did here with respect to ground rules, union offices, official time, awards, alternate work schedules, and a host of other matters open at the term bargaining table, the Authority has held that it *will* grant a *status quo ante* remedy in the absence of special circumstances. Department of Veterans Affairs Medical Center Ashville, North Carolina and American Federation of Government Employees Local 446, AFL-CIO, 51 FLRA 1572, 1580 n. 13 (1996); Federal Deposit Insurance Corporation and National Treasury Employees Union, 41 FLRA 272, 279 (1991). "The purpose of *status quo ante* relief is to place parties in the positions they would have occupied had there been no unlawful conduct." National Guard Bureau and Association of Civilian Technicians, 57 FLRA 240 (2001). Here, that requires returning the parties to the bargaining table to negotiate a ground rules agreement to govern the bargaining of a successor term contract, to provide NTEU with the information it requested on all opened contract articles so that it may bargain over those articles *with the aid of that information*, and to bargain *in good faith* over all the articles and issues open at the term table, which includes discussing the Agency's proposals and answering NTEU's questions about them. The Authority has found that a *status quo ante* remedy is required in these circumstances to effectuate the purposes and policies of the Statute and prevent rendering meaningless the statutory duty to bargain in good faith. Dept. of Navy, Naval Underwater Systems Center, Newport, Rhone Island and Federal Union of Scientists and Engineers/NAGE, Local R1-144, 30 FLRA 697, 701(1987); United States Army Adjutant General, Publication Center, St. Louis, Missouri and AFGE Local 2761, 35 FLRA 631, 634-35 (1990); Long Beach Naval Shipyard Long Beach, California and Federal Employees Metal Trades Council, 17 FLRA 511, 527 (1985) ("When an employer fails to bargain concerning a change in conditions of employment which is substantively negotiable, the Authority has held that a *status quo ante* remedy is required. "Such conclusion is supported by the literal language and the legislative history of the Statute and is necessary in order to avoid rendering meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment." U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA No. 15, at p. 119 (1982).").

A *status quo ante* remedy is warranted because the record is bereft of any evidence establishing special circumstances. The Agency had a duty to substantively bargain with NTEU over ground rules for negotiating a successor term agreement, and to substantively bargain over numerous issues in the articles open for negotiation at the term table, including matters related to employee and union space in the new articles (Employee Space) proposed by each party and in Article 9 (Union Access

to Employer Services) (Union office space is substantively negotiable. U.S. Geological Survey Caribbean District Office San Juan, Puerto Rico and AFGE Local 1503, 53 FLRA at 1042), official time for union representational activities in Article 10 (Union Representatives/Official Time), [The Authority has carved out official time under 5 U.S.C. §7131(d) as an exception to management's right to assign work under 5 U.S.C. §7106(a)(2), thus it is substantively negotiable. NTEU and U.S. Department of Commerce, Patent and Trademark Office, 52 FLRA 1265 (1997)][alternate work schedules in Article 25 (Alternative Work Schedules/Hours of Work). It is well-established that alternate work schedules are substantively negotiable. National Treasury Employees Union, Chapter 41 and U.S. Department of the Treasury, Internal Revenue Service, 57 FLRA at 643-644; 5 U.S.C. §6131(b) and (c).], Awards (Article 27) [Matters pertaining to awards are substantively negotiable. For example, the Authority has held that union participation on incentive awards committees, which was one of the central issues open in the HHS Awards article, does not interfere with a management right under 5 U.S.C. §7106(a). Dept. of Navy, Naval Underwater Systems Center, Newport, Rhode Island and Federal Union of Scientists and Engineers/NAGE, Local R1-144, 30 FLRA at 700. Nor is it a management right to determine whether to reward superior performance. NTEU v. FLRA, 793 F.2d 371, 374 (D.C. Cir. 1986). (The right to assign work and direct employees does not include the right to reward superior performance.)], and Article 50 (Health and Safety) [Preventive programs related to health and safety are substantively negotiable. Navaho Area Indian Health Service Winslow Service Unit Winslow, Arizona and Navajo Nation Health Care Employees Local 1376, LIUNA, 55 FLRA 186 (1999).] Where the failure to meet a bargaining obligation is substantive in nature, as it is here, the Authority applies the "special circumstances" test to determine the appropriateness of a *status quo ante* remedy. Air Force Logistics Command Warner Robins Air Logistics Center Robins Air Force Base and American Federation of Government Employees Local 987, 53 FLRA 1664, 1671 (1998) (Robins Air Force Base); Dept. of Defense, Defense Commissary Agency and NAGE, 59 FLRA 472, 473-474 (2003); Dept. of Justice, Immigration and Naturalization Service Los Angeles, California and American Federation of Government Employees, Local 505, 59 FLRA 387, 388 (2003) (Applying the "special circumstances" test where the agency had a substantive obligation pursuant to 5 U.S.C. §6131 to bargain over alternative work schedules).

A party opposing a *status quo ante* remedy has the burden to prove the existence of special circumstances. U.S. Army Corps of Engineers Memphis District Memphis, Tennessee and National Federation of Federal Employees Local 259, 53 FLRA at 85. This burden requires more than vague assertions without any legal support. *Id.* at 85-86. It requires that special circumstances be established by evidence in the record. Dept. of Defense, Defense Commissary Agency and NAGE, 59 FLRA at 474; Social Security Administration Office of Hearing and Appeals Montgomery, Alabama and American Federation of Government Employees Local 3627, 60 FLRA 549, 555 (2005) (Unsupported assertions are insufficient to establish that a *status quo ante* remedy is inappropriate).

There are no special circumstances present in this case that would defeat a *status quo ante* remedy, and the Agency has not introduced any evidence to support a special circumstances argument. Because it is the Agency that bears the burden to prove special circumstances and it has not met that burden, a *status quo ante* remedy returning the parties to the bargaining table first on ground rules and then on all of the substantive contract articles opened for term negotiations, is warranted and must be granted.

1. A *status quo ante* remedy is warranted under the FCI factors.

Where an agency violates the duty to bargain over the impact and implementation of changes involving the exercise of a management right, the Authority has applied the test developed in Federal Correctional Institution and American Federation of Government Employees, Local 2052, AFL-CIO, 8 FLRA 604 (1982) (FCI) to determine the appropriateness of a *status quo ante* remedy. DOJ, Federal Bureau of Prisons and AFGE, Local 3828, 55 FLRA 848 (1999). In FCI, the Authority stated:

[I]n determining whether a *status quo ante* remedy would be appropriate in any specific case involving a violation of the duty to bargain over impact and implementation, the Authority considers, among other things, (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. FCI, 8 FLRA at 606.

It is not necessary here to apply the FCI factors because this matter involves failure to bargain in good faith *substantively* over a successor term agreement, unlike FCI where the issue involved impact and implementation bargaining only. Dept. of Defense, Defense Commissary Agency and NAGE, 59 FLRA at 473-474 (The Authority applies the "special circumstances" test to determine the appropriateness of a *status quo ante* remedy where there is a substantive bargaining obligation, not the FCI factors.); Veterans Administration, Washington, D.C. and AFGE, 22 FLRA at 636. Nevertheless, application of the FCI criteria to the instant action demonstrates the absence of special circumstances and the appropriateness of a *status quo ante* remedy in this case.

The first three FCI factors establish that a *status quo ante* remedy is appropriate in this case. The first three FCI factors pertain to the notice of changes, the demand to bargain, and the willfulness of the Agency's refusal to bargain. With respect to the first and second factors, NTEU initiated the bargaining of a successor term agreement in July 2015. However, because the Agency disapproved the Panel order on ground rules on agency head review, the parties did not commence bargaining until July 2018 after the Agency unilaterally rescinded that disapproval, refused to bargain over new ground rules with NTEU, and unilaterally implemented the disapproved Panel order. Those actions resulted in bargaining under protest by NTEU, which commenced with the exchange of initial proposals by NTEU on June 11, 2018 under protest, and bargaining under protest which began on July 9, 2018. Thus, it can be said that the "notice" under FCI factor 1 was given to NTEU on May 10, 2018 when the Agency notified NTEU that it had unilaterally rescinded its disapproval of the Panel order on ground rules. NTEU asserts that notice was not valid. NTEU filed a national grievance over the Agency's unilateral implementation of the disapproved ground rules Panel order based on its rescission of that

disapproval some 16 months later, and that matter is currently pending on exceptions with the FLRA. Nevertheless, NTEU did submit initial proposals and commenced bargaining, both under protest. Because the circumstances under which the Agency provided “notice” to NTEU are the subject of ongoing litigation, and because there is no question about whether NTEU acted timely to preserve its bargaining rights, the first two FCI factors establish the propriety of a *status quo ante* remedy here.

The third FCI factor examines the willfulness of the Agency’s actions in failing to fulfill its statutory duty to bargain and to do so in good faith. The Authority has held that where the Agency intentionally refuses to bargain, even if it believes erroneously that it has no duty to bargain, the Authority will find that action willful under the FCI factors. U.S. Dept. of Justice, INS and AFGE National Border Patrol Council, 56 FLRA 351, 358-359 (2000); Department of Justice Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 55 FLRA at 906; U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky and Ronald D. Lewis, 38 FLRA 647, 649 (1990). Here, the Agency had a duty to bargain over all of the articles opened at the term table, as manifested by the fact that it asked the Panel to assert jurisdiction over all of them to resolve a bargaining impasse. Instead, it refused to discuss or bargain over any of them with NTEU, with the limited exception of some discussion of Article 2, before it insisted to impasse on all of them. As a specific example, the parties never had an opportunity to bargain over Article 25 concerning alternate work schedules. Alternate work schedules are substantively negotiable under 5 U.S.C. §6131, yet the Agency never discussed or bargained over its last best offer on July 31, 2018 striking that article in its entirety from the contract. Its mistaken belief that it could do so without bargaining demonstrates its willful disregard of its statutory bargaining obligations.

As explained in great detail above in Section V.B, NTEU has established that the Agency repeatedly and willfully violated its statutory duties by (1) refusing to bargain over ground rules, which is a mandatory subjects of bargaining; (2) repeatedly refusing to discuss its proposals on Article 2 during bargaining on July 9-10, 2018; (3) unilaterally terminating bargaining on July 10, 2018 and insisting to impasse and mediation without ever discussing 33 of the 34 open articles; (4) continuing to refuse to discuss its proposals on Article 2, and refusing to discuss *any* of its proposals on the other 33 open articles, during mediation on July 30-31, 2018; (5) repeatedly demanding during bargaining and mediation in July 2018 that NTEU submit counter-proposals on articles the parties had not yet even discussed or bargained over; (6) unilaterally terminating mediation after one day, declaring impasse and submitting last best offers on all open articles without ever discussing or bargaining over its proposals on 33 of the 34 open articles; (7) submitting last best offers on July 31, 2018 which proposed to waive statutory rights of NTEU and the bargaining unit employees, and which removed mandatory subject of bargaining from the table (e.g., alternate work schedules); (8) insisting to impasse on permissive subjects of bargaining in many of its proposals in 5 of the articles open for term negotiations; (9) repeatedly refusing to fully respond to NTEU’s July 10, 2018 information requests submitted pursuant to 5 U.S.C. §7114(b)(4); and (10) refusing to respond at all to NTEU’s August 2, 2018

information requests submitted pursuant to 5 U.S.C. §7114(b)(4). These actions are nothing short of willful, and in fact demonstrate the Agency's utter and complete disregard of its statutory bargaining obligations. These willful and illegal actions fully support the appropriateness of, indeed the need for, a *status quo ante* remedy.

NTEU was adversely impacted by the Agency's statutory violations. Under the fourth FCI factor, it is clear that NTEU was adversely impacted by the deprivation of its statutory bargaining rights. NTEU was prematurely forced by the Agency's unlawful actions to submit its initial bargaining proposals on June 11, 2018 under protest or else risk a potential bargaining waiver, or worse, the unilateral implementation by the Agency of its proposed changes to the parties' term agreement. Similarly, NTEU began term bargaining under protest on July 9, 2018, even though the parties had not negotiated or agreed to the full bargaining schedule for the successor term negotiations and did not have an enforceable ground rules agreement in effect. There was a single day of bargaining, during which the Agency substantially refused to answer NTEU's questions on the single article the parties discussed on that day, before the Agency invoked mediation assistance. There was then a single day of mediation, during which the Agency again refused to answer NTEU's questions, before the Agency unilaterally declared impasse after having only discussed at most 2 of the 34 articles opened for negotiation and submitted a request for Panel assistance on all 34 open contract articles. NTEU was forced to participate in Panel impasse proceedings, including defending against the assertion of Panel jurisdiction, without ever having had the opportunity to ask questions of the Agency about its proposals on the 34 open articles to ascertain the meaning of those proposals and how they would impact bargaining unit employees, how the Agency proposals would operate if implemented, and a host of other questions necessary for NTEU to understand and respond to those proposals.

NTEU was also harmed by the Agency's refusal to provide information requested by NTEU pursuant to 5 U.S.C. §7114(b)(4). These actions deprived NTEU of information necessary to understand and respond to the Agency's proposals during bargaining, and deprived NTEU of information it needed to participate in Panel proceedings, to support its own proposals, and rebut the Agency's proposals during those proceedings. In fact, because the Agency refused to respond to information requests and issued an untimely denial of virtually all of the information requested by NTEU on the penultimate day of Panel-ordered mediation, that necessary information was specifically unavailable for NTEU to use in its final statement of position to the Panel submitted on December 21, 2018. By these actions, the Agency's bad faith deprived NTEU of the ability to fully represent its institutional interests and the interests of the bargaining unit during bargaining, mediation, and Panel proceedings.

The only way to remedy the loss of NTEU's statutory bargaining rights is to return the parties to the bargaining table, *status quo ante*. Unless the Agency is required to return to the *status quo ante* and resume negotiations *ab initio*, NTEU will continue to be irreparably harmed. NTEU will have been deprived of its substantive statutory right to bargain over ground rules, deprived of its right to ask questions and receive answers about the Agency's term contract proposals, deprived of its statutory right to receive information necessary to respond to those

proposals and to participate in Panel impasse proceedings, and deprived of its statutory right to substantively bargain over a successor term agreement. By extension, bargaining unit employees will be irreparably harmed by the loss of their exclusive representation by NTEU concerning the matters contained in those contract articles, and in particular the 23 articles imposed by the Panel in its April 1, 2019 order. HHS and NTEU, 18 FSIP 077 (April 1, 2019). Since NTEU has no legal right to challenge a Panel order imposing contract terms, and those orders are final and binding unless disapproved on agency head review, the harm to bargaining unit employees and NTEU as their exclusive representative will be permanent, unless *status quo ante* relief is granted. 5 U.S.C. §7119(c)(5)(C); U.S. Department of Justice Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 37 FLRA at 1354-1355; U.S. Department of Justice Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 37 FLRA at 1354-1355.

A *status quo ante* remedy will not disrupt Agency operations. The Authority bases a finding of whether a *status quo ante* remedy would be disruptive to agency operations “on specific evidence in the record.” Lexington-Blue Grass Army Depot, 38 FLRA at 650. Mere argument concerning administrative burden or that special circumstances exist, without supporting evidence in the record, will not defeat the appropriateness of a *status quo ante* remedy. Social Security Administration Office of Hearing and Appeals Montgomery, Alabama and American Federation of Government Employees Local 3627, 60 FLRA at 555 (“The Authority requires any conclusion that a *status quo ante* remedy would be disruptive to the operations of an agency to “be based on record evidence.””), citing, Department of Justice Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 55 FLRA 892, 906 (1999).

There is absolutely no evidence in the record of this case to demonstrate whether, how, or to what degree the Agency operations would be disrupted if a *status quo ante* remedy is imposed. The only witnesses the Agency called at the hearing failed to address this issue. Nor did the Agency offer any documentary evidence relevant to a *status quo ante* remedy, or any other remedy. The Agency was functioning and completing its mission prior to NTEU opening the contract for renegotiation in July 2015. The Agency delayed that bargaining for nearly three years without any adverse impact on Agency operations, it disapproved the Panel Order on ground rules on January 31, 2017 knowing at the time that doing so would have the effect of stalling the negotiations, and only when the political climate was beneficial to the Agency did it finally decide in May 2018 to come to the table and resume negotiations with NTEU. There is no evidence in the record to even suggest, let alone establish, that a *status quo ante* remedy requiring the parties to renegotiate the term contract would prevent the Agency from continuing its operations.

Moreover, the April 1, 2018 Panel order imposing terms for 23 of the contract articles cannot go through agency head review or be implemented until negotiations are completed on the entire contract. Patent Office Professional Association and Dept. of Commerce Patent and Trademark Office, 41 FLRA 795, 803 (1991) (A Panel order does not become final for purposes

of agency head review until the date on which no further action is necessary to finalize a complete agreement). There are still 6 outstanding articles over which the Panel declined to assert jurisdiction on the basis of duty to bargain issues which it stated must be resolved “in the appropriate forum”. The Agency submitted revised last best and final offer proposals on these 6 articles to NTEU on December 13, 2018, in its since rejected attempt to interject them into the Panel proceedings. NTEU resubmitted last best and final offer proposals on these 6 articles to the Panel with its final Panel submission on December 31, 2018, in which it modified those proposals yet again. For the second time, in its April 1, 2019 Order, the Panel declined to assert jurisdiction over them. HHS and NTEU, 2018 FSIP 077 (April 1, 2019). Thus, not only have the Parties never bargained over the Agency’s revised proposals on these 6 articles, but NTEU asserts they still contain permissive subjects of bargaining which must be resolved in the appropriate forum. Here, the appropriate forum in which to address those disputed articles is through a petition for review of negotiability filed with the FLRA. 5 C.F.R. Part 2424. The Agency has not yet filed any such petition and there is thus no estimated date on which the outstanding duty to bargain issues will be resolved. Once any duty to bargain issues are resolved, the Parties will have to return to the bargaining table anyway to negotiate those 6 articles. If no agreement is reached, the Parties will by statute have to submit those issues to mediation. 5 U.S.C. §7119(a). If mediation does not resolve the impasse, then either party may seek the assistance of the Panel to resolve them. 5 U.S.C. §7119(b). As it has done successfully since NTEU opened the contract for renegotiation in July 2015, the Agency is fully able to continue its operations under the Parties’ expired term agreement until the term bargaining process is concluded with finality. Consequently, there is no basis to find that Agency operations would be unduly disrupted or that a delay caused by a *status quo ante* return to the bargaining table would rise to the level of a special circumstance. Absent special circumstances, a *status quo ante* remedy must be granted to effectuate the congressional intent to deter unlawful conduct and promote the remedial goals of the Statute. NTEU v. FLRA, 856 F.2d at 296 (Finding that Congress intended that unlawful conduct under the Statute must be deterred and the fullest measure of “make whole” relief must be granted.)

Here, there are no discernible circumstances that would prevent the Agency from turning back the clock. There are no special circumstances that would preclude a *status quo ante* remedy and NTEU has fully satisfied the FCI criteria. In the absence of record evidence of special circumstances, Authority precedent dictates that the *status quo ante* must be restored. U.S. Department of Justice Immigration and Naturalization Service and American Federation of Government Employees National Border Patrol Council, 56 FLRA at 359 (“In the absence of record evidence establishing that a *status quo ante* remedy is not appropriate, the Authority should restore the *status quo*.”); DOJ, 55 FLRA at 906, *citing* National Treasury Employees Union v. FLRA, 910 F.2d 964, 969 (D.C. Cir. 1990).

A *status quo ante* remedy is necessary to ensure compliance with the Statute and deter future violations by the Agency. The Authority has recognized that a “critical purpose” of the *status quo ante* remedy is to deter the Agency “from failing to satisfy their duty to bargain” and reduce the incentive to “unilaterally implement changes” and “then refuse to negotiate.” FCI,

55 FLRA at 857. Here, NTEU is entitled to a return to the *status quo ante* which existed prior to the Agency's bad faith conduct which began as early as its May 10, 2018 notice of intent to commence term bargaining under the disapproved Panel order on ground rules, and which continued throughout the bargaining process. Further, a *status quo ante* remedy is necessary to hold the Agency accountable for its violations of the Statute. There must be some meaningful consequences to its illegal actions in order to deter similar conduct by this Agency in the future. In fact, it is critically important to send this Agency a clear message now that it must bargain in good faith with NTEU and that failure to do so will have consequences, since the parties must still resolve the 6 articles over which the Panel declined to assert jurisdiction. Failure to return the parties to the *status quo ante* now will simply encourage the Agency to engage in the same bad faith conduct with respect to bargaining over those remaining 6 articles, and will send a message that it may violate the Statute with impunity, or at most a meaningless slap on the wrist.

In sum, a *status quo ante* remedy is appropriate in this case, and Authority precedent demands it because there is no record evidence of special circumstances. The Agency should be ordered to return to the *status quo ante*, which must include a return to the bargaining table to negotiate an enforceable ground rules agreement, and to bargain in good faith with NTEU over all 34 open contract articles through new impasse proceedings if necessary.

(2) A Cease and Desist Order and Posting is an appropriate remedy. The Authority typically issues cease and desist orders accompanied by the posting of a notice to employees as a remedy where it finds violations of the Statute. *F.E. Warren Air Force Base, Cheyenne, Wyoming and AFGE Local 2354*, 52 FLRA 149, 161 (1996). (Cease and desist orders and posting are ordered in virtually all cases of statutory violations.). Because the Agency violated its statutory good faith bargaining obligation and committed numerous unfair labor practices, NTEU also respectfully requests that the Arbitrator order the Agency to cease and desist from engaging in conduct that violates the Statute, including, specifically, with respect to its duty to bargain in good faith and to respond to information requests. NTEU also requests a 60-day posting of a notice on all official Agency bulletin boards, signed by the Secretary of the Department of Health and Human Services, wherein the Agency will acknowledge its unlawful conduct and its intention to cease and desist from continuing that unlawful conduct. See Department of Transportation, FAA and NATCA, 53 FLRA 312, 320 (1997) ("The Authority typically directs the posting of a notice signed by the highest official of the activity responsible for the violation."). Moreover, the request that the HHS Secretary sign the posting is warranted by case law as a means of conveying the seriousness and import of the order. The Authority has repeatedly held that requiring a responsible official to sign the notice signifies that the respondent acknowledges its obligations under the Statute and intends to comply with those obligations. See Department of Justice, Office of the Inspector General, Washington, D.C. and Immigration and Naturalization Service, El Paso, TX and AFGE, INS Council, Local 1210, El Paso, TX, 47 FLRA 1254 (ALJ) (1993) (Ordering nationwide cease and desist as a result of finding of an unfair labor practice); see also NTEU and Federal Deposit Insurance Corporation, Washington, DC, 48 FLRA 566 (1993) (An arbitrator is empowered to fashion the same remedies as the FLRA in arbitrating a grievance alleging unfair labor practices). Here, NTEU

asserts it is appropriate that the Secretary of HHS sign the posting because the Agency repeatedly and willfully violated its duty to bargain in good faith with NTEU over a successor term agreement which impacts all bargaining unit employees across HHS operating divisions. The various operating divisions are identified in Article 1 of the parties 2014 Consolidated Collective Bargaining Agreement. These include the Office of the Secretary and Administration on Aging, Administration for Children and Families, Centers for Disease control and Prevention, National Center for Health Statistics, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, and Substance Abuse and Mental Health Services Administration.

(3) An Order Compelling Responses to NTEU's Information Requests is Appropriate. The Agency should also be ordered to fully respond to NTEU's July 10, 2018 and August 2, 2018 information requests. NTEU has demonstrated that the Agency failed to fully comply with the July 10, 2018 information requests, in particular request number 1 asking for copies of all mid-term agreements between the parties since October 1, 2010. NTEU also demonstrated that the Agency failed to respond to NTEU's August 2, 2018 information requests and that its untimely countervailing anti-disclosure interests are either patently false or it failed to conduct good faith inquiries to ascertain whether and to what extent the requested information is available and subject to production. Under these circumstances, it is appropriate that the Agency be ordered to immediately conduct a search to identify all of the information requested by NTEU in the July 10, 2018 and August 2, 2018 information requests and to immediately provide that information to NTEU.

The Arbitrator should retain jurisdiction over the remedy. Finally, NTEU respectfully requests that the Arbitrator retain jurisdiction over the issue of remedies in order to resolve any disputes that may arise between the parties should the Arbitrator sustain the grievance. In U.S. Department of Veterans Affairs Denver Regional Office, Denver, Colorado and American Federation of Government Employees, Local 1557, 60 FLRA 235 (2004), the Arbitrator found that the Agency had acted arbitrarily in denying employees administrative leave following a snowstorm and created a process for employees to apply for administrative leave for the day in question. The Arbitrator then retained jurisdiction over the case to settle any disputes that arose from the implementation and administration of the process created to remedy the violation. The Authority found that the Arbitrator's retention of jurisdiction in the case appropriate.

The evidence in the record is clear. The Agency violated the Statute by refusing to bargain in good faith with NTEU, by submitting permissive subjects of bargaining to the impasse process, and refusing to respond to information requests. NTEU requests that the Arbitrator sustain the grievance, order the remedies requested herein and in the National Grievances, and retain jurisdiction to oversee the implementation of any suggested remedies.

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DISCUSSION AND FINDINGS AUGUST 7, 2018 NATIONAL GRIEVANCE

Arbitrability

Issue 1: Is the Grievance arbitrable?

Answer: Yes. The Arbitrator holds that the August 7, 2018 National Grievance is arbitrable.

The Arbitrator holds that the August 7, 2018 National Grievance is arbitrable. The Arbitrator accepts the Union contentions, application of statutory law, and cited authority. The Arbitrator finds that arbitration is proper to resolve the ULP charges contained in the National Grievance. The Arbitrator finds that the Federal Service Impasses Panel does not have jurisdiction to resolve unfair labor practice charges. The FLRA, and not the FSIP, has jurisdiction under the Statute to resolve unfair labor practice charges with arbitrators being empowered to order the same remedies as the Authority in arbitrating grievances alleging agencies committed an unfair labor practice. 5 U.S.C. §7105. As noted by the Union 5 U.S.C. 7119(c) specifically defines the Panel's limited role as follows:

The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

The Arbitrator notes the following authority cited by the Union: NTEU and Federal Deposit Insurance Corporation, 48 FLRA 566 (1993); Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP, 437 F.3d 1256, 1265 (2006) ("It is also clear that any alleged unfair labor practices must be addressed in the first instance by the FLRA – not the FSIP, the District Court, or this court.").

The Arbitrator strongly rejects the Agency argument to the effect that assertion of jurisdiction by the FSIP body makes the matter moot and therefore not arbitrable. This is not a sound argument that is based upon either fact or law. The FSIP has legal authority to take certain actions which does not include orders or making decisions on Unfair Labor Practices. The Arbitrator adopts the rationale cited by the Union in its Brief that precedent clearly recognizes that the FSIP does not have jurisdiction to decide duty to bargain issues or unfair labor practices. Applying 5 U.S.C. §7105, it is the FLRA that has the authority to "resolve issues relating to the duty to bargain in good faith," (5 U.S.C. §7105(a)(2)(E)) and also to "conduct hearings and resolve complaints of unfair labor practices" (5 U.S.C. §7105 (a)(2)(G)). Remedial authority is pursuant to 5 U.S.C. §7105 (g)(3) of the Statute which states that the FLRA may "require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter." The Statute §7116(d) provides two options to resolve an ULP allegation—through a grievance or a charge filed with the FLRA General Counsel. A timely grievance was filed alleging an ULP. The FSIP has no jurisdiction to address a formal charge of an ULP or in determining an appropriate remedy for sustained charges. As noted by the Union, the FSIP may apply existing FLRA case law to rule on the negotiability of specific proposals. This proposition is supported by the case law cited by the Union.

The complexity of issuing an appropriate remedy after the FSIP has asserted jurisdiction and issued specific decisions does not void the jurisdiction of the Arbitrator or otherwise void *ab initio* any attempt by the Arbitrator to fashion an appropriate remedy. To permit otherwise would allow a party who has acted in bad faith to continue to act in bad faith. This unlawful conduct could include delaying and manipulating guidelines with the expectation that the other party will be rendered powerless to obtain an appropriate remedy because of events which have transpired while the dispute is being processed in concurrent forums. Although the Agency is correct that FSIP has taken jurisdiction of most of the underlying articles, if the Parties arrived at FSIP as a consequence of bad faith bargaining, this delegitimizes the statutory process by running contrary to its intent. This may have a significant impact on the ability of the FSIP to fulfill its statutory mission in a fair and impartial manner. The intent is for parties to resolve their own issues directly, with FSIP being primarily designed to assist, and not substitute for, collective bargaining. The statutory framework is clear that assertion of FSIP jurisdiction does not act as a stay or otherwise supercede all other forums with concurrent jurisdiction.

Furthermore, although because of timing of the concurrent proceedings, the Arbitrator, FLRA, or court may ultimately conclude that collective bargaining activities or other events have outpaced the arbitral proceedings, this would have no effect upon customary remedies which may be available for ULP violations. For example, posting notices of bad faith bargaining can still occur regardless of the result of collective bargaining process. This is one of the specific remedies requested by the Union. Additionally, as set forth in the Union Brief, citing 1988 and 2009 cases involving NTEU and the FDIC and Customs and Border Protection, the FLRA has the authority to issue a stay of an FSIP order,

The Arbitrator also notes that Arbitrator Clark found the June 8, 2018 National Grievance filed by NTEU arbitrable. The Arbitrator's holding is consistent with his Opinion and Award. The Agency's Motion to dismiss is denied with prejudice.

Bad Faith Bargaining & ULP

Issue 2. Did the Agency engage in bad faith bargaining resulting in a violation of 5 U.S.C 7116(a)?

Answer: Yes. The Arbitrator holds that the Agency committed an Unfair Labor Practice in violation of the Statute by August 7, 2018.

The Arbitrator does not address any alleged violations or events which occurred after the August 7, 2018 date of the National Grievance because the bad faith bargaining prior to the filing of the National Grievance is more than sufficient to mandate remedial action. Once the burden of persuasion has been met, then the additional weight of the evidence of continuing violations is not material since the finding of an ULP triggers full remedial authority. The Arbitrator finds that any subsequent good faith bargaining, intervention by FMCS, or jurisdiction of FSIP, does not cure or vitiate any prior violation of the duty to bargain in good faith nor render a determination of the commission of an Unfair Labor Practice moot. To make an analogy to criminal law, if a person has committed a crime, subsequent good behavior, including remedial action or restitution, does not erase the fact that a crime was committed in the past. Once the

bargaining process has been derailed by bad faith, the other party may be affected to such an extent that its actions may no longer be considered independently of the impact of the bad faith actions. The playing field has been tilted and is no longer level and fair. The appropriate remedy is to start over from the start of coming to the table. The negotiation process will be too tainted to recover and proceed as if no bad faith bargaining had happened. This is akin to what happens when an ULP is committed by an employer during a union organizing campaign. Since the precise chilling or other adverse effects are unknown, there is a redo of the election process. The fact that there was an outcome does not make the matter moot. The Arbitrator may take all subsequent factors and behavior into consideration when fashioning the details of a specific remedy but not when issuing the ULP finding that there was a violation of the duty to bargain in good faith.

Good Faith Bargaining

There is a mutual duty under law for parties to bargain in good faith. The FSLMRS includes obligations that mandate that a party must:

- “approach the negotiations with a sincere resolve to reach a collective bargaining agreement” 5 U.S.C. § 7114(b)(1)
- “be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment” 5 U.S.C. § 7114(b)(2)
- “meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays” 5 U.S.C. § 7114(b)(3)
- “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 . . .” 5 U.S.C. § 7301(a)(12)

It is an Unfair Labor Practice under the Statute for an agency to fail to bargain in good faith. The Statute includes the following language:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

- “to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter” 5 U.S.C. § 7116(a)(1)
- “to refuse to consult or negotiate in good faith with a labor organization as required by this chapter” 5 U.S.C. § 7116(a)(5)
- “to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or 5 U.S.C. § 7118(a)(7).

The Parties cited case authority on the issue of what good faith bargaining and what constitutes bad faith violations resulting in an Unfair Labor Practice. The Union cited U.S. Geological Survey, Caribbean District Office, San Juan, PR and AFGE, Local 1503 findings that being inflexible in discussing proposals and presenting ultimatums is not acting in good faith. An unwillingness to participate in discussions or deliberations or engage in “give and take”

demonstrates bad faith. See Fed. Aviation Admin., Nw. Mountain Region, Seattle, WA and Amalgamated Transit Union Int'l cited by the Union.

The US District Court for the District of Columbia case AFGE v. Trump decided August 25, 2018 addresses conduct similar to that which occurred during the 2018 bargaining between these Parties. The Decision interprets and applies the Federal Service Labor-Management Relations Act ("FSLMRS") which is Title VII of the Civil Service Reform Act of 1978. The Arbitrator notes the NTEU cases filed on behalf of Gregory J. O'Duden were consolidated along with cases filed by lead plaintiff unions, AFSCME, National Federation of Federal Employees, FDI, IAMA W., AFL-CIO, which were joined by over a dozen other federal and private sector unions.

The findings and holdings of the Arbitrator are independent of the findings, holding and decision made by the federal district court in AFGE v. Trump. The Arbitrator does not rely upon that Decision, or the underlying Executive Orders in the analysis or findings issued herein. The Arbitrator does not consider the motivation behind the HHS Agency's bad faith bargaining conduct or whether HHS was acting in accordance with directives consistent with the Executive Orders. The Arbitrator does not issue any finding that Agency actions or behavior are derivative of, or pursuant to the Executive Orders challenged in AFGE v. Trump. The finding of the violation of the duty to bargain in good faith is based upon the actual conduct of the Agency prior to filing of the National Grievance on August 7, 2018. It is based upon an interpretation and application of the statute. The Memorandum Opinion of AFGE v. Trump was issued on August 25, 2018 after the filing of the National Grievance. An appeal was noted as having been filed on September 26, 2018.

Totality of Circumstances Standard

There is a significant amount of case law on the topic of good faith bargaining in both the public and private sectors. Application of the federal sector authority results in an analysis based upon the "totality of the circumstances" standard. The Arbitrator resolves the National Grievance pursuant to this standard to determine if bad faith happened resulting in an ULP violation by the Agency.

A totality of the circumstances is by necessity a macro approach which is comprised of "micro-actions" or factors/elements when added together are deemed sufficient to meet the criteria for bad faith bargaining. The totality rationale is that one or two actions may not be deemed of sufficient weight to tip the scale from good faith to bad faith, but the combined effect of all factors is sufficient to constitute bad faith bargaining. The sum of all the parts makes a whole, with the whole being examined with the benefit of hindsight focused on each component action or behavior. Under a totality of circumstances standard, the fact finder need not identify a specific trigger, or the precise tipping point, when the shift from a presumption of good faith to a finding of bad faith happened in the bargaining process. The neutral puts all the pieces in place and then examines the total picture to decide if it is sufficient to meet the applicable legal standard. Events may not be probative when viewed in isolation, or at the time they happened, but when viewed in the context of later events, a pattern may emerge that is convincing to the objective fact finder or neutral. Viewing this pattern, or entirety of events, here leads to a conclusion that by the time of the filing of the August 7, 2018 National Grievance, the Agency

had engaged in bad faith bargaining. The Arbitrator addresses each of the various actions and conduct of the Agency to determine if it is an element which supports a finding that the Agency failed to bargain in good faith as of the date of the filing of the National Grievance on August 7, 2018.

Bargaining Concerning December 2016 Ground Rules Decision

The Arbitrator finds that the Agency did not violate the statute by adherence to the “ground rules” or any alleged failure to revisit and revise the ground rules issued on December 31, 2016. The Arbitrator declines to include any alleged misconduct by the Agency on this issue in the “totality of the circumstances” analysis. The specific terms and conditions in the Johnson Decision are *per se* reasonable and appropriate so an insistence on following them by either Party cannot constitute bad faith bargaining. This issue was addressed in other forums. The Arbitrator declines to accept the Union invitation to address the effect on the National Grievance at hand of an approval following disapproval by the Agency head. It is not necessary for a findings supporting a decision by the Arbitrator.

To the extent that any ground rules were mutually revised at the commencement of bargaining, these revised rules govern the expectations and conduct at the table. Violations of revised ground rules may become factors in a totality of the circumstances analysis.

Conduct at the Bargaining Table on July 9, 10, 2018

The Arbitrator finds that the conduct and communications by the Agency at the table on these two days are elements in the totality of circumstances analysis which support a finding of a violation of the duty to bargain in good faith. The Arbitrator need not conclude that a violation occurred solely on what happened on these two days under the totality of the circumstances standard which examines the commencement of bargaining until the date of the National Grievance.

The Arbitrator credits the testimony offered by the Union that the Agency refused to answer questions or engage in further dialogue by declaring Article 2 “closed” on July 10th and demanding written counter-proposals as a condition precedent to further negotiation. Although it was reasonable for the Union to conclude that this was a failure to deliberate, these actions standing in isolation or combined, are found to be insufficient to sustain an ULP charge at this point in time. The Arbitrator recognizes that the Union has a strong contention that the federal district court case can be interpreted that insistence on only written proposals is *per se* a violation of the duty to bargain in good faith. Nevertheless, the Arbitrator is not convinced that what the Agency did at the table on July 9th and 10th regarding written proposals by itself crosses a bright line from conduct within an acceptable range to a clear and proven violation of the statute. This behavior is best examined in the context of the “totality circumstances” standard. The Arbitrator, however, finds that these actions have probative value when placed in the context of this legal standard. This type of negotiation style, which the Agency characterizes as “hard bargaining,” is

inconsistent with the mandates of good faith bargaining which requires dialogue in the context of the participants keeping an open mind and a willingness to consider other points of view.

Termination of Bargaining on July 10; Request for FMCS Intervention

The Arbitrator finds that the Agency request for FMCS intervention after the initial bargaining sessions on July 10th in a 3:00 p.m. email is not a violation of the duty to bargain in good faith. The Johnson Decision governing ground rules is clear and unambiguous that either Party may request FMCS intervention at any time during negotiations. This is consistent with Section 7119 (a) and (b) of the Statute. HHS had the right and discretion to request assistance. The Arbitrator agrees with HHS that standing alone the July 10th request to FMCS is not a negative initiative or bad faith bargaining. Any party should request assistance based upon any good faith beliefs that this would be positive and a productive way to further negotiations.

This HHS assumption, however, that FMCS could provide invaluable assistance to the Parties because of the “tone and tenor” of communications at the table is undermined by its own willingness to have an impasse declared after only a short period of mediation by the FMCS. Although FMCS Commissioners are highly skilled and experienced mediators, it would be unreasonable to expect that a few bargaining sessions conducted at the early stages of an agreed upon 18-week bargaining schedule would result in immediate resolution of contested articles. This is particularly true when there would be a significant impact by eliminating a number of longstanding provisions which affect significant terms and conditions of employment. Viewing the matter in hindsight how quickly the Agency moved the matter to impasse after minimal FMCS involvement does cast suspicion on the decision to seek early intervention by FMCS and to abandon the previously agreed-upon multiple week bargaining schedule. The Arbitrator, however, gives the benefit of the doubt to the Agency and declines to include the decision itself in early July to seek FMCS intervention as an element of bad faith in the totality of circumstances analysis.

FMCS Intervention; July 29-30 Sessions; FMCS Release to FSIP

The Arbitrator finds that the FMCS declaring an impasse and the release on August 8, 2018 has no impact on the issue of whether the Agency engaged in bad faith bargaining prior to impasse. Impasse and good faith bargaining must not be conflated since an impasse can be reached via either good or bad faith bargaining. At no point prior to filing of the Grievance on August 7, 2018 has the FMCS opined or otherwise addressed, either bargaining expressly or by implication, the question of if either of the Parties acted in bad faith during the bargaining process. Nothing in the content of the email communication of Commissioner Passwaters raises the issue of any bargaining conduct of either Party. The FMCS does not resolve ULP charges that occur during negotiations it is facilitating. An FMCS declaration of impasse is just that, a finding that further bargaining will likely not progress to an agreement on any of the open issues. If there is a correlation between impasse and bargaining conduct, it seems that acting in bad faith is more likely to produce an impasse than when negotiators are acting in good faith. If a

negotiator is using bad faith tactics it is logical to assume that this will make it more difficult to reach a resolution via bargaining. FMCS releasing the Parties to the FSIP as the next step in the process does not immunize either Party from a bad faith bargaining ULP charge being sustained.

It makes little sense to call upon FMCS for an early intervention yet not discuss over 30 of the 34 contested Articles via facilitated negotiators with expert mediators. This incongruent conduct is an element which supports a finding that the totality of the circumstance supports a finding that the Agency engaged in bad faith bargaining prior to the filing of the August 7, 2018 National Grievance. Standing alone even without the other past elements, it could be deemed sufficient to support a finding of bad faith. The Arbitrator finds that the Agency acted in bad faith by breaking off negotiations in July of 2018. It is bad faith to end negotiations without even discussing the overwhelming majority of Articles at issue. There were two new Articles proposed by each Party that had zero explanation or discussion. Good faith bargaining requires that there be actual bargaining, i.e., presentations, discussions, deliberations, negotiations, and a “sincere resolve to reach a collective bargaining agreement.” critical thinking and decision making prior to seeking declaration of an impasse. The Statute expressly states the parties are to “discuss and negotiate on any condition of employment.” Here the Agency unilaterally refused to participate in any bargaining on numerous conditions of employment at the heart of the daily work of the employees.

Last Best Offers

The Arbitrator finds that the Agency by forcing the submission of Last Best Offers on July 31st was an element of bad faith bargaining. Submission by a party of a LBO that was never subjected to a robust, good faith discussion and open-minded consideration consistent with the clear intent of the Statute, is improper. A LBO should be a bottom line honed after discussions. The LBOs themselves were never been vetted or refined based upon the give-and-take dialogue expected to have happened at the table itself. LBO proposals here may have been the “reach” efforts or “home run” outcomes that may be filled with fluff or throwaways common to initial proposals if they have never been discussed with a sincere resolve to reach resolution.

Totality of Circumstances

The Authority utilizes a totality of the circumstances analysis. This entails assessing the Agency’s conduct throughout the course of the negotiations. See U.S. Department of the Air Force Headquarters, Air Force Logistics Command Wright-Patterson Air Force Base and American Federation of Government Employees Council 214, 36 FLRA 524, 531 (1990) (Wright-Patterson); U.S. Geological Survey, Caribbean District Office, San Juan, P.R. and AFGE, Local 1503, 53 FLRA 1006, 1037 (1997) as cited by the Union above. This is consistent with private sector case law of the National Labor Relations Board (NLRB).

The Arbitrator holds that the combined effect of the following factors and elements overwhelmingly supports the finding that, based upon the totality of the circumstances, HHS engaged in bad faith bargaining during July of 2018.

1. Failing to follow the agreed-upon order of addressing Articles.
2. Insisting on counterproposals by NTEU for Articles 2 and 3 before robust and open-minded discussions were concluded on these two Articles.
3. Unilaterally declaring Article 2 “closed” until the submission of written counterproposals on July 30, 2018.
4. Refusing to provide any detail, metrics, or explanation how its three goals would be advanced by any specific proposal during mediation on July 30 and 31, 2018.
5. Insisting on unilaterally terminating mediation at the end of July, 2018.
6. Submitting Last and Best Offers on July 31, 2018.
7. Removing mandatory subjects of bargaining from the Parties negotiations, such as deleting Article 25 (Alternative Work Schedules), from the CBA without discussion or bargaining.
8. Removing eight subjects of bargaining Articles (13, 15, 16, 18, 21, 22, 34, and 50) in its last best offer of July 31, 2018 which included permissive subjects of bargaining. This was without prior notice or any bargaining and in violation of the limitations imposed by the FSIP 2016 Decision of Arbitrator Johnson.

The Arbitrator finds that the termination of the bargaining sessions at the end of July 2018 was a unilateral action by the Agency that was not as a result of any NTEU actions, provocations, misconduct, or bad faith bargaining. NTEU was clear and unequivocal in numerous communications that it did not believe the Parties were at impasse and that it wanted to return to the bargaining table. HHS made the unilateral decisions to force impasse and not return to the bargaining table. In addition to credible testimony, written communications supporting this finding include:

- NTEU J. Harling, Chief Negotiator, July 11, 2018, 5:38 pm to J. Murphy, HHS
- HHS J. Murphy July 17th 8:03 am to J. Harling, NTEU
- NTEU J. Harling email August 2nd 6:15 p.m. to Catherine Bird, HHS
- NTEU Content in National Grievance filed August 7, 2018
- HHS C. Bird email August 9th 12:59 pm to J. Harling, NTEU
- NTEU J. Harling email August 9th 5:02 p.m.
- NTEU K. Moffett letter August 28th to HHS General Counsel to return to unassisted bargaining
- HHS GC Charrow September 4th letter declining to return to the bargaining table

The content of some of these emails (excerpts above starting p. 11) support the Union version of the events leading to impasse and the finding of the lack of good faith by the Agency. In the HHS J. Murphy email, it acknowledges that both Parties agreed to a specific schedule of meetings. Although the Agency disputed the characterization of some of what happened at the initial bargaining sessions, the email of J. Harling on July 11th is consistent with her credible testimony which is supported by the weight of the evidence. The Arbitrator finds that the NTEU was acting in good faith in how it pursued negotiations. The Arbitrator notes in the July 17th HHS email from J. Murphy she endorses a process where the Parties would return to discuss

Articles after a counter-proposal was made while continuing to discuss other Articles. Despite this assertion, the Agency declined the NTEU requests made in August to return to the table following the “Final Offer” of the Agency submitted on July 31st, only two weeks after these communications and after only minimal involvement of the FMCS.

The Arbitrator rejects the Agency contention that “the evidence shows that it was the intransigency of both parties that caused the impasse” argued in its Brief when addressing the impasse on permissive subjects of bargaining. The evidence summarized above is clear and unequivocal that it was HHS alone who voided the 18-week agreed-upon bargaining schedule and forced the Parties to impasse. This resulted in, from a collective bargaining perspective, a premature intervention by the FSIP because the express dictates of the Statute mandating good faith bargaining were violated solely by the Agency. Although the Agency is correct that a party at the collective bargaining table cannot be forced to make a concession or accept proposals from the other side, good faith bargaining does require more than repeatedly saying no without dialogue. HHS characterized its approach as “hard bargaining.” The Agency seems to place the emphasis on the word “hard” without giving any meaning to the word “bargaining.” A refusal to discuss a proposal may be within the definition of “hard” but it is certainly not within the common usage and understanding of the word “bargaining” in labor relations. The concept of “hard bargaining” as practiced by the Agency eliminated many of the core elements of what is commonly recognized as good faith bargaining such as discussion, openness to other perspectives, reflection and deliberation, concessions, flexibility, and a willingness to engage and allow the communication process to unfold and progress at the actual bargaining table. Although the Agency claimed that the “tone and tenor” of Union communications were either heated, offensive or otherwise inappropriate, the Arbitrator finds that there is no credible evidence that the NTEU participants acted in a threatening or unprofessional manner outside of the range of conduct that is to be expected at the collective bargaining table. The Arbitrator has scrutinized all of the email communications between the representatives of the Parties without finding offensive, coercive, or language of an inappropriate tone or tenor outside the range of what could be expected under these circumstances. The Arbitrator finds that the Agency alone negatively impacted the bargaining schedule to force an impasse. The Arbitrator holds that the Agency violated the duty to bargain in good faith by the date of the filing of the National Grievance.

The Arbitrator finds that the bad faith of the Agency tainted the entire bargaining process and derailed it from normal and customary negotiations in a manner that was prejudicial to the Union. It is inappropriate to uphold and allow a de facto advantage obtained by the Agency through its own misconduct and avoidance of clear legal requirements and decades of behavior followed by the during collective bargaining negotiations for prior contracts.

REMEDY

The Arbitrator accepts the Union assertion that it is well-established that arbitrators are empowered to order the same remedies as the FLRA in arbitrating a grievance alleging the commission of an unfair labor practice. NTEU and Federal Deposit Insurance Corporation, 48

FLRA 566 (1993). The Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C.S. §§ 7101-7135, defines the remedial authority and responsibility of the FLRA. The Statute provides discretion to the Authority to fashion remedies. In 5 U.S.C. §7105(g)(3) states that the Authority may require an agency to take any remedial action it considers appropriate to implement the intent and provisions the Statute. Moreover, under 5 U.S.C. §7118(a)(7), if the Authority determines that an agency an unfair labor practice, then the Authority has the power to issue a remedial order requiring the parties to return to the collective bargaining table to renegotiate; the agreement, as now amended, can be given retroactive effect. National Treasury Employees Union v. Federal Labor Relations Authority, 856 F.2d 293, 295 (D.C. Cir. 1998).

The Panel's November 15, 2018 Decision to take jurisdiction over some of the articles the parties were negotiating at the term table does not have any effect on the broad arbitral discretion to issue an appropriate "make whole" remedy for a violation of the Statute. Likewise, any subsequent Decision of the Panel, or any future behavior at the bargaining table, regardless of FMCS assistance, does not erase or cure the initial bad faith bargaining by the Agency which caused the involvement of FSIP. The NTEU is forced into these processes by an unnatural impasse created by bad faith bargaining.

Status Quo Ante Remedy; FCI Factors

The Union cited U.S. Army Corps of Engineers Memphis District as articulating the requirement that the party opposing a *status quo ante* remedy has the burden to prove the existence of special circumstances by evidence in the record. The Arbitrator agrees with the Union that the Agency has failed to sustain its burden to support a special circumstances finding in its favor. The Arbitrator finds that there are no special circumstances which preclude a *status quo ante* remedy applying to the substantive contract articles opened for term bargaining.

In the 1982 case of Federal Correctional Institute and AFGE Local 2052, the FLRA set forth five factors is considers, among other things, in determining the appropriateness of the remedy. These factors are stated in the case as follows:

- (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon;
- (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change;
- (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute;
- (4) the nature and extent of the impact experienced by adversely affected employees;
- (5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. See 8 FLRA at 606.

The Union contends that these factors establish that a *status quo ante* remedy if appropriate. The Arbitrator finds that the Union met the notice and other criteria of FCI Factor 1. The Union contends that it and its employees will be irrevocably harmed unless the Agency is required to

return to the *status quo ante* and resume negotiations *ab initio*. The Arbitrator accepts the Union assertion that because NTEU has no legal right to challenge a FSIP order imposing contract terms, the harm to unit employees and NTEU is ongoing and permanent. The Arbitrator finds that Factors 2 and 4 are in favor of the Union. The Agency made deliberate choices to impede bargaining over a period of weeks despite repeated pleas and communications from NTEU to return to the table and to adhere to the multi-week bargaining schedule. The Agency rejection to continuing bargaining meets the general understanding of “willfulness” in its common usage and interpretation here. There is even a communication to the General Counsel of the Agency from an NTEU counsel not at the bargaining table seeking resumption of collective bargaining. This was quickly rejected by the Agency. The Arbitrator finds that Factor 4 supports the Union.

The Arbitrator finds that Factor 5 supports the Union. The Arbitrator also accepts the Union argument that there is no evidence in the Record that Agency operations would be disrupted if a *status quo ante* remedy is ordered by the Arbitrator. The Arbitrator agrees with the Union that there is no evidence that HHS has not continued its operations successfully since the NTEU first raised term bargaining in 2015. The Arbitrator finds that there would be no disruption or impairment of the efficiency and effectiveness of the Agency’s operations. The Arbitrator finds that there are no operational special circumstances precluding the *status quo ante* remedy.

A *status quo ante* remedy is necessary to ensure compliance with the Statute and deter future violations by the Agency. The Arbitrator agrees with the Union that there must be meaningful consequences resulting from the illegal actions of the Agency. The remedy should be fashioned to make the aggrieved party whole and to deter future misconduct. The Arbitrator finds that a *status quo ante* remedy is appropriate to address the Agency’s failure to bargain in good faith. The Arbitrator, however, recognizes that the Parties may have, pursuant to the FSIP, engaged in a significant amount of direct, and assisted negotiations, since the filing of the National Grievance. Some, or all of these negotiations may have been fruitful and resulted in final articles that are acceptable to both Parties. The Arbitrator does not want to undo any positive results which were achieved by mutual good faith bargaining. Therefore, if there are Articles both Parties conclude should be incorporated into the final term bargaining agreement based upon tentative agreement, then these may be excluded from the return to the table under the *status quo ante* remedy. To permit the Parties to make this determination, and to allow logistical or unforeseen issues, the Arbitrator remands the matter while retaining full jurisdiction.

Cease and Desist Order; Posting of Notice

The Arbitrator agrees with the Union that it is common for the FLRA to issue cease and desist orders and to mandate a posting of violation. The Arbitrator shall issue an order that the Agency cease and desist from engaging in conduct that violates the Statute and that it bargain in good faith. Unless mutually agreed otherwise by the Parties, there shall be a posting of a notice of commission of the Unfair Labor Practice of violating the duty to bargain in good faith. This notice shall be signed by the appropriate HHS official. Although the Union submitted a notice attached to its Brief, the Arbitrator declines to order this notice without input from the Agency. The posting issue is also remanded to allow discussion for them to obtain consensus on the

details of the posting. If they are unable to do so, each Party shall submit its proposal for the content of the notice and posting details to the Arbitrator for resolution. The Arbitrator retains jurisdiction over this and all aspects of the matter.

AWARD

The Agency's Motion to dismiss is denied with prejudice. The Grievance is arbitrable. The Agency committed an Unfair Labor Practice by bargaining in bad faith. The Agency must Cease and Desist from bad faith bargaining. The matter shall be remanded to the Parties until November 19, 2019 for them to negotiate a resolution consistent with this Opinion and Award. The Arbitrator retains jurisdiction. The Arbitrator is prepared to order the *status quo ante* remedy sought by the Union by defers issuance of it since there may have been consensus reached on a number of contested Articles since the date of the Record of this proceeding was closed. If both Parties are satisfied with any tentative agreement reached on any Article, then by mutual agreement these can be eliminated as a contested matter upon any return to the bargaining table pursuant to an arbitral remedial *status quo ante* remedy. The Agency may be required to post an appropriate notice of the statutory violations with proposed drafts submitted by each of the Parties to the Arbitrator. Either Party may Petition the Arbitrator to conduct an oral or electronic hearing, or otherwise to introduce evidence, or to make arguments that may affect the terms and conditions of any final remedy, after November 19, 2019, or upon agreement of both Parties prior to that date.

It is hereby so Ordered this 30th day of September 2019.

A handwritten signature in cursive script, appearing to read "Robert A. Creo", written over a horizontal line.

Robert A. Creo, Arbitrator
Pittsburgh, Pennsylvania