



To: Patrick Nagle, Chief Administrative Law Judge
From: Melissa McIntosh, AALJ President
Date: August 10, 2020
Subject: Bad Faith Bargaining, Illegal Implementation of Partial CBA, and Unilateral Change Grievance Step Three

¹Pursuant to Article 10, Grievance Procedure, of the National Agreement (the Collective Bargaining Agreement) between the Association of Administrative Law Judges (AALJ), International Federation of Professional and Technical Engineers (IFPTE), AFL-CIO, and the Social Security Administration, Office of Disability Adjudication and Review (known as Office of Hearing Operations, or OHO) the AALJ files this grievance on behalf of the Union.

This grievance is filed at Step 3 of the Grievance process pursuant to Article 10, Section 6. “The grievance shall be filed at the Step at which the subject matter of the grievance arose.”

Article 10, Section 2: “A grievance is defined as any complaint:...By any Judge, the AALJ, or the Employer concerning: 1. The effect or interpretation, or a claim of a breach, of this Agreement; or, 2. Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.”

Article 10, Section 3: “The AALJ has the right to file, as a grievance under this contract, any alleged unfair labor practices (ULP).”

October 18, 2018 Negotiated Ground Rules:

IX. Executing the Agreement

A. As the parties reach tentative agreements on contract articles, the Chief negotiators or designees and up to two (2) additional members of each Negotiating Team will signify tentative agreement by signing and dating those articles, and also they will initial each page.

B. Within two (2) weeks of an agreement of the parties on all articles or impasse panel decision, two (2) representatives from each side shall meet via technology, on one or more days as needed, to prepare a

¹ The Union disputes the legality of the unilaterally imposed Article 10, Grievance Procedure, and Article 11, Arbitration Procedures, Imposed on August 10, 2020. There is no step 3 process in the August 10, 2020 version. As such, in order to avoid unnecessary threshold disputes, it is acknowledged that should the imposed articles be found lawfully imposed, the grievance should be considered to have been filed at step 2.

proofread (e.g., typos, citations, abbreviations, and consistency in terminology) final version of the new CBA.

C. The dates for this process during this two-week period shall be jointly agreed to by the parties. During this meeting, substantive changes will not be made to the CBA.

D. The Union shall have sixty (60) calendar days after signature of the new CBA to ratify, unless otherwise agreed to by the Parties. If ratified, the Agency will have thirty (30) calendar days after being notified that the ratification process is complete to complete Agency head review. If the Agreement fails ratification, the parties will resume negotiations on the Agreement within one week of notification. The session will be a one-week five-on-five session.

E. The executed new CBA will be subject to the appropriate review and clearance by the Agency head pursuant to 5 U.S.C §7101 et seq. (Emphasis added.)

VIOLATION 1: The Agency has engaged in bad faith bargaining by violating the negotiated ground rules and implementing a partial contract prior to a ratification vote and agency head review in violation of 5 U.S.C. § 7116 (a) (1) and (5).

VIOLATION 2: The Agency has violated the negotiated ground rules and thus, the CBA, because the ground rules are incorporated into the CBA:

Article 1, Section 2: This Agreement shall remain in effect for a period of four (4) years from September 30, 2013 and shall automatically renew from year to year thereafter except where changes in the law, rule, or regulation mandate modification of the Agreement. In addition, the Parties may extend for a longer period by mutual consent. However, either Party may give notice to the other Party, in writing, at least sixty (60) days, but not more than one-hundred-five (105) days prior to the expiration date of its intention to reopen, amend, modify, or terminate this Agreement. Ground rule negotiations will then begin no later than forty-five (45) calendar days after receipt of the notice provided by either Party. **Such ground rule negotiations shall be conducted in accordance with Article 2, Section 5, as to number of bargaining days, number of negotiators, payment of travel and per diem, and location.** (Emphasis added.)

VIOLATION 3: The Agency committed the unfair labor practice of a unilateral change in violation of 5 U.S.C. § 7116 (a) (1) and (5) by unilaterally implementing a change in dues withholding without notice and the opportunity to negotiate.

Discussion

A. Bad Faith Bargaining

The Agency has failed to come to the table with an open mind and sincere resolve to reach agreement, pursuant 5 U.S.C. § 7114 (b) (1). The repeated, inarguable violations of the negotiated ground rules demonstrate bad faith bargaining. Unilateral implementation of a partial contract in violation of negotiated ground rules which do not provide for severability of the CBA, constitutes bad faith bargaining.

B. Ground Rules Violations

As quoted above in IX, Executing the Agreement, the parties had two weeks upon the CBA's completion to proofread and finalize the CBA, then the Union had 60 days to submit to its members for a ratification vote. The CBA was not completed until the Federal Service Impasses Panel issued an order on the nine articles over which it took jurisdiction.² However, the FLRA stayed the Federal Service Impasses Panel. *Social Security Administration and the Association of Administrative Law Judges*, 71 FLRA 763 (May 21, 2020). The CBA, at the date of this grievance, is not complete because of this stay.

There is no severability in the negotiated ground rules. As such, it was not possible to submit for ratification and Agency Head Review a portion of the CBA. The entire CBA must be submitted for ratification and Agency Head Review. *See Department of Defense Education Activity and Federal Education Association*, 2019 FSIP 001, 26 (February 19, 2019) and *Dep't of Commerce Patent & Trademark Office*, 41 FLRA 795 (July 24, 1991). The Agency has aggressively violated the negotiated ground rules.

Further, Article 1, Duration, is the implementation mechanism for the CBA. Without it, there is no implementation date for the CBA or its duration. Article 9 Official Time is referenced in six of the 20 tentatively agreed to articles. It is a material term in: Article 8, Agency's Equipment, Article 10, Grievance Procedure, Article 11, Arbitration Procedures, Article 23, Health and Safety, Article 26, New Judge Orientation, and Article 27, Joint Technology Advisory Committee (JTAC). The affected terms cannot be reasonably interpreted without referencing the applicable stayed articles. A ratification vote is not possible until the legality of the Panel order is determined.

Pursuant to its notification of August 5, 2020, the Agency has violated the negotiated ground rules by implementing a partial CBA prior to ratification, Agency Head Review, and in general, the negotiated ground rules.

C. Unilateral Change

On August 5, 2020, the Agency submitted a rewritten Article 12, Dues Withholding, that had never been provided to the Union. The Agency notified the Union that the article they rewrote was in effect as of August 10, 2020. The Agency must give both notice and the notice and opportunity to

² *U.S. Social Security Office of Hearing Operations and the Association of Administrative Law Judges*, 20 FSIP 001 (April 15, 2020). The Union Disputes the constitutionality of the Federal Service Impasses Panel and this is the subject of a pending lawsuit. Nothing in this grievance constitutes a waiver of the Union's constitutional claim.

negotiate changes in conditions of employment that are more than de minimis. 5 U.S.C. § 7106 (b) (2) and (3). As such, the unilateral implementation is in violation of 5 U.S.C. § 7116 (a) (1) and (5).

Conclusion

The Agency has relentlessly sought to eliminate this union. The unilateral implementation of a partial contract, with no duration provision, no ratification vote, no agency head review, and no severability provision in the negotiated ground rules, is an expression of hubris. At the least, it is bad faith bargaining and a violation of 5 U.S.C. § 7115(a) (1) and (5). A separate violation of 5 U.S.C. § 7115(a) (1) and (5) was made when it drafted a new Article 12, Dues Withholding out of whole cloth, and inserted it into the illegally implemented articles. The Agency has also violated the CBA by disregarding the ground rules, to include ignoring the ratification process required of the entire contract, as well as the necessity agency head review for the entire contract.

Corrective Action

The corrective action requested is the following:

- a. Order the Agency to cease and desist from engaging in bad faith bargaining in violation of 5 U.S.C. §7116(a) (1) and (5).
 - b. Order the Agency to cease and desist from refusing to negotiate a change in conditions of employment in violation of 5 U.S.C. §7116(a) (1) and (5).
 - c. Order *status quo ante*.
 - d. Order the Agency to rescind its last best offers and return to the term bargaining table with the Union on mutually agreed upon dates.
 - e. Order the Agency to bargain in good faith.
 - f. Order the Agency to comply with the 2013 CBA Article 12. When there is a complete contract, consistent with the law and the mutually agreed to ground rules, the tentatively agreed to Article 12 should be included in the complete CBA for ratification and agency head review consistent with the negotiated ground rules and law.
 - g. The Agency pay all expenses paid by the Union due to the illegal implementation of the 20 articles.
 - h. Post a notice that the Agency committed bad faith bargaining and a unilateral change unfair labor practice, both in violation of 5 U.S.C. §7116(a) (1) and (5), as well as violated the collective bargaining agreement. The posting is to be signed by the Commissioner and posted for a period of sixty (60) days. This notice should be displayed on all SSA bulletin boards (both physical and electronic) for the entire sixty (60) day period, as well as emailed to every member of the bargaining unit and every management official of the bargaining unit; and
 - i. Grant any other appropriate remedy to which the AALJ is entitled under law, rule and regulation.
1. The Union does not request an oral presentation.

Respectfully submitted,

/s/ Melissa McIntosh
President, AALJ, IFPTE, AFL-CIO