IN THE MATTER OF THE ARBITRATION BETWEEN

The American Federation of Government Employees National Council 222 Union, v. The United States Department of Housing and Urban Development Agency.	)	FMCS Case No: 231006-00138

AGENCY'S MOTION TO DISMISS FOR LACK OF ARBITRABILITY

The United States Department of Housing and Urban Development ("HUD" or "the Agency") respectfully requests that the Arbitrator grant the Agency's motion to dismiss the Grievance of the Parties ("GOP") filed by the American Federation of Government Employees, Local 3294, ("AFGE" or "the Union"), for lack of arbitrability under the Grievance procedures provided for in Article 51, Section 51.14 of the HUD/AFGE Collective Bargaining Agreement ("CBA").

The Union's claims are untimely because the GOP was filed well after 45 days from when the Union knew or should have known of the matters being grieved as required by the CBA. Even if all the Union's claims are timely, the GOP should still be dismissed because there is no disputable fact giving rise to a meritorious claim. Accordingly, the GOP should be dismissed.

I. STATEMENT OF FACTS

This case involves HUD exercising its right under the CBA to introduce a new policy and invite the Union to bargain over its impact and implementation ("I&I"). Pursuant to the Equal Employment Opportunity Commission's ("EEOC") requirements in Management Directive 715 ("MD-715"), federal agencies must establish an anti-harassment policy ("AHP") that prevents and addresses harassment on all protected bases, regardless of whether the conduct violated the law. EEOC, INSTRUCTIONS TO

FEDERAL AGENCIES FOR MD-715 SECTION I THE MODEL EEO PROGRAM, https://www.eeoc.gov/federal-sector/management-directive/instructions-federal-agencies-md-715-section-i-model-eeo (last visited Mar. 31, 2023). The AHP must meet certain requirements as outlined in the MD-715 checklist, including a requirement that the Agency begin an inquiry within ten days of receiving an allegation. EEOC, MD-715 - PART G AGENCY SELF-ASSESSMENT CHECKLIST, https://www.eeoc.gov/federal-sector/management-directive/md-715-part-g-agency-self-assessment-checklist (last visited Mar. 31, 2023).

Because HUD did not have an AHP pursuant to MD-715, HUD drafted one in 2016. *See* Ex. 1, at 2-3. After going through an internal clearance process, HUD finalized the AHP ("2017 AHP") and, on August 17, 2017, issued the Union a notice to bargain over the 2017 AHP's I&I pursuant to Article 49 of the CBA ("Article 49 notice"). The Article 49 notice attached a copy of the 2017 AHP and stated, "Please accept the attached draft Anti-Harassment Policy as official notification to the union." Ex. 2 and 3. In early 2018, the Union and HUD agreed to Supplement 18, which governed the I&I of the 2017 AHP. Ex. 4.

Supplement 18 was signed on February 7, 2018. Ex. 5 and 6. Yvette White, HUD's chief negotiator asserts that Supplement 18 was intended to apply only to the 2017 AHP and not to any future anti-harassment policy. Ex. 7, at 2. Similarly, Salvatore Viola, the Union's chief negotiator, testified at a previous arbitration that Supplement 18 was based on the I&I of the anti-harassment policy that the Agency provided with its Article 49 notice. Ex. 8, at 131 (lines 5-14 of the transcript). During negotiations of Supplement 18, the parties referred to and negotiated changes to the 2017 AHP. Ex. 7, at 2; Ex. 9; and Ex. 10. The parties never referred to future anti-harassment policies or discussed Supplement 18 applying to future anti-harassment policies during negotiations of Supplement 18. Ex. 7, at 2.

Supplement 18 states its scope "encompasses the impact and implementation of the Anti-Harassment Policy" and it references specific sections in the 2017 AHP. Ex. 4, at 1. For example, Section 32 said, "The Anti-Harassment Policy will be amended to be in compliance with the intent of this supplement, see AHP Draft Sections 2.3(d) and 3.5(b)." Ex. 4, at 8. Moreover, terms used throughout Supplement 18, such as "Conflict Resolution Coordinator" or "CRC", "fact-finder," "aggrieved person," and "Alleged Harasser," mirror the terms used in the 2017 AHP. *Compare* Ex. 4 *with* Ex. 11.

By March 2020, HUD had not yet formally implemented the 2017 AHP and had received a letter from the EEOC stating HUD remained out of compliance with MD-715. Ex. 12. HUD's Affirmative Employment Division in the Office of Departmental Equal Employment Opportunity ("ODEEO") concluded the 2017 AHP failed to comply with the EEOC's requirements. For example, ODEEO noted the 2017 AHP did not indicate that an inquiry into a harassment allegation will be initiated within 10 days. Ex. 13.[1] Moreover, HUD's Office of Diversity and Inclusion ("ODI") concluded "the [2017 AHP] and Supplement with the union did not align with the requirements of the EEOC and does not comply with HUDs MD-715 Report, neither does it comport with the direction given to HUD during the EEOC Technical Assistance (TA) visit and subsequent TA letter to the Secretary." Ex. 14, at 1.

Consequently, ODI took the lead on drafting a new anti-harassment policy ("new AHP") that would "align with the federal policy and guidance from the EEOC and will bring HUD into 100% compliance [with EEOC requirements] once implemented." Ex. 14, at 1; and Ex. 15, at 1.

[1] ODEEO also noted several other issues with the 2017 AHP, such as (1) the policy did not meet certain ODEEO's requirements; (2) the policy did not make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible; and (3) the policy did not use gender neutral terms. Ex. 13.

On November 17, 2020, management sent the Union an email stating Supplement 18 will be removed from HUD@work[2] because the 2017 AHP was not implemented. The email, sent to the Union President and other principal Union officials, said, "The Anti-Harassment Policy was not implemented, therefore Supplement 18- Implementation of the Anti-Harassment Policy will be removed from HUD @ work, and the [Article 49 Notice] submitted on August 17, 2017 regarding this subject is being rescinded." Ex. 16. This notification to the Union started the 45-day clock to initiate a grievance based on any alleged issues the Union had with the removal of, non-implementation of, and alleged failure to recognize Supplement 18.

In March 2021, an early draft of the new AHP went into the HUD clearance process to gain feedback and concurrence from the HUD program offices. On March 21, 2021, management responded to the EEOC's finding that HUD was not in compliance with MD-715. Management noted to the EEOC that a draft of the new AHP was in the clearance process and emphasized that it "includes a requirement that the investigation begins within 10 days of receiving the complaint," which was a legal deficiency in the 2017 AHP. *See* Ex. 17, at 1-2.

By the summer of 2021, a draft of the new AHP was finalized after completing the clearance process. The EEOC reviewed the draft policy and confirmed it satisfied MD-715's requirements. Ex. 18.

On August 18, 2021, Ginger Burnett, Senior Labor Relations Advisor, sent to the Union a notice pursuant to Article 49 of the CBA inviting the Union to bargain over the I&I of the new AHP. Ex. 19, at 5-13. Ms. Burnett included a copy of the new AHP with the notice. *Id.*

On September 1, 2021, the Union issued a response stating its refusal to bargain. The Union objected to "HUD's attempt to issue new policies that are covered by and in conflict with our CBA as stated in Supplement 18" and demanded that HUD modify the new AHP to comply with Supplement

[2] HUD@work is HUD's intra-agency website that provides employees access to systems, information, policies, handbooks, etc.

18. *Id*. at 1-4. The Union also demanded that Supplement 18 and the contact information for utilizing the AHP be added to HUD@work within ten days, or by September 11, 2021. *Id*. at 4.

On April 18, 2022, in a final attempt to engage the Union in good faith bargaining, Ms. Burnett sent the Union a last chance letter. Ex. 20. The letter outlined why the 2017 AHP and Supplement 18 were deficient under MD-715. *Id*. The letter also highlighted how the new AHP satisfies MD-715 and "provides a holistic strategy to address all forms of unwelcome conduct in the workplace, improve morale, and increase employee safety." *Id*. at 2.

The letter also notified the Union of HUD's position that the new AHP was not covered-by Supplement 18. The letter said, "We understand your position is that the new AHP is covered by Supplement 18. We respectfully disagree with that position. We would like to bargain over impact and implementation of the new AHP and agree to a new Supplement that will apply to the new AHP." *Id*. at 2. In an attempt at good faith compromise and to satisfy many of the Union's concerns, HUD attached a draft proposed supplement that contained many of the same provisions as Supplement 18. *Id*. at 2; Ex. 21; and Ex. 22. Finally, the letter put the Union on notice that the new AHP would be implemented if the Union did not agree to bargain within 15 days. Ex. 20, at 2.

On April 22, 2022, the Union again refused to bargain because it believed the new AHP was covered by Supplement 18. Ex. 23, at 40. In its response, the Union again admitted it was aware of many matters it is grieving here. For example, it noted "HUD did not even add Supplement 18 to the HUD@Work AFGE/HUD Agreements page since last September…." *Id*. The Union also said HUD violated Section 4 of Supplement 18 by failing to negotiate procedures for bullying, hostile work environment, and other forms of harassment within one year of Supplement 18 being signed. *Id*. at 41.

On July 1, 2022, the Union again requested Supplement 18 be added to HUD@work. On July 14, 2022, HUD denied the Union's request, saying, "Supplement 18 was not posted on HUD@work, because the Agency did not implement the policy Supplement 18 addresses, and is currently moving forward with a new AHP, which the Union was invited to bargain. We respectfully are not in agreement with posting Supplement 18." *Id*. at 43-47.

On July 21, 2022, the Union filed a GOP asserting (1) HUD's alleged failure to post Supplement 18 on HUD@work and recognize its validity constitutes repudiation of Supplement 18 and a violation of Sections 49.06(k), 49.06(n), 53.05, 53.06, and 53.07 of the CBA; (2) HUD violated Section 15 of Supplement 18 by failing to make the contact information to use the 2017 AHP available on HUD@work; (3) HUD violated Section 4 of Supplement 18 for failing to negotiate the procedures for bullying, hostile work environment, and other forms of harassment within one year of Supplement 18 being signed; (4) HUD committed a ULP under the covered-by doctrine; and (5) HUD violated numerous other provisions of Supplement 18. *Id*.

On July 21, 2022, HUD formally implemented the new AHP. Ex. 24, at 3. On July 28, 2022, the Union filed an amended GOP responding to the new AHP's implementation. The Union, asserting many of the same arguments from the original GOP, claimed various violations of Supplement 18 constituted repudiation thereof. *Id*. at 1-2.

On September 14, 2022, Ms. Burnett, the Deciding Official, issued HUD's response to the GOP. Ms. Burnett found the following claims untimely: (1) HUD's failure to post Supplement 18 on HUD@work and recognize its validity; (2) HUD's failure to make the contact information to use the 2017 AHP available on HUD@work; and (3) HUD's failure to negotiate procedures for bullying, hostile work environment, and other forms of harassment within one year of Supplement 18 being signed. Ms. Burnett denied the remaining claim on the merits. Ex. 25.

The Union invoked arbitration on October 6, 2022. On October 21, 2022, an arbitrator was selected. A hearing has been scheduled for June 7 and 8, 2023.

II. STANDARD OF REVIEW

Under Section 51.14 of the CBA, "Questions of arbitrability may be raised at any step of the grievance procedure, including the arbitration stage. . . . Any unresolved question shall be considered as a threshold issue should the grievance go to arbitration. Questions of arbitrability **shall** be submitted to the arbitrator in writing and **be decided prior to any hearing unless mutually agreed otherwise**. The moving party bears the burden of demonstrating that the matter is not grievable." (emphasis added). Ex. 26, at 241. Section 52.10 says the arbitrator "shall be confined to the issue(s) presented in the grievance." Ex. 26, at 245. When resolving a grievance alleging a ULP, an arbitrator must apply the same standards and burdens that an Administrative Law Judge would apply in a ULP proceeding under 5 U.S.C. § 7118. *Nat'l Treasury Emps. Union Chapter 168 and United States Dep't of the Treasury*, 55 FLRA 237, 241 (1999). In a grievance alleging a ULP by an agency, the union bears the burden of proving the elements of the ULP by a preponderance of the evidence. *Id.*

II. DISCUSSION

The GOP should be dismissed as many of its claims are procedurally non-arbitrable because they were untimely filed pursuant to Section 51.15(1) of the CBA. Even if all the claims are considered timely, the grievance is without merit.

A. The Union's untimely claims are procedurally non-arbitrable.

Section 51.15(1) of the CBA says a GOP must be filed in writing within 45 days of "when the party became aware or should have become aware of the matter being grieved." Ex. 26, at 241-42.

1. The Union's claims that HUD repudiated Supplement 18 and violated Sections 49.06(k), 49.06(n), 53.05, 53.06, and 53.07 of the CBA by failing to post Supplement 18 on HUD@work and refusing to accept that Supplement 18 applied to the new AHP are untimely.

The Union alleges HUD repudiated Supplement 18 and violated Sections 49.06(k), 49.06(n), 53.05, 53.06, and 53.07 of the CBA by failing to post Supplement 18 on HUD@work and refusing to accept that Supplement 18 applied to the new AHP. Those claims should be dismissed as untimely because the Union became aware or should have become aware of those issues more than 45 days before it filed the GOP on July 21, 2022.

On November 17, 2020, HUD notified the Union that, "The Anti-Harassment Policy was not implemented, therefore Supplement 18 - Implementation of the Anti-Harassment Policy will be removed from HUD @ work, and the [Article 49 notice to bargain] submitted on August 17, 2017 regarding this subject is being rescinded." Ex. 16. Thus, the Union knew or should have known as of November 17, 2020, that HUD was taking Supplement 18 off HUD@work and no longer considered it applicable. The Union, however, did not file the GOP until **612 days or more than a year and a half later**.

Moreover, in the Union's September 1, 2021, response to HUD's first invitation to bargain, the Union admitted it knew Supplement 18 was not on HUD@work and gave a September 11, 2021, deadline for HUD to post Supplement 18 at HUD@work. Ex. 19, at 3-4. HUD did not post it on HUD@work because it was no longer applicable. Therefore, the Union knew or should have known on September 12, 2021, that HUD failed to post Supplement 18 on HUD@work. Yet, the Union filed the GOP **313 days or almost one year later**.

Additionally, Ms. Burnett told the Union on April 18, 2022, "We understand your position is that the new AHP is covered by Supplement 18. We respectfully disagree with that position. We would like to bargain over impact and implementation of the new AHP and agree to a new Supplement that will apply to the new AHP." Ex. 20, at 2. Ms. Burnett told the Union HUD would implement the new AHP in 15 days if the Union did not agree to bargain. *Id*. Accordingly, the Union knew or should have known as of April 18, 2022, that HUD refused to accept that Supplement 18 applied to the new AHP. The Union nevertheless waited **95 days** to file its GOP.

Finally, on April 22, 2022, the Union responded to Ms. Burnett and again admitted it knew HUD did not post Supplement 18 on HUD@work. The Union said, "HUD did not even add Supplement 18 to the HUD@Work AFGE/HUD Agreements page since last September as an act of good faith in all the months since then. Your refusal to do so is an ongoing act of repudiation." Ex. 23, at 40. Even using the latest date of April 22, 2022, these claims are still untimely because the GOP was filed **91 days later**, or more than double the time provided in the CBA.

The Agency respectfully requests the Arbitrator dismiss these claims for lack of arbitrability.

2. <u>The Union's claim that HUD violated Section 15 of Supplement 18 by failing to make the contact information to utilize the AHP available on HUD@work is untimely.</u>

The Union's claim that HUD violated Section 15 of Supplement 18 by failing to make the contact information to utilize the AHP available on HUD@work should be dismissed as untimely. In the Union's September 1, 2021, response to HUD's invitation to bargain, the Union stated the contact information for utilizing the AHP was not on HUD@work and demanded it be added on HUD@work within ten days, or by September 11, 2021. Ex. 19, at 3-4. While HUD never complied with that demand because Supplement 18 was no longer applicable, the Union knew or should have known that the contact information to utilize the AHP was not on HUD@Work as of September 12, 2021. Using September 12, 2021 as the latest day related to this allegation, the Union's claim is still untimely because it was filed **313 days later**, or nearly seven times longer than the required 45-day time frame.

The Agency respectfully requests the Arbitrator dismiss this claim for lack of arbitrability.

3. <u>The Union's claim that HUD violated Section 4 of Supplement 18 by failing to negotiate procedures for bullying, hostile work environment, and other forms of harassment is untimely.</u>

The Union argues HUD violated Section 4 of Supplement 18 by failing to negotiate the procedures for bullying, hostile work environment, and other forms of harassment "within one year of signing Supplement 18." Ex. 23, at 5. Supplement 18 was signed on February 7, 2018. Ex. 5 and 6. The parties never negotiated the procedures for bullying, hostile work environment, and other forms of harassment. The Union therefore knew or should have known one year later, on February 7, 2019, that those procedures had not been negotiated. The Union, however, did not file the GOP until **896 days or nearly two and a half years later.**

The Union also acknowledged on April 22, 2022, that it was aware HUD had not negotiated these procedures. In a response to HUD's last chance letter dated April 22, 2022, the Union President wrote, "Supplement 18, provision 4, required HUD 'to negotiate procedures for bullying and hostile work environment and all other harassment whether or not it is based on protected classes, with the goal of including such procedures in this supplement' within one year. **I am not aware of that happening in the four years since the supplement was signed**." (emphasis added). Ex. 23, at 41. Thus, even using this later date, the claim is still untimely because it was filed **91 days** after the Union demonstrated its awareness of the matter being grieved.

For these reasons, this claim should be dismissed.

4. <u>The Union's Unfair Labor Practice claim under the covered-by doctrine is untimely.</u>

The claim that HUD committed a ULP under the covered-by doctrine should be dismissed as untimely. The Union argues it had no obligation to bargain the I&I of the new AHP because the new AHP is "expressly covered by Supplement 18" and "insisting on bargaining to impasse for matters already covered by an existing [CBA] is an Unfair Labor Practice." Ex. 23, at 4. The Union became

aware or should have become aware of this matter on April 18, 2022, at the latest. In Ms. Burnett's letter dated that day, she said,

> We understand your position is that the new AHP is covered by Supplement 18. We respectfully disagree with that position. We would like to bargain over impact and implementation of the new AHP and agree to a new Supplement that will apply to the new AHP…Please kindly let us know within 15 days if you would like to bargain over a new Supplement that would apply to the new AHP. If the union does not articulate an interest in bargaining over a new Supplement that will apply to the new AHP, please be advised of management's plan to implement the new AHP under the terms set forth in this message and management's notification issued on August 18, 2021.

Ex. 20, at 2.

Ms. Burnett's letter put the Union on notice that HUD was requesting to bargain the I&I of the new AHP, that it disagreed with the Union's position on the covered-by doctrine, and that it was giving the Union a final chance to bargain before implementing the new AHP. The Union waited **95 days** or again, more than double the allowed time under the CBA. The claim is therefore untimely.

The Union is familiar with the grievance timelines in the CBA. This is not a matter of filing the GOP a few days late—the Union clearly decided not to file a GOP on these claims at the appropriate time. Instead, it waited until it was dissatisfied with the Agency's creation of a new, EEOC compliant AHP. The Union clearly failed to exercise its rights, and now in some cases nearly two and a half years later, is attempting to circumvent and undermine the integrity of the negotiated procedures the parties agreed to in the CBA. For all these reasons, the Agency respectfully requests that the Union's claims as discussed above be dismissed as they are beyond untimely.

5. <u>Because the Union filed a GOP, Section 51.15(1) of the CBA applies and the continuing violation theory is unavailable.</u>

The continuing violation theory is unavailable here under Section 51.15(1) of the CBA. A well-recognized principle of contract interpretation is a specific contract provision governs over a general provision. *Laborers International Union of North America Local 1776 and Nevada Army National Guard*, 121 LRP 28457 (2021) (citing and discussing authorities).

The Union argues its claims are continuing violations and may be grieved at any time under Section 51.06(1) of the CBA. Ex. 23 at 5. That section generally prescribes the timelines for filing a grievance: "Time limits for the filing of a grievance under this procedure, is, at a minimum, forty-five (45) calendar days, unless extended. The time period shall begin to run from the next workday after the grievant became aware or should have become aware of the matter being grieved. A continuing violation may be grieved at any time." Ex. 26, at 239.

Section 51.15(1) of the CBA, in contrast, **applies specifically to GOPs** and prescribes the specific timeframe for filing a GOP. The section does not state a continuing violation may be grieved at any time—in fact, it says nothing about continuing violations. Instead, it explicitly states the grievance must be filed within 45 days from when the party became aware or should have become aware of the matter being grieved. *Id.* at 241-42. Because Section 51.15(1) of the CBA applies specifically to GOPs, it governs over the general provision in Section 51.06(1) of the CBA. If the parties wanted to allow continuing violations to be grieved at any time for a GOP, they would have said so as they did for other grievances in Section 51.06(1). Accordingly, the continuing violation theory is unavailable here and the claim is untimely.

6. <u>Even if the continuing violation theory is available, the claims are nonetheless untimely because they do not constitute a continuing violation.</u>

Even if the continuing violation theory is available here, the claims are nonetheless untimely because they do not constitute a continuing violation. There is no continuing violation "where an identifiable action with a determinative date serves as the subject matter of the aggrieved situation." *Int'l Fed'n of Prof'l and Tech. Eng'rs Local 386 and United States Dept. of the Army*, 66 FLRA 26, 27 (2011). In other words, a singular or discrete action does not constitute a continuing violation. *AFGE Local 501 and United States Dep't of Justice*, 112 LRP 52499 (2012). When determining whether a claim is a continuing violation, the "arbitrator must evaluate whether the grievant and union were unaware of the extent of the action or incident grieved, or whether they were 'lying in

the weeds' to allow the employer's potential liability to accumulate far beyond what it would have been had the grievance been filed when the alleged violation became known to them." *NIH and AFGE Local 2923*, 106 LRP 49976 (2006).

Here, all of the Union's allegations are singular actions with a determinative date that serves as the subject matter of the aggrieved situation. First, HUD's decision to take Supplement 18 off HUD@work and rescind the August 17, 2020, Article 49 notice was a singular event that occurred on November 17, 2020. Ex. 16. Second, HUD's decision not to post Supplement 18 and the contact information for using the AHP on HUD@work by the Union's deadline was a singular event that occurred when the deadline expired on September 12, 2021. Third, HUD's alleged failure to negotiate the procedures for bullying, hostile work environment, and other forms of harassment within one year of signing Supplement 18 was a singular event that occurred on March 8, 2019—one year after the parties signed Supplement 18. Finally, HUD's attempt to bargain over a matter the Union believed was covered-by Supplement 18 was a singular event that occurred on April 18, 2022, when Ms. Burnett expressed disagreement that the new AHP was covered by Supplement 18 and gave the Union a final chance to bargain before HUD implemented the new AHP. Thus, the continuing violation theory does not apply because the Union's claims involve singular actions.

Despite the Union being aware of the matters being grieved for a long time—in some respects nearly two and a half years—it did not file a grievance until it was clear HUD was about to implement a new AHP. If the Union was truly concerned with HUD's failure to recognize and follow Supplement 18, it would have filed a grievance much sooner when it first became aware of each of the alleged claims. Accordingly, the claims are untimely and should be dismissed.

B. **The GOP should be dismissed because there are no disputed facts giving rise to a meritorious claim.**

Even if the GOP is timely, it should be dismissed because there are no disputed facts giving rise to a meritorious claim for which relief can be granted.

1. <u>Supplement 18 does not apply to the I&I of the new AHP.</u>

Supplement 18 applies only to the I&I of **the 2017 AHP**, and not to the I&I of the new AHP. First, the language of Supplement 18 makes this clear. Supplement 18 states its scope "encompasses the impact and implementation of the Anti-Harassment Policy." Ex. 4, at 1. The referenced "Anti-Harassment Policy" is the 2017 AHP that was included with the Article 49 notice wherein HUD invited the Union to bargain over the 2017 AHP's I&I. Ex. 2 and 3.

Moreover, Section 32 of Supplement 18 says, "The [Conflict Resolution Coordinator] will advise appropriate management officials on any non-disciplinary corrective measures. ELR is responsible for recommending disciplinary actions. The Anti-Harassment Policy will be amended to be in compliance with the intent of this supplement, see AHP Draft Sections 2.3(d) and 3.5(b)." Ex. 4, at 8. The referenced "AHP Draft Sections 2.3(d) and 3.5(b)" are sections in the 2017 AHP, showing Supplement 18's scope was limited to the I&I of the 2017 AHP. Ex. 11, at 7 and 11.

Additionally, terms used throughout Supplement 18, such as "Conflict Resolution Coordinator" or "CRC", "fact-finder," "aggrieved person," and "Alleged Harasser," mirror the terms used in the 2017 AHP, demonstrating Supplement 18 was intended to apply specifically to the I&I of the 2017 AHP. *Compare* Ex. 4 *with* Ex. 11.

Second, the bargaining history shows Supplement 18 was intended to apply only to the 2017 AHP. HUD's chief negotiator attests that Supplement 18 was intended to apply only to the 2017 AHP and not to any future anti-harassment policy that HUD may draft. Ex. 7, at 2. Similarly, the Union's chief negotiator has previously testified at an arbitration that Supplement 18 was based on the I&I of the anti-harassment policy that HUD provided with its Article 49 notice. Ex. 8, at 131 (transcript lines 5-14). As stated above, HUD provided the 2017 AHP with its Article 49 notice. In fact, during negotiations of Supplement 18, the parties (1) referred to and negotiated changes to the 2017 AHP and (2) never referred

to future anti-harassment policies or discussed Supplement 18 applying to future anti-harassment policies. Ex. 7, at 2; Ex. 9; and Ex. 10.

Because it is indisputable that Supplement 18 applies only to the I&I of the 2017 AHP and does not apply to the new AHP, there is no fact giving rise to a claim for which relief can be granted and the Union's claims should be dismissed.

2. <u>Sections 49.02 and 49.03(4) of the CBA give HUD the right, as it did here, to create a new AHP so long as HUD invites the Union to bargain over its I&I.</u>

Sections 49.02 and 49.03(4) of the CBA provide HUD the right to develop a new AHP so long, as it did here, HUD invites the Union to bargain over its I&I. Article 49 of the CBA covers mid-term bargaining, including bargaining over the I&I of a new policy. Ex. 26, at 230-35. Section 49.02 requires Management to provide notice and an opportunity to bargain to the Union for any "proposed changes relating to personnel policies, practices, and general conditions of employment. *Id*. at 230. Section 49.03(4), titled "Change in a Policy or Past Practice," describes the information management must provide when it plans to implement a new policy: "(a) Copy or statement of **the current policy** or past practice; (b) The nature, scope, and rationale for the proposed change; (c) A copy or statement of **the proposed new policy** or practice; and (d) The proposed implementation date." *Id*. at 231 (emphasis added). By Section 49.02 and Section 49.03(4)'s own terms, HUD has the right to propose a new policy, even if the parties previously bargained over a prior policy that covers the same subject matter, so long as HUD provides the required notice and opportunity to bargain. *See also* Ex. 7, at 2-3.

The parties' past practice interpreting Article 49 also supports this. In practice, when HUD submits to the Union a notice pursuant to Article 49 of the CBA with a specific draft policy attached, any agreement on the I&I applies only to the policy that was attached to the notice. Ex. 7, at 3. When HUD has introduced a new policy that governs a similar subject matter as a prior policy over which

HUD and the Union have bargained mid-term, then HUD has done so by issuing notice and an opportunity to bargain under Article 49 of the CBA. *Id*.

Under the Union's theory, HUD could never propose and offer an opportunity to bargain over a new policy where the parties have already bargained over a prior policy that covers the same subject. Nothing in Article 49 supports this premise. Indeed, such an interpretation of the contract is impermissible because it would render the terms "the current policy" and "the proposed new policy" in Section 49.03(4) meaningless. *Dep't of the Navy and Portsmouth Fed. Emps. Metal Trades Council*, 4 FLRA 619, 625 (1980) (refusing to interpret a contractual provision in a way that would render any words meaningless). Indeed, the Union's interpretation would contravene the plain meaning of Sections 49.02 and 49.03(4) by prohibiting HUD from introducing a new policy mid-term. This would also hinder management's ability to update policies to respond to changed circumstances; to further its mission; to serve the needs of the Agency and its employees; and as here, to rectify legal deficiencies in its current policies.

Thus, there is no genuine dispute that Sections 49.02 and 49.03(4) of the CBA permitted HUD to, as it did here, create a new AHP and offer the Union an opportunity to bargain. In fact, as an act of good faith, HUD offered the Union multiple opportunities to bargain. The GOP should therefore be dismissed.

3. <u>The covered-by doctrine argument is meritless.</u>

The Union's covered-by doctrine claim is meritless for two reasons. First, the doctrine does not apply as a matter of law. Second, even if the doctrine applies, the I&I of the new AHP is not covered by Supplement 18. Thus, there are no disputed facts giving rise to a meritorious claim.

a. <u>The covered-by doctrine does not apply as a matter of law.</u>

The Union's claim that HUD committed a ULP under the covered-by doctrine should be dismissed because that doctrine is inapplicable to this situation. The covered-by doctrine is a defense

to a claim that a party violated its statutory obligation to bargain. *United States Dep't of Justice and AFGE Local 3148*, 67 FLRA 442, 449 (2014). A party accused of unlawful failure to bargain can assert the defense that it was not obligated to bargain because it has already bargained over the subject at issue. *Soc. Sec. Admin. and AFGE Local 3448*, 64 FLRA 199, 202 (2009). This doctrine "applies *only* in cases alleging an unlawful refusal to bargain." *AFGE Local 1916 and United States Dept. of Energy*, 64 FLRA 532, 533 (2010) (emphasis in original) (hereinafter "*DOE*"). Moreover, "nothing in the 'covered by' doctrine prohibits a party from requesting negotiations." *NAGE Local R3-32 and United States Dept. of the Air Force*, 61 FLRA 127, 131 (2005).

There is no allegation by either HUD or the Union of an unlawful refusal to bargain here, so the covered-by doctrine does not apply.

The Union is improperly using the covered-by doctrine to affirmatively prevent HUD from implementing a new policy. *DOE* is instructive. In that case, the agency notified the union of its intent to implement a new pass/fail performance standard and offered to bargain over its I&I. *DOE*, 64 FLRA at 532. The union constructively refused to bargain. *Id*. After the agency implemented the new standard, the union filed a grievance challenging its implementation. The union noted the parties' existing agreement stated an employee's performance would be determined by assigning the employee to specified rating levels, which did not include a pass/fail rating. *Id*. at 533. The union argued that, under the covered-by doctrine, further bargaining over performance standards was inappropriate and the agency's proposal could not be implemented. *Id*. 532-33.

The FLRA rejected the union's argument. The FLRA noted the union did not allege the agency unlawfully refused to bargain. *Id*. at 533. Rather, it was the agency that provided the union the opportunity to bargain over the I&I of the new standard. *Id*. at 532. Additionally, the FLRA said that although the union claimed the agreement did not permit the agency to implement the change, the union did not seek to bargain over that change. *Id*. at 533. The FLRA also noted the agency's right

to modify the performance standards "during the term of the agreement when consistent with the agreement" was not in dispute. *Id*. Accordingly, the FLRA held the covered-by doctrine did not apply. *Id*.

Like in *DOE*, the Union here is not alleging HUD unlawfully refused to bargain. Instead, as in *DOE*, the Union here claims HUD's proposed policy is covered-by an existing agreement and therefore, cannot be implemented. Ex. 19, at 1 ("The Union objects to (1) HUD's attempt to issue new policies that are covered by and in conflict with our CBA as stated in Supplement 18"). Moreover, while the Union claims Supplement 18 does not permit HUD to implement the new AHP, the Union does not seek to bargain over the new AHP. Indeed, just like the agency in *DOE*, HUD affirmatively sought to bargain and **the Union** refused. Similar to *DOE*, it is indisputable that HUD has the right to, as it did here, create the new AHP during the term of the agreement so long as it offers the Union the right to bargain over the new AHP's I&I. *See supra* Part II.B.2. Thus, the covered-by doctrine does not apply.

i. <u>HUD did not insist on bargaining to impasse over matters covered by an existing agreement.</u>

The Union, citing *AFGE Local 3937 and Social Security Administration*, claims the covered-by doctrine applies because "insisting on bargaining to impasse for matters already covered by an existing collective bargaining agreement is an Unfair Labor Practice." Ex. 23, at 4. That case is inapposite, however. In that case, the union filed a ULP against the agency after the agency invoked the jurisdiction of the Federal Services Impasse Panel ("Panel"). *AFGE Local 3937 and Soc. Sec. Admin*. 64 FLRA 17, 21 (2009). Here, HUD did not invoke the jurisdiction of the Panel. Neither did HUD insist on bargaining over the new AHP to the point of impasse. Instead, HUD offered multiple opportunities to bargain, and after the Union's repeated refusals to participate in bargaining, HUD proceeded with implementation. Thus, the covered-by doctrine does not apply because HUD simply requested bargaining. *NAGE Local R3-32 and United States Dept. of the Air Force*, 61 FLRA 127,

131 (2005) (holding "nothing in the 'covered by' doctrine prohibits a party from requesting negotiations").

b. <u>The I&I of the new AHP is not covered by Supplement 18.</u>

Even if the covered-by doctrine applies, the I&I of the new AHP is not covered by Supplement 18. A matter is covered by an existing agreement if the matter is expressly contained in, or inseparably bound up with a subject covered by, the agreement. *Soc. Sec. Admin. and AFGE,* 66 FLRA 569, 573 (2012). As stated above, Supplement 18 covers **only the I&I of the 2017 AHP**. *Supra* Part II.B.1. Indeed, the parties' existing agreement expressly gives HUD the right to create a new AHP and offer the Union the opportunity to bargain over it, which occurred here. *Supra* Part II.B.2.; *see DOE,* 64 FLRA at 533 (rejecting a covered-by argument where the agency's right to make the disputed policy change "during the term of the agreement when consistent with the agreement" was not in dispute). Therefore, the covered-by claim fails because the I&I of the new AHP is neither expressly contained in, nor inseparably bound up with a subject covered by, Supplement 18.

4. <u>The repudiation claim is meritless.</u>

The Union's repudiation claims should be dismissed because there are no disputed facts giving rise to a meritorious claim. The FLRA applies a two-prong test to determine if repudiation occurred. First, the FLRA looks at "the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?)." *United States Bureau of Prisons and AFGE Local 3935,* 68 FLRA 786, 788 (2015). Under this prong, the FLRA analyzes the clarity of the provision that the charged party allegedly breached and "will not find a repudiation where a party acts in accordance with a reasonable interpretation of an unclear contractual term." *Id*. The second prong is "the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?)." *Id*. For this prong, the FLRA focuses on "the importance of the provision that was allegedly breached relative to the agreement in which it is contained." *Id*.

The Union claims HUD's "refusal to accept Supplement 18 as governing the implementation of [the new AHP]" amounts to repudiation of Supplement 18. Ex. 23, at 3. The Union also claims HUD's implementation of the new AHP breached various provisions of Supplement 18 and those breaches constitute repudiation. Ex. 24, at 1-2. As stated above, however, Supplement 18 applies **only to the I&I of the 2017 AHP** and the CBA expressly gives HUD the right to create a new AHP and offer the Union the opportunity to bargain over the I&I, which occurred here. *Supra* Part II.B.1 and 2. Thus, HUD's "refusal to accept Supplement 18 as governing the implementation of [the new AHP]" was not a breach of Supplement 18—let alone a clear and patent breach that went to the heart of Supplement 18. Furthermore, HUD did not breach any provision of Supplement 18 by implementing the new AHP. Therefore, the Agency requests the Union's repudiation claims be dismissed because there are no disputed facts giving rise to a meritorious claim.

5. <u>The Union's claimed violations of various sections of Articles 49 and 53 and specific sections of Supplement 18 lack merit.</u>

The Union's claimed violations of various sections of Articles 49 and 53 and specific sections of Supplement 18 lack merit because Supplement 18 does not apply to the I&I of the new AHP. All the Union's remaining claims depend on Supplement 18 applying to the I&I of the new AHP. The Union alleges HUD's refusal to apply Supplement 18 to the new AHP was a refusal to accept Supplement 18 as an integral part of the CBA, in violation of Section 49.06(k). Ex. 23 at 4. The Union's Section 49.06(n) claim is based on HUD's alleged refusal to comply with and accept the enforceability of Supplement 18. *Id*. The Union's claimed violations of various provisions of Article 53 relies on HUD "failing to accept the validity of Supplement 18" and refusal to post it on HUD@work. *Id*. at 5.

As stated *supra* Part II.B.1 and 2., Supplement 18 applies **only to the I&I of the 2017 AHP** and the CBA expressly gives HUD the right to create a new AHP and offer the Union the chance to bargain over the I&I, which occurred here. Because it is indisputable that Supplement 18 applies only

to the I&I of the 2017 AHP and does not apply to the new AHP, there is no fact giving rise to a claim for which relief can be granted and the Union's claims should be dismissed.

IV. CONCLUSION

HUD exercised its right under the CBA to introduce a new policy and invite the Union to bargain over its I&I. Indeed, as an act of good faith, HUD provided multiple opportunities for the Union to bargain. Rather than avail itself of those opportunities, the Union filed a GOP wrought with untimely claims. Those claims are procedurally non-arbitrable and should be dismissed. Even if the claims are timely, they should be dismissed because there is no disputable fact giving rise to a meritorious claim. Accordingly, HUD respectfully requests the Arbitrator dismiss the Union's GOP and find the Union responsible for all costs under Section 52.04 of the CBA as the losing party.

Respectfully submitted,

JAMES RADCLIFFE

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Date: March 31, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2023, the foregoing **AGENCY'S MOTION TO DISMISS FOR LACK OF ARBITRABILITY** was sent in the following manner:

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Stephen Caldwell, Union Representative
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Respectfully submitted,

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