



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 22-01

DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE,
ARIZONA

RESPONDENT

AND

Case Nos. DE-CA-21-0125
DE-CA-21-0126
DE-CA-21-0130

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

CHARGING PARTY

Katie Norris Smith
For the General Counsel

Phillip G. Tidmore
For the Respondent

Harley Hembd
For the Charging Party

Before: CHARLES R. CENTER
Administrative Law Judge

DECISION ON SUMMARY JUDGMENT

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Although the Respondent asserts that there are facts in dispute, after reviewing the motion, response and the exhibits attached thereto, I find that summary judgment is appropriate as the relevant material facts necessary to reach a decision in this matter are not in dispute. Therefore, no hearing will be conducted and the General Counsel's motion for summary judgment is **GRANTED.**

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135, and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), 5 C.F.R. parts 2423 and 2429.

The ground rule negotiations that led to this complaint were as tortured as one might expect given the adversarial nature of the collective bargain relationship these parties have demonstrated over the course of my fifteen years as an administrative law judge with the FLRA. While some of the peripheral faces have changed, the primary actors have remained the same, as has their gamesmanship. Such recidivist behavior is a prime example of federal sector labor relations that led to the Executive Orders at issue in this case. Congress passed the Statute establishing collective bargaining in the federal sector to make government more efficient and effective. It did not establish the system to give parties opportunity to engage in recreational labor law to see which side could yank the other's chain the hardest. However, that is an accurate and fair description of the behavior these parties have demonstrated in this case, and it is hardly their first foray into such shenanigans.

On January 6, 2021, the American Federation of Government Employees, Local 2924, (Union/Charging Party) filed two unfair labor practice (ULP) charges against the Department of the Air Force, Davis-Monthan Air Force Base, Arizona, (Respondent). The first charge accused the Respondent of making a unilateral change to the conditions of employment for bargaining unit employees on December 11, 2020. On March 3, 2021, the Union amended the first charge to assert that the Respondent represented to bargaining unit employees that the contract it unilaterally implemented was agreed to by the Union.

The second charge accused the Respondent of repudiating the parties' collective bargaining agreement (CBA), supplemental agreements and past practices effective December 11, 2020. On March 3, 2021, the Union amended the second charge to assert that the Respondent had failed to maintain the existing terms of the previously negotiated agreement during the pendency of negotiating a new agreement as required by the prior CBA.

On January 11, 2021, the Union filed a third charge against the Respondent, asserting that the Respondent refused to resume bargaining on ground rule negotiations.

After investigation, a Consolidated Complaint and Notice of Hearing was issued by the Regional Director of the Denver Region on May 21, 2021, alleging that the Respondent had bargained in bad faith; interfered with employees in the exercise of their rights; and repudiated the terms of the parties' CBA. The consolidated complaint alleged that in so doing, the Respondent violated 5 U.S.C. § 7116(a)(1) and (5).

On June 15, 2021, the Respondent filed an Answer in which it admitted certain allegations within the complaint, but denied any violation of the Statute. On August 13, 2021, the General Counsel filed a motion for summary judgment with Exhibits 1a-e, 2a-d, 3, 4, 5a-f, 6-11, 12a-b, 13, 14a-d, 15a-c. The Respondent filed a response on August 31, 2021, supported by

Exhibits 1-7. On September 7, 2021, the General Counsel filed a response to the Respondent's pleading.¹

Based upon the extensive pleadings and exhibits presented by the parties, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it failed to finish the negotiation of ground rules for the bargaining of a new CBA; unilaterally imposed new conditions of employment for the bargaining unit; and repudiated the parties existing CBA by repeatedly failing to comply with the terms of their previously negotiated CBA, which specifically required that it remain in effect until negotiations upon a new CBA were completed. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is part of a federal agency within the meaning of § 7103(a)(3) of the Statute. Answer ¶4. The American Federation of Government Employees, Local 2924, AFL-CIO, is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of employees at Respondent. *Id.* at ¶5,6.

On February 18, 2020, the Respondent notified the Union of its intent to open negotiations for a new collective bargaining agreement to replace the existing CBA which went into effect on April 15, 2011. *Id.* at ¶8. On that date, the Respondent also provided the Union with its proposed ground rules. *Id.* ¶8. On February 28, 2020, the Union responded, indicating that it would submit its proposed ground rules the following week and was available to bargain over them on March 24-25, 2020. GC Ex. 4 B.2.²

On March 6, 2020, the Union provided the Respondent with its ground rule proposals which the Respondent treated as a counterproposal. Answer ¶9. On March 9, 2020, the Respondent notified the Union that it was treating its submission as a counter proposal. On March 16, 2020, approximately one month after initiating bargaining upon ground rules, the Respondent advised the Union that it was temporarily suspending the negotiation of ground rules until the National Emergency related to the COVID-19 pandemic was lifted along with the travel ban. GC Ex. 4 B.6. On April 13, 2020, the Respondent reconfirmed to the Union that it would resume bargaining upon ground rules after the National Emergency was lifted and noted that because it had provided notice of the intent to bargain a new CBA, the current CBA would expire on April 15, 2020. *Id.* B.7.

On May 18, 2020, three months after it initiated bargaining upon ground rules, the Respondent reversed its earlier position that bargaining would not take place until the National Emergency ended and proposed that ground rules and CBA negotiations be conducted by email and phone. *Id.* B.9. At that time, the Respondent presented the Union with a new proposal for ground rules and CBA negotiations which referenced use of those methods. *Id.* On May 26, 2020, the Union advised that it did not agree with conducting negotiations in that manner. *Id.*

¹ As this case is decided upon a motion for summary judgment, there is no need to further address the Respondent's second motion to reschedule initially denied by an order issued on July 19, 2021.

² The B#, reflects the page numeration added to the original document afterwards using the Bates system.

B.10. On May 28, 2020, the Respondent suggested that negotiations be conducted face to face using a video conferencing platform and gave the Union a new set of proposed ground rules that included bargaining using those methods of communication. *Id.* B.11

Those methods were also rejected by the Union, and on June 12, 2020, the Respondent advised the Union that it had secured a location for in person negotiations and the building would be available from 8 am to 2 pm. *Id.* B.12. At that point, the Respondent returned to the version of proposed ground rules originally sent to the Union on February 18, 2020, and provided the Union with another copy. *Id.* On June 16, 2020, the Respondent acknowledged that it had failed to designate a date for the in person negotiations at the location previously identified and that it was proposing to negotiate three days later on Friday, June 19, 2020. *Id.* B.13. Thus, as a result of the COVID-19 pandemic, the first date the Respondent proposed for in person negotiation of ground rules was over four months after giving notice of its intent to bargain. On that same day, the Union advised that Friday negotiations would not work and that it was unavailable that coming Friday. *Id.* B.14. The Respondent replied that same day and indicated that a new location, previously used for other negotiations was available on June 24, 2020, from 8 am to 4 pm and that it would have two negotiators present. *Id.* B.15. On June 19, 2020, the Union informed the Respondent that the location was acceptable, but that negotiations could not take place the following week because AFGE personnel were under travel restrictions. *Id.* B.16.

On June 25, 2020, the Respondent notified the Union that it had scheduled a conference call for Monday, June 29, from 1200-1500 hours for the negotiation of ground rules and that management would have two participants. *Id.* B.17. On June 26, 2020, the Union advised the Respondent that it would try to negotiate by telephone but that it could not do so on the proposed date, indicating that July 14, 2020, would work for the Union. *Id.* B.18. On July 7, 2020, the Respondent agreed to the July 14 date. *Id.* B.19. On that date, the parties met via a telephone call and agreed upon some ground rule provisions. On July 16, and Respondent forwarded to the Union the ground rules that had been agreed to "so far". *Id.* B.20. On July 27, 2020, the Respondent contacted the Union to confirm that negotiation of the ground rules could continue on August 11, 2020, and the Union confirmed that date in a response sent on July 30. *Id.* B.21-22. However, the August 11 negotiation did not occur after official time for one of the Union participants was not approved in writing prior to the scheduled bargaining session. *Id.* B.23-27.

On August 12, 2020, the Respondent proposed additional telephone negotiations on August 20. *Id.* B.28. The Union responded that same date indicating that August 20 would not work and proposed August 26 or 27, while advising that an arbitration the first week of September and jury duty the second week of that month would preclude use of those dates for negotiation. *Id.* B.29. In reply on August 14, the Respondent suggested using August 17 or 18, and 26 or 27. *Id.* B.30. On August 17, the Union advised that August 27 at 9 am was good and additional bargaining over ground rules took place on that date. *Id.* B.31.

On August 31, 2020, the Respondent proposed to continue negotiation of the ground rules on September 1 or 3, 9 am to Noon. *Id.* B.32. On that same day, the Union reminded the Respondent that, as previously disclosed, it was not available the first two weeks of September, and proposed sometime the week of September 14, while advising that only afternoon hours

would work on September 14th and 17th. *Id.* B.33.

On September 2, 2020, the Respondent, citing the six week time period for ground rule negotiations recommended as reasonable in Executive Order (EO) 13836 Section 5(a), unilaterally announced that telephone negotiations were scheduled from 0900-1500 on September 7 through 11, and that they would be conducted “each day to negotiate the ground rules every day until we are finished.” *Id.* B.34. The Union replied on the same date, pointing out that among other things, September 7 was a federal holiday and again suggesting times on September 14, 16 and 17. *Id.* B.35. On September 3, 2020, the Respondent asked the Union if the jury duty previously cited as the reason for unavailability the second week of September was telephone stand-by or if reporting to the court was required. *Id.* B.36. On that same day, the Union replied that it would not know the requirements of jury service until the following Sunday. *Id.* B.37. The Respondent then inquired if the Union would be willing to negotiate that week if jury duty only involved telephone stand-by. *Id.* B.38. The Union replied, indicating it was available contingent upon jury duty obligations, but that the availability of other Union participants would have to be determined. *Id.* B.39. The Respondent then attempted to ascertain the availability of the other Union negotiators. *Id.* B.40.

On September 9, 2020, the Union advised the Respondent that it was available for negotiations the following morning so long as its negotiators were released for use of official time. *Id.* B.42. On the same day, the Respondent advised that it was available and inquired about the time to start. *Id.* B.43. On September 10, 2020, the Union informed the Respondent that the Respondent had not notified the other Union negotiators of the accepted date and attempted to ascertain the official time status of the other negotiators. *Id.* B.44-45. Negotiations did not occur because the other Union negotiators had not requested or been approved for use of official time because they were unaware that the negotiation session had been agreed upon.

On September 14, 2020, the Respondent contacted the Federal Mediation and Conciliation Service (FMCS) to request mediation assistance with the ground rule negotiations. R. Ex. 1 p.5. On September 17, 2020, the FMCS advised the Respondent that the Union did not think mediation was needed at that time, and in reply, the Respondent requested that the FMCS continue its efforts at mediation. *Id.* On September 23, the FMCS advised the Respondent that the Union continued to assert that mediation was not presently needed. *Id.*

On September 24, 2020, the Respondent declared impasse upon the ground rule negotiations, citing the six week period for ground rules negotiation in EO 13836 and the Union’s refusal to go to mediation with the FMCS. GC Ex. 4 B.46. On that same date, the Union responded, asserting that the Respondent was the reason additional negotiation sessions had not taken place and that declaring impasse before all the ground rule proposals were addressed was bad faith bargaining. *Id.* B.48. On September 25, the Union sent an email to the Respondent expanding upon its claims about who was responsible for delays in the negotiation of ground rules and offering additional dates and times the following week. *Id.* B.48-50. On October 1, 2020, the Respondent proposed that additional negotiation upon the ground rules take place on October 5, 2020, having mistakenly used September 5 in an earlier email. However, that was a date the Union had declared unavailable in an earlier email due to scheduled leave. *Id.* B.51-55.

On October 14, 2020, the Respondent filed a grievance with the Union alleging bad faith tactics were being used to stall ground rule negotiations. R. Ex. 1 p.6. On October 20, the Union denied the Respondent's first step grievance. G.C. Ex.1 B.57. On October 26, 2020, the Respondent requested that the Union negotiate ground rules from 28 October through October 30, 2020, between the hours of 9 am and 1pm. *Id.* B.58. On October 27, 2020, the Union informed the Respondent that it was not available on those dates and proposed to negotiate on November 4th or 5th. *Id.* B.59. On October 30, having not heard from the Respondent, the Union made a second inquiry about negotiating on November 4th or 5th, but advised that jury duty could preclude the use of those dates. *Id.* B.60. On November 4, 2020, the Union informed the Respondent that those dates would no longer work and proposed negotiating the ground rules on November 12, 2020. *Id.* B.62.

On November 10, 2020, the Respondent invoked arbitration for the grievance filed on October 14. *Id.* B.63. On November 12, 2020, the Union advised the Respondent that arbitration was not available because the Respondent had not filed a Step 2 grievance within 10 days of receiving the Union's denial of the Step 1 grievance on October 20. *Id.* B.64. Having obtained a list of potential arbitrators, the Respondent on November 24, 2020, asked the Union when it wanted to strike arbitrators from the list. *Id.* B.65. On that same date, the Union advised the Respondent that it had no idea what it was trying to do, as the grievance was resolved and finalized when a Step 2 grievance was not filed. *Id.* B.66.

On December 1, 2020, the Respondent asked the Union if it was refusing to submit to arbitration. *Id.* B.67. On that same date, the Union expanded upon its explanation that the Respondent had not followed the grievance process set forth in their CBA and thus, arbitration was not available. *Id.* B.68. On December 2, 2020, the Respondent explained its opinion that the procedural issue raised by the Union was a threshold issue for the arbitrator. *Id.* B.69. On that same date, the Union proclaimed that the grievance had died after the decision upon the Step 1 grievance (as identified by the Respondent) was not taken to Step 2 of the grievance process, let alone to the Step 3 level necessary to invoke arbitration under the CBA. *Id.* B.70.

On December 4, 2020, the Respondent notified the Union via email that its last best offer for a new CBA was attached. *Id.* B.73. The attached documents consisted of a memorandum explaining its last best offer and the basis for making it, along with a new contract. The memorandum requested that the Union sign the new contract and declared that it would go into effect on December 11, 2020, whether or not the Union agreed with and signed the new contract. GC Ex. 8, 9.

On that same date, the Union replied by telling the Respondent they were currently bargaining over ground rules and not a collective bargaining agreement, and that once ground rules were established, it would respond to the Respondent's proposals for a new CBA. Further explaining that no CBA proposals had been exchanged or bargained over, and explaining that bargaining upon CBAs containing mandatory subjects of bargaining was not the same as bargaining over a change to conditions of employment through the exercise of management rights. GC Ex. 1 B.74-75. On December 7, 2020, the Respondent reminded the Union that its last best offer would be effective on December 11, 2020. *Id.* B.78. On December 8, 2020, the

Union informed the Respondent that it was not a party to the document presented as a last best offer and that indicating otherwise within the document was a misrepresentation. The Union also indicated that it remained ready to continue bargaining upon ground rules, offering the date of December 17. *Id.* B.76-77.

On December 14, 2020, the Respondent sent what it called a new CBA for Davis-Monthan AFB to the Union. *Id.* B.80. That document was signed by Colonel Joseph Turnham. On December 16, 2020, the Union informed the signatory that the document erroneously indicated that the Union was a party, and that its implementation was illegal. The Union offered the signatory a five day grace period before seeking legal recourse and invited him to discuss the matter with the Union. *Id.* B.81-82. After the new document was signed by Colonel Turnham, it was distributed to managers at Davis-Monthan AFB, with guidance indicating that it superseded all previous collective bargaining agreements and made substantial changes that should now be used when dealing with employees. GC Ex. 11. Since the unilateral implementation of the new contract on December 11, 2021, the Respondent has used the provisions set forth therein when dealing with issues involving bargaining unit employees.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent prematurely declared an impasse in the negotiation of ground rules; illegally and unilaterally implemented a new collective bargaining agreement by making a last best offer for a new collective bargaining agreement before negotiations were started; improperly misrepresented the nature of the document it unilaterally implemented to bargaining unit employees; repudiated the parties existing CBA by failing to comply with the provisions of the duration article therein; and improperly refused to negotiate ground rules, in violation of § 7116(a)(1) and (5) of the Statute. The GC submits that the appropriate remedy for the violations is the posting of a notice of violation, imposition of a status quo ante remedy and an order to make whole any bargaining unit employees adversely affected by the Respondent's failure to comply with the terms and conditions of the 2011 CBA that remained in effect until an agreement upon a new CBA was reached.

Respondent

The Respondent contends that the Union bargained in bad faith upon the ground rules for the negotiation of a new CBA, and that Executive Order 13836 obligated it to unilaterally impose a new collective bargaining agreement in response to the Union's unreasonable delay, which it contends was an intentional effort to avoid negotiating a new CBA that would be subject to the requirements set forth in Executive Orders 13836 and 13837.

ANALYSIS

In an effort to characterize the effort to reach agreement upon ground rules for the negotiation of a new CBA in a manner consistent with their theory of the case, the GC and

Respondent devoted a substantial amount of paper and toner to present extensive explanations of the parties' behavior from February 2020 through December 2020. However, the material genuine issues of fact necessary to resolve this matter are simple and not in dispute.

In February 2020, the Respondent provided notice of its intent to negotiate a new CBA to replace the agreement that had been in effect since April 2011. Article 38 of the existing 2011 agreement covered Duration and Section 2(b) of that article states:

The present Agreement will remain in full force and effect during the re-negotiation of said Agreement, until such time as a new agreement is approved.³

After initial ground rule negotiations were delayed by the Respondent in response to the COVID-19 pandemic, negotiation of the ground rules took place in July and August, and while those negotiations resulted in an agreement upon some terms, a complete agreement upon ground rules was not reached. After additional negotiation upon ground rules were impeded in the fall of 2020 by scheduling issues, miscommunication, and Respondent's alternative efforts, including pursuit of a grievance, attempted arbitration⁴, and attempted mediation, the Respondent used the recommended bargaining times set forth in EO 13836 Section 5(a), to justify making a last best offer of an entirely new contract, contending that the time which had elapsed in the course of negotiating ground rules demonstrated that the Union had engaged in bad faith bargaining.

The EO used by the Respondent to justify its last best offer and the unilateral implementation of a new contract contains guidance in Section 5(a) that agencies use their best effort to negotiate ground rules within six weeks, and negotiate a term CBA within four to six months. However, Section 9(c) of that EO contains more than mere guidance about reasonable times for an agency use to complete negotiations, it specifically and unequivocally states:

Nothing in this order shall abrogate any CBA in effect on the date of this order.⁵

³ The Respondent's failure to cite or discuss this provision in its response, despite it being fatal to its argument that the 2011 agreement ceased to be effective when it unilaterally issued a new contract that was not negotiated could be construed as a deliberate attempt to mislead the adjudicator.

⁴ The Respondent contends that the Union had an obligation to proceed to arbitration. However, it did not file a ULP over the Union's refusal and while the grievance article of the CBA gives management the right to file a grievance, it is silent with respect to the process to be used or what steps must be completed before arbitration can be invoked. In the absence of a process to be used for a management grievance, the Union applied the same three step process it is required to use under the terms of the CBA. While illogical and inefficient given the unified nature of the Union's structure which would result in the same Union official answering the grievance three times before arbitration could be invoked, the Respondent cannot demonstrate that it was entitled to a different process under the terms of the CBA and the Union's application of the only process set forth therein cannot be shown to be improper. More importantly, any ULP related to the arbitration dispute is not a matter present in this case and thus neither the arbitration dispute nor the issue of a grievance precluding a ULP for bad faith bargaining will be further addressed.

⁵ The companion EO 13837, which imposed limits upon official time, contained an identical restriction upon abrogation of existing CBAs in its Section 9(a).

As the EO was issued on May 25, 2018, when the Duration Article 38 of the April 2011 CBA was in effect, nothing in the EO relied upon by the Respondent to justify its unilateral implementation of a new contract abrogated the prior CBA's requirement that it remain in full force and effect during any renegotiation of said agreement until such time as a new agreement was approved. That was the controlling language previously agreed to by the parties in the course of collective bargaining and the EO did not alter or abrogate those previously agreed upon terms.

While Respondent contends that it "was obligated to follow Executive Order 13836, Section 5 (c)(ii) in unilaterally implementing its last best offer...", this myopic view of the EO is woefully mistaken for several reasons when the entirety of the Executive Order is considered. First, as explained above, the EO could not be used to abrogate a duration provision previously agreed to by the parties that was in effect at the time the EO was issued.

Second, while Section 5(c) of the EO directs that an agency consider certain options when bargaining is delayed or impeded by a representative's failure to comply with the duty to negotiate in good faith, it does not obligate an agency to unilaterally implement a proposed new contract. In fact, the first option it directs an agency to consider is the filing an Unfair Labor Practice (ULP) complaint. More importantly, the EO authorizes the unilateral implementation of a proposed "new contract, memorandum, or other change in agency policy" only when the collective bargaining representative does not offer counter-proposals in a timely manner. In this case, the Respondent implemented a new contract in response to unfinished ground rule negotiations for which the Union submitted proposals and no negotiation upon any proposal for a new CBA had taken place.

Until December 4, 2020, the parties had not exchanged proposals or engaged in any discussion, let alone negotiation of proposals for a new CBA. They had only exchanged and negotiated ground rules and they reached agreement upon some of those. Further, when the Respondent presented the Union with its proposed new contract, it did not invite counter-proposals or negotiation; it simply gave the Union seven days to decide if it would sign the unilaterally drafted document which substantially altered the parties existing 2011 CBA. The Respondent informed the Union that the new contract would be effective on December 11, whether or not it signed the document or if it failed to disclose its intent. Thus, even if Section 5(c)(ii) could be invoked against the Union in this case, it could not be used to impose a new contract when no negotiation had taken place, nor was the Union given an opportunity to submit counter proposals. The failure to comply with the duty to negotiate in good faith which is a condition precedent to the consideration of either Section 5(c)(i) or (ii) is not present when no negotiations upon a new contract are even attempted by an agency. In short, even if Section 5(c)(ii) could be applied in this case, the Respondent did not comply with the requirements necessary for unilateral implementation of a new contract.

That the Respondent's application of Section 5(c)(ii) to failed ground rule negotiations was misguided is further demonstrated by the fact that negotiations to establish ground rules are the specific subject of Section 5(a) which clearly directs that when "...negotiations to establish ground rules that do not conclude after a reasonable period should, to the extent permitted by

law, be expeditiously advanced to mediation and, as necessary, to the Panel⁶.” While the Union rejected the Respondent’s claim that an impasse had occurred and contended that mediation was not yet necessary because further negotiation needed to occur; if the Respondent felt that an impasse upon the negotiation of ground rules was present, the appropriate response under the directive of the EO was to advance the impasse to FSIP.⁷ Furthermore, the fact that the Respondent considered the parties at impasse demonstrates that its argument that the Union waived the right to bargain is completely without merit. Having bargained to impasse, the Respondent could either submit the unresolved matters to FSIP, or, if it believed the impasse was a function of bad faith bargaining it could pursue a ULP⁸. However, an inability to reach agreement during bargaining over ground rules is the antithesis of a bargaining waiver.

Finally, the overreach of the Respondent’s effort to unilaterally implement a new contract on the basis of the recommended times periods set forth in EO 13836 is revealed improper when those times periods are applied in this case.⁹ Renewal of the parties’ effective agreement on April 15, 2020 was precluded when the Respondent provided notice of its intent to negotiate a new contract. However, negotiations were unilaterally suspended by the Respondent until May 18, 2020 due to the COVID-19 national emergency. Given that the EO allots six weeks as reasonable for the negotiation of ground rules, that period would run from mid-May to the start of July 2020; and when the allotted six months for the negotiation of a term CBA is also applied, the reasonable period that would preclude an allegation of bad faith bargaining ran through the end of December of 2020. Thus, even if such time periods were applicable in this case, and even if they were hard fixed limits rather than recommended periods, and even if negotiation over a new contract had taken place and all of the delay could be attributed to the Union, the lapse in time would not have given the Respondent the authority to declare that the delay evidenced the bad faith bargaining necessary to unilaterally impose a new contract on December 11, 2020. The Respondent’s assertion that it was obligated to unilaterally implement a new contract because the Union caused the time periods set forth in EO 13836 Section 5(a) to be exceeded is specious.¹⁰

6 Federal Services Impasses Panel (FSIP), as identified in Sec. 3(d)(ii) of the EO.

7 Negotiation of ground rules is not covered by the parties 2011 CBA, thus, the restriction upon abrogation of an existing CBA set forth in Section 9 of EO 13836 would not apply. However, the use of Section 5(c)(ii) is limited to “...a new contract, memorandum, or other change in policy...” thus, the only options for dealing with a failure to comply with the duty to negotiate ground rules in good faith are those set forth in Section 5(a) filing with the Impasse Panel or 5(c)(i) filing a ULP. The Respondent elected to pursue neither of those options in response to its belief that the Union was negotiating in bad faith.

8 The Respondent’s ability to file a ULP may have been precluded by its earlier grievance over bad faith bargaining but that question is not at issue.

9 Despite its vigorous effort to invoke Section 5(c) of the EO, the Respondent presented no evidence that it complied with Section 4(a)’s directive that a report with recommended language be prepared “...on operative term CBAs at least 1 year before their expiration or renewal date.” If no such preparation was completed, the effort to execute other portions of the EO was, at best, misguided, and demonstrates that the Respondent failed to comply with the directives in the EO that would preclude its actions.

10 It is significant to note that the Respondent’s sudden haste to not only resolve the negotiation of ground rules but to suddenly and unilaterally implement a new contract which had never been negotiated upon and incorporated limitations upon the use of official time set forth in the companion Executive Order 13837, occurred after the result of the November 3 Presidential election was known and it was anticipated that the EOs issued on May 25, 2018, would be rescinded by the incoming Executive. In fact, said rescissions

Because EO 13836 Section 5(c) did not give the Respondent a legitimate basis for unilaterally implementing a new contract in response to unsuccessful ground rule negotiations, its actions in issuing and applying a new contract to bargaining unit employees; misrepresenting the origin of the contract; refusal to comply with the terms of the existing 2011 CBA which remained in effect; and refusal to continue negotiation of ground rules for bargaining over a new agreement violated § 7116(a)(1) and (5) of the Statute.

REMEDY

The Authority has broad discretion under the Statute to fashion appropriate remedies for unfair labor practices.¹¹ The Authority has determined that absent special circumstances, status quo ante is appropriate when an agency implements a change without fulfilling its obligation to bargain.¹² A return to the status quo ante directing the parties to honor and abide by the terms of the 2011 CBA until a new agreement is approved is hereby ordered because it effectuates the purposes and policies of the Statute and ensures that the obligation to bargain is not rendered meaningless.¹³ The parties agreed that the prior CBA would remain in effect until they negotiated a new one and they must comply with their agreed upon provision.

In addition to returning to the status quo, the traditional remedies of a cease and desist order and notice to employees, along with nontraditional remedies are appropriate in this case.¹⁴ In *Warren*, the Authority set forth the standard for assessing whether nontraditional remedies are appropriate in an individual case:

[A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.¹⁵

Consistent with the standard in *Warren*, the Respondent is directed to rescind all decisions on grievances that it denied by application of the unilaterally implemented 2020 contract, issue new decisions on those grievances in accordance with the 2011 CBA, and consider any future grievances filed due to issues related to the use and enforcement of the unjustified 2020 contract as timely when filed. The purpose of this remedy is to return

were issued by the new Executive on January 22, 2021.

11 See *National Treasury Employees Union v. FLRA*, 910 F.2d 964 (D.C.Cir.1990) (en banc) (*NTEU v. FLRA*).

12 *Fed. Deposit Ins. Corp.*, 41 FLRA 273, 279(1991); *US Dep't of Health & Human Serv. Soc. Sec. Admin., Seattle, Wash.*, 37 FLRA 880, 891 (1990); *Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 35 FLRA 153, 155-56 (1990).

13 *Dep't of Veterans Affairs, Veterans Admin. Medical Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 179, 191 (1992); *US Army Adjutant General, Publications Ctr., St. Louis, Mo.*, 35 FLRA 631, 634-35 (1990).

14 See *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 161 (1996) (*Warren*).

15 *Id.* at 161.

bargaining unit employees adversely affected by Respondent's improper unilateral implementation of a new contract to the situation in which they would have been had the improper actions not occurred.¹⁶

The Respondent is also directed to post at all locations used for communication with employees the attached Notice to All Employees signed by the Commander, 12th Air Force (Air Forces Southern), Davis-Monthan Air Force Base, Arizona.¹⁷ In addition, a copy of the signed notice must be electronically distributed to all bargaining unit employees at Davis-Monthan Air Force Base, Arizona.¹⁸ The distribution must include acknowledgement that the unilaterally drafted and implemented contract issued on December 11, 2020, is rescinded, and that the 2011 CBA will remain in effect and be followed until a new CBA is negotiated and agreed upon. A copy of the effective 2011 CBA must be attached to the email and the employees must be informed that any employee affected by the application of the 2020 contract may contact the Union at 520-745-3858 or afgelocal2924@qwestoffice.net.

CONCLUSION

The Respondent committed numerous violations of § 7116(a)(1) and (5) of the Statute when it improperly and unilaterally implemented a new contract on December 11, 2020, and applied the terms set forth therein to bargaining unit employees who were covered by a 2011 CBA that remained in effect, and then used that unilateral implementation to refuse to negotiate ground rules for the negotiation of a new successor CBA. Accordingly, the General Counsel's Motion for Summary Judgment is **GRANTED**. It is recommended that the Authority adopt the following order:

ORDER

Pursuant to Section 2423.41(c) of the Rules and Regulations of the Authority and Section 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of the Air Force, Davis-Monthan Air Force Base, Arizona (Respondent) shall:

1. Cease and desist from:
 - (a) Enforcing the unilaterally drafted contract it improperly implemented on December 11, 2020.
 - (b) Repudiating the parties' 2011 collective bargaining agreement, which, consistent with the duration clause agreed to by the parties, remains in effect until a new collective bargaining agreement is renegotiated and approved.
 - (c) Refusing to bargain with the American Federation of Government

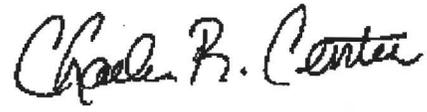
¹⁶ *Nat'l Fed. Of Fed. Employees, Local 1827*, 49 FLRA 738, 748 (1994); see *Dep't of Health and Human Svcs., Social Security Admin., Dallas, Tex.*, 32 FLRA 521, 525 (1988).

¹⁷ *U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699 (2000).

¹⁸ *U.S. Dep't of Justice, Fed. BOP. Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

- Employees, Local 2924, AFL-CIO over ground rules for and the negotiation of a successor collective bargaining agreement;
- (d) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.
2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:
- (a) Rescind the unilaterally drafted contract it improperly implemented on December 11, 2020;
- (b) Rescind all decisions on grievances denied by application of the unilaterally drafted contract improperly implemented on December 11, 2020, and issue new decisions on those grievances in accordance with the terms of the effective 2011 CBA, and consider all grievances filed due to issues related to the use and enforcement of the unilaterally implemented contract as timely when filed;
- (c) Negotiate in good faith with the American Federation of Government Employees, Local 2924, AFL-CIO over a successor collective bargaining agreement to replace the 2011 CBA that remains in effect until those negotiations are completed and the new collective bargaining agreement is approved;
- (d) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, 12th Air Force (Air Forces Southern), Davis-Monthan Air Force Base, Arizona, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and all other places where notices to employees are normally posted. Reasonable steps should be taken to ensure that such Notices are not altered, defaced, or covered by any other material.
- (e) In addition to the physical posting of paper notices, the Notice shall be distributed electronically through email to all bargaining unit employees by the Commander, 12th Air Force (Air Forces Southern), Davis-Monthan Air Force Base, Arizona, and the email accompanying the Notice shall state, "The December 11, 2020 APF Bargaining Agreement is rescinded. The 2011 APF Collective Bargaining Agreement will remain in effect until a new CBA is executed. A copy of the effective 2011 APF CBA is attached to this email. Employees affected by the application of the unilaterally drafted contract improperly implemented on December 11, 2020, can contact the Union at 520-745-3858 or [afgelocal2924 @qwestoffice.net](mailto:afgelocal2924@qwestoffice.net)."
- (f) Pursuant to Section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing within thirty (30) days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, D.C., October 21, 2021

A handwritten signature in black ink that reads "Charles R. Center". The signature is written in a cursive style with a large, prominent "C" at the beginning.

CHARLES R. CENTER
Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Department of the Air Force, Davis-Monthan Air Force Base violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to abide by this notice:

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in working conditions prior to bargaining with the American Federation of Government Employees, Local 2924, AFL-CIO (Union) to the extent required by law or unilaterally draft a contract that is improperly implemented and purports it was reached in agreement with the Union.

WE WILL NOT refuse to negotiate in good faith with the Union over a successor collective bargaining agreement.

WE WILL NOT repudiate the 2011 Collective Bargaining Agreement, which, consistent with the terms previously agreed to by the parties, remains in effect until a new agreement is negotiated and approved.

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

WE WILL rescind the unilaterally drafted contract improperly implemented without negotiation on December 11, 2020, and abide by the 2011 Collective Bargaining Agreement until a new successor Collective Bargaining Agreement is negotiated by the parties and approved.

WE WILL rescind all decisions upon grievances that were denied by application of the unilaterally drafted contract implemented on December 11, 2020, and issue new decisions on those grievances which are consistent with the 2011 CBA, and consider any grievances filed due to issues related to the use and enforcement of the unilaterally drafted contract as timely when filed.

WE WILL resume bargaining with the Union over a successor Collective Bargaining Agreement to the 2011 Collective Bargaining Agreement, which remains effective until those negotiations result in a new agreement that is approved by the parties.

Department of U.S. Air Force,
Davis-Monthan Air Force Base

Dated: _____

, Commander
Davis-Monthan Air Force Base

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Blvd., Suite 446, Denver, Colorado 80204, and whose telephone number is: (303) 331-5300.