FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-19
Office of Administrative Law Judges
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DEPARTMENT OF VETERANS AFFAIRS VA MEDICAL CENTER, MARTINSBURG, WV RESPONDENT AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-78 CHARGING PARTY	Case No. WA-CA-10-0295

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Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Sometimes, a person or an institution does everything wrong, yet somehow manages to emerge unscathed, even vindicated. In popular culture, images of "Mister Magoo" and "the Pink Panther" come to mind. Federal labor relations is not a cartoon or a farcical movie, but even here, there are instances when a party can act for all the wrong reasons, yet still have acted lawfully.

This is one of those cases.

The Agency, under new management that was unfamiliar with many of the documents and policies applicable to labor relations at the hospital and not even on good

speaking terms with its own human resources staff, was determined to change the hospital's superior

performance awards program by eliminating such awards for employees rated Fully Successful. Under the impression that it was required to bargain with the Union over the amount of the 2009 awards, it engaged in negotiations for a period of time; when the Union would not agree to the amounts proposed by the Agency, the Union and the Agency filed a joint request for the assistance of the Federal Service Impasses Panel (the Panel). But the Agency became frustrated with the lack of resolution, believed it needed to pay employees their awards before Christmas, and unilaterally implemented the awards it had previously proposed, derailing the case pending with the Panel.

This sort of unilateral action would normally be an unfair labor practice. It was not justifiable under the basic rules of bargaining, which require that the *status quo* be maintained until the impasse is resolved by the Panel. But in this case, the Agency had no underlying obligation to bargain: unknown to the hospital director at the time, and only discovered by the Agency months after it had unilaterally halted negotiations, the Agency and Union on a national level had negotiated an agreement in 2005 that covered this very situation and authorized the hospital director to determine the amount of money to be awarded to employees. The Agency didn't have to negotiate awards with the Union, but it did; then it waited until the very last minute to terminate negotiations and pay the awards in the amounts it wanted to pay. Nonetheless, the Agency was simply doing what it had the right to do all along, and it did not violate the Statute.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On March 3, 2010, the National Association of Government Employees, Local R4-78 (the Union or Charging Party) filed an unfair labor practice charge against the Department of Veterans Affairs, VA Medical Center, Martinsburg, West Virginia (the Agency or Respondent). After investigating the charge, the Regional Director of the Washington Region of the Authority issued a Complaint and Notice of Hearing on August 9, 2010, alleging that the Agency implemented performance awards of $150 for employees rated Fully Successful while the parties were at impasse on this issue and while the dispute was pending before the Panel, in violation of section 7116(a)(1) and (5) of the Statute. The Respondent filed its Answer to the complaint on September 9, 2010, denying that it failed to negotiate in good faith and insisting that in any case it had no duty to bargain with the Union over the amount of performance awards.

A hearing was held in this matter on October 20, 2010, in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel (GC) and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. GC Ex. 1(b), ¶2; GC Ex. 1(c), ¶2. The Charging Party is a labor organization within the meaning of section 7103(a)(4) of the Statute, and it is the exclusive representative of a bargaining unit composed of some of the Respondent's employees. GC Ex. 1(b), ¶3; GC Ex. 1(c), ¶3. The Department of Veterans Affairs (VA) and the National Association of Government Employees are signatories to a national collective bargaining agreement (the Master Agreement) that covers the Martinsburg facility. GC Ex. 13; Tr. 134-35. Ann Brown has been the director of the Martinsburg facility since early 2008, and Susan Anderson has been the president of the Charging Party since 1999. Tr. 11, 66, 74.

Article 20 of the Master Agreement is entitled "Employee Awards and Recognition," and Section 3 of that article lists five types of awards that employees are eligible to receive; superior performance awards are not included on that list. GC Ex. 13 at 68. Section 4 calls for the formation at each facility of union-management awards panels to establish criteria for awards. *Id.* At the time the Master Agreement was negotiated, the VA evaluated employee performance on a pass-fail basis and did not give superior performance awards to employees. Tr. 35-36, 48-49. In 2005, the VA decided to replace the pass-fail system with a five-tiered rating scale,[1] which was incorporated into a revised VA Directive and Handbook 5013 (Performance Management Systems) and 5017 (Employee Recognition and Awards). Tr. 35, 129. The VA and the NAGE national union then negotiated a Memorandum of Understanding, dated September 28, 2005 (referred to hereafter as the MOU), which further revised the two handbooks in a variety of ways. Tr. 129; Resp. Ex. 2. ¶6 of the revisions to Handbook 5017 provides, in part:

> Superior performance awards are based on an employee's annual performance appraisal rating of record. Employees who receive performance ratings of outstanding or excellent are eligible to receive a superior performance award. Employees who receive performance ratings of fully successful are eligible to receive a superior performance award if they receive an exceptional achievement level on at least one critical element. Management will determine the amount of money, if any, to be awarded to an eligible employee. The awards panel, as established in Article 20 Section 4 of the DVA/NAGE Master Agreement will recommend to the facility directors how funds for superior performance awards for NAGE Bargaining Unit Employees should be distributed i.e. use of percentages or monetary amounts. [Resp. Ex. 2 at 3]

[1] The three highest ratings on the scale (in ascending order) are Fully Successful, Excellent, and Outstanding. Tr. 41. At times, the parties use the terms "excellent" and "exceptional" interchangeably to refer to the second-highest rating. *Compare, e.g.,* the second and third sentences of Paragraph 6 of Resp. Ex. 2; *see also* GC Ex. 3, 4, 5 &14.

The new rating and awards system was first put into practice nationally in 2006, and in that year and every subsequent year, Martinsburg management and the three unions representing employees at the Martinsburg facility discussed how much money would be paid to employees in each rating category for superior performance awards.[2] Tr. 38-44, 51-52. In 2006, 2007, and 2008, the parties agreed that employees rated Fully Successful[3] would receive $500, employees rated Excellent would receive $1,000, and employees rated Outstanding would receive $1,500. Tr. 42, 52-53. The negotiations in 2007, conducted between the unions and then-Acting Director Pedro Garcia, were somewhat contentious, as the acting director initially proposed awards at all three rating levels that were considerably lower than the amounts awarded in 2006. Tr. 41. The unions objected to this proposal and contacted the VA's regional (or VISN) director, who agreed to performance awards of $500, $1,000, and $1,500, as they had paid the year before. Tr. 39-44. In 2008, Ms. Brown's first year as director of the Martinsburg facility, Ms. Brown offered to continue the performance awards at the 2007 levels, and the unions agreed without any controversy. Tr. 52-53. But in 2009, Ms. Brown sought to change the formula that had been used in prior years, leading to the current dispute.

Ms. Brown testified that when she became director in 2008, the awards program was in "complete disarray," but she had more urgent issues to address first, so she deferred action on improving the awards program until the next year.[4] Tr. 74, 76. In 2009, she increased the budget for special contribution awards, decentralized the system for distributing awards among each service, and reinstituted service-level awards committees in accordance with the Master Agreement. Tr. 77-78; GC Ex. 13 at 68. She also wanted to eliminate superior performance awards for Fully Successful employees. Tr. 79, 87; GC Ex. 12.

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[2] Employees are evaluated for a year ending on September 30, and superior performance awards are usually paid by Christmas of that year. Tr. 44-45.

[3] When I refer in this decision to superior performance awards for "Fully Successful" employees, I am referring to employees who met the eligibility criteria of the MOU, as quoted above: that is, employees whose overall rating was Fully Successful and who received a rating of Excellent or Outstanding on at least one critical element. The Union President testified that she understood that not all employees rated Fully Successful were entitled to superior performance awards, and that the Union never sought to negotiate awards for all employees rated Fully Successful. Tr. 66-69. At the hearing, Ms. Brown testified that she had been unaware of the existence of the MOU during the 2008 and 2009 discussions of performance awards, and it was suggested (without confirmation) that awards may have been paid to some Fully Successful employees who were not eligible. Tr. 67, 92. However, since the Union and the Agency agree as to who is eligible for the awards, there is no dispute on this issue for me to resolve.

[4] As a further indication of the "disarray" of the awards program, Brown testified that she had been unable to pay the 2008 performance awards by the mid-December time that employees expected them. Tr. 81. Her boss and the employees were very upset by this lapse, and she vowed that this "rookie mistake . . . will never occur again." *Id.*

In a memo dated May 27, 2009, the Agency's Human Resource Officer, David Loy, notified the presidents of the three unions that the Agency wished to "negotiate Performance Awards for Fiscal Year 2009." GC Ex. 2. The memo further indicated, "This negotiation is required to determine the amount awarded for each rating." *Id.* The parties met in person for one bargaining session, on July 14, at which Brown proposed that Fully Successful employees receive no award, Exceptional employees receive $1,000, and Outstanding employees receive $1,500. Tr. 62-64. After objecting to management's proposal of no award for Fully Successful employees, Ms. Anderson and another union president walked out of the meeting. Tr. 69-71, 123-26. Thereafter, Brown decided to implement her plan for Fully Successful employees over a two-year period, rather than immediately, and on August 17 the Agency submitted a written proposal to the unions, modifying its offer for Fully Successful employees from 0 to $150. Tr. 125; GC Ex. 3. The Union responded with its own written proposal, dated August 31, of $500 for Fully Successful employees. GC Ex. 4. On September 21, Brown notified the three unions that "a determination has been reached" to pay $150 awards to employees rated Fully Successful. GC Ex. 5. On behalf of the Union, Anderson then notified Art Hicks, her primary contact in the Agency's Human Resources office, that she believed the parties were at impasse; Hicks agreed and notified the Federal Mediation and Conciliation Service. Tr. 15; GC Ex. 11. As she had in 2007, Anderson also appealed to the Agency's VISN director to intervene in the 2009 dispute. Tr. 49. The VISN director met with the three union presidents during his November visit to Martinsburg, and he advised them that he would not overrule Brown's offer of a $150 award for Fully Successful employees. Tr. 49, 87. After a mediation session also proved unsuccessful, the parties jointly filed a Request for Assistance with the Federal Service Impasses Panel on November 23. Tr. 15-18; GC Ex. 6, 7.

As the awards dispute drifted into December with no agreement, Brown began to get anxious. She was acutely aware that her failure to pay employees their 2008 performance awards before Christmas had gotten both the employees and her boss upset, and she was determined not to repeat that mistake. Tr. 81, 86-87. She was also concerned that the dispute might remain at the Panel for an indeterminate length of time, and somewhat contradictorily, she also believed that at some point in their discussions, the Union had agreed to $150 awards for the Fully Successful employees. Tr. 86-87. With or without the agreement of
the Union, Brown felt she "had to pay something[.] . . to the employees." Tr. 86. On December 11, she sent an email message to all employees, notifying them that performance awards would be paid in the next two pay periods: $150 to employees rated Fully Successful, $1,000 to employees rated Excellent, and $1,500 to employees rated Outstanding. GC Ex. 8. Ms. Anderson then advised the contact person at the Panel that the Agency had just implemented the performance awards that were the subject of the impasse, and she was advised by the Panel that the Request for Assistance would have to be withdrawn. Tr. 21-27. The Union and the Agency jointly withdrew the Request for Assistance on February 16, 2010, and the Union filed its unfair labor practice charge on March 3, 2010. GC Ex. 9, 10.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel starts with the premise that an agency has a duty to bargain over proposals concerning the amount of performance awards. *See U.S. Dep't of the Navy, Naval Underwater Sys. Ctr., Newport, R.I.,* 38 FLRA 456, 488-93 (1990)(*Underwater Systems*). Here, the Agency did enter into negotiations with the Union regarding the amounts to be paid as performance awards for 2009, but when those negotiations reached an impasse, the Agency unilaterally implemented its own scale of awards. The GC argues that this unilateral implementation, at a time when the impasse was pending resolution by the Panel, violated section 7116(a)(1) and (5) of the Statute. Citing *U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 55 FLRA 892, 902-03 (1999)(*INS*), the GC asserts that the Agency was required to maintain existing working conditions pending the completion of the entire bargaining process. According to the GC, this rule was specifically applied to impasses pending at the Panel in *U.S. Sec. & Exch. Comm'n,* 62 FLRA 432 (2008), and is equally applicable to the instant case.

The GC concedes that even under the *SEC* and similar decisions, an agency is permitted to implement changes unilaterally when a delay would impede the agency's ability to effectively and efficiently carry out its mission. But the GC argues that the Respondent failed to prove a "necessary functioning" defense. Rather, Ms. Brown's explanation that she was unsure how long it would take the Panel to resolve the impasse, and that employees and her supervisor would be upset by a delay, fell considerably short of showing that a delay would have prevented the hospital from carrying out its mission.

The General Counsel also rejects the Agency's claim, raised at the hearing, that the procedure for determining performance awards is covered by the 2005 MOU. According to the GC, the testimony of Union officials Anderson and Bailey established a pattern, both at Martinsburg and other VA facilities, of bargaining on a local level to set the amount of performance awards for employees at each rating level. The Agency, they said, sets the amount of money budgeted for awards, and within that budget, union and management officials negotiate how to distribute the money. While the Master Agreement and the MOU refer to awards panels at the medical centers, Anderson testified that there have not been awards panels at the Martinsburg facility, and that each year since 2006 the medical center director and the three union presidents have sat down and negotiated specific dollar amounts, within the Agency's budget, for employees at each rating level. Mr. Bailey testified that at some VA facilities, such as the one in Coatesville, PA, management and the local union have negotiated local supplemental agreements that set fixed amounts for the awards at each level, so that further negotiations are not necessary every year (GC Ex. 14), but at all facilities the amount of performance awards is established through bargaining.

The GC further argues that the covered by doctrine is inapplicable to this case. It argues that the covered by doctrine is an affirmative defense to an alleged failure to bargain, whereas the GC here has accused the Agency of unilateral implementation during an impasse, not a failure to bargain. The GC also argues that the Agency's insistence that it negotiated with the Union over the amount of performance awards only because it was unaware of the 2005 is not credible and is contradicted by the evidence.

As a remedy, the General Counsel requests that the Agency be required to bargain with the Union regarding the amount of performance awards in future years, and that the Agency make whole those employees with Fully Successful ratings in 2009, who were eligible under the MOU for performance awards and who were paid $150, by paying them back pay in the amount of $350 each.

Respondent

Not only does the Agency deny that it violated the Statute by implementing its performance award proposals in this case, but it argues that it was the Union that committed the unfair labor practice here, by insisting to impasse on a matter that was already covered by the MOU. While confessing to embarrassment at its managers' unawareness of the MOU until late in 2010 (i.e. just before the hearing), counsel for the Respondent places the blame squarely on the Union, which admittedly knew of the MOU and failed to advise Brown of that fact during negotiations. In the Agency's view, the Union's concealment of the MOU misled Brown not only about her ability to unilaterally determine the amounts of performance awards, but also about the ineligibility of many employees rated Fully Successful for performance awards. The Agency therefore urges that the complaint be dismissed.

The Authority has long held that it is an unfair labor practice for either an agency or a union to insist to impasse on a permissive subject of bargaining. *SPORT Air Traffic Controllers Org. (SATCO),* 52 FLRA 339, 347 (1996); *Fed. Deposit Ins. Corp., Headquarters,* 18 FLRA 768, 771-72 (1985). Recently, the Authority applied this principle for the first time to matters that are covered by an existing agreement. *Am. Fed'n of Gov't Employees, Local 3937,* 64 FLRA 17, 21 (2009). In the current case, it is undisputed that the parties negotiated to impasse, and that the only issue referred to the Panel was the amount of performance awards for Fully Successful employees. Therefore, if the size of performance awards was a subject covered by the MOU, the Union -- not the Agency -- committed an unfair labor practice; the Agency was not required to negotiate on this subject; and its unilateral implementation of $150 awards to Fully Successful employees was lawful.

The Agency insists that the MOU's revisions of Handbook 5017 (Resp. Ex. 2 at 3, ¶6), expressly cover the subject of performance awards by providing, "Management will determine the amount of money, if any, to be awarded to an eligible employee." In accordance with this provision, the Respondent argues that Brown was fully authorized to resolve the dispute over performance awards unilaterally and to pay the awards in whatever

amounts she felt were appropriate, even while the dispute was pending at the Panel. It argues that the Union officials' testimony was not credible when they stated that local unions and awards panels retain the right to negotiate locally with management concerning the amounts to be awarded to employees at each rating level. In the Agency's view, the express language of the MOU leaves no doubt that management can set performance awards unilaterally and need not bargain with the Union. Thus the Agency acted appropriately in imposing $150 awards for Fully Successful employees at Martinsburg in 2009.

Analysis

Prior to implementing a change in conditions of employment, an agency is required, by section 7116(a)(5) of the Statute, to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a *de minimis* effect on conditions of employment. *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland AFB*, 64 FLRA 166, 173 (2009). The Authority has held that proposals concerning the amount of money to be paid as performance awards to employees are substantively negotiable. *Underwater Systems*, 38 FLRA at 481-82, 490-94; *see also U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Coatesville, Pa.,* 57 FLRA 663, 672 (2002).[5] Thus it is clear that the underlying question of how much to pay the Respondent's employees at each rating level as superior performance awards is substantively negotiable, and that issuing new levels of performance awards constituted a change in conditions of employment.

If the subject of the change was within the duty to negotiate, the Agency was required to maintain the conditions of employment until the entire negotiating process was complete. *INS, supra*, 55 FLRA at 902-03. I will address the Agency's "covered by" defense separately, but I first want to make it clear that the other justifications given by the Respondent for its conduct are legally unacceptable. Thus I reject the contention that Brown had no choice but to implement her proposed awards in December, because the employees and Brown's supervisor expected the awards to be paid by Christmas and would be upset if the awards were delayed. By the Agency's own admission, the 2008 awards had been paid late, and it offered no evidence to indicate that the hospital suffered in any serious way as a result. Certainly the employees would have been upset by a repeat of the 2008 delay, as they undoubtedly were the year before, and as some of them undoubtedly were when they received a $150 award in 2009. But the legal standard for overriding the duty to bargain is that a delay in implementation would impede the agency's ability to effectively carry out its mission. *Id.* at 904. That standard was not met here. Indeed, the evidence suggests that the only real damage that would have resulted from a delay in paying the awards here was to Brown's relationship with her supervisor. I also reject the Respondent's contention, asserted without

[5] Ironically, the *VA Coatesville* case involved an unfair labor practice arising from changes to the VA's awards policy after the agency had changed from a five-tiered to a two-tiered (pass/fail) performance rating system in 1998. 57 FLRA at 663.

any real evidence or support, that the parties had previously agreed to pay the Fully Successful employees $150 awards. Tr. 86. The record includes several documents that were exchanged by the parties between May and November of 2009, regarding the amounts proposed for performance awards (GC Ex. 3-8, 11; Resp. Ex. 1), and at no point is there any indication that the Union agreed to $150 for Fully Successful employees. Therefore, unless the issue of superior performance awards was nonnegotiable, the Respondent committed an unfair labor practice.

It is undisputed that the VA and the Union did negotiate, at the national level, regarding superior performance awards when they returned to a five-tiered rating system in 2005. The MOU was the product of those negotiations. The question that is now presented in this case is whether the MOU resolved the matter of how much to pay Fully Successful employees at Martinsburg for their 2009 performance awards. This, in turn, requires the application of the so-called "covered by" test or defense.

The covered by defense took a number of forms in the early years of Authority case law, but after one formulation of the policy was rejected by the D.C. Circuit Court of Appeals,[6] the Authority set forth a "definitive test" that has remained in place since 1993. *U.S. Dep't of Health & Human Serv., Soc. Sec. Admin., Balt., Md.,* 47 FLRA 1004, 1016 (1993). The Authority sought to prevent the "disruption that can result from endless negotiations over the same general subject matter[,]" but it also warned that an "agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining." *Id.* at 1017-18. Accordingly, it announced a two-pronged test for determining whether a contract provision covers a matter in dispute. First, it looks at "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.* at 1018. If the answer to this question is no, the Authority goes on to determine whether the matter in dispute is "inseparably bound up with" a subject expressly covered in the contract. *Id.* If the answer to either question is yes, then the proposal is covered by the contract and there is no obligation to bargain over it. *See also, U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.,* 56 FLRA 809, 813-14 (2000)(*Customs Mgmt. Ctr.*).

Before applying the covered by test, I should stop to address some threshold questions. First, the GC argues that the covered by defense does not apply in this case, because the "complaint alleges unilateral implementation while the Parties were at impasse, not a refusal or failure to bargain." GC's Post-Hearing Brief at 9. But in alleging that the Agency unilaterally implemented its award proposal while the parties were at impasse, the complaint indeed asserted that the Agency failed to allow the bargaining process to reach its proper conclusion, and if the complaint is correct, that would constitute an unlawful failure to bargain. The complaint itself alleges that the Respondent "refused to negotiate in good faith with the Union in violation of 5 U.S.C. § 7116(a)(1) and (5)." GC Ex. 1(b), ¶16.

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[6] *Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA,* 962 F.2d 48 (D.C. Cir. 1992), *remanding* 39 FLRA 1060 (1991).

A second problem is how awfully late it was when the Agency first raised the covered by defense: in its prehearing disclosure, a week before the hearing. The hospital director and her staff exchanged written proposals with the Union, met with the Union, and sought impasse resolution at the Panel, in a process spanning six months, and at no time during that process did the Agency claim, in any way, shape, or form, that the issue was not negotiable. No Agency official told the Union that this was a permissive subject on which the Agency could elect not to negotiate, or that the amount of the awards was covered by a prior agreement. I believe Ms. Brown when she testified that she was unaware of the MOU, but ignorance itself does not excuse unlawful conduct. Even if her Human Resources staff was similarly unaware of the MOU (though the Respondent chose not to call them to testify), mass ignorance is no more legitimate than one individual's.[7] Because the Agency allowed negotiations to proceed for so long without advising the Union that this was a permissive subject of bargaining, it raised the Union's expectation that the bargaining process would continue to a resolution by the Panel. And by upsetting those expectations abruptly, the Agency asserted its rights in a manner that maximized animosity.

But did the Respondent waive the right to raise the covered by defense by waiting until the week before the hearing? The case law says no. "Covered by" is an affirmative defense, and as such, it must be raised no later than the pleadings or at trial. *Pension Benefit Guaranty Corp.,* 59 FLRA 48, 52 (2003), *citing U.S. Dep't of Housing & Urban Dev.,* 56 FLRA 592, 596 (2000) and *United States Army Armament Research, Dev. & Eng'g Ctr., Picatinny Arsenal, N.J.,* 52 FLRA 527, 534 (1996). Respondent's counsel did assert the covered by defense in its amended prehearing disclosure and at the hearing. Perhaps most relevant on this point is *Equal Employment Opportunity Comm'n, Washington, D.C.,* 52 FLRA 459 (1996)(*EEOC*), where the Authority explicitly rejected the argument that the agency waived a covered by defense by failing to assert it during bargaining. The Authority noted: "Indeed, if a matter is contained in or covered by a collective bargaining agreement an agency may act unilaterally without providing <u>any</u> reason for so doing." *Id.* at 460. The Administrative Law Judge, whose decision and reasoning were affirmed by the Authority, elaborated that parties should be encouraged to resolve their disputes bilaterally, and to engage in negotiations, even when they have no obligation to do so. *Id.* at 472-73. Although the Agency's handling of the negotiations in our case may have caused a great deal of unnecessary friction between the parties, it didn't amount to a waiver of its right to rely on the MOU.

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[7] I reject the inferences in the Respondent's post-hearing brief that the Union consciously concealed the existence of the MOU, or its knowledge of the MOU, from the Agency's officials. There is no evidence in the record to suggest that Union officials understood that the Agency negotiators were unaware of the MOU or concealed the document from management; absent such evidence, the Union officials were entitled to assume that their management counterparts were in possession of the Master Agreement and applicable MOUs and policies. Similarly, if the Agency paid superior performance awards to employees rated Fully Successful who were not eligible for such awards under the MOU, this was due to management's negligence, not the Union's deception.

This brings us back to the central issue of whether the amount of the 2009 performance awards was covered by the 2005 MOU. The pertinent language of Paragraph 6 of the MOU was quoted above and is really quite clear. After setting forth the eligibility requirements for superior performance awards, Paragraph 6 states: "Management will determine the amount of money, if any, to be awarded to an eligible employee." Resp. Ex. 2 at 3 (emphasis added). It further provides that local awards panels "will recommend to the facility directors how funds for superior performance awards for NAGE Bargaining Unit Employees should be distributed i.e. use of percentages or monetary amounts." *Id.* (emphasis added). The initial step in the covered by analysis is to ascertain whether the matter in dispute is expressly contained in the MOU. Paragraph 6 of the MOU explicitly describes how performance awards will be awarded. First it specifies who is eligible for the awards, and then it specifies how the amount of the awards will be determined. It assigns a function to the facility director and a function to the awards panel. The director determines the amount each eligible employee will receive, and the panel recommends whether this will be a fixed dollar amount or a percentage of salary.

It is hard to imagine how the MOU could encompass the subject of the 2009 bargaining more precisely than this. We are not comparing a general contract provision to a specific situation, as in *Customs Mgmt. Ctr.,* for example. In that case, the contract contained provisions relating to fitness and leave, and the parties disputed whether the granting of administrative leave to participate in a fitness competition was covered by the contract.
56 FLRA at 814. In our case, the MOU and the 2009 bargaining involved exactly the same thing: how much to pay individual employees, or groups of employees, as superior performance awards. A reasonable reader of the MOU cannot avoid the conclusion that it was intended to address the situation that occurred in 2009. While "exact congruence of language" is not required for the first prong of the test, we have such congruence here. Therefore, it is not necessary to move to the second prong of the covered by test.

At the hearing, Union witnesses testified that the negotiators of the MOU intended for the parties to negotiate performance awards locally. Tr. 38-39, 56-57, 130-31. Counsel for both parties debated this point in their post-hearing briefs. In doing so, it is not clear whether they are disputing the application of the covered by test, the substantive meaning of the MOU, or both. The latter issue is often referred to as the *IRS* doctrine or defense, in reference to *Internal Revenue Serv., Wash., D.C.,* 47 FLRA 1091 (1993). The Authority has stated that both the covered by and *IRS* doctrines may apply in appropriate cases. As explained in *Social Security Admin. Region VII, Kansas City, Mo.,* 55 FLRA 536, 538 (1999), when it applies the covered by test, "the Authority does not determine whether any of the terms of the agreement have been violated." But in applying the *IRS* test, "the Authority must not only determine whether the agreement provision covers the action alleged to constitute an unfair labor practice, but also whether the provision permitted the respondent's alleged unlawful action." *Id.; see also Social Security Admin.,* 64 FLRA 199, 202 (2009)(*SSA 2009*). While the *IRS* defense can be asserted against any type of alleged unfair labor practice, the covered by defense applies only to a refusal to bargain. *Id.* at 202. Thus the two doctrines overlap when a party relies on a contract provision that specifically concerns bargaining. *Id., citing United States Dep't of Energy, WAPA, Golden, Colo.,* 56 FLRA 9, 12 (2000).

The Respondent here has not expressly asserted the *IRS* defense or cited the case, but both the Agency and the General Counsel argue that the MOU should be interpreted as supporting their positions. The Respondent asserts that Paragraph 6 of the MOU gives management (in this case the facility director, Ms. Brown) the authority to unilaterally "determine" the amount of money to be paid to employees rated Fully Successful, Excellent, and Outstanding as performance awards, while the GC asserts that the reference to the awards panel in the same paragraph describes a bilateral process of negotiating the amounts for awards. The GC further points to testimony from witnesses Anderson and Bailey as demonstrating that the parties interpreted and carried out the MOU by engaging in local negotiations to determine the amount of the awards in a given year.

On its face, Paragraph 6 of the MOU does not specifically concern bargaining (in contrast, for instance, to a reopener or zipper clause). It does not state that bargaining is impermissible on the question of how large a performance award to give particular groups of employees, nor does it state that bargaining is required. By inference, however, the Respondent does argue that the facility director's authority to "determine the amount of money, if any, to be awarded to an eligible employee" is unfettered, and that it may be exercised unilaterally, except with regard to whether the award should be distributed as a percentage or a monetary amount. For its part, the General Counsel insists that the language of the MOU can only be understood in the context of how it was applied by the parties, which involved negotiations (at Martinsburg as well as at other VA facilities) every year from 2006 through 2009. Or, as the Authority held in another SSA decision, *Social Security Admin., Balt., Md.,* 60 FLRA 674, 681 (2005)(*SSA 2005*), the "resolution of the [covered by] issue . . . depends on an analysis, under *IRS,* of whether the Judge properly interpreted the parties' bargaining obligations under that agreement."

Indeed, it would appear in this case that applying the *IRS* doctrine in its favor is essential to the General Counsel's case, whereas it is secondary (and perhaps unnecessary) to the Agency's case. I have already indicated that the question of how much to pay Martinsburg employees in superior performance awards is expressly contained in the MOU. As noted in *SSA 2009,* "finding that a matter is addressed in or an aspect of a matter addressed in an agreement is sufficient to excuse further bargaining." 64 FLRA at 202. But in order to rule in favor of the GC, I would have to conclude first that it is not sufficient to find that the MOU "covers" the 2009 dispute, and second that the MOU affirmatively requires bargaining with the Union over the size of the performance awards.

The relationship between the *IRS* and covered by doctrines in this case is further complicated by yet another SSA case, *Social Security Admin., Balt., Md.,* 66 FLRA 569 (2012)(*SSA 2012*). In *SSA 2012,* the Authority reviewed exceptions to an arbitrator's decision that had found the agency violated both the collective bargaining agreement and section 7116(a)(5) of the Statute by unilaterally implementing a new procedure for online job applications. The agency contended that existing contract provisions expressly covered the subjects addressed in the new procedures and permitted the agency to implement those

procedures. The Authority agreed that the agency's action was covered by the contract, and that it therefore had no statutory duty to bargain, but it upheld the arbitrator's conclusion that the new procedure violated those same contract provisions. *Id.* at 571-73. Thus, a violation of the contract did not necessarily give rise to a violation of the Statute -- a contradiction that Member Dubester objected to in his partial dissent. *Id.* at 575-76.

It is not clear whether the reasoning of the *SSA 2012* majority would apply in an unfair labor practice case such as ours. Although the union in that case was still able to obtain a contractual remedy for the agency's unilateral action, the Union in our case would not be so fortunate, since it chose to file an unfair labor practice charge rather than a grievance. I cannot order a remedy for a contractual violation unless I also find a statutory violation, and that is problematical under *SSA 2012*.

It appears to me that it is sufficient for the Agency to prevail in our case under the covered by doctrine alone, but I further find that the Agency would also prevail under the *IRS* doctrine. First, as the Authority noted in *SSA 2009*, "[u]nder the covered by doctrine, finding that a matter is addressed in or an aspect of a matter addressed in an agreement is sufficient to excuse further bargaining." 64 FLRA at 202. Without attempting to substantively interpret paragraph 6 of the MOU, it seems apparent on its face that the provision describes precisely the situation that arose in 2009 at Martinsburg, and that it set forth a procedure for determining the amount of money that eligible employees would be awarded. Having found that the MOU addressed the issue being disputed in 2009, this should be "sufficient to excuse further bargaining." *Id.* Moreover, under the rationale of *SSA 2012*, the Agency would not need to show that its conduct was permitted by the MOU if the matter in dispute was covered by the MOU, but the General Counsel and the Union would have to show both that the dispute was not covered by the MOU and that the Agency's conduct was not permitted by the MOU. 66 FLRA at 573 nn.5, 6 ("a change cannot violate a contract provision unless the contract provision ′covers′ the subject matter of the change.").

However, a substantive analysis of the meaning of the MOU also warrants a conclusion that the Respondent has the authority to unilaterally set the amounts of superior performance awards. Paragraph 6 of the MOU states: "Management will determine the amount of money, if any, to be awarded to an eligible employee." The American Heritage Dictionary of the English Language, Fifth Edition, defines "determine" as "[t]o decide or settle (a dispute, for example) conclusively and authoritatively." In contrast, the same paragraph of the MOU provides that the awards panel "will recommend" how award funds should be distributed, reinforcing the conclusion that management (in this case, the hospital director) controls the decisions on this subject, albeit with input from the awards panel.

The testimony of Union officials Anderson and Bailey does not override the clear language of the MOU. Ms. Anderson testified that the MOU was a "guide" for the parties locally, but they could always try to negotiate more than the MOU provides. Tr. 56-57. Mr. Bailey testified that local awards panels were supposed to discuss "how awards should look" and pass their suggestions to the hospital directors. Tr. 131. Since the Martinsburg hospital

has not had awards panels in recent history, the Union president has served as the equivalent of the awards panel, and she has negotiated the amount of awards with the director every year. Tr. 38-39. Similar practices have been followed at other VA hospitals, and some hospitals have even negotiated local supplemental agreements specifying exactly how much money will be awarded to employees at each rating level. Tr. 132-34; GC Ex. 14.

None of this testimony alters the authority of Agency management to unilaterally set the amount of money to be awarded to individual employees, as provided in the MOU. The language of Paragraph 6 makes it clear that awards panels only have a role in recommending whether the awards will be given in a monetary amount or a percentage, not in setting the amounts "to be awarded to an eligible employee." The fact that Ms. Brown and previous hospital directors may have agreed to sit down with the various unions and discuss the amount of awards in the years between 2006 and 2009 does not compromise the director's authority to set the amounts after discussions, and the record does not reflect that the directors waived their authority in this regard, or that full negotiations occurred in any of those years. *See, e.g., U.S. Dep't of Housing & Urban Dev., Rocky Mountain Area, Denver, Colo.,* 55 FLRA 571, 574 (1999). As noted earlier, parties are encouraged to negotiate even on permissive subjects, and such negotiations do not constitute a waiver of the right to end negotiations unilaterally. *EEOC*, 52 FLRA at 460, 472-73. The only evidence that supports the Union's position here is GC Exhibit 2, the letter from the Agency's Human Resource Officer, David Loy, to the three unions, initiating the discussions of performance awards for 2009. The letter states that it is "our request to negotiate Performance Awards for Fiscal Year 2009" and that "[t]his negotiation is required to determine the amount awarded for each rating[.]" The wording of this letter suggests that Mr. Loy believed that management could not set the amounts unilaterally, and that true bilateral negotiations were required. However, it is also consistent with Ms. Brown's testimony that she and her staff were not aware of the MOU; thus, they were not consciously waiving any authority given to management in the MOU itself. Moreover, extrinsic evidence of this nature is generally permissible only to clarify ambiguities in the contract, and not when the language of the agreement is clear and unambiguous. *Continental Conveyor Co.,* 51 L.A. 1023, 1025 (1968); *see also* Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 296, 303 (3rd ed. 1973).

I therefore conclude that pursuant to both the "covered by" and *IRS* doctrines, the Respondent had no duty to bargain with the Union regarding the amount of performance awards to be given to employees. It would have been preferable if the Respondent had stated at the outset of its 2009 discussions with the Union that the issue was not negotiable, or that it was a permissive subject on which management retained final authority. Nonetheless, the MOU allowed the Respondent to impose the award amounts without negotiation, even at the late stage that it did so in December 2009.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued Washington, D.C., August 9, 2012.

RICHARD A. PEARSON
Administrative Law Judge