

FEDERAL MEDIATION AND CONCILIATION SERVICE

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In the Matter of the Arbitration between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
National VA Council

Union,

And

U.S. Department of Veterans Affairs,

Agency.

FMCS Case No: 201003-00095
NG 81619 (VHA Directive 1085.01)

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BEFORE: MARY P. BASS, Arbitrator

Briefs received September 28, 2020, and October 13, 2020

APPEARANCES:

For the Union:

Thomas Dargon, Jr.
Staff Counsel, National VA Council
Office of the General Counsel
AFGE, AFL-CIO

For the Agency:

Lindsay J. Gower
Alfred "Bron" Steinmetz
Agency Representatives

OPINION AND AWARD

Introduction & Issue

The parties agreed to proceed without an in-person or virtual hearing. The stipulated record consists of the Stipulated Facts and the Exhibits set out just below.

The stipulated Issue is:

Whether the Agency violated law or contract by implementing VHA Directive 1085.01 as applied to AFGE bargaining unit employees. If so, what shall be the remedy?

Stipulations

Stipulated Facts (Stip. Fact___)

1. The case is arbitrable.
2. The Parties may not supplement the record except by mutual agreement.
- 3 Nationwide, AFGE represents approximately 270,000 bargaining unit employees at the VA.
- 4 On July 30, 2008, the Parties executed a Memorandum of Understanding ("July 2008 MOU") concerning VHA Directive 2007-XXX, which became effective on August 26, 2008, as VHA Directive 2008-052 (Smoke-Free Policy for VA Health Care Facilities).
- 5.The July 2008 MOU did not contain a sunset provision.
- 6.On March 15, 2011, the Parties executed the 2011 Master Agreement.
- 7.On February 10, 2017, VHA Directive 2008-052 was rescinded.
Following the rescission of VHA Directive 2008-052, the Parties continued to follow the July 2008 MOU.
- 8.On December 15, 2017, the V A notified AFGE of its desire to reopen and renegotiate the 2011 Master Agreement.
- 9.On March 20, 2019, the VA provided a mid-term bargaining notification to AFGE stating that it would implement VHA Directive 1085.01 to create a "smoke-free policy for employees."
- 10.On April 2, 2019, the Parties executed a Memorandum of Understanding containing the ground rules governing negotiations of the successor term agreement ("Ground Rules MOU").
- 11.On April 20, 2019, AFGE notified the VA that any negotiations concerning VHA Directive 1085.01 would need to be addressed in term bargaining.
- 12.On May 2, 2019, pursuant to the Ground Rules MOU, the Parties exchanged a complete set of proposals for term bargaining.
- 13.In this exchange, neither party submitted proposals regarding the smoking rights of AFGE BUEs.
- 14.AFGE did not agree to negotiate concerning VHA Directive 1085.01 during term bargaining.
- 15.AFGE did not agree to negotiate concerning VHA Directive 1085.01 during mid-term bargaining.
- 16.On July 9, 2019, NVAC Mid-Term Bargaining Committee Chairperson, Oscar L. Williams, Jr. informed the Agency that NV AC would not be able to address VHA Directive 1085.01 "until after the National Term Negotiations end."
- 18.On August 7, 2019, the Agency sent an e-mail to the NVAC Mid-Term Bargaining Committee Chairperson, Oscar L. Williams Jr., providing him with notice that VHA planned to advance with the issuance of VHA Directive 1085.01 Smoke-free Policy for Employees at VA Health Care Facilities with an implementation date of October 1, 2019.

19. On August 8, 2019, the VA transmitted VHA Directive 1085.01 entitled "Smoke-Free Policy for Employees at VA Health Care Facilities," with an implementation date of October 1, 2019.
20. On October 1, 2019, VHA Directive 1085.01 took effect as applied to AFGE BUEs.
21. As of the implementation of VHA Directive 1085.01 on October 1, 2019, the Agency no longer followed the July 2008 MOU, contending it was no longer bound by the July 2008 MOU.
22. In conjunction with VHA Directive 1085.01, the VA closed, removed, or otherwise denied access to designated smoking areas on VA property as applied to AFGE BUEs.
23. In conjunction with VHA Directive 1085.01, the VA issued threats of disciplinary action to AFGE BUEs.

Stipulated Exhibits ("Ex. _").

1. 2011 Master Agreement
2. VHA Directive 2008-052 Smoke-Free Policy for VA Health Care Facilities, dated 8/26/08
3. AFGE/VA MOU "AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities, dated 7/30/08 ("July 2008 MOU")
4. AFGE/VA MOU re Ground Rules for Term Bargaining, dated 4/2/19 ("Ground Rules MOU")
5. VHA Directive 1085.01 (Smoke-Free Policy for Employees at VA Health Care Facilities), dated 8/8/19
6. National Grievance-8/16/19, dated 8116119 ("NG-8116119") (Ex. 6 had attachments, which are included here and marked as Exs. A-B)
7. VA Response to NG-8116/19, dated 9126/19 (Ex. 7 had attachments, which are included here and marked as includes Exs. 1-5)
8. Email from Michael Clements to Oscar Williams entitled "VHA Directive 1085.01, Smoke-free Policy for Employees at VA Health Care Facilities," dated 3/20/19
9. Letter from Oscar Williams to Tracy Schulberg entitled "VHA Directive 1085.01, Smoke-free Policy for Employees at VA Health Care Facilities," dated 4/12/19
10. Email exchange between Michael Clements, Oscar Williams, et al. entitled "VHA Directive 1085.01, Smoke-free Policy for Employees at VA Health Care Facilities," dated 06/18/19 - 7/9/19
11. Email response from NV AC President Alma Lee on exchange between Michael Clements, Oscar Williams, et al. entitled "VHA Directive 1085.01, Smoke-free Policy for Employees at VA Health Care Facilities," dated 06/18/19 - 7/1/19
12. Email from Michael Clements to VHA VISN HROs entitled "VHA Directive 1085.01, Smoke-free Policy for Employees at VA Health Care Facilities," dated 8/8/19

Factual Background of the Dispute

The Union represents approximately 270,000 bargaining unit employees (hereinafter, "BUEs") at the Agency. Stip. Fact 3

The chronology of the July 2008 MOU and the relevant directives issued by the Agency, both relating to the subject of BUEs smoking on Agency property, are as follows:

The Agency and the Union entered into a Memorandum of Understanding relating to designated smoking areas on VA Health Care Facilities property for BUES in July, 2008 (hereinafter, "the July 2008 MOU"). Stip. Fact 4. The July 2008 MOU did not contain a "sunset" provision. Stip. Fact 5. The MOU "concern[ed]" VHA Directive 2007-XXX, which became effective as VHA Directive 2008-052 (Smoke-Free Policy for VA Health Care Facilities) on August 26, 2008. Stip. Fact 4.

Thereafter, on February 10, 2017, the Agency rescinded VHA Directive 2008-052. Stip. Fact 7.

On August 8, 2019, the Agency transmitted VHA Directive 1085.01, entitled "Smoke-Free Policy for employees at VA Health Care Facilities" with an implementation date of October 1, 2019, and on the latter date the Directive took effect as applied to the BUEs. Stip. Fact 19, 20. In conjunction with VHA Directive 1085.01, the Agency closed, removed, or otherwise denied access to designated smoking areas on VA property as applied to the BUEs and the Agency issued threats of disciplinary action to the BUEs. Stip. Fact 22, 23.

During the entire period between the execution of the July 2008 MOU and October 1, 2019, the Agency complied with the provisions of the July 2008 MOU. Stip. Fact 8, 21.

The July 2008 MOU (EX. 3) reads in its entirety as follows:

"MEMORANDUM OF UNDERSTANDING (MOU)

The following constitutes an agreement between the Department of Veterans Affairs (VA) and the American Federation of Government Employees, AFL-CIO, National Veterans Affairs Council #53 (AFGE-NVAC) concerning VHA Directive 2007-XXX, "Smoke-Free Policy for VA Health Care Facilities."

1. The national parties agree that bargaining unit employees will continue to be provided with reasonably accessible designated smoking areas.

2. Whenever practicable, smoking areas should not be within 35 feet of an entrance to a VA health care building or office building that is routinely used by patients, residents, employees or staff.

3. Where an established smoking area has been located within 35 feet of an entrance due to space constraints or other logistical limitations, such smoking area need not be relocated to comply with this provision or the subject Directive.

4. Bargaining unit employees will be permitted to smoke outside on the grounds so long as they avoid smoking around routinely used building entrances.

5. Appropriate signage will be installed to clarify where smoking is not permitted.

6. The appropriate management official shall provide the local Union President with a copy of this MOU upon receipt.”

The Policy contained in VHA Directive 1085.01 states in pertinent part as follows:

“Consistent with its core health mission, as authorized in 38 U.S.C. 7301(b), it is VHA policy that all VHA health care facilities will be smoke free for employees effective October 1, 2019. Accordingly, at VHA health care facilities, by that date all designated smoking areas for employees must be eliminated.” Ex. 5, p.5.

Relevant Provisions of the 2011 Master Agreement

Article - Duration of Agreement Article

Section 2 - Duration of the Agreement

This Agreement shall remain in full force and effect for a period of three years after its effective date. It shall be automatically renewed for one year periods, unless either party gives the other party notice of its intention to renegotiate this Agreement...” (the “renegotiation” provision).

Section 3 – Reopener

Negotiations initiated by either party during the term to add to, amend, or modify the Agreement may be conducted only by mutual consent of the parties....” (the reopener provision.)

Section 4 – Negotiation Schedule

Arrangements for negotiating both the reopener or renegotiation under Section 2 or 3 above shall be in accordance with Article 47 – Mid Term Bargaining.

Article 47 – Mid-Term Bargaining Section 1 – General.

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....”

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...

Uncontested Facts relating to the parties’ bargaining history

On March 15, 2011, after the July 2008 MOU was issued, the parties executed the 2011 Master Agreement between the parties , which Master Agreement has not been superseded as of the date hereof. Stip. Fact 6; Ex.1.

Term bargaining: With respect to term bargaining, on December 15, 2017, the Agency notified the Union of its desire to reopen and renegotiate the 2011 Master Agreement. Stip. Fact 9. Negotiations ensued. Section 2 of the Duration of Agreement article of the 2011 Master Agreement provides that, “If renegotiation of an Agreement is in progress but not completed upon the termination date of this Agreement, this Agreement will be automatically extended until a new agreement is negotiated.”

On April 2, 2019, the Parties executed an MOU containing the ground rules governing negotiations of the successor term agreement (hereinafter, “Ground Rules MOU”). Stip. Fact 11. Ex. 4. On May 2, 2019, pursuant to the Ground Rules MOU, the parties exchanged a complete set of proposals for term bargaining. Stip. Fact 13. In this exchange, neither party submitted proposals regarding smoking venues for BUEs. Stip. Fact 14. The Union did not agree to negotiate concerning VHA Directive 1085.01 during term bargaining. Stip. Fact 15.

Mid-term bargaining: With respect to the subject of mid-term bargaining of VHA Directive 1085.01, on March 20, 2019, the Agency provided a mid-term bargaining notification to the Union, stating its intention to implement VHA Directive 1085.01. Stip. Fact 10.

The Union did not agree to negotiate concerning VHA Directive 1085.01 during mid-term bargaining. Stip. Fact 16.

Contemporaneous positions of the parties as to the status of the July 2008 MOU:

The emails set out below evidence the positions of the parties prior to this proceeding relating to possible mid-term bargaining on VHA Directive 1085.01. The Union's position was that the July 2008 MOU was in full force and effect and that the Union was not required to bargain mid-term for a replacement. The Agency asserted that its mid-term bargaining obligations would be satisfied by notifying the Union of its intent to implement VHA Directive 1085.01, and by providing NVAC the opportunity for a briefing, to submit proposals, and to bargain on the new Directive; that until October 1, 2019 the MOU would remain in effect; and that thereafter, in the absence of an alternative resolution on VHA Directive 1085.01, it would be unilaterally implemented.

Agency response to Grievance (Exhibit 6 at pp 6-8, signed by Tracy L. Schulberg for Roy E. Ferguson, Executive Director Office of Labor Management Relations, dated August 16, 2019:

"Again, on March 6, 2019, [the Office of the Deputy Under-Secretary for Health for Operations and Management] (DUSHOM) also requested that all VHA facilities do the following:

- Cease and desist any implementation of smoke free policies [referring to VHA Directive 1085.01], and
- Return to the previous status quo ante and adhere to the provision of the 2008 National Memorandum of Understanding (MOU) between the VA and AFGE reference Smoke Free Policy for VA Health Care Facilities..."

Email from Michael Clements, VA Central Office of Labor Relations Management to AFGE counsel Michael Gillman dated June 10, 2019" (Exhibit 6 attachment Exhibit B, p. 9

"....."[T]his will help me ...make sure the facility understands that full compliance with the July 2008 MOU is required."

Email from Clements to Gillman dated June 11, 2019. *Id.* ..”I explained that Proposal #4 in the MOU, [a reference to par. 4 of the July 2008 MOU] allows AFGE BUEs to smoke anywhere on the grounds as long as it not near entrances, which means that they may smoke in the parking lot or in their cars and by not allowing employees to do so they were in violation of the MOU...”

Email from Clements to NVAC Mid-Term Bargaining Chairperson Oscar Williams dated June 28, 2019 (Exhibit 7, Agency Response to the Grievance, p. 11: ...As you are aware, our office provided notification to the NVAC of VHA”s intent to implement VHA Directive 1085.01 on March 12, 2019 under the provisions of Article 47, Section 2 of the VA/AFGE Master Agreement.....

Email from Clements to Gillman dated July 3, 2019, *id at p. 10*: “.... [t]here is no contractual or statutory bar preventing VHA Directive 1085.01 from being addressed thru the mid-term bargaining process. .. By this message, I am providing notification once more to AFGENVAC of the Department’s intent to implement the Directive per the provisions of Article 47, Section 2, and provide the NVAC the opportunity for a briefing, to submit proposals, and bargain VHA Directive 1085.01 under the provisions of Article 47, Section 2 of the VA/AFGE Master Agreement.”

Email from Gillman to Clements dated July 3, 2019, *id at p. 9*: ...” But understand that the Union is under no obligation to renegotiate the 2008 Smoking MOU. You have previously admitted several times that the 2008 Smoking MOU is in full force and effect, which by its terms sets the rules governing smoking on VHA facilities for AFGE bargaining unit employees. That MOU contains neither sunset nor reopener language.”

Positions of the Parties

The Union argues that the subject of VHA Directive 1085.01 was covered by an existing agreement, the July 2008 MOU, and was accordingly a permissive subject of bargaining which the Union was not required to negotiate in mid-term bargaining. The Union further argues that the Agency failed to submit proposals on VHA Directive 1085.01 in term bargaining and that the Union was accordingly not required to negotiate on it in term bargaining. It further argues that the Agency wrongfully repudiated the July 2008 MOU, and that the Agency violated its obligations to bargain in good faith with the Union. If further argues that VHA Directive 1085.1 does not concern the exercise of a management right, and if it did, the Agency still has a duty to bargain in good faith.

With respect to the ULP charge, the Union argues that the Agency repudiated the July 2008 MOU; and that the Agency violated its statutory and contractual obligations to bargain in good faith with the Union.

The Agency argues that VHA Directive 1085.01 was appropriate for mid-term bargaining and the Agency met all mid-term bargaining obligations; mutual consent to bargaining was not required. It also argues in the alternative that it was not obligated to bargain as to the subject of Directive 1085.01 because internal security practices are excluded from the scope of bargaining.

Discussion

(1)

The Union argues that the subject matter of VHA Directive 1085.01 is covered by the July 2008 MOU and that bargaining on this subject is accordingly a permissive subject that the Union was not required to negotiate in mid-term bargaining.

The Federal Labor Relations Authority has ruled that, absent other factors, a party cannot be compelled to bargain over matters already covered by an existing agreement during the term of the agreement. *AFGE & Social Security Admin*, 64 FLRA 17, 22 (2009) and cases cited therein. In such a case, the subject matter, including here VHA Directive 1085.01, becomes a permissive subject of bargaining, meaning that bargaining may be refused by either party during the term of the agreement. “In this regard, the ‘covered by’ doctrine is the principle that a party is not obligated to bargain over matters contained in or covered by an existing agreement between the parties. ...As such, matters covered by agreements are properly considered ‘permissive’ subjects of bargaining.”... *Id*, at p. 21.

It is not contested that the July 2008 MOU was valid at the time it was executed and that the parties continued to comply with it until October 1 2019. The Agency’s correspondence set out above substantiates its concession that until the July 2008 MOU was validly replaced, the Agency was required to comply with it. Accordingly, absent any factor compelling another conclusion, the July 2008 MOU qualifies as an existing

agreement that covers the subject of BUE smoking on Agency premises.

It is also not contested that the July 2008 MOU and VHA Directive 1085.01 cover the same subject matter, viz. whether and where BUE smoking on Agency premises will be permitted. The July 2008 MOU provides for designated smoking areas on Agency premises. Ex. 3. VHA Directive 1085.01 eliminates smoking on its premises entirely: “Consistent with its core health mission, ...it is VHA policy that all VHA health care facilities will be smoke free for employees effective October 1, 2019. Accordingly, at VHA health care facilities by that date all designated smoking areas for employees must be eliminated.” Ex. 5, p. 5.

In *U.S. Dept. of HHS, SSA, & AFGE*, 47 FLRA 1004 (1993), FLRA set forth a framework for determining “whether a contract provision covers a matter in dispute. Initially, we will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute.” *Id.* I find that the subject matter of BUE smoking on Agency premises is expressly contained in both VHA Directive 1085.01 and the July 2008 MOU, and that under *AFGE & Social Security Admin*, 64 F.L.R.A. 17, 22 (2009) and cases cited therein, the Union could at its option bargain on the provisions of VHA1085 as a replacement, but was not required to do so, in the absence of other factors.

(2)

The remaining substantive questions are whether the Union was nevertheless required to bargain on the subject matter of VHA Directive 1085.01 because of certain bargaining provisions of the 2011 Master Agreement; because the July 2008 MOU had expired by operation of law or contract; or because the subject matter, employee smoking on Agency premises, is a matter of internal security excluded from the scope of bargaining.

With respect to term bargaining, neither party argues that bargaining was undertaken by them in respect of VHA Directive 1085.01 in the negotiation for the successor agreement to the 2011 Master Agreement. The parties stipulated that on May 2, 2019, pursuant to the Ground Rules MOU (Ex. 4), they exchanged a complete set of proposals for term bargaining, and that in this exchange, neither party submitted proposals regarding the smoking venues for BUEs. Stip. Fact 13, 14. The question here is only as to whether the Union was required to bargain on VHA Directive 1085.01 as a replacement for the July 2008 MOU in mid-term bargaining in the spring of 2019. It was stipulated that the Union did not agree to negotiate during mid-term bargaining. Stip. Fact 16.

The Agency argues that Union consent to mid-term bargaining on VHA Directive 1085 was not necessary because of the applicability of the bargaining provisions of the 2011 Master Agreement, then and now in existence. Its argument is based on Section 3 of the Duration of Agreement provision of the 2011 Master Agreement, which states that:

“Section 3 – Reopener: “Negotiations initiated by either party during the term to add to, amend, or modify this Agreement may be conducted only by mutual consent of the parties...”

The Agency argues that under section 3, “the Master Agreement only requires mutual consent when either party seeks to ‘add to, amend, or modify *this* Agreement,’” that ‘smoking access is not discussed anywhere in the Master Agreement,’ and that therefore “mutual consent is not required to negotiate smoking access.” A. Brief, p. 4.

The Union states that “It is well settled that MOUs are part of collective bargaining agreements,” citing Dept. of Veterans Affairs, Consolidated Mail Outpatient Pharmacy, Leavenworth, KS and AFGE Local 85, 60 FLRA 844 (2005), but also that it is independently effective based on its status as an existing agreement that covers the subject matter of BUE smoking on Agency premises.

Whether the July 2008 MOU is part of the Master Agreement or not, I find that mutual consent to mid-term negotiations on BUE smoking is the required outcome. If it is part of the Master Agreement, mutual consent is dictated by Section 3 of the Duration of Agreement provision. If it is not, the provisions of the Master Agreement do not cover it, it stands alone with respect to its effectiveness, and mutual consent to bargaining on the subject of the July 2008 MOU would be required.

In *Dept. of Veterans Affairs Consolidated Mail, Outpatient Pharmacy, Leavenworth. Kansas & AFGE*, 60 FLRA 844 (2005), a case which concerned the same disputants as here, FLRA found that the MOUs there in question were part of the master agreement for purposes of the mid-term bargaining provisions of the master agreement. FLRA based its determination on the presence of an entry for “Memorandum of Understanding” in the index of the master agreement. Here, the Master Agreement has three entries for “Memorandum of Understanding.” This supports a conclusion that the provisions of Section 3 of the Duration of Agreement article of the Master Agreement requiring mutual consent to mid-term bargaining of the July 2008 MOU is applicable.

The undersigned has found in the preceding sections that the July 2008 MOU is an existing agreement covering the same subject as VHA Directive 1085.01, and that it is subject to permissive bargaining only, in the absence of several other factors discussed just below. The Agency provided no reasoned basis for why an MOU should be treated differently from a master agreement. The *quid pro quo* rationale which underlies the basic idea that a bargain made should be a bargain kept is applicable to both.

(3)

The next question is the effect of the absence of an expiration clause in the July 2008 MOU. The Agency argues that since the July 2008 MOU does not contain an expiration provision, the Union is attempting to force it into “perpetual compliance with a 12 year old MOU”. A Brief, p. 4. It is to be noted that the parties’ preparations for term bargaining for the renegotiation of the Master Agreement and the steps taken by the Agency to implement VHA Directive 1085.1 took place at about the same time, the spring

and summer of 2019. Nothing prevented the Agency from submitting proposal relating to designated smoking areas in the exchange of proposals for term bargaining in the renegotiation of the entire 2011 Master Agreement in May, 2019. It chose not to do so. To the extent the Agency relies on the absence of an expiration provision in the July 2008 MOU, the solution to this problem lay in its own hands.

The Agency relies on *Boeing Airplane Co. & NLRB*, 174 F.2d 988, 991(1949) for the proposition that “where a contract is of indeterminate duration, it may ‘become terminable by unilateral action on the part of either party after a reasonable lapse of time.’”

Boeing is not applicable here. The federal District judge in *Boeing* made a factual finding of what a reasonable lapse of time would be. He found there that in “§8(d) [of the National Labor Relations Act] Congress specified what reasonable notice of termination would be, namely sixty days.” 174 F. 2d 988 at 991. That provision of law is not applicable in this case. There is nothing in the record that would support a finding as to what a “reasonable” lapse of time in this case would be, even if the Boeing argument were otherwise applicable.

(4)

The Agency further argues that mid-term bargaining on VHA Directive 1085.01 was appropriate because the July 2008 MOU was ineffective by the time the new directive was issued. This was assertedly either because of the rescission on February 10, 2017 of VHA Directive 2008-052 (Stip. Fact 7), or the implementation of VHA Directive 1085.01 on October 1, 2019.

With respect to VHA Directive 2008-052, which was rescinded on February 10, 2017, it argues that the July 2008 MOU was specifically tied to that directive, and that it would be “unreasonable to continue to enforce the MOU, the only purpose of which was to “interpret the now rescinded directive.” The record reflects that the July 2008 MOU was executed on July 30, 2008, and VHA Directive 2008-052 was issued on August 26, 2008. Thus, the 2008 Directive was issued subsequent to the July 2008 MOU and the

MOU could not “interpret” a document not in existence at the time. Moreover, the July 2008 MOU is a contract, while both directives were unilaterally issued by the Agency. Under the “covered-by” doctrine, elimination of the July 2008 MOU could be effectuated only by mutual consent of the parties, not unilaterally by the Agency. For the same reason, the unilateral issuance by the Agency of VHA Directive 1085.1 could not, *ipso facto*, terminate the July 2008 MOU.

Also, the Agency’s actions were not in accord with this argument. It complied with the July 2008 MOU until October 1, 2019, and repeatedly reaffirmed that was in full force and effect during this period. Stip. Fact 8 and email correspondence. The Agency’s reliance on *AFGE, Local 3937 & Social Security Administration*, 64 FLRA 1113 (2010) is misplaced. There, the arbitrator found as a matter of fact that the conditions of employment in 12 MOUs were “not in effect as of the effective date” of the successor master agreement.” Here, the “successor agreement” has not yet been finalized, and the facts underlying that case are entirely different.

(5)

The Agency further argues it was not obligated to bargain as to the subject of VHA Directive 1085.01 because internal security practices are excluded from the scope of bargaining. It states that the right to determine its internal security practices is a matter excluded from the scope of bargaining under 5 U.S.C. § 7106(1), and that smoking, as the “leading cause of preventable death in the United States,” referring in its brief to the Center for Disease Control and the Surgeon General, is a matter of internal security. A. brief, p. 8.

Smoking on Agency premises by employees is subject to bargaining. *56th Combat Support Group, MacDill AFB, FL and NFFE Local 1553* (1993). The Agency cites no case holding that it is a topic subject to managerial prerogative.

It is the case that, “[w]here an Agency shows a link or reasonable connection between its security objective and a policy or practice designed to implement that

objective, a proposal that conflicts with the policy or practice affects management's right under § 7106(a)(1)," *AFGE Local 1547 & U.S Dept. of the Air Force, Luke Air Force Base*. 63 FLRA 174, 176 (2009). A "link or reasonable connection" must be shown, however. Neither of the cases relied on by the Agency on this point dealt with smoking. There is no evidence on the record, which is entirely stipulated, that establishes such a "link" or any legal analysis of an alleged transformation of a subject that currently is covered by a binding agreement into a management right.

The only references in the record to the Agency's factual claim that the designation of smoking venues is within its managerial right to determine its internal security are to be found in the Agency's response to the Grievance, Ex. 7, p. 5-6 and 27-28.) These are two similar letters signed by Agency staff in the Office of Labor Management Relations. There is no claim that the individual making the factual statements is a medical or scientific expert or is a person with any particular knowledge of the health effects of smoking or the distances required for protection from secondary smoke. The "link" was accordingly not made.

The MOU relating to smoking was entered into in 2008, when the hazards of smoking were already well known. The rescinded Directive VHA Directive 2008-052, issued in August, 2008 after the July 2008 MOU was negotiated, refers extensively to the hazards of smoking indoors, Ex. 2, p. 2, but simultaneously states that "Smoking areas for Federal employees, including VHA employees, have traditionally been negotiated through Collective Bargaining Agreements". *Id.* The Agency did not place into evidence in this case any significant scientific insights into the dangers of smoking at the workplace discovered since 2008 that would change its bargaining category into one of managerial right.

(6)

It is not necessary to address the Union argument that the Agency failed to submit proposals on VHA Directive 1085.01 in term bargaining and that the Union was accordingly not required to negotiate on it in term bargaining. *Stip. Fact* 13, 14. The

parties have stipulated that under the Ground Rules MOU, they exchanged a complete set of proposals for term bargaining, and that neither party submitted proposals regarding the smoking rights of the BUEs. The Agency did not argue that the Union was required to negotiate on smoking venues during term bargaining.

(7)

With respect to the ULP charge, the parties agree that on and after October 1, 2017, the Agency no longer complied with the July 2008 MOU. Stip. Fact 21. Whether this failure constitutes a repudiation of the July 2008 MOU and an unfair labor practice in violation of 5 U.S.C. §§7116(a)(1) and (a)(5) depends upon: “(1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?).” *Dept. of Air Force, 375th Mission Support Squadron, Scott AFB and NAGE*, 51 FLRA 858 (1996).

Since the parties have stipulated that the July 2008 MOU was rejected entirely and a no smoking policy was instituted on October 1, 2019, the breach was clear and went to the heart of the agreement. The Agency's actions constituted a repudiation of the July 2008 MOU. *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211 (1991). “Where the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms, we will find that an unfair labor practice has occurred in violation of the Statute.” *id* at 1218-19.

Given that the Agency's repudiation constituted an unfair labor practice, it is not necessary to further discuss the Union's charge that the Agency refused to bargain VHA Directive 1085.01 during mid-term bargaining. It is stipulated that the Union refused to negotiate concerning this Directive at that time. Stip. Fact 16. It is also stipulated that “On March 20, 2019, the VA provided a mid-term bargaining notification to AFGE stating that it would implement VHA Directive 1085.01 to create a “smoke free policy for employees.” Stip. Fact 10. The record is unclear as to the scope of actual attempts by the Agency to bargain VHA Directive 1085.01.

Remedy

FLRA “has developed several "traditional" remedies, including a cease-and-desist order accompanied by the posting of a notice to employees, which are provided in virtually all cases where a violation is found.” *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996). These are the *status quo ante* remedies appropriate here. *Dept. of Justice, Fed. Bureau of Prisons, FCI Danbury and AFGE Local 1661*, 55 FLRA 201, 205 (1999).

AWARD

The Agency violated law and contract by implementing VHA Directive 1085.01 as it applied to AFGE bargaining unit employees. The Agency repudiated the AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities, dated 7/30/08 in violation of 5 U.S.C. §§ 7116(a)(1) and (a)(5). The following relief is ordered:

Within 30 days, the Agency shall:

1. Cease and desist from further implementation of VHA Directive 1085.01 as applied to AFGE bargaining unit employees;
2. Rescind VHA Directive 1085.01 as applied to AFGE bargaining unit employees;
3. Take any and all steps necessary to fully comply with the provisions of AFGE/VA MOU re Smoke-Free Policy for VA Health Care Facilities, dated 7/30/08;
4. Distribute a remedial notice posting to all AFGE bargaining unit employees by email, to be signed by the current Deputy Under-Secretary for Health for Operations and Management of the Agency, setting forth the terms of this Award.

The undersigned shall retain jurisdiction for purposes of resolving any dispute concerning implementation of this Award.



Mary P. Bass
Arbitrator

Dated: November 10, 2020, New York , NY

AFFIRMATION

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

I, Mary P. Bass, do hereby affirm upon my oath as an arbitrator that I am the individual described in and who executed this instrument, which is my award.

Mary P Bass

Dated: November 10, 2020
New York, N.Y.

Mary P. Bass
Arbitrator