

IN THE MATTER OF ARBITRATION]	
]	ARBITRATOR’S RULING ON
BETWEEN]	AGENCY’S MOTION
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT]	TO DISMISS
]	FMCS FILE NO. 231006-00138
AND]	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES NATIONAL COUNCIL 222]	

Introduction

On March 31, 2023, the Agency filed a Motion to Dismiss for lack of arbitrability. The Union responded on April 13, 2023, and the Agency submitted a reply to the Union’s response on April 24, 2023. In August 17, 2017, the Agency issued the Union a Notice to Bargain and in early 2018, the parties agreed to Supplement 18, which controlled the implementation of the 2017 AHP. However, the Agency did not formally implement the policy.

In March, 2020, the Agency was notified by the EEOC that it was not in compliance with MD-715. The Agency’s ODI drafted a new AHP that would be fully compliant with the requirements of MD-715 and EEOC requirements. On Nov, 20, 2020, HUD notified the Union that Supplement 18 would be removed from HUD@work because the 2017 AHP had never been formally adopted.

In the summer of 2021, the Agency finalized the new AHP and confirmed that it fulfilled all the requirements of MD-715 and EEOC guidelines. On August 18, 2021, Ginger Burnett, the Senior Labor Relations Advisor, sent the Union an invitation to bargain over the implementation of the new AHP. On Sept. 1, 2021, the Union responded with a refusal to bargain, arguing that the new AHP was in conflict with the Agreement, as set forth in Supplement 18. The Union also

demanded that Supplement 18 be added to HUD@work by Sept. 11, 2021. However, the Agency did not comply with this demand.

On April 18, 2022, Ms. Burnett sent the Union a letter offering them a final opportunity to bargain over the implementation of the new AHP. The letter stated that the 2017 AHP was not in conformity with MD-715 and EEOC requirements, and set out HUD's position that Supplement 18 did not apply to the new AHP. On April 22, the Union responded by again refusing to bargain and again claiming that the Agency had violated Supplement 18.

On July 1, 2022, the Union submitted a request that Supplement 18 be added to HUD@work. The Agency denied the request, stating that the policy associated with Supplement 18 was never implemented, and reiterating its position that the new AHP would be implemented without input from the Union, since they had refused to bargain.

On July 21, 2022, the Union filed a GOP asserting that the Agency's refusal to post Supplement 18 on HUD@work constituted repudiation of Supplement 18 and a violation of the Agreement. The grievance also claims that the Agency violated Section 15 of Supplement 18 by failing to make the contact information to apply the 2017 AHP available on HUD@work, and Section 4 of Supplement 18 for failing to negotiate procedures for addressing harassment within one year of Supplement 18 being signed. The grievance also alleges that the Agency committed an unfair labor practice under the covered-by doctrine.

On July 21, 2022, HUD formally implemented the new AHP, and on July 28, 2022, the Union filed an amended GOP responding to the new AHP's implementation.

Cited Portions of the Agreement

**ARTICLE 51
GRIEVANCE PROCEDURES**

Section 51.06 - Time Limits.

- (1) 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. The date of expiration of a time limit shall be close of business hours the last day of the stated period, unless that day falls on a Saturday, Sunday, or nonworkday, in which case the following full workday shall be considered the last day. Either party may grieve a continuing condition at any time. Where a grievant fails to meet a time limit, unless extended by mutual consent, the matter shall be considered resolved according to the last response.

Section 51.13 - Employee Grievances.

Step 1

If the dispute is not resolved informally, on or before forty-five (45) days from the date when the employee became aware of or should have become aware of the matter being grieved, the employee or Union shall submit the grievance on an Employee Grievance Form. Management will designate the Deciding Official who will have the full authority to resolve the grievance. A Deciding Official shall be at the same level or higher than the initiating official.

Section 51.15 - Grievance of the Parties.

- (1) Should either party have a grievance over any matter covered by this procedure, it shall inform the designated representative of the other party of the specific nature of the complaint in writing within forty-five (45) of the date of when the party became aware or should have become aware of the matter being grieved.

Contentions of the Parties

Agency Contentions

The Agency contends that the grievance should be dismissed for lack of arbitrability because the Union's claims are untimely. It emphasizes that according to Section 51.15 of the Agreement, the deadline for filing the grievance was 45 days after the party became aware or should have become aware of the matter being grieved. The Agency argues that it first notified the Union of its intent to remove Supplement 18 from HUD@work on November 17, 2020, more

than 1 ½ years before the grievance was filed. In addition, it points out that in the Union's Sept. 1, 2021 response to the Agency's invitation to bargain, they acknowledged that Supplement 18 was not posted on HUD@work and gave the Agency a deadline of Sept. 11, 2021 to post it. The Agency also points out that in the communications with Ms. Burnett in April of 2022, the Union admitted that it was aware that Supplement 18 had not been posted on HUD@work, yet the grievance was not filed until some 91 days later.

The Agency maintains that the Union's claim of a violation of Section 15 of Supplement 18 by its failure to post contact information to utilize the AHP is also untimely. It argues that the Union knew as of Sept. 12, 2021 that the contact information had not been posted, but the grievance was not filed until 313 days later. It also submits that the asserted violation of Section 4 of Supplement 18 is without merit, since the Union knew as of Feb. 7, 2019, that the parties had not negotiated "procedures for bullying, hostile work environment, and other forms of harassment".

Finally, the Agency charges that the Union's unfair labor practice claim pursuant to the "covered by" doctrine is untimely as well. It emphasizes that Ms. Burnett informed the Union on April 18, 2022, more than 90 days before the grievance was filed, that the Agency disagreed with the Union's assertion that the new AHP was covered by Supplement 18.

The Agency submits that because the Union entered a GOP, the continuing violation argument is not applicable. It maintains that the language of Section 51.15(1) of the Agreement applies specifically to GOP's, and it is controlling over the general language of Section 51.06(1). Since there is no mention of continuing violations in connection with time limits under Section 51.15(1), the Agency contends that the 45-day time limit is the only applicable standard. Moreover, it asserts, even if the contract did allow for GOP's to be recognized for continuing

violations, the matters here in dispute do not constitute continuing violations. It argues that all of the alleged violations arose from singular actions with determinate dates that the Union was well aware of.

On the merits, the Agency contends that there are no disputed facts giving rise to a meritorious claim. It maintains that Supplement 18 does not apply to the I&I of the new AHP, emphasizing that it specifically applies only to the 2017 AHP, and the Union has so acknowledged. It asserts also that it has the right to develop a new AHP, as long as the Union is given the opportunity to bargain over its I&I.

The Agency charges that the Union's reliance on the covered-by doctrine is misplaced, claiming that it is inapplicable as a matter of law, and also because the I&I of the new AHP is not covered by Supplement 18. It points out that the covered-by doctrine applies only in situations where there is an unlawful refusal to bargain, which is not the case here. The Agency asserts that the Union is attempting to use the covered-by doctrine to prevent implementation of the new AHP; however it emphasizes that the Union was offered the opportunity to bargain over the I&I of the new policy, but the Union refused. The Agency submits that it has the right to implement a new policy, as long as the Union is afforded the opportunity to bargain. In addition, it notes, there was no move for the Union to bargain to impasse over matters already included in the Agreement. The Agency stresses that it offered the Union an opportunity to bargain over the I&I of the new AHP, but the Union refused. Thus, it submits, the covered-by doctrine is inapplicable in this case.

Even if the covered-by doctrine applies, the Agency asserts that the I&I of the new AHP is not covered by Supplement 18. Again, it points out that Supplement 18 covers only the 2017 AHP, and it reiterates that it has the right, under the Agreement, to create and implement a new

AHP as long as the Union has the opportunity to bargain over the I&I. A similar analysis applies to the Union's claims that HUD violated various sections of Articles 49 and 53, and sections of Supplement 18. The Agency submits that because Supplement 18 applies only to the 2017 AHP, there is no factual basis for the Union's claimed violations.

The Agency charges that the grievance should be dismissed as untimely, and even if it were timely, there is no factual basis for a grant of the relief sought.

Union Contentions

The Union contends that the grievance was timely filed, since the violation is continuing. It emphasizes that Section 51.06 of the Agreement provides that a continuing violation may be grieved at any time. It argues that the Agency's removal of Supplement 18 from HUD@work, its failure to post contact information for utilizing the AHP, and other actions are violations which were repeated on a daily basis; therefore each day constitutes a separate occurrence. Taken together, all of the Agency's actions in violation of the Agreement and Supplement 18 amount to repudiation, the Union asserts. It submits that repudiation is not a singular occurrence, but rather an ongoing "continuing condition", as set forth in Section 51.06. As such, the Union claims, it may be grieved at any time. Moreover, the Union asserts that where there are ambiguities concerning timelines for filing a grievance, any uncertainty should be resolved in favor of arbitrability.

The Union points to a number of actions taken by the Agency that amount to violations of the Agreement and Supplement 18. It argues that these are not singular events, but rather constitute a course of conduct that amounts to repudiation, which is the basis for the unfair labor practice charge.

The Union maintains that the Agency's assertion that Section 51.15(1) does not allow for a GOP based on a continuing violation is erroneous. It argues that if Section 51.15(1) disallows a GOP for a continuing violation, then Section 51.13, Step 1, which provides that an individual grievance must be filed within 45 days after the grievant knew or should have known about the matter being grieved, also would foreclose an individual grievance for a continuing violation. The Union asserts that the parties clearly intended the time limits in Section 51.13, Step 1 to apply to single-occurrence grievances, and not to continuing grievances. Likewise, it argues that the provisions of Section 51.15 apply to single-occurrence grievances, but do not foreclose continuing grievances. It emphasizes that Section 51.06 addresses time limits "for filing a grievance under this procedure" and does not distinguish between individual and GOP grievances.

The Union contends that the Agency repudiated Supplement 18 by failing to post Supplement 18 on HUD@work and by posting a new AHP on July 21, 2022. It asserts that each day the Agency refuses to post Supplement 18 is a new occurrence; thus HUD's actions constitute a continuing violation.

The Union submits that the grievance is procedurally and substantively arbitrable, noting that there is a strong presumption in favor of arbitrability. It maintains that the covered-by doctrine clearly applies in this case, emphasizing that the subject matter (anti-harassment policy) is expressly addressed in Supplement 18, and therefore, a subject explicitly covered by the Agreement. As such, the Union avers, there is no requirement to bargain over this subject, since the parties have already done so. Indeed, the Union emphasizes that there is no objection to the introduction of a new AHP, as long as it is consistent with the provisions of Supplement 18. It notes that the applicability of Supplement 18 is not limited to a specific version of the AHP but

rather applies generally to the I&I of the AHP. Thus, the Union asserts, Supplement 18 is not nullified by the implementation of a new AHP.

The Union avers that the Agency's claim that Supplement 18 applies only to the 2017 AHP is without merit. It argues that there is no such limiting provision in Supplement 18. Again, the Union states that it has no objection to the Agency's introduction of a new AHP, as long as the policy is compliant with the other terms of the Agreement, which includes Supplement 18. It charges that the Collective Bargaining Agreement supersedes any action by the Agency to amend or introduce new policies.

The Union submits that the grievance is arbitrable, both procedurally and substantively, and it requests that the motion to dismiss be denied.

Discussion

The question to be resolved in this ruling is whether this grievance is arbitrable. The primary rule of contract construction is that the interpreter must ascertain and give effect to the mutual understanding of the parties when they developed the contract. A corollary to this rule is that where the language of an agreement is clear and unequivocal, it will be enforced according to its clear meaning.

The crux of the timeliness issue is whether or not the Agency's actions in this matter can be characterized as a continuing violation which, according to Section 51.06, may be grieved at any time. The Union's argument is that the Agency's entire course of conduct, including removal of Supplement 18 from HUD@work; failure to post contact information for utilizing the AHP; failure to negotiate procedures for bullying, hostile work environment, and other forms of harassment, as well as posting of a new AHP on July 21, 2022, amounted to repudiation of Supplement 18. Repudiation is an ongoing condition, it asserts, with each day that the Agency fails or refuses to act constituting a new occurrence.

This argument is not persuasive, however, because although the Agency's actions were "continuing" as of the time the grievance was filed, all of the alleged violations were based on singular actions with determinate dates that the Union was aware of. The Agency notified the Union of its intent to remove Supplement 18 from HUD@work on November 17, 2020. On Sept. 1, 2021 the Union noted that Supplement 18 was not posted on HUD@work and gave the Agency a deadline of Sept. 11, 2021 to post it. That deadline was not met, and the Union acknowledged that situation in communications with Ms. Burnett in April, 2022. Similarly, the Union was aware well more than 45 days prior to the filing of the grievance that the parties had not negotiated procedures for bullying, hostile work environment, and other forms of harassment and that HUD had not posted contact information for utilizing the AHP. With respect to implementation of the new AHP, the Union was provided with several opportunities to bargain over the I&I of the new policy, but it refused. In communication dated April 18, 2022, the Agency made clear its intent to post the new AHP without input from the Union since it had refused to bargain, and it reiterated its position that Supplement 18 did not apply to the new AHP.

It is clear that the Union had numerous opportunities to enter grievances concerning these asserted violations of the Agreement and Supplement 18, and each of the matters raised in the grievance is connected with a singular incident that triggered the Union's awareness of the issue and thus the time limits for filing.

Ruling

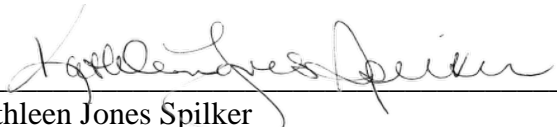
After full consideration of the record submitted by the parties, I find that the grievance filed on July 28, 2022 is well beyond the time limits for filing a grievance regarding any of the issues raised therein. Therefore, I conclude that the matter is not arbitrable, and this grievance

must be dismissed. Therefore, the grievance lacks procedural arbitrability. Accordingly, the grievance must be and it is dismissed.

Consistent with Section 51.14 of the Agreement, the Agency shall pay the arbitrator's fee.

SO ORDERED

June 16, 2023
Camp Hill, Pennsylvania



Kathleen Jones Spilker
Arbitrator