BEFORE THE IMPARTIAL ARBITRATOR KATHLEEN J. SPILKER

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL COUNCIL 222 UNION,	:	
	:	**FMCS CASE NO. 231006-00138**
AND	:	
	:	**APRIL 13, 2023**
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, **AGENCY**	:	

UNION RESPONSE TO THE AGENCY MOTION TO DISMISS

Comes now the Union through its undersigned counsel and files the Union response to the Agency's motion to dismiss. The Union Relevant Facts are incorporated into the Union's argument; all other facts remain disputed if not covered in the Union's argument.

ARGUMENT AND CITATION OF AUTHORITY

A. THE UNION WAS TIMELY IN FILING THE GRIEVANCE, AS THE VIOLATION IS CONTINUING.

The July 23, 2015, Collective Barging Agreement between the U.S. Department of Housing and Urban Development and the American Federation of Government Employees, Council of HUD Locals 222, hereafter, the CBA, gives the time limits for filing grievances under Article 51, Section 51.06:

> (1) Timeliness 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 the close of business hours on the last day of the stated period unless that day falls on a Saturday, Sunday, or non-workday, 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. Agency Exhibit 26, p. 241

The CBA does not specifically define what is a continuing violation, so it is necessary to look at relevant arbitration case decisions. Continuing violation grievances are recognized in federal sector grievance arbitrations.

The *Elkouri* treatise on pages 218-219 similarly explains and defines continuing violation grievances as follows:

> Many arbitrators have held that "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new "occurrence."

A continual violation is an affirmative defense where the Union has the burden to show an allegation of violation of law or CBA requirement.

Arbitration treatises and manuals summarize arbitral law similarly. According to *Elkouri & Elkouri,* How Arbitration Works, (6th ed. 2003), p. 221, "where there are ambiguities in the wording of contractual time limits, or uncertainty as to whether time limits have been met, all doubts should be resolved against forfeiture of the right to process the grievance. Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement." *The federal sector labor arbitration manual, A Guide to Principles of Federal*

Sector Arbitration, Broida (1st ed. 2008), p. 21, similarly recognizes the "strong presumption toward arbitrability." (Citing Ernest C. Hadley, A Guide to Federal Sector Labor Arbitration (2d 3d. 1999).

Union avers is Not a singular action.

Here, the Agency lists multiple actions taken by HUD that allegedly represent singular actions, such as removing Supplement 18 from HUD@work. However, all these actions taken together are indicators of repudiation, which is the unfair labor practice raised in the GOP. The repudiation is not a one-time, singular action but an ongoing, "continuing condition," as stated in Section 51.06(1). There is no direct contractual obligation to post supplements on HUD@work, nor to retain the supplements on HUD@work, but rather an obligation to maintain the supplements on a HUD website. Article 29, Section 29.10, states, "The Department shall distribute an electronic copy of this Agreement and all supplements to each employee, along with a statement of where to locate the Agreement and Supplements on the HUD website." Article 53, Section 53.07(1) uses nearly identical wording: "Management shall distribute an electronic copy of this Agreement and all supplements to each employee by the effective date, along with a statement of where to locate the Agreement and Supplements on the HUD website."

Here, the Agency's argument for the Union's untimeliness in its motion on pages 11 and 12 is a misreading and misapplying of the relevant contract provisions. If Section 51.15(1)—regarding grievances of the parties were intended to negate the continuing violation provision of Section 51.06(1), then Section 51.13, Step 1 regarding individual employee grievances, would also negate Section 51.06(1). 51.13, Step 1, states: "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." Both these provisions refer to one-time or single-action occurrences when imposing a time limit.

Section 51.06 addresses time limits in general for both individual and GOP: "(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 the close of business hours on the last day of the stated period unless that day falls on a Saturday, Sunday, or non-workday, in which case the following full workday shall be considered the last day. Either party may grieve a continuing condition at any time."

Further, the Agency's contention on p. 12 of its motion. "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)." This argument misrepresents the CBA by ignoring the structure of Article 51. Section 51.06(1) (about continuing violations/conditions) is stated first. It applies to all grievances; does not specify either individual or Party. Section 51.13, Step 1, follows (about individual/employee grievances). States general 45-day time limit. Section 51.15(1) comes third (about Grievances of the Parties). States general 45-day limit. It's clear that 51.06(1) applies to both types of grievances.

1. 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 SUPPLEMENT 18.

Agency Repudiation

The Agency fails to include actual, blatant indicators of repudiation:

- Posting of new Anti-Harassment Policy on or about July 21, 2022
- Announcement of new Anti-Harassment Program on July 21, 2022 (Exhibit 4)
- Grievance (including July 28, 2022, addition to GOP) addresses continuing repudiation of Supplement 18, with

the Agency's continuing failure to include Supplement 18 on HUD@work as an example of that repudiation.

- Each day that the Agency refuses to accept Supplement 18 as a governing agreement is a continuing violation.

In Addition, the Agency admits to the continuing violation through its misunderstanding of what a continuing violation is when it states, "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." No, the correct analysis is that the Agency's failure to negotiate procedures for bullying, hostile work environment, and other forms of Harassment every day since March 8, 2019, make this a continuing violation/condition. A singular event is when a party takes a specific action one time on a given date (e.g., a manager improperly denies a leave request). Agency's continuing failure to act cannot, by definition, be a singular event. In rebutting the allegation that the Union did not file a grievance until it was clear, HUD was about to implement a new AHP on page 13 of the Agency motion.

The Union made numerous attempts to work with the Agency rather than launch into an adversarial process. See, e.g., Jerry Gross/Sonya Gaither's email exchange, July 1-July 18, 2022 (Exhibit 5). Union clearly states it has no objection to a new Anti-Harassment Policy as long as the new policy is consistent with Supplement 18.

B. THE UNION CLAIMS ARE ARBITRABLE.

The Union's grievance is both substantively and procedurally arbitrable. The party challenging a grievance's procedural arbitrability bears the burden of proof. The challenging party must prove each element of its defense by a preponderance of the evidence. A finding of arbitrability is preferred, and Arbitrators are inclined to decide matters on the merits.

Simply put, there is the strongest presumption in favor of arbitrability and against hurdles put in place to hinder an Arbitrator's authority to decide the merits of a labor dispute. Only the most compelling evidence will suffice to render a labor dispute not arbitrable. In *United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 584-585 (1960),* the United States Supreme Court held that "an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute. . . Doubts should be resolved in favor of coverage."

This strong presumption in favor of arbitrability has been continually confirmed. *In NTEU Chapter 235 and DHHS, 100 FLRR 2-1026 (1999),* the Arbitrator recognized that "it is clear that under the law, arbitration is favored, and grievance procedures should be liberally construed to affect their intended purposes." I*n NAGE, Local R12-135 and EPA, 103 LRP 2451 (2002)*, the Arbitrator explained the basis for this strong presumption:

> Resolving disputes between management and labor by means of the provisions of the parties' negotiated grievance procedure is one of the foundations for successful labor/management relationships. There is no dispute that failing to bring closure to outstanding issues in the workplace may well impact the productivity and cohesiveness of an organization's success in accomplishing its mission. Arbitrators engaged in the profession of the resolvent of industrial disputes, when there is a threshold issue relating to alleged procedural defects, will often [lean] towards processing the issue on the substantive merits rather than having a procedural challenge act as a closed door, which blocks the efforts of bringing the grievance to a final and binding resolution.

In Department of Air Force, Air Force Materiel Command and AFGE, Local 2263, 106 LRP 46541 (2006), the Arbitrator explained that Arbitrators are generally disposed to resolve "[d]oubts concerning the interpretation or application of contractual time limits ... in favor of processing the grievance." *citing Fairweather, Practice, and Procedure in Labor Arbitration 125*

(4th ed. Schoonoven 1999). Even where there was a "delay in filing the grievance," if the delay was "not substantial, Arbitrators are very reluctant to dismiss the grievance and may take considerable pains to construe the agreement in favor of timely filing." *Id.* "Especially at the last step" of the grievance procedure, "which is arbitration," it has been held that "reasonable doubts, whether based on the language of the agreement or conduct of the parties, should be resolved against forfeiture of a grievance." *Id.* at n. 34. Thus, it is generally accepted that the grievance procedure in a collective bargaining agreement is meant "to facilitate, not frustrate, the resolution of grievances" -- if not by the parties, then by an Arbitrator of their choice. *Id.*

In *INS and National Immigration and Naturalization Council, Local 2859, AFGE, 103 LRP 2515, 103 FLRR-2 137 (2002)*, the Arbitrator explained that "there is a strong presumption of arbitrability in labor relations cases interpreting collective bargaining agreements, unless the evidence is clear and convincing to the contrary." See also AFGE, Local 919 and Federal Bureau of Prisons, 103 LRP 18194, 103 FLRR-2 125 (2003) ("Any doubts involved in the interpretation of a time limit clause, according to most Arbitrators, should be resolved in favor of hearing the merits of the Grievance."); *AFGE, Local 1482 and Department of Defense, Navy,* 96 FLRR 2-1210 (1996) ("strong presumption favoring arbitrability… and [avoiding] forfeiture"); *International Assoc. of Machinists and Aerospace Workers and Department of Defense, Navy, 89 FLRR 2-1048* ("There is a general presumption of arbitrability unless the evidence is clear and conclusive to the contrary.").

1. THE COVERED BY DOCTRINE APPLIES TO THE UNION'S CLAIMS

The U.S. Court of Appeals for the District of Columbia Circuit (the Court) has held that the application of the covered-by doctrine is an exercise of construction, and "the scope of what is covered must be construed to give the parties the benefit of their bargain." As the Court stated,

"[w]hen parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules – a new code of conduct for themselves– on that subject:

Under established law, a matter is covered by a collective bargaining agreement if it is "inseparably bound up with a subject expressly covered by the contract." *National Treasury Emps. Union v. FLRA, 452 F.3d 793, 796 (D.C. Cir. 2006) (alterations omitted) (quoting U.S. Dep't of Health & Human Servs., 47 F.L.R.A. 1004, 1017-18 (1993))*. If a collective bargaining agreement "covers" a particular subject, "then the parties to that agreement are absolved of any further duty to bargain about that matter during the term of the agreement." F*ederal Bureau of Prisons v. FLRA (BOP I), 654 F.3d 91, 96 (D.C. Cir. 2011)*.

The covered-by doctrine is rooted in "the need to provide the parties to a collective bargaining agreement with stability and repose with respect to matters reduced to writing in the agreement." *Department of Navy v. FLRA, 962 F.2d 48, 59 (D.C. Cir. 1992); see also BOP I, 654 F.3d at 95* ("When the question is whether an agreement 'covers' a matter, we must answer bearing in mind the importance of finality to collective bargaining.").

The Authority applies a two-prong test to determine whether a matter is covered by a collective bargaining agreement. *See National Treasury Emps. Union, 452 F.3d at 796.* It asks, first, whether the matter is "expressly addressed by" the agreement. Id. For a matter to be deemed covered, "there need not be an 'exact congruence' between the matter in dispute and a provision of the agreement, so long as the agreement expressly or implicitly indicates the parties reached a negotiated agreement on the subject." *BOP I, 654 F.3d at 94-95; see also Department of Navy,*

962 F.2d at 58-59 (rejecting standard under which a decision would be covered by a collective bargaining agreement only if agreement "specifically addresses the particular subject matter at issue" (quotation marks omitted)). If a "reasonable reader would conclude that the provision in the agreement settles the matter in dispute, then the matter is covered." *National Treasury Emps. Union, 452 F.3d at 796* (alterations omitted). Second, even if a matter is not expressly contained in an agreement, the matter is covered if it is "inseparably bound up with a subject expressly covered by the contract." Id.

Supplement 18 is expressly addressed by the agreement.

Here, applying the two-prong test in the instant case the subject matter (anti-harassment policy) is "expressly contained in Supplement 18, "Implementation of Anti-Harassment Policy." The matter is "inseparably bound up with and ... thus [is] plainly an aspect of ... a subject expressly covered by the contract.

The Agency states 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")." *Sacramento Air Force Logistics Center* is instructive on this issue. There, the union proposed to bargain midterm over the presentation and posting of sustained superior performance awards. The parties had stipulated that the CBA contained "no provision expressly providing for the presentation of performance awards and the posting of awards information" *47 FLRA at 1252-1253.* Nevertheless, the Authority held that the Agency had no duty to bargain midterm because the CBA contained an extensive provision relating to performance awards and the union's proposal "concern[ed] matters that are plainly aspects of subjects expressly covered by that agreement." *Id. at 1253*. In other words, even though the precise method for presenting awards was not spelled out, the general subject matter was extensively "covered by" the existing agreement. Pursuant to the same analysis, Supplement 18 was bargained and signed by both parties. see Agency Exhibit

4. HUD wants to bargain on matters that are non-material to the Unions mutual acceptance of the agreement and the Agency's compliance with OPM regulations.

HUD has not shown in its motion with specificity how changes from OPM compliance have materially affected the bargain for agreement to where new bargaining between the parties must take place. All HUD has done has made conclusionary statements that compliance with OPM regulations necessitates re-bargaining Supplement 18. The Agency has the burden to show facts warrant dismal in its motion but have not provided them on this key issue. Like in Sacramento Air Force Logistics Center, the Union argument should prevail that Supplement 18 is covered by. If Agency wants to bargain, the Union is only willing on those issues not covered by Supplement 18. Additionally, this is why there is a presumption for Arbitrability to resolve issues and should be maintained in this case, so a hearing can be had to flesh out facts to the nature of the Agency's argument rather than decide Arbitrability on conclusionary facts.

To the Agency's assertion on p. 16-18 in its motion, the covered-by doctrine does not apply as a matter of law because 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 covered-by doctrine applies not only to unlawful refusal to bargain but also to the unilateral implementation of changes to conditions of employment that are covered by a collective bargaining agreement. Union does not have to re-bargain matters that "already have been resolved by bargaining. "Under the 'covered-by' doctrine, a party is not required to bargain over matters that already have been resolved by bargaining. As relevant here, to determine whether a matter is covered by an existing agreement, the Authority examines whether the subject matter of the change in conditions of employment is expressly contained in the agreement." *U.S. Department of the Treasury, Internal Revenue Service,*

Office of Chief Counsel and National Treasury Employees Union, 70 FLRA 783 (2018) (internal citations omitted). In U.S. Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, 72 FLRA 687 (2022): Agency cannot unilaterally implement a change that is covered by a collective bargaining agreement: "the Arbitrator found that the parties could engage in midterm bargaining, but that it would be permissive and not mandatory because annual leave procedures were covered by the parties' existing agreement . . . the Agency could not unilaterally implement changes to the procedures of Article 32 or the mutually agreed upon local practices and procedures of the MOU."

Further, the Agency's assertion that the Union is improperly using the covered-by doctrine to affirmatively prevent HUD from implementing a new policy is meritless and unsupported by facts and law. The Union is following well-established case law and its interpretation of the parties' CBA in good faith. In fact, the Union advised Agency that it has no objection to a new Anti-Harassment Policy as long as the new policy is consistent with Supplement 18. See, e.g., Jerry Gross/Sonya Gaither email exchange, July 1-July 18, 2022 (Exhibit 5)

To the Agency's assertion on p. 19 in its motion, "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." The Union asserts, the Agency's statements are completely unsupported by the clear language of Supplement 18. The Agency cites its own arguments on pp 14-15, discussing the alleged "bargaining history" when there are no contemporaneous notes to support the Agency's theory. The subject of the Agency's new AHP is "expressly contained in [and] inseparably bound up with a subject covered by" Supplement 18, which is the Agency's Anti-Harassment Policy—any anti-harassment policy.

Note the language used in Supplement 18, which does not limit the applicability to a specific version of the Agency's Anti-Harassment Policy but offers general statements, guidance about fact-finding, and references to the CBA. For example, the scope of this supplement encompasses the impact and implementation of the Anti-Harassment Policy. [No date/version limiting the applicability is included.] The purpose of this policy is to stop harassing behavior. [General statement, not the parties understand the policy will apply to reports received after the effective date of the policy and this supplement.

This supplement, the Policy, and procedures regarding how investigations and fact-finding inquiries involving allegations of Harassment shall not supersede any article in the Agreement. If there is any conflict between this supplement/procedures and Articles 6, 9, 51, and 52, then Articles 6, 9, 51, and 52 will govern. The implementation of the Policy will be in compliance with the Departmental Reasonable Accommodation Policy and Article 45 of the Agreement. This supplement will be used in addition to the policy; in cases where conflict arises, the supplement shall supersede.

Parties "are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not "contained in or covered by" the term agreement" See *U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Virginia (Respondents) and National Federation of Federal Employees, Local 1309, 56 FLRA 45 (2000)* (emphasis added) (regarding Agency's obligation to bargain over union-initiated proposals).

To the Agency Argument at p. 20 in its motion that all the Union's remaining claims depend on Supplement 18 applying to the I&I of the new AHP." The Union avers, the argument is addressed above the plain language of Supplement 18, which does not refer to any specific Anti-

Harassment Policy, must govern, where agreements are related to specific versions of Agency policies that have been specified. “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.” Section 49.06(n) states, “The product of mid-term bargaining is enforceable upon signature at the completion of negotiations.” The plain language of 49.06(n) means that Supplement 18 became enforceable when the parties signed the agreement in 2018. There are no caveats, restrictions, or exceptions to Section 49.06(n).

To the Agency's assertion, the Union's claimed violations of various provisions of Article 53 rely on HUD 'failing to accept the validity of Supplement 18.’ The Union avers Section 53.05 states, "During the term of this agreement, either party may propose negotiations to re-open, amend, or modify this Agreement. Such negotiations may only be conducted by mutual agreement of the parties and in accordance with Article 49 Mid-term Bargaining provisions." Section 53.05 permits the Agency to propose changes that are covered by the Agreement but do not permit implementation of those changes unless the Union agrees to bargain over them. Section 53.06 states, “Any amendments to this Agreement shall become a part of this Agreement and subject to expiration on the same date as this Agreement.” Thus, under Section 53.06, Supplement 18 does not expire before the CBA does. Section 53.07(1) states, “Management shall distribute an electronic copy of this Agreement and all supplements to each employee by the effective date, along with a statement of where to locate the Agreement and Supplements on the HUD website. New Employees shall be provided a copy within ten (10) days of employment.” Failure to comply with Section 53.07(1) is not only a contract violation but also an indication of repudiation of Supplement 18.

The Agency avers that Supplement 18 applies only to the 2017 AHP and not to any future anti-harassment policy." This argument is unmolested by facts and the parties' CBA. Supplement 18 scope says, "The scope of this supplement is the impact and implementation of the Anti-Harassment Policy." Nothing addresses the expiration of the supplement if Agency wishes to modify the policy. Expiration of supplements covered by CBA:

> Article 49, Section 49.06(k): "Changes that are negotiated or agreed to pursuant to this Section shall be duly executed by the parties. Supplements shall become an integral part of this Agreement and subject to all of its terms and conditions."
> Article 53, Section 53.01: "The terms of this Agreement shall remain in effect for three (3) years from the effective date. The provisions of this Agreement shall continue in full force and effect until a new Agreement goes into effect."
> Article 53, Section 53.06: "Any amendments to this Agreement shall become a part of this Agreement and subject to expiration on the same date as this Agreement."

Nothing states that Supplement 18 is limited to the impact and implementation of only the 2017 policy. Compare this with Supplement 33, which specifically states that it addresses the implementation of HUD's proposed Flexiplace Policy dated January 10, 2022 (Exhibit 6). If Agency were correct that it could withdraw supplements whenever it wanted to change a policy, the Union would have no basis for enforcing any contractual agreements. This is contrary to all intents of the Federal Labor-Management Statute. Accordingly, this Arbitrator should "reject any construction of a collective bargaining agreement that treats it as 'but a starting point for constant negotiation over every agency action.' " *BOP I, 654 F.3d at 95 (quoting Dep't of Navy, 962 F.2d at 59).*

The bargaining history does not show Supplement 18 was intended to apply only to the 2017 AHP.

Agency's Exhibit 7 at 2 is only the after-the-fact statement by the Agency's negotiator and does not show any universal agreement on that point. The 2015 CBA clearly states that all supplements become part of the CBA and are in effect until a new agreement goes into effect Agency's Exhibit 8 at 131(transcript lines 5-14). does not address the application of Supplement 18 nor its expiration.

To the Agency's averment 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." First, there was no need to discuss future anti-harassment policies as CBA requires that supplements remain in effect until a new CBA goes into effect(see above). Second, Agency's Exhibit 9 is only an internal management email that does not discuss the future applicability of Supplement 18. Finally, Agency's Exhibit 10 is only an email from management to the negotiators asking a question about policy language; it does not discuss the future applicability of Supplement 18. When the Parties intend a supplement to be of temporary duration, i.e., less than the life of the CBA, it is noted in the supplement itself. See, e.g., Supplement 32 (Exhibit 7).

To the Agency argument, 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 . . . 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." The Union asserts, the Agency has the right to develop new policies and introduce them at mid-term; however, if the

subject is *covered by* the CBA, the new policies must comply with the Agency's contractual obligations. A review of current and past supplemental agreements (Supplements and MOUs) shows that notices of proposed changes to policies and the subsequent supplements address new situations (e.g., COVID Pandemic); new technology (e.g., Zscaler VPN Implementation); reorganizations (e.g., CFO Establishment of Financial Data Reporting/Analysis Division); new handbooks/policies where either none existed before or were significantly outdated, and their terms were not covered by the existing CBA (e.g., Implementation of Personnel Security and Suitability Handbook 755.1).

To the Agency's argument on p. 16 of its motion that the Union's covered by the defense in this case " 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." The Union avers there is nothing in Supplement 18 that prohibits the Agency from updating its policy to comply with EEOC requirements. Second, the Agency has failed to identify any specific elements of Supplement 18 that conflict with EEOC or legal requirements. More importantly, the Agency position is contrary to Section 7116(a)(7) of the Federal Labor-Management Statute, which makes it an unfair labor practice for an agency "to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."

Further, Under section 7116(a)(7), a Government-wide regulation that does not implement 5 U.S.C. § 2302, pertaining to prohibited personnel practices, is not controlling in relation to a conflicting provision of a collective bargaining agreement that was in effect before the date the

regulation was prescribed. S*ee, e.g., U.S. Dep't of Defense, Defense Contract Audit Agency, Central Region and American Federation of Government Employees, Local 3529, 37 FLRA 1218, 1228 (1990); U.S. Department of the Army, Fort Campbell District, Third Region, Fort Campbell, Kentucky and American Federation of Government Employees, Local 2022, 37 FLRA 186, 193 (1990).* Section 7116(a)(7) makes it clear that the parties' CBA takes precedence over any Agency's desire to modify its policies.

Conclusion

For the foregoing reasons stated above, the Union requests that the Agency's Motion to Dismiss be denied.

Respectfully submitted,

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Certificate of Service

On this date, I caused it to be delivered to the below-named parties or their representatives by the method(s) indicated as a true copy of the attached instrument. Unions Response to the Agency's Motion to Dismiss.

James Radcliffe
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Arbitrator Spilker
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Respectfully this 13th Day of April 2023.

_____/s/Stephan B. Caldwell_____
Stephan B. Caldwell, Esq.
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