Federal Mediation and Conciliation Services

In the Matter of the Arbitration **between** **American Federation of Government Employees (AFGE), National Veterans Affairs Council (NVAC)** **and** **Department of Veterans Affairs (VA)**	**National Grievance: NG-127-17** **Contract Interpretation** **FMCS No: 170626-02202**

Opinion and Award: Dr. Andrèe Y. McKissick, **Arbitrator**

Appearances:

For Management: Kimberly McLeod, Esq.
Richard F. Johns, Esq.
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

For Union: Michael Gillman, Esq.
Office of the General Counsel
Am. Federation of Government Employees
80 F Street, NW
Washington, DC 20001

HEARING DATE: **May 15, 2018**

HEARING LOCATION: Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

POST-HEARING BRIEFS: **July 20, 2018**

DATE OF AWARD: **August 8, 2018**

AWARD: **This Arbitrator finds that this grievance is arbitrable and is also sustained. Accordingly, this Arbitrator further finds that the Agency violated 5 U.S.C. § 7116 (a) (1) and (5) as well as the Master Collective Bargaining Agreement (MCBA), Articles 2, 11, 47, and 49. Thus, the delineated remedy herein is awarded.**

BACKGROUND

This arbitration proceeding is pursuant to the grievance and arbitration provisions of the Master Collective Bargaining Agreement (MCBA) between the Department of Veterans Affairs (VA), hereinafter "the Agency", and the American Federation of Government Employees (AFGE), National Veterans Affairs Council (NVAC), hereinafter "the Union". The hearing was held on May 15, 2018 at the Department of Veterans Affairs, located at 810 Vermont Avenue, NW, Washington, DC 20420. At the hearing, exhibits were offered and made part of the record and oral arguments were heard. Post-Hearing Briefs were received on July 20, 2018.

STATEMENT OF FACTS

On January 27, 2017, a grievance was filed by the American Federation of Government Employees (AFGE), National Veterans Affairs Council (NVAC), the Union, against the Department of Veterans Affairs (VA), the Agency. This grievance is pursuant to the subject matter of contracting out by management officials of the VA office of Information and Technology (OI&T) which relates to two (2) contracts: the National Service Desk (NSD) Help Desk Contract and the Support Services Contract (Region 4). Specifically, the Union alleges in the grievance that OI&T failed to comply with contractual and statutory obligations to notify and bargain with the Union, violative of 5 U.S.C. § 7116 (a) (1) and (5), 41 U.S.C. § 1710, Consolidated Appropriations Act 2016, P.L. 114-113 § 742, and Articles 2, 11, 47, and 49 of the Master Collective Bargaining Agreement (MCBA) between the Agency and the Union.

Facts reveal, through Joint Exhibit II (a), that a Request for Information, 5 U.S.C. § 7114 (b) (4) regarding outsourcing of the Office of Information and Technology (OI&T) work was made, documented via letter to the Agency on January 9, 2017. Incorporated in this exchange is a reference to a November 18, 2016 email from the Agency announcing its intention to "augment staffing...with contractors" to perform work previously performed by the bargaining unit members in the OI&T of the Agency.

Another important email, dated October 17, 2016, was from Alan Barta, Manager (FLM and COR), who described certain contracting out of bargaining unit work to take effect beginning December 28, 2016 (See Joint Exhibit II (a)). Analysis of these specific emails and the following stipulations shall be analyzed in the Findings and Discussion of this Award.

STIPULATIONS

The Parties agreed to the following stipulations:

1. 5 U.S.C. § 7114 (b) (4) Request for Information, dated January 9, 2017, from M. Gillman, Esq. to K. McLeod (Joint Exhibit II (a)).

2. Agency Response to January 9, 2017, Request for Information, dated February 2, 2017, from R. Fulcher to M. Gillman, Esq. (Joint Exhibit II (b)).

3. Agency Supplemental Email Response on January 9, 2017, Request for Information, dated February 28, 2017, from R. Fulcher to M. Gillman, Esq. (Joint Exhibit II (c)):

4.

> Work being done by Federal employees as part of their normal duties is the same work done by contractors under the contracts at issue.

On May 12, 2017, the Agency denied the grievance. Subsequently, on June 7, 2017, the Union invoked arbitration. Thereafter, on May 15, 2018, a hearing was held. Post-Hearing Briefs were submitted on July 20, 2018.

STIPULATED ISSUE

Whether or not the Department of Veterans Affairs violated the Master Agreement and federal law by contracting out the work at issue?

If so, what shall the remedy be?

PERTINENT PROVISIONS

The central controversy of this grievance lies within the applicability of the contractual provisions in the Master Agreement between the Department of Veterans Affairs (VA) and the American Federation of Government Employees (AFGE), hereinafter referred to as "Master Collective Bargaining Agreement" and federal law and regulations.

COLLECTIVE BARGAINING AGREEMENT

[MCBA – Joint Exhibit I, effective 2011]

ARTICLE 2 - GOVERNING LAWS AND REGULATIONS

Section 1 - Relationship to Laws and Regulations
In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

Section 2 - Department Regulations
Where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

ARTICLE 11 - CONTRACTING OUT

Section 1 - Periodic Briefings
Periodic briefings will be held with AFGE officials at the local and national levels to provide the Union with information concerning any Department

decisions that may impact bargaining unit employees in implementing Office of Management and Budget (OMB) Circular A-76.

Section 3 - Union Notification
When the Department determines that unit work will be contracted out, the Department will notify the local union to provide them an opportunity to request to negotiate as appropriate.

Section 4 - Employee Placement
When employees are adversely affected by a decision to contract out, the Department will make maximum effort to find available positions for employees. This effort will include:

A. Giving priority consideration for available positions within the Department;
B. Establishing an employment priority list and a placement program; and,
C. Paying reasonable costs for training and relocation that contribute to placement.

ARTICLE 47 - MID-TERM BARGAINING

Section 1 - General

A. The purpose of this article is to establish a complete and orderly process to govern mid-term negotiations at all levels. The parties are encouraged to use an IBB approach in all mid-term negotiations and will ensure that negotiators are trained in this approach prior to the inception of bargaining.
B. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded from mid-term bargaining will be identified within each article.
C. As appropriate, the Union may initiate mid-term bargaining at all levels on matters affecting the working conditions of bargaining unit employees.

Section 2 - National

A. The Department will forward all proposed changes for which there is a bargaining obligation to the President of the NVAC or designee(s) along with copies of all necessary and relevant documents relied upon. When a new law is enacted and the Department decides not to issue a national policy, the Union will be notified prior to implementation.
B. If either party initiates a demand to bargain, briefings will occur within 20 workdays of the demand to bargain. Proposals will be submitted 20 workdays after the briefing. Any Union demand to bargain must be received by the designated Department official within 20 workdays from the date the NVAC President or designee receives the proposed change. The date of receipt shall be documented on a simple form agreed upon by both parties. Extensions or reductions of the 20 workday time period will be by mutual agreement.
C. The Department's bargaining obligation is triggered when the Union submits a bargaining demand. When the Union's bargaining demand is submitted, the parties will discuss the proposed change and share their interests and concerns.
D. The parties may first attempt to reach agreement by conducting telephone negotiations. In addition the parties will meet face-to-face quarterly. Such negotiations should normally begin no later than 10 workdays after the Department chairperson receives the Union's demand to bargain. Telephone negotiations shall normally be for up to three hours per day, commencing at a mutually agreeable time on consecutive days unless concluded sooner.

E. If the parties are unable to reach agreement, negotiations will normally proceed to face-to-face bargaining. When traditional bargaining is used, the Union's written proposal(s) will be submitted prior to bargaining. The parties retain the right to modify, withdraw, or add to any interests, concerns, or proposals they may have discussed or exchanged earlier.
F. Bargaining sessions will be for 8-1/2 hour days at mutually agreeable times which include a break for lunch. However, the parties, by mutual agreement, may extend or shorten such bargaining sessions as necessary. The parties agree to utilize ADR mechanisms, as appropriate, without waiving either party's statutory rights.
G. Each party may have up to four negotiators which by mutual agreement may be increased based on the complexity and/or number of issues to be negotiated. The parties will exchange the names of the bargaining team members for the specific issue(s) to be negotiated. This does not preclude the attendance of experts by mutual consent of the parties. Travel and per diem will be paid by the Department pursuant to the Federal Travel Regulations for bargaining team members. These members will be allowed official time to complete the bargaining obligation. An automated data base for existing and future memorandums of understanding will be established and maintained by the Department. This data base will be made accessible to both the national and local Union officials.

ARTICLE 49 - RIGHTS AND RESPONSIBILITIES

Section 1- Introduction

The Parties recognize that a new relationship between the Union and the Department as full partners is essential for reforming the Department into an organization that works more efficiently and effectively and better serves customer needs, employees, Union representatives, and the Department.

Section 2 - Rights and Responsibilities of the Parties

A. In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the obligations imposed by 5 USC Chapter 71 and this Agreement, and the maintenance of a cooperative labor-management working relationship.
B. Each party shall recognize and meet with the designated representative(s) of the other party at mutually agreeable times, dates, and places that are reasonable and convenient.
C. The Department supports and will follow statutory and contractual prohibitions against restraint, coercion, discrimination, or interference with any Union representative or employee in the exercise of their rights.

Section 3 - Union Representation

The Union will be provided reasonable advance notice of, be given the opportunity to be present at, and to participate in any formal discussion between one or more representatives of the Department and one or more employees in the unit or their representatives concerning any grievance, personnel policy or practice, or other general condition of employment. The Union will also be allowed to be present and represent a unit employee at any examination by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary/adverse action/ major adverse action against the employee and the employee requests representation.

Section 4 - Notification of Changes in Conditions of Employment

A. The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain. The Department will work with the Union to identify and provide specific training and equipment to address concerns related to the use of technology, to include the sending and receiving of electronic communications.

CIRCULAR NO. A-76
[May 29, 2003]

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Performance of Commercial Activities

3. Authority. Reorganization Plan No. 2 of 1970 (31 U.S.C. § 1111); Executive Order 11541; the Office of Federal Procurement Policy Act (41 U.S.C. § 405); and the Federal Activities Inventory Reform (FAIR) Act of 1998 (31 U.S.C. § 501 note).

41 USC Ch. 17: AGENCY RESPONSIBILITIES AND PROCEDURES

From Title 41—PUBLIC CONTRACTS
Subtitle I—Federal Procurement Policy
Division B—Office of Federal Procurement Policy

§1710. Public-private competition required before conversion to contractor performance
(a) Public-private competition.—

(1) When conversion to contractor performance is allowed.—A function of an executive agency performed by 10 or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—

31 USC SUBTITLE I: GENERAL

From Title 31—MONEY AND FINANCE

§501. Office of Management and Budget

(1) Notwithstanding any other provision of law, none of the funds appropriated by this or any other Act shall be available to convert to contractor performance an activity or function of an executive agency that, on or after the date of enactment of this Act [Dec. 26, 2007], is performed by Federal employees unless – (A) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function....

U.S. Federal Labor Relations Authority

5 U.S.C. §§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

POSITIONS OF THE PARTIES

It is the Agency's position that Circular A-76 itself bars grievances under the negotiated grievance process. Thus, the Agency reasons that the Union is without standing to grieve Circular A-76. That is, the Agency asserts that any award on the merits of such a grievance would be unenforceable as the grievance is not arbitrable.

In regards to the merits of this grievance, the Agency counters that the Agency has the authority, under Title VII of the Civil Service Reform Act, 5 U.S.C. §§ 7101-7135, to make

determinations with respect to contracting out. Moreover, the Agency further asserts that it is its decision whether or not to use contractors and to make decisions regarding what work should be performed as well as which work should be performed.

Specifically, in this case, the Agency further reasons that its decision did not have any impact on the conditions of work for the bargaining unit employees. In addition, the Agency contends that, due to the moratorium and the inapplicability of Circular A-76, it did not complete a cost comparison. As to the allegation of the violation of Article II, Section 1, of the Master Collective Bargaining Agreement (MCBA), Periodic Briefings, the Agency retorts that the briefings were unnecessary because the contracts did not convert work from bargaining unit employees and did not effect a change in working conditions.

The Agency does concede that it failed to notify the Local Union when it determined that unit work would be contracted out (Article II, Section 3, of the Agreement). However, the Agency counters that the Union failed to present any evidence that the Agency's violation was more than a de minimis change in conditions of employment for bargaining unit employees.

Most importantly, the Agency still further asserts that the Union failed to show that the lack of prior notice amounted to any detriment to the bargaining unit employees. Moreover, the Agency also points out that the members of the bargaining unit were not adversely impacted by the Agency's failure to give notice to the Local Union. Based on the foregoing, the Agency concludes that the Union's grievance should be denied and no relief should be granted.

On the other hand, it is the Union's position that before an Agency may convert work previously performed by federal employees to contractors and that federal statutes require an Agency to conduct a public-private cost competition in accordance with certain specifications

(OMB-Circular A-76). The pertinent federal statutes which govern this prerequisite are: 41 U.S.C. § 1710 (a) and 31 U.S.C. § 501, the Union asserts. Still further, the Union points out that Congress placed a moratorium on conducting these public-private cost competitions. Thus, the Union reasons that the Agency is currently prohibited from converting federal employee work to contractors while this moratorium is in place. Notwithstanding this prohibition, the Union further asserts, the Agency proceeded to contract out certain work in the Office of Information and Technology (OI&T) in violation of federal law.

In addition to these federal statutes, the Union also points out that the Agency concurrently violated Article 2, Section 1, of the Master Collective Bargaining Agreement (MCBA), which makes federal statutes applicable to the Master Agreement.

Although the Agency conceded that notice to the National and Local Union was not given and claims that there is no nexus between the lack of notice and harm to the bargaining unit, the Union strongly disagrees. That is, the Union counters that this statutory prohibition amounts to a direct conversion, in whole or in part, and also rebuts the Agency's de minimis argument. Instead, the Union maintains that notice and consultation are required by the Agency whenever the Agency undertakes to contract out bargaining unit work, as noted in the Master Collective Bargaining Agreement (MCBA), Article II, Section 1 and 3.

In response to the Agency's de minimis argument, the Union rebuts that the Union is not required to show immediate impact on a bargaining unit in order to give rise to a bargaining obligation. In response to the Agency's claim of protection from the management's right provision, 5 U.S.C. § 7106 (a) (2) (B), the Union counters that the Agency still has the requirement of notice and bargaining obligations to the Union. That is, the Union asserts that it

is mandatory that the Agency notify and bargain with the Union over procedures to be followed in the exercise of that right and follow appropriate arrangements of bargaining unit employees who are affected by the change.

Lastly, in response to the Agency's argument that this grievance is not arbitrable, the Union rebuts that this lack of standing was not raised by the Agency until this hearing. As such, the Union contends, it is in violation of the Master Collective Bargaining Agreement (MCBA), Article 43, Section 11 (B), requiring arbitrability to be raised within forty-five (45) days of receipt of the grievance. Based on the forgoing, the Union requests this Arbitrator to sustain this grievance.

In regards to a remedy, the Union requests the following:

1. Cease and Desist contracting out in violation of federal law;

2. Cease and Desist from contracting out, without provided notice and bargaining with the Union as set forth in the Master Agreement;

3. Extricate itself from the contractual relationship at issue, without breaching its contractual obligations;

4. Bargain with the Union regarding procedures and follow appropriate arrangements with respect to bargaining unit employees affected by the conditions of that agreement, to be applied retroactively;

5. Return and make whole any employee adversely affected by the contracts at issue to status quo ante the violations identified.

FINDINGS AND DISCUSSION

After a careful review of the record in its entirety and having had the opportunity to weigh and evaluate the testimony of witnesses, this Arbitrator finds this grievance to be arbitrable. This Arbitrator also finds that this grievance should be sustained for the following reasons.

First, in response to the Agency's argument asserting that this grievance is not arbitrable, this Arbitrator finds that the National Grievance, NG-127-17 was filed on January 27, 2016, yet the Agency failed to raise this issue within forty-five (45) days of receipt of this grievance (See Article 43, Section 11 (B) of the Master Collective Bargaining Agreement (MCBA). Moreover, the record reflects that it was at this arbitration hearing that this issue of arbitrability was raised for the first time. In addition, no Agency witnesses were called to substantiate that arbitrability was raised earlier, as the time limit in Article 43, Section 11 (B) of the Master Agreement requires. Based on the forgoing, this grievance is arbitrable.

Second, the record further reflects that the Union discovered that conversion was in progress through two (2) emails. The first email was dated October 17, 2016 from the Manager of NSD Health, Alan F. Barta, regarding the subject matter, the updating on staffing and moving to Managed Services, addressed to "VA IT SDE NSO SDO Health Region 4 Employees". In this email, he states the following:

> For Health [Region 4 Employees] this means that FTEs [Full-Time employees] are no longer answering the phones or email requests from users. Because this work will be handled 100% by ASM

> Research, we have not been backfilling FTE technicians as they leave for other jobs or retire.
> (Joint Exhibit III at 5)

The second email, dated November 18, 2016, was from Acting Director (Region 4), Diane Niemann, regarding "IT Support Service Contractors", addressed to "VA IT Region 4 All Staff". In this email, she states the following:

> Region 4 is intending to augment staffing due to attrition or other staffing shortages and/or workload surge(s) with contractors... Some of the tasks performed by these contractors will be inventory management, cable management of telecom closets, cleaning up storage closets, and management of wireless access points. This initiative will free up current IT staff to perform other duties.
> (Joint Exhibit III at 7)

Third, based upon these emails, the Union made a request for the relevant and necessary information, documentation pursuant to 5 U.S.C. § 7114 (b) (4) (Joint Exhibit II (a). On February 2, 2017, the Office of Labor –Management Relations, Ryan Fulcher, responded to the Union's request and denied it (Joint Exhibit II (b)). Based upon this noncompliance of the information requested, the Union filed a National Grievance for the Agency's failure to comply with its contractual and statutory obligations to notify and bargain with the National Veterans Affairs Council (NVAC) regarding the direct conversion of bargaining unit work in the Office of Information and Technology and for the otherwise unlawful contracting out of said bargaining unit work.

Specifically, this grievance cites the following violations:

- Articles 2, 11, 47, and 49 of the Master Collective Bargaining Agreement (MCBA)
- 5 U.S.C. § 7116 (a) (1) and (5)

- 41 U.S.C. § 1710, Consolidated Appropriations Act 2016
- P.L. 114-113 § 742

Fourth, at the hearing, various stipulations were made. That is, the Agency acknowledged the Request for Information pursuant to 5 U.S.C. § 7114 (b) (4) made by the Union. The Agency also acknowledged the Agency's denial to this request (Joint Exhibit II (b) and (c)). Most importantly, the Parties stipulated to the following:

> The work being done by the federal employees as part of their normal duties is the same work being done by contractors under the contracts at issue.

Besides this concession by the Agency, the Agency's own witness, Lynette Sherrill, Director of OI&T, admitted though her testimony that the Agency "dropped the ball", when questioned about the lack of notice given to the Union.

On the other hand, NVAC's 2nd Vice President, Oscar Williams, testified that he was the designee, but never was given notice by the Agency of their intent to convert. Another Union witness, Diana Price, Procurement and Contracting Out Specialist, AFGE, was most persuasive in her testimony regarding the condition precedent of the public-private cost-comparison, which is required prior to any viable conversion. She was also clear that there were no exceptions to OMB Circular A-76, when questioned. Stated differently, she was adamant that the governing statutes did not provide any exceptions (See U-6). Thus, it follows that the Agency is left with the prohibition against contracting out (See 41 U.S.C. § 1710 (a), Public-Private Competition).

Fifth, based on the foregoing, the Agency's decision to eliminate bargaining unit work, without consulting with the Union and without providing notice and an opportunity to bargain with the Union is violative of the MCBA as well as federal law and regulation.

Specifically, Article 2 and Article 11 of the MCBA require compliance of federal statutes. Federal laws, 5 U.S.C. § 7116 (a) (1) and (5), require the Agency to directly communicate with the Union, in contravention to the emails which directly address bargaining unit employees. In particular, 5 U.S.C. § 7116 (a) (5) requires consultation and negotiation in good faith with the Union. In addition, the MCBA also requires, in Articles 47 and 49, for the Agency to notify and bargain over proposed changes in working conditions of bargaining unit employees, prior to implementation.

In response to the Agency's reliance on the management's right provision, that provision does not provide protection from the Agency's obligations to the Union as to: notice, consultation, and the right to bargain for changes in working conditions regarding bargaining unit employees (See United Steelworkers of America v. Warrior and Gulf Navigation Company, 80 S. Ct. 1347 (June 30, 1960)).

Sixth, although the Agency argues that the violations are de minimis, thus, correspondingly, the Agency has no obligation to bargain over a mere de minimis change as there is no harm or adverse impact to the bargaining unit, this Arbitrator disagrees. Moreover, case law differs from the Agency's analysis of its circumstances. The new standard for assessing whether or not a change must be bargained over now involves: "the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining

unit employees" (See Social Security Administration and AFGE, Local 1760, 24 FLRA No. 42, 1986).

Applying this standard to the circumstances of this grievance, there is more than de minimis evidence which requires a duty to negotiate and bargain. In particular, the Agency, in this case, did not directly announce a conversion to the Union directly. Instead, the Agency bypassed the Union and addressed the bargaining unit employees. This is in addition to its omission to give notice and refusal to bargain with the Union, as noted earlier. Also, the Agency did not comply with federal regulations when it failed to obtain a cost comparison prior to conversion. All of these factors make the violations more than de minimis. Here, the potential impact and its consequential adverse effects can manifest itself to the bargaining unit employees and perhaps affect their opportunities by the Agency's lack of overtime work due to the presence of contractors (See US Department of Labor Occupational Safety and Health Administration and National Council of AFGE, Local 644, 24 FLRA 743 (1986)).

In addition, another case, directly on point, reiterates the same current test, requiring bargaining in the presence of more than de minimis evidence is: US General Services Administration and AFGE Council 236, 62 FLRA 341 (2008). In this similarly-situated grievance, the Arbitrator ordered the Agency to cease and desist from unilaterally terminating rotational assignments without bargaining over this change of conditions. The Authority affirmed the Arbitrator's Award and denied all the Agency's exceptions. It is interesting to note that two (2) of the denied exceptions dealt with the Agency's assertion that there was no harm to the staff of the bargaining unit employees. The other Agency's argument, which was also denied by the Authority, was the protection of the management's right provision, as with our instant grievance.

Seventh, in an analogous case, Federal Bureau of Prisons Federal Correctional Institution, Texas v. AFGE, Local 3828, 55 FLRA 848 (1999), the Agency also failed to comply with § 7114 (a) (2) (A) as well as violated 5 U.S.C. § 7116 (a) (1) and (5) by unilaterally implementing changes in conditions of employment without providing the Union with an opportunity to negotiate and by refusing to bargain over the substance, impact, and implementation of changes. In that case, the Authority affirmed a status quo ante remedy and found it was appropriate under the circumstances. A more recent case, US Department of Homeland Security Customs and Border Protection v. National Treasury Employees Union, 64 FLRA 989 (2010), the Authority confirmed the Arbitrator's determination of the violation of 5 U.S.C. § 7116 (a) (1) and (5). The Authority also found that the Status Quo Ante (SQA) remedy to be appropriate for the Agency's failure to give the Union notice and opportunity to bargain over the impact and implementation of changes.

Eighth, based on the foregoing, this Arbitrator finds the following remedy to be appropriate under the circumstances presented. The Agency is directed to:

1. Cease and Desist contracting out in violation of federal law;

2. Cease and Desist from contracting out, without provided notice and bargaining with the Union as set forth in the Master Agreement;

3. Extricate itself from the contractual relationship at issue, without breaching its contractual obligations;

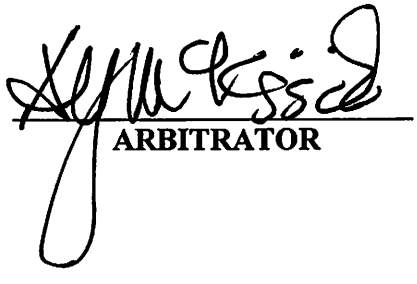
4. Bargain with the Union regarding procedures and follow appropriate arrangements with respect to bargaining unit employees affected by the conditions of that agreement, to be applied retroactively;

5. Return and make whole any employee adversely affected by the contracts at issue to status quo ante the violations identified.

AWARD

This Arbitrator finds that this grievance is arbitrable and is also sustained. Accordingly, this Arbitrator further finds that the Agency violated 5 U.S.C. § 7116 (a) (1) and (5) as well as the Master Collective Bargaining Agreement (MCBA), Articles 2, 11, 47, and 49. Thus, the delineated remedy herein is awarded.

DATE OF AWARD: August 8, 2018



ARBITRATOR