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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
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WASHINGTON, DC 20510-6300

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September 17, 2018

The Honorable Alex M. Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Azar:

I write to urge the Department of Health and Human Services (HHS) to adhere to its obligation under the Federal Service Labor-Management Relations Statute (the Statute) to bargain in good faith with its employees.¹ HHS has declared bargaining with its employees' representative to be at an impasse and has sought the assistance of the Federal Services Impasse Panel (FSIP). However, I understand that, to date, the parties have discussed only two of the 34 contract articles open for discussion with HHS refusing to explain or discuss its proposal to eliminate 21 articles entirely, including popular programs that mutually benefit employees and HHS. Further, I understand that HHS walked out on bargaining after just one full day of bilateral discussions. This conduct is inconsistent with HHS's duty to bargain under federal law, and I urge the agency to return to the bargaining table.

HHS appears to be engaging in classic "surface" bargaining, going through the motions of what it purports to be "bargaining," but with no sincere resolve to reach agreement.² This is evidenced by HHS's withdrawal from bargaining discussions after just one full day. HHS appears merely to be "checking boxes" by moving to seek mediation from the Federal Mediation and Conciliation Service and now assistance from the FSIP. However, FSIP action is only appropriate when the parties have reached a true impasse.³ Here, HHS has declared an

¹ See 5 U.S.C. § 7114(a)(4); 5 U.S.C. § 7102(2).

² *Dep't of the Air Force Headquarters 93rd Combat Support Grp. (Sac) Castle Air Force Base, California & Nat'l Ass'n of Gov't Employees, Local R12-91*, 18 F.L.R.A. 642, 652 (June 21, 1985) ("An employer must demonstrate, in order to comply with its duty in this regard, that it has discussed the issue at hand with an open mind and engaged in a 'give and take' relationship. *Limited discussions with no attempt to reach an agreement is not bargaining.*") (emphasis added); see also *Mississippi Wood Preserving Co.*, 173 NLRB 1370, 1377 (1968) (party violated duty to bargain in good faith by "merely going through the motions of collective bargaining in an effort to cloak a design to make the negotiations fail.").

³ 5 U.S.C. § 7119(c)(1) ("The [FSIP] . . . is to provide assistance in resolving *negotiation impasses* between agencies and exclusive representatives.") (emphasis added); 5 C.F.R. § 2470.2 ("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.") (emphasis added); *Patent Office Prof'l Ass'n v. Fed. Labor Relations Auth.*, 26 F.3d 1148, 1153 (D.C. Cir. 1994) ("before the Panel can employ its power, *there must first be an impasse.*") (emphasis in original).

“impasse,” but no impasse could have been reached given the lack of sincere effort to resolve disagreements via collective bargaining.

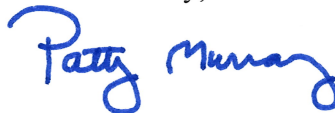
I also understand that HHS relied on Executive Orders issued by the President on May 25, 2018, to justify some of the rigid positions it took—and continues to take—during the process. On August 25, 2018, a federal court struck down the core provisions of those Executive Orders because they illegally interfered with the duty to bargain.⁴ Any reliance on these unlawful and invalid provisions is therefore misplaced. It is difficult to avoid the conclusion that this Administration as a whole does not take seriously its legal obligations under the Statute, evidenced by the issuance of the illegal, anti-bargaining Executive Orders together with the growing prevalence of bad faith bargaining behavior across federal agencies.

I urge HHS to disclaim any reliance on the President’s now-invalid Executive Orders and return to the bargaining table with a sincere resolve to reach agreement with its employees’ representatives. Additionally, I request that, no later than October 1, 2018, HHS provide answers to the following questions:

1. Which actions did HHS take prior to August 25, 2018, in reliance (in whole or in part) on Executive Orders 13836, 13837, and 13839?
2. Which actions did HHS take on or after August 25, 2018, in order to comply with the decision of the United States District Court for the District of Columbia issued on August 25, 2018 in *Am. Fed’n of Gov’t Employees, AFL-CIO v. Trump*, Case No. 18-cv-1261?
3. Which steps does HHS plan to take or not take prospectively in order to ensure that the agency complies with that decision?

Thank you for your attention to this request. If you have any questions, please contact John_DElia@help.senate.gov. I look forward to hearing from you.

Sincerely,



Patty Murray
U.S. Senator

⁴ *Am. Fed’n of Gov’t Employees, AFL-CIO v. Trump*, Case No. 18-cv-1261, slip op. at 119 (D.D.C. Aug. 25, 2018); *id.* at 88 (“various aspects of the Orders . . . violate the statutorily protected duty to bargain. This violation is most easily perceived as an illegitimate attempt to take four categories of otherwise negotiable matters off the bargaining table.”).