American Federation of Government Employees
National Council of HUD Locals 222

Affiliated with AFL-CIO

451 7th Street, SW, Suite 3172
Washington, DC 20410

Holly Salamido, President
E-mail: Holly.Salamido@hud.gov

Phone: 202-202-5243
Fax: 202-708-7638

October 23, 2014

MEMORANDUM FOR: D'andra A. Hankinson, Labor and Employee Relations Division

FROM: Holly Salamido, President, AFGE Council 222 of HUD Locals

Subject: Demand to Bargain – Ebola Virus

This is in response to your October 21, 2014, e-mail with the subject: "AFGE Oct. 16, 2014 'demand to bargain: Ebola Virus'." On October 16, 2014, Council 222 had submitted a demand to bargain to the Department over health and safety measures specifically related to the Ebola virus. In your October 21 response, you stated that the Department refuses to bargain on the grounds that the matter is covered by Article 26 of the AFGE-HUD collective bargaining agreement (CBA), Supplement 99 to that agreement, and HUD's "Pandemic Planning and Response Guidance."

A serious incident occurred last week in Fort Worth, Texas, in which an employee who had possibly been exposed to the Ebola virus, and who had announced that exposure to co-workers, was subsequently out sick with symptoms that are connected to Ebola, such as fever and vomiting. This presented an unanticipated change in working conditions, in that employees may have been exposed to a health hazard, which HUD was totally unprepared to deal with. The presence of the Ebola virus in the United States is an unanticipated condition that was not reasonably contemplated at any time before now. Ebola presents unique conditions of contagion, severity of symptoms, and a 70% mortality rate that is unlike almost any disease previously confronted in modern times. WHO Ebola Response Team, *Ebola Virus Disease in West Africa – The First 9 Months of the Epidemic and Forward Projections*, 371 N. Engl. J. Med. 1481 (2014).

I. HUD has a specific duty to bargain over a union-initiated midterm proposal.

The CBA, at Section 3.02, states, "Management shall fulfill any bargaining obligations imposed by law." The Federal Labor Relations Authority (FLRA) has held that an agency has a specific duty to bargain over a union-initiated midterm proposal. The FLRA held in *Dept. of Interior & NFFE Local 1309* (*Interior)*:

> Consistent with the Supreme Court's remand instructions, we have considered anew the question of union-initiated midterm bargaining. We conclude that an agency is required to bargain over a proposal obligating the agency to engage in midterm bargaining over matters not contained in or covered by the term agreement. Such proposals are within the duty to bargain for two reasons: First they further the purposes of the Statute and thus restate a statutory obligation; and second, they are not inconsistent with law, rule, or regulation.

56 FLRA 45 (2000).

In *NFFE Local 1309 v. Dept. of Interior et al.*, which the Supreme Court subsequently remanded to the FLRA, the Court specifically rejected a Fourth Circuit interpretation that the Federal Labor Relations Statute did not require mid-term bargaining on union-initiated proposals, reaching "the conclusion that Congress delegated to the Authority the power to determine…whether, when, where, and what sort of midterm bargaining is required." 526 U.S. 86, 98 (1999).

The FLRA, in reaching its conclusion that agencies are obligated to engage in midterm bargaining over union-initiated proposals, commented in *Interior* on the agency's lop-sided approach to midterm bargaining. Stating that the Department of the Interior's U.S. Geological Survey does not "recognize that, under the Statute, there is a mutual obligation to bargain," the FLRA continued,

> Under Survey's approach, unions would have an obligation to bargain over agency-initiated proposals, but agencies would have the discretion to bargain or not over union–initiated proposals. … This theory not only lacks a basis in the Statute, but also represents an asymmetrical view of the parties' collective bargaining rights and obligations.

Interior, 56 FLRA at 51, n.12.

Determining that the agencies have an obligation to bargain over union-initiated proposals, the FLRA went on to analyze the question of when a matter should be raised. The FLRA explained that unions should be able to raise issues when they become important:

> In addition, permitting unions to raise issues at the time they arise or become a priority for the parties serves the public interest in a more efficient Government because it will likely lead to more focused negotiations. As noted above, the ability to bargain over such issues in a timely manner is preferable to the alternative of leaving potentially important concerns unaddressed for perhaps a period of years until term negotiations on the basic contract commence again. Moreover, requiring unions to raise matters that do not currently present problems, but might do so in the future, could unnecessarily and inefficiently broaden and prolong term negotiations.

Interior at 52.

II. HUD's assertion of the "covered by" doctrine does not apply because the cited documents do not address the threat of the Ebola virus.

The FLRA has explained, "The 'covered by' doctrine excuses parties from an obligation to bargain on the basis that they have already bargained and reached agreement concerning a disputed matter." *AFGE Local 1916 and Dept. of Energy, Nat'l Energy Technology Laboratory*, 64 FLRA 532, 533 (2010). The Union and the Department have never bargained nor reached any agreement regarding appropriate responses to the appearance and spread of the Ebola virus in the United States.

Article 26 of the CBA, Supplement 99, and HUD's "Pandemic Planning and Response Guidance" do not apply to the threat of Ebola. They specifically and clearly address other situations that are exclusive of the Ebola virus. They were prepared at times when incidents of Ebola virus in the United States were not envisioned, so neither the Union nor the Department could have anticipated such a threat to employee health.

A. Article 26, Safety and Health, covers routine safety and health matters that are envisioned by the Occupational Safety and Health regulations. The introductory general paragraph of that article states, "The Department's Occupational Safety and Health Program shall comply with requirements of Executive Order 12196 and the basic program elements of the Department of Labor regulations (29 CFR § 1960)." CBA at 26.01. It is clear that the article did not envision a health threat such as Ebola, because a later paragraph states, "Safety Equipment. Employees shall be provided with necessary personal protective equipment and other devices and procedures with which to protect themselves from hazards on the job." CBA at 26.03. In the event of a possible Ebola threat, the "necessary personal protective equipment" is complete personal biohazard gear. Necessary procedures would include appropriate disinfection and some form of quarantine. HUD did not take any of these actions in Ft. Worth. Based on HUD's lack of response to the potential exposure to Ebola, it is clear that the Department does not really consider that Article 26 addresses the threat of Ebola.

B. Supplement 99, Pandemic Planning and Response Guidance, also does not apply. It addresses a pandemic outbreak, specifically a pandemic influenza outbreak. References are made throughout the supplement to a pandemic influenza outbreak but not to any other type of health hazard. Incidents of Ebola in the United States at this time are serious but are not a "pandemic;" they are treated as individual cases that must be isolated and handled carefully to prevent an epidemic situation such as in West Africa. The United States Centers for Disease Control and Prevention (CDC) has a website that identifies controls to be placed on people possibly exposed to the Ebola virus that are unlike any requirements for exposure to or even infection with influenza.

C. The Department's own "Pandemic Planning and Response Guidance" (Guidance) does not apply to the situation we face with the Ebola virus because, as the Guidance states, "This is a threat specific document mandated under the national strategy for pandemic influenza." Guidance at 5. Furthermore, as noted above, the response to threats of exposure to Ebola have to be handled differently than a situation involving an influenza pandemic. Due to the severity and mortality of Ebola, we hope that the Department shares the Union's goal of preventing the development of an Ebola pandemic in the United States.

The planning assumptions underlying the Guidance are also inapplicable to Ebola. For example,

- "*In a severe pandemic, absenteeism may reach 40 percent attributable to illness*…" As we have seen, in a severe Ebola epidemic, mortality rates have reached 70%; absenteeism becomes irrelevant in such a situation.

- "*Public health measures of temporarily closing schools and declaring other "snow days" or closures, and quarantining household contacts of infected individuals are likely to increase rates of absenteeism*." This has already happened in two states due to the existence of a **single** case of Ebola infection. See, e.g., Caroline Chen and Zain Shauk, *Schools Close as Nurse's Ebola Infection Ignites Concern*, Business Week,

Oct. 16, 2014, http://www.businessweek.com/news/2014-10-16/schools-close-as-nurses-ebola-infection-ignites-concern.

- "*Epidemics will last 6 to 8 weeks in affected communities*." The situation in West Africa shows what an understatement this is with regard to Ebola.

Additionally, the Guidance cannot be said to be part of a collective bargaining agreement; it is a Government-written and -issued document that is, in fact marked "for official use only." Therefore, it cannot apply to this discussion of "covered by" doctrine.

III. This matter does not pass the "covered by" test with regard to the CBA, Supplement 99, and the Guidance.

The FLRA established a three-pronged test for determining whether a matter is "covered by" a collective bargaining agreement. *United States Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md*., 47 FLRA 1004, 1017-1018 (1993).

A. Under the first prong, the FLRA considers whether the matter is "expressly contained" in a collective bargaining agreement. Although it does not require that the matter be specifically stated in the agreement, the FLRA has held that if a "reasonable reader" would conclude that a provision in a collective bargaining agreement settles the matter in dispute, the "covered by" argument meets this test. In the present case neither the CBA (including Supplement 99) nor the Department's own Guidance contains provisions that apply to the unique and unforeseen circumstances presented by Ebola.

B. If the first prong of the test is not met, the FLRA will consider a second prong, whether the matter is "inseparably bound up with" an existing provision of an agreement. The FLRA has explained that under this prong of the test, it is necessary to consider "whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter." It cannot be argued that preventing the spread of Ebola was contemplated, let alone "commonly considered," to be part of Occupational Safety and Health matters or an influenza pandemic.

C. The third prong of the test applies only in cases where "it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated." *VA Medical Center, Denver, CO, Veterans Canteen Service, Denver CO & AFGE, Local 2241*, 52 FLRA 16 (1996). In a situation where it is not clear whether the issue is included in matters that were bargained previously, the FLRA considers whether the parties "reasonably should have contemplated" the matter at hand during previous bargaining. In other words, should the parties have realized that their agreement would preclude future bargaining on the matter? The FLRA answers, "If the subject matter is only 'tangentially' related to the provisions of the agreement and was not a subject 'that should have been contemplated as within the intended scope of the provision'' the subject matter would not be covered by that provision." Federal Labor Relations Authority, *Guidance on the Impact of Collective Bargaining Agreements on the Duty to Bargain and the Exercise of Other Statutory Rights*, (n.d.), https://www.flra.gov/Guidance_impact%20of%20collective%20bargaining#Part_1A.

> It cannot be argued that either the Department or the Union should have anticipated the spread of Ebola to the United States when the agreements were signed, the CBA in 1998 and Supplement 99 in 2008. The CDC said just this past summer, "The world is facing the biggest and most complex Ebola virus disease (EVD) outbreak in history." It went on to say, "On August 8, 2014, the EVD outbreak in West Africa was declared by the World Health Organization (WHO) to be a Public Health Emergency of International Concern (PHEIC) because it was determined to be an 'extraordinary event' with public health risks to other States." Centers for Disease Control and Prevention, *Interim Guidance for Monitoring and Movement of Persons with Ebola Virus Disease Exposure*, Ebola, (Aug. 22, 2014). http://www.cdc.gov/vhf/ebola/hcp/monitoring-and-movement-of-persons-with-exposure.html.
>
> The Ebola virus is only tangentially related to the intended scope of Supplement 99, and in fact, is excluded by the specificity of that supplement. It is distinguished from routine safety and health concerns, which are well documented and regulated, and from other infectious diseases, such as influenza, for which there are vaccines.

IV. The Department has an obligation to negotiate in response to a demand to bargain regarding specific threats to employee health based on past practice.

Supplement 99 demonstrates that special situations of unique illnesses are not covered by the CBA. Supplement 99 responded to a United States initiative to establish a national flu strategy, which was first published in 2005. In negotiating and concluding an agreement regarding the response to the potential threat of pandemic influenza, the Department acknowledged that the CBA does not cover changes to working conditions posed by serious threats of contagion from specific illnesses.

The appearance and spread of the Ebola virus in the United States must be handled separately from the Department's planning for a potential influenza pandemic. While comparisons have been made between the current deadly Ebola outbreak and the 1918 influenza pandemic, it must be remembered that in 1918, antiviral drugs did not exist, and antibiotics were not available to treat secondary bacterial infections. Today, there are both flu vaccines to prevent the spread of seasonal flu and treatments that did not exist one hundred years ago. In contrast, we do not yet have an Ebola vaccine, and mortality remains at 70%.

Due to its mortality rate, Ebola remains a unique health hazard. When an infected victim first exhibits symptoms, early symptoms of fever, nausea, vomiting, and diarrhea may be confused with symptoms of routine flu. Employees with initially low fevers and nausea may (and often do) come to work to avoid using sick leave. The CDC states, "Ebola virus on dry surfaces, such as doorknobs and countertops, can survive for several hours." The virus is found in body fluids such as sweat and other bodily excretions, which may be found on common surfaces such as door handles, toilet seats, sink faucet handles, desktops, and keyboards. Centers for Disease Control and Prevention, *Frequently Asked Questions about Dallas and Ohio Flights*, (Oct. 21, 2014). http://www.cdc.gov/media/releases/2014/faq1017-ebola-investigation-frequently-asked-questions.html.

V. Conclusion. The covered-by doctrine does not apply and the Department is obligated to negotiate the matter of how it will respond to, and protect employees from, the spread of the Ebola virus.

As when Supplement 99 was written, we need to acknowledge once again that we face a new health hazard that was not contemplated at the time the CBA was signed, and that is not addressed by either the 1998 CBA or the subsequent supplement. As shown above, the Department's assertion of the covered-by doctrine does not pass the FLRA's three-prong test. Consequently, the Union requests that the Department reconsider its refusal to negotiate this matter.

Please refer to the Union's October 16 memo. As a week has already elapsed since I sent that memo, I request a prompt response within the next five days.