UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 23-07

U.S. DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI

RESPONDENT

AND

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2338, AFL-CIO

CHARGING PARTY

Case No. CH-CA-21-0414

Alicia Weber
For the General Counsel

Dane R. Roper
Kathleen M. Hunter
For the Respondent

Kevin Ellis
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

In this case, pursuant to its collective bargaining agreement with the Agency, the Union submitted to arbitration an unresolved grievance over the termination of bargaining unit employee Carissa Tompkins.[1] After the first arbitrator selected to hear the grievance withdrew, the parties received a second panel of arbitrators. It is undisputed that the Agency has refused to participate in

[1] The grievant's name has been spelled several different ways in the exhibits, motions, and pleadings. However, for consistency herein, the undersigned will spell it consistent with the spelling in the Complaint: Carissa Tompkins. Complaint, ¶ 7.

the selection of arbitrators from this panel or otherwise proceed to arbitration. It defends this refusal to proceed on the basis that the grievance allegedly has already been dismissed by operation of a six-month deadline for scheduling arbitrations in the collective bargaining agreement. Alternatively, it requests the Authority, as part of its original jurisdiction, to interpret the collective bargaining agreement to determine that the grievance is not arbitrable due to alleged violation of the six-month deadline in the collective bargaining agreement.

Under the processes established pursuant to the Statute, an Agency is not at liberty unilaterally to determine that a grievance is dismissed and then refuse to participate in the arbitration processes. Nor may it refuse to participate in the arbitration process and then ask the Authority (as part of its original jurisdiction) to interpret the terms of the collective bargaining agreement's arbitration provisions to find that it appropriately refused to participate – that is, without drawing an unfair labor practice.

Instead, it is well established that, should questions of arbitrability arise, such as whether a collective bargaining agreement's time frames for arbitration have been met, such questions are for the arbitrator to decide, absent clearly established law that precludes arbitration. *U.S. Dep't of VA, Veterans Canteen Serv., Martinsburg, W. Va.*, 65 FLRA 224, 228 (2010) (*Veterans Canteen Serv.*). A party to a collective bargaining agreement may not make this determination on its own. Nor may it look to the Authority to interpret the collective bargaining agreement's arbitrability provisions as part of its original jurisdiction. Given that, it is an unfair labor practice in violation of § 7116 (a)(1) and (8) of the Statute to decline to participate in the selection process for an arbitrator or otherwise to proceed to arbitration. *Id.* As it is undisputed that the Agency did exactly that, and defends that refusal on the basis of its interpretation of the collective bargaining agreement (or the Authority's, as part of its original jurisdiction), the Agency has committed an unfair labor practice in violation of § 7116 (a)(1) and (8) of the Statute.

I. Statement of the Case

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101 – 7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On August 6, 2021, the American Federation of Government Employees, Local 2338 (the Union or the Charging Party) filed a ULP charge against the John J. Pershing VAMC, VA Medical Center, Poplar Bluff, Missouri (the Agency or Respondent). The charge alleged that the Agency refused to strike arbitrators in the grievance for Carissa Tompkins, FMCS Case No. 200727-08478, in violation of 5 U.S.C. § 7121. GC Ex. 12.

Thereafter, the Regional Director of the Authority of the Chicago Region issued a Complaint and Notice of Hearing on March 13, 2023, on behalf of the Acting General Counsel (GC). The Complaint alleged that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing and refusing to participate in the selection of an arbitrator to decide the grievance the Union filed under the collective bargaining agreement concerning the termination of Carissa Tompkins (FMCS 200727-08478). Complaint, ¶¶ 9-11. On April 5, 2023, the Respondent filed its Answer to the Complaint, denying that it violated the Statute. Answer, ¶¶ 9-11.

On May 25, 2023, the GC filed a Motion for Summary Judgment (GC MSJ), arguing that no material facts are in dispute and that it is entitled to a decision as a matter of law. On June 2, 2023, the Respondent filed a Response to General Counsel's Motion for Summary Judgment and Motion for Summary Judgment on Behalf of Respondent (Resp. MSJ).[2] On June 9, 2023, the General Counsel filed a Response and Opposition to Respondent's Cross-Motion for Summary Judgment (GC Opp'n).

II. Discussion of Motions for Summary Judgment

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The General Counsel has submitted an affidavit and exhibits in support of its Motion for Summary Judgment. The Respondent has submitted exhibits in support of its Response to Motion for Summary Judgment and Motion for Summary Judgment.[3] After reviewing these documents fully, the undersigned concludes that there are no genuine issues of material fact in this case. While the Respondent has not fully conceded this point, to the extent the Respondent alleges disputes, the disputes regard the characterization of the facts, rather than the facts themselves, as will be explained below. Therefore, it is appropriate to decide the case on the motions for summary judgment.

III. Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of Section 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide consolidated unit of VA employees, which includes employees of the Respondent. GC MSJ, Witness Affidavit of Kevin Ellis (Ellis Aff.), ¶ 4. The American Federation of Government Employees, Local 2338 (the Union) is an agent of AFGE for the purpose

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[2] The Respondent's Response to Motion for Summary Judgment and Motion for Summary Judgment does not include page numbers. However, this Decision will reference page numbers from that document as they would have existed if included.

[3] In connection with its Motion for Summary Judgment, the GC submitted an Affidavit from Union President Kevin Ellis which properly authenticated the GC's Exhibits 1-12 (GC Exs.). The Respondent submitted Agency Exhibits A, D, F, G, H, I, J, K, and L (Agency Exs.). Neither the undersigned nor the GC received Agency Exhibits B, C, or E. GC Opp'n at 1. As to Agency Exhibits A, D, F, G, H, I, J, K and L, the GC argued that the Respondent did not submit an affidavit properly authenticating those exhibits. However, because Agency Exhibits A, D, F and L were essentially duplicative of exhibits the GC produced, the GC did not object to them. GC Opp'n at 1. As to the others, Agency Exhibits G, H, I, J, and K, they are emails between and among Mr. Ellis, the Respondent's representatives, the Federal Mediation and Conciliation Service (FMCS), and the first arbitrator, Mr. Petersen, primarily about scheduling the arbitration. While, typically, emails should be authenticated by an affidavit from someone with knowledge that it is what it is claimed to be, Fed. R. Evid. 901(b)(1), it is unnecessary to parse this issue out. That is because the Respondent has admitted that it failed and refused to strike arbitrators or otherwise proceed to arbitration after the first arbitrator, Mr. Petersen, withdrew, which is the crux of the case. Nevertheless, the undersigned does not have reason to doubt their authenticity, and the GC essentially acknowledged the same: "At best, Respondent has produced documents that speak for themselves." GC Opp'n at 2.

of representing the unit employees employed at the Respondent. Ellis Aff., ¶ 5. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. Complaint, ¶ 2; Answer, ¶ 2.

The Union and the Respondent are parties to a collective bargaining agreement, which covers a nationwide consolidated unit of VA employees, including employees of the Respondent. This agreement, titled Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees (Master Agreement), has been in effect at all times relevant to the matters in this proceeding. Ellis Aff., ¶ 6; Complaint, ¶ 6; Answer, ¶ 6; GC Ex. 1. The Master Agreement includes a grievance procedure with provisions for arbitration of unresolved grievances. GC Ex. 1, Articles 43 and 44, at 228-235.

On July 6, 2020, the Respondent issued its decision to remove bargaining unit employee Carissa D. Tompkins, Pharmacist, from federal employment. Ellis Aff., ¶ 7; GC Ex. 2; Resp. MSJ at 2. Tompkins was not a probationary employee. Ellis Aff., ¶ 8; Resp. MSJ at 2.

Tompkins designated the Union to represent her and Kevin Ellis, the Union President, served as her designated representative on the removal. Ellis Aff., ¶¶ 1, 9. On July 13, 2020, the Union filed a third step grievance challenging Tompkins' removal. *Id.*, ¶ 10; GC Ex. 3; Resp. MSJ at 2. When the grievance was not resolved, the Union invoked arbitration on the grievance. Ellis Aff., ¶ 11; Resp. MSJ at 2. Thereafter, on August 10, 2020, the Federal Mediation and Conciliation Service (FMCS) designated Arbitrator Donald Petersen to hear the Union's grievance and assigned it the case number FMCS 200727-08478. Ellis Aff., ¶ 12; GC Ex. 4; Resp. MSJ at 2.

Between August 2020 and June 21, 2021, a number of emails were exchanged between the Union, the Respondent, and Arbitrator Petersen, primarily about scheduling the arbitration, but also about the arbitration processes. Resp. MSJ at 5; Agency Exs. G-L; Ellis Aff., ¶ 13; GC Ex. 5. During that time period, specifically in March 2021, the Respondent by email informed Mr. Ellis that six months had passed and that the Respondent was therefore obliged to file a jurisdictional threshold motion regarding the arbitration. Agency Ex. J. While the email did not specify the six-month period at issue or the basis for the jurisdictional threshold motion, the Master Agreement, Article 44, Section 2 (B) states:

> The arbitration hearing date must be scheduled (not held) within six months from the date the arbitrator was selected or the grievance will be considered terminated. An exception to this time period will be made by mutual consent to extend the timeframes. Additionally, an exception will be made for inability on the part of the arbitrator to provide a hearing date. Should the Department refuse to participate in scheduling the arbitration within the time frames set forth in this article, the Union may unilaterally schedule the arbitration hearing date.

GC Ex. 1 at 234.

On June 21, 2021, Mr. Ellis emailed Arbitrator Petersen, the Respondent's representatives, and FMCS about concerns regarding scheduling the arbitration, communications with the arbitrator, and other matters. GC Ex. 5. The GC's Motion for Summary Judgment and Mr. Ellis's affidavit stated that "the parties exchanged a series of emails about scheduling the arbitration, which culminated in a June 2021 dispute about whether a hearing date had been timely scheduled." GC MSJ at 3; Ellis Aff., ¶ 13. The Respondent disputed this characterization as an "overly broad

and vague statement that fits the Union's narrative of what actually occurred." Resp. MSJ at 3. The Respondent provided other emails during the period prior to Mr. Ellis's June 21, 2021 emails to Arbitrator Petersen. These emails, as noted above, were primarily about scheduling the arbitration, whether a date had been chosen, how long each side needed to present its case, and other related matters. Agency Exs. G-L. Therefore, both the GC's and the Respondent's evidence support that there was a series of emails exchanged about scheduling the arbitration. Further, both the GC and the Respondent provided emails from June 2021 which establish that the Union was treating June 23, 2021 as the arbitration date, that the Respondent disagreed, and that the arbitrator confirmed that he did not have the arbitration on schedule for June 23, 2021. Agency Ex. L; GC Ex. 5. After that, Mr. Ellis sent emails reporting concerns about Arbitrator Petersen and scheduling the arbitration and asking FMCS for a new arbitrator panel. GC Ex. 5. The Respondent has not questioned the validity of those emails. Therefore, the undersigned finds that there is no dispute that the parties exchanged emails about scheduling the arbitration and that in June 2021 there was a dispute about whether the arbitration had been scheduled.

On June 24, 2021, FMCS informed the Union and the Respondent's representatives that Arbitrator Petersen had withdrawn from the case. FMCS further informed the parties that their default in such a situation is to issue a new panel of arbitrators. GC Ex. 6 (Email, June 24, 2021, 8:52 a.m.); Resp. MSJ at 3. On that same day, FMCS sent an email to the Union and the Respondent with a new panel of arbitrators. GC Exs. 6 (Email, June 24, 2021 2:35 p.m.), 8; Resp. MSJ at 3. Also on that day, the Respondent attempted to file a Motion to Dismiss with Arbitrator Petersen. GC Ex. 7; Resp. MSJ at 3. FMCS informed the Respondent again that Arbitrator Petersen had withdrawn, that a new panel of arbitrators had been sent to the parties and that FMCS had no jurisdiction regarding the motion to dismiss. GC Ex. 9 (Email June 24, 2021, 12:09 p.m.); Resp. MSJ at 3. In response to the Respondent's assertion to FMCS that Mr. Ellis was attempting to drive one of FMCS's arbitrators to an early exit, FMCS responded that its lack of jurisdiction and its action of providing a new panel should not "be construed as approval by us of the tactics of Mr. Ellis." GC Ex. 9 (Emails, June 24, 2021, 1:04 p.m. and 12:09 p.m.); Resp. MSJ at 3.

On June 25, 2021, Mr. Ellis wrote to the Respondent, requesting availability to strike for arbitrators. Resp. MSJ at 3; Ellis Aff. ¶ 18; GC Ex. 10. The Respondent did not reply or agree to strike for arbitrators. Resp. MSJ at 3; Ellis Aff. ¶ 18; GC Ex. 10. The General Counsel asserts that, on July 22, 2021, the Respondent confirmed that it was unwilling to strike arbitrators. Ellis Aff., ¶ 19. The Respondent disputes that as "an overly broad and vague statement that fits the Union's narrative of what actually occurred." Resp. MSJ at 4. However, the Respondent did not provide evidence of what it believed actually occurred on July 22, 2021 that caused it to disagree with the GC's statement. It is unnecessary to resolve this alleged dispute, however, as Respondent has admitted that the Respondent refused to strike arbitrators or proceed to arbitration in this case. Resp. MSJ at 4-5. Other evidence also supports that the Respondent refused to strike arbitrators from the second panel or otherwise proceed to arbitration, making this single day's event events irrelevant. Specifically, the Respondent confirmed that, on August 18, 2021, Mr. Ellis again asked the Respondent to strike and that no one replied. Resp. MSJ at 4; Ellis Aff., ¶ 20; GC Ex. 11. The Respondent further confirmed that, on September 1, 2021, Mr. Ellis asked a third time for the Respondent to strike and again received no reply. Resp. MSJ at 4; Ellis Aff. ¶ 21; GC Ex. 11. Finally, the Respondent conceded that, since August 6, 2021, it has refused to strike arbitrators or proceed to arbitration. Resp. MSJ at 4-5.

IV. Positions of the Parties

A. General Counsel

The GC argues that it is entitled to judgment as a matter of law because it is undisputed that the Respondent has been failing and refusing to participate in the selection of an arbitrator to decide a grievance challenging an employee's termination. GC MSJ at 1. The GC points out that the Respondent specifically conceded that it has failed and refused to participate in the selection of an arbitrator and proceed to arbitration. GC Opp'n at 1. The GC argues that such a refusal is in violation of § 7121 of the Statute, and thereby violates § 7116(a)(1) and (8) of the Statute. GC MSJ at 1. The GC argues that the Authority has repeatedly so held. *Id.* at 2 (citing *U.S. DHS, U.S. ICE, Wash., D.C.*, 69 FLRA 72, 74 (2015) (*ICE*) (finding refusal to strike arbitrators violated the Statute)).

The GC explains that 5 U.S.C. § 7121(a) requires that collective bargaining agreements contain procedures for the settlement of grievances, including questions of arbitrability. *d.* at 4. Further, any grievance not satisfactorily settled under the negotiated grievance procedure "'shall be subject to binding arbitration.'" 5 U.S.C. § 7121(b)(1)(C)(iii). And, when questions of arbitrability arise, those issues must be decided by the arbitrator. GC MSJ at 5 (citing *Veterans Canteen Serv.*, 65 FLRA at 224, 228; *ICE*, 69 FLRA at 74; and *Interpretation & Guidance*, 2 FLRA 274, 279 n. 7 (1979)). Therefore, the GC argues that the Authority has repeatedly held that a party who refuses to arbitrate unresolved grievances, including when there is a threshold question of arbitrability, violates § 7116(a)(1) and (8) of the Statute. *Id.*

The GC argues that this holds true even if the refusing party has a reasonable basis for its position. *Id.* (citing *Dep't of the Air Force, Langley Air Force Base Hampton, Va.*, 39 FLRA 966, 969 (1991) (*Dep't of the Air Force, Langley*)). The GC explains that this makes sense because it is the arbitrator's interpretation of the contract for which the parties bargained. *Id.* (citing *IFPTE, Ass'n Admin. L. Judges*, 70 FLRA 316, 317 (2017); *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 56 FLRA 249, 251 (2000); and *Dep't of HHS, SSA, Louisville, Ky.*, 10 FLRA 436, 437 (1982)).

The GC further argues that the Authority has already defined the particular arbitrability question involved in this case as one of procedural arbitrability, which is solely for the arbitrator to decide. GC MSJ at 6 (citing *AFGE, Local 2338*, 73 FLRA 229, 229 (2022)). In that case, involving the same parties, the Authority specifically described the question of whether the six-month scheduling language in Article 44 precluded arbitration in a case as one of procedural arbitrability. *AFGE, Local 2338*, 73 FLRA at 229. The GC argues that, because the Respondent failed and refused to select an arbitrator to hear the grievance involved herein, which is a procedural arbitrability matter, the Respondent has violated § 7116(a)(1) and (8) of the Statute. GC MSJ at 7.

The GC notes that the Respondent, rather than providing cases to refute the unequivocal case law establishing that it is for the arbitrator to decide procedural arbitrability questions, provided cases that actually further support that point. GC Opp'n. at 3. Specifically, the Respondent cited to cases in which the arbitrator decided the issue of procedural arbitrability, which was proper, and then the Authority heard the cases on exceptions to the arbitration awards. *Id.* (citing *U.S. Dep't of VA, John J. Pershing VA Med Ctr.*, 71 FLRA 947, 947-49 (2020); *AFGE, Local 2338*, 73 FLRA at 230-33; and *U.S. Dep't of the Navy, Naval Facilities Eng'g Command,*

Wash., D.C., 71 FLRA 825, 826-67 (2020) (*U.S. Dep't of the Navy, Naval Facilities*)). In other words, the Respondent's cited cases establish only that the Authority has appellate jurisdiction to address procedural arbitrability of grievances after the arbitrator has issued an award, rather than original jurisdiction, as the Respondent asserts. Moreover, the Authority does not even have appellate jurisdiction over cases such as this, a grievance regarding an employee's removal. GC Opp'n. at 4 (citing 5 U.S.C. §§ 7122(a), 7121(f); *U.S. Dep't of VA, John J. Pershing VA Med Ctr., Poplar Bluff, Mo.*, 72 FLRA 88, 89 (2021); *AFGE, Local 2338*, 73 FLRA 24, 25 (2022)).

The GC acknowledges that there is an exception to the rule that it is for the arbitrator to decide arbitrability, specifically in cases where there is a "clearly established law" which precludes arbitrating a grievance. GC MSJ at 5 (citing *Veterans Canteen Serv.*, 65 FLRA at 228; *ICE*, 69 FLRA at 74). The GC points out that this exception is very narrow and has been applied by the Authority only once, specifically regarding a grievance over the termination of a probationary employee, which is not cognizable under any grievance procedure negotiated under the Statute as a matter of law. GC MSJ at 5 (citing *Dir. of Admin. Headquarters, U.S. Air Force*, 17 FLRA 372, 375 (1985) (*Dir. of Admin. HQ*)). The GC points out that this grievance does not regard the termination of a probationary employee. GC MSJ at 7. Further, the GC notes that the Respondent specifically conceded that its basis for refusing to arbitrate the grievance at issue is Article 44, Section 2(B) of the Master Agreement, which contains the six-month timeline language. GC Opp'n at 2. Thus, the Respondent's refusal to arbitrate is based on contract language, rather than a clearly established law. GC Opp'n at 3. The GC also points out that the Respondent has not identified any clearly established law that precludes arbitrating the grievance at issue. GC Opp'n at 1. Therefore, the Respondent has violated § 7116(a)(1) and (8) of the Statute.

Regarding the Respondent's argument that it would be harmful procedural error for the Authority to refuse to address the six-month deadline in the Master Agreement, rather than requiring it to be first addressed by an arbitrator, the GC argues that it is unclear how harmful procedural error applies in an unfair labor practice proceeding, as that concept relates to other matters. Further, the GC reiterates that, in any event, the Authority does not have statutory authority to consider questions of arbitrability before an arbitrator rules. GC Opp'n at 4. Instead, the Statute effectively requires parties to use negotiated grievance procedures and arbitration to resolve their contractual disputes, including arbitrability questions. *Id.* (citing *U.S. Dep't of the Army, Army Materiel Command, Army Sec. Assistance Command, Redstone Arsenal, Ala.*, 73 FLRA 356, 359 (2022) (*Redstone Arsenal*)).

Given that the Respondent has admitted that it has refused to strike arbitrators or otherwise proceed to arbitration, that the Authority case law unequivocally supports that such a failure is an unfair labor practice in violation of § 7116(a)(1) and (8), absent a "clearly established law" which precludes arbitration, that the Respondent has not provided such a "clearly established law," but rather has cited to legal authority that supports the GC's argument, and that there is no harmful procedural error, the GC argues it is entitled to judgment as a matter of law. GC MSJ and GC Opp'n.

The GC argues that, in like cases, the Authority orders the Respondent to proceed to arbitration. GC MSJ at 7 (citing *Veterans Canteen Serv.*, 65 FLRA at 229). Further, the Authority also orders the highest-level official of the entity responsible for the violation to sign a notice regarding the violation, and orders electronic distribution of the notice. GC MSJ at 7 (citing *U.S. Dep't of HUD, Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 (2002); *U.S. DOJ, Fed. BOP, Fed.*

Transfer Ctr., Okla. City, Okla., 67 FLRA 221, 222-26 (2014)). Therefore, the GC requests that, consistent with precedent, such remedies be issued for the Respondent's violations. GC MSJ at 7.

B. Respondent

The Respondent asserts that it is undisputed that the Union failed to schedule the arbitration within the six-month deadline, pursuant to the Master Agreement, Article 44, Section 2(B). As such, the Respondent argues that the arbitrator therefore lost the ability to make any substantive ruling on the matter, as it was now untimely. After that, according to the Respondent, the Union barraged the arbitrator with falsehoods and demands that caused him to withdraw from the case, which the Respondent argues is inappropriate and an abuse of the system. Resp. MSJ at 8.

According to the Respondent, the drafters of the Master Agreement did not intend for the Union to be able to manipulate the arbitrator into submission so that he withdraws, forcing a new panel to be issued with a new six-month deadline issued. *Id.* The Respondent argues that Authority case law and the Master Agreement are clear that, when six months have passed and the Union has not scheduled the arbitration, but the Union has caused the arbitrator to withdraw, the case does not need a new arbitrator to decide the clear violation of the Master Agreement. *Id.* Instead, the grievance is dismissed by "self-execution." *Id.* at 1.

The Respondent also argues that the GC is incorrect that this issue must be decided by an arbitrator. Instead, according to the Respondent, the Authority should resolve this procedural arbitrability issue. This is so, according to the Respondent, because the Authority requires parties to adhere to deadlines. In intended support of its position, the Respondent then cites to cases in which the Authority set aside arbitration awards involving timeliness procedural arbitrability determinations made by arbitrators. *Id.* at 8 (citing *U.S. Dep't of VA, John J. Pershing VA Med Ctr.*, 71 FLRA at 947-49; *AFGE, Local 2338*, 73 FLRA at 230-33; and *U.S. Dep't of the Navy, Naval Facilities,* 71 FLRA at 825, 826-67)). However, those cases involve only the Authority's appellate jurisdiction to review arbitrators' awards, that is, after the arbitrator has made a procedural arbitrability determination in the first instance. They do not support the proposition the Respondent asserts, that the Authority may make procedural arbitrability determinations in the first instance.

The Respondent also argues that it is harmful procedural error for the Authority to refuse to address the six-month deadline in the Master Agreement, rather than requiring it to be first addressed by an arbitrator. The Respondent asserts that the Authority knows how to calculate six-month deadlines, because it has its own six-month deadline for unfair labor practice charges, because the Authority instructs arbitrators to adhere to deadlines, and because the Union is allegedly a "repeat offender" of violating arbitration deadlines. The Respondent further argues that the GC has damaged its reputation as an arbiter of fair play by prosecuting this complaint and is engaged in waste, fraud and abuse. The Respondent argues that a failure to dismiss the unfair labor practice complaint is therefore harmful procedural error. *Id.* at 10-11.

The Respondent concludes that awarding summary judgment to the GC would be an award for the Union's "bad behavior." *Id.* at 12. Instead, for the reasons provided, summary judgment should be granted in favor of the Respondent. Resp. MSJ.

V. Analysis and Conclusions

A. The Respondent violated § 7116(a)(1) and (8) by refusing to proceed to arbitration over the Tompkins grievance.

The Authority has repeatedly and consistently held that, when a party to a collective bargaining agreement, whether it be the Agency or the Union, refuses to cooperate in the arbitration process, that party commits an unfair labor practice in doing so. *Veterans Canteen Serv.*, 65 FLRA at 228; *Dep't of the Air Force, Langley*, 39 FLRA at 966; *ICE*, 69 FLRA at 74-76; *Health Care Financing Admin.*, 22 FLRA 437, 439 (1986). Specifically, § 7121(a) of the Statute requires that "any collective bargaining agreement shall provide procedures for the settlement of grievances, *including questions of arbitrability.*" 5 U.S.C. § 7121(a) (emphasis added). Further, § 7121(b)(1)(C)(iii) requires all negotiated grievance procedures to include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency."

As part of the process, there are sometimes questions of whether a particular matter is arbitrable under the collective bargaining agreement. On the basis of the statutory language above, the Authority has long held that "all questions of arbitrability not otherwise resolved shall be submitted to arbitration." *Health Care Financing Admin.*, 22 FLRA at 439. In other words, it is the arbitrator who must decide whether a matter is arbitrable under the collective bargaining agreement. This makes sense, of course, because it is the arbitrator's construction of the agreement for which the parties have bargained. *IFPTE, Ass'n Admin. L. Judges*, 70 FLRA at 317.

The requirement to submit arbitrability questions to the arbitrator applies even if the refusing party has a reasonable basis for its position. *Dep't of the Air Force, Langley,* 39 FLRA at 966. Moreover, it applies even when the refusing party believes the contract language precluding arbitrability is "clear" or "settled." *Id.* In *Dep't of the Air Force, Langley*, the agency argued that its refusal to proceed to arbitration was not violative of the Statute because the grievance concerned the grievant's separation, a matter that was specifically excluded from the parties' negotiated grievance procedure. Therefore, according to the agency, there was "no 'question' of arbitrability and therefore, no requirement (or purpose) for going to arbitration." *Id.* It argued that the "'collective bargaining process is undermined and human and financial resources wasted, when clear contract provisions are ignored, and matters are sent to arbitration that were specifically excluded from the grievance process[.]'" *Id.* The Authority explained that, consistent with § 7121 of the Statute, "all questions of arbitrability" must be submitted to arbitration, regardless of how justified the party's contention that the matter is not arbitrable. Therefore, the Authority found that the agency committed an unfair labor practice in violation of § 7116(a)(1) and (8) by refusing to proceed to arbitration. *Id.* Simply put, a party to the collective bargaining agreement cannot unilaterally determine whether the contract language renders a matter not arbitrable. That matter must be submitted to the arbitrator.

Nor can a party to the collective bargaining agreement refuse to proceed to arbitration and then request an administrative law judge to interpret the contract to determine whether it was justified in refusing to proceed based upon the contract's language. *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 11 FLRA 456, 456 (1983) (*Portsmouth*). In *Portsmouth*, the administrative law judge held that the agency had not committed an unfair labor practice by

refusing to proceed to arbitration on two grievances, because the grievances were "clearly and unmistakably excluded by the parties' negotiated agreement," making the refusal to arbitrate justified. *Id.* The Authority reversed and held that "'Section 7121 (of the Statute) mandates that each collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability and unless the parties, consistent with law, mutually agree otherwise, such procedures must be read as providing that all questions of arbitrability, not otherwise resolved, shall be submitted to arbitration.'" *Id.* at 457. On that basis, the Authority found that the administrative law judge erred by attempting to resolve the question of arbitrability himself. The Authority held that the question of arbitrability based on the contract language must be presented to the arbitrator in the first instance. Therefore, a refusal to proceed to arbitration is contrary to § 7121 of the Statute and the refusing party violates § 7116(a)(1) and (8) of the Statute. *Id.*

In this case, the Respondent has conceded that it refused to participate in the selection of arbitrators by refusing to strike arbitrators or otherwise proceed to arbitration over the Tompkins grievance. Resp. MSJ at 4-5. It further conceded that it did so based upon the belief that the Union did not comply with contract language found in the Master Agreement, Article 44, Section 2(B). *Id.* at 8. As noted, that contract language specifies that arbitrations must be scheduled within six months from the date the arbitrator was selected or the grievance will be considered terminated, *id.*, subject to certain exceptions. GC Ex. 1 at 234.

As to the Respondent's contention that it was justified in refusing to strike arbitrators or proceed to arbitration because the contract language described above is "self-executing" and dismisses the grievance when the six-month deadline is violated, *Dep't of the Air Force, Langley* answers that question. A party may not make that decision unilaterally, no matter how "settled" or "clear" it may seem to the refusing party. 39 FLRA at 966. While it does not make a difference to the outcome of the case, it is noteworthy that the deadline the Respondent alleges the Union violated contains exceptions, such as when the arbitrator is unavailable or the parties mutually agree to extend the deadline. GC Ex. 1 at 234. This is noteworthy because it helps to explain why the Statute and the Authority do not allow parties to unilaterally decide arbitrability based on the contract language. Collective bargaining agreements are subject to interpretation and it is the arbitrator's interpretation for which the parties bargained. *IFPTE, Ass'n Admin. L. Judges*, 70 FLRA at 317.

Alternatively, the Respondent contends that the Authority should interpret this contract language (as part of its original, as opposed to appellate, jurisdiction) and find that the grievance is dismissed by operation of the Master Agreement, Article 44, Section 2(B). Resp. MSJ at 8-9. However, the Authority's decision in *Portsmouth* makes clear that the Authority may not do so. As noted above, "Section 7121 (of the Statute) mandates that...questions of arbitrability...shall be submitted to arbitration." 11 FLRA at 457 (internal quotation marks omitted).[4]

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[4] The GC argues that, in particular, procedural arbitrability questions must be submitted to the arbitrator to decide and that Article 44, Section 2(B) of the Master Agreement has specifically been found to be a procedural arbitrability provision. GC MSJ at 6 (citing *AFGE, Local 2338*, 73 FLRA at 229. While it is true that the provision involved in this case is a procedural arbitrability provision, the requirement to present to the arbitrator questions of arbitrability based on the collective bargaining agreement is not limited only to procedural arbitrability provisions, but rather also applies to substantive questions of arbitrability based on the contract language. See *Dep't of the Air Force, Langley*, 39 FLRA at 966. Given the parties' continuing relationship and the likelihood that such an issue might arise, it is important to so note.

The Respondent cites to several cases which it believes supports its position that the Authority may rule on this contract interpretation question to determine that the Respondent was justified in refusing to proceed to arbitration. Resp. MSJ at 8 (citing *U.S. Dep't of VA, John J. Pershing VA Med Ctr.*, 71 FLRA at 947-49; *AFGE, Local 2338*, 73 FLRA at 230-33; and *U.S. Dep't of the Navy, Naval Facilities,* 71 FLRA at 826-67). However, those cases do not support the Respondent's argument. In each of the cases, an arbitrator made an arbitrability determination based on contract language. Thereafter, on exceptions to the arbitration award, the Authority determined whether the arbitrator's award was deficient. The Authority's jurisdiction to address such matters was appellate, rather than original. *U.S. Dep't of VA, John J. Pershing VA Med Ctr.*, 71 FLRA at 947-49; *AFGE, Local 2338*, 73 FLRA at 230-33; *U.S. Dep't of the Navy, Naval Facilities,* 71 FLRA at 826-67. In the instant case, the Respondent is requesting the Authority to interpret the arbitrability question based on contract language in the first instance, without a prior determination by the arbitrator. The Authority does not have such original jurisdiction. *Dep't of the Air Force, Langley*, 39 FLRA at 966; *Portsmouth*, 11 FLRA at 456. Moreover, it is also noteworthy that the Authority would not even have appellate jurisdiction in this case as it is a grievance regarding an employee's removal, which the Statute excepts from Authority appellate review. *See* 5 U.S.C. §§ 7122(a); 5 U.S.C. § 7121(f); 5 U.S.C. §7703.

While not directly raised by the Respondent, it is important to note that there is one situation in which a party may refuse to proceed to arbitration without being found to violate the Statute. That situation is when there is a "clearly established law" that precludes arbitration. *Dir. of Admin. HQ*, 17 FLRA at 375. Thus, in *Dir. of Admin. HQ,* the agency refused to proceed to arbitration over the termination of a probationary employee, contending that the matter was not grievable because the termination of a probationary employee is precluded by law from arbitration under § 7121(c)(4) of the Statute. *Id.* at 373. In holding that the agency did not violate the Statute in so refusing, the Authority explained that Congress did not intend grievance and arbitration procedures negotiated under the Statute to cover grievances concerning the termination of probationary employees, consistent with § 7121(c)(4). Therefore, as a matter of clearly established law, the matter was excluded from negotiated grievance and arbitration procedures. In so holding, the Authority explained that, "even assuming the parties' negotiated agreement purported to require the agency to proceed to arbitration concerning the termination of probationary employees…such requirement would be contrary to law and regulation and hence unenforceable." *Id.* at 375. Therefore, "it would be a pointless and hollow exercise to require the parties to proceed to arbitration over an issue which, *as a matter of law*, is not cognizable under any grievance procedure negotiated under the Statute." *Id.* (emphasis added). It is noted that this case is the only Authority case of which the undersigned is aware in which the Authority found that a "clearly established law" precluded arbitration.[5]

In this case, the Respondent has not directly argued that a clearly established law precludes arbitration. Further, it is undisputed that the grievance does not concern the termination of a probationary employee, which is the only instance of which the undersigned is aware in which the Authority has previously held that a "clearly established law" justified a party's refusal to proceed to arbitration. *Id.* at 2; Ellis Aff., ¶ 8. Moreover, as noted above, the Respondent has conceded that

[5] Again, due to the parties' continuing relationship and the likelihood that an issue might arise, it is worth explaining that it is only a law that is "clearly established" that will allow a party to refuse to proceed to arbitration without being found to violate the Statute. If the law is less clear, the argument that the law precludes arbitration will not shield a party to the collective bargaining agreement from an unfair labor practice violation. *See Veterans Canteen Serv.*, 65 FLRA at 228.

it refused based on the Master Agreement's six-month deadline. Resp. MSJ at 8. Such a matter involves contract interpretation, not "clearly established law." As such, there is no argument in this case that clearly established law precludes arbitration of the Tompkins grievance.

The Respondent does argue however that it is harmful procedural error for the Authority to refuse to address the six-month deadline in the Master Agreement, rather than requiring it to be first addressed by an arbitrator. The Respondent asserts that the Authority knows how to calculate six-month deadlines, because it has its own six-month deadline for unfair labor practice charges, because the Authority instructs arbitrators to adhere to deadlines, and because the Union is allegedly a "repeat offender" of violating arbitration deadlines. The Respondent further argues that the GC has damaged its reputation as an arbiter of fair play by prosecuting this complaint and is engaged in waste, fraud and abuse. The Respondent argues that a failure to dismiss the unfair labor practice complaint is therefore harmful procedural error. *Id.* at 10-11. As it is not error for the undersigned to decline to address the six-month deadline in the Master Agreement, as explained above, the undersigned rejects this argument, as well as the other arguments addressed to alleged bad behavior, perceived waste, fraud and abuse, and alleged reputational matters.[6] Authority precedent and the Statute require questions of arbitrability based on contract interpretation to be heard by the arbitrator, plain and simple. That is so because, as noted, it is the arbitrator's interpretation of the contract for which the parties bargained. *IFPTE, Ass'n Admin. L. Judges*, 70 FLRA at 317. Therefore, a party to that contract is in no position to throw stones or make *ad hominem* attacks simply because it is held to that obligation.

For all of the reasons stated above, the undersigned concludes that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (8) of the Statute when it refused to participate in the selection for arbitrators or otherwise proceed to arbitration of the Tompkins grievance.

B. The Respondent is ordered to remedy its unlawful conduct.

In like cases, the Authority orders a cease and desist order requiring the Respondent to proceed to arbitrate the grievance at issue. *Veterans Canteen Serv.*, 65 FLRA at 229. Such an order is therefore appropriate in the instant case. Further, in like cases, the Authority typically orders the highest-level official of the entity responsible for the violation to sign the notice. *U.S. Dep't of HUD, Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 (2002); *Veterans Canteen Serv.*, 65 FLRA at 229. The GC indicated that the Respondent's Medical Center Director is the highest-level official of the entity responsible for the violation. GC MSJ at 7. The Respondent has not disputed that point. Resp. MSJ. As such, the Respondent's Medical Center Director shall be required to sign the notice. The notice shall be posted at the John J. Pershing VAMC, VA Medical Center, Poplar Bluff, Missouri, along with electronic distribution. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 222-26 (2014).

I therefore recommend that the Authority grant the GC's Motion for Summary Judgment and deny the Respondent's Motion for Summary Judgment and issue the following Order:

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[6] It is unclear if the Respondent intended to argue that alleged "harmful procedural error" is a clearly established law that precludes arbitration. Even if that is the case, the points made above—that the Respondent has conceded it refused to proceed to arbitration based on its interpretation of the Master Agreement, rather than a matter of law, that the grievance does not concern a probationary employee's removal, and that there is no error for the Authority to decline to interpret the Master Agreement's six-month deadline as a matter of its original jurisdiction—address that point.

VI. ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri (the Respondent) will:

1. Cease and desist from:

   (a) Failing or refusing to proceed to arbitration concerning the grievance over Carissa Tompkins' removal, after receiving timely notice from the Union of its desire to proceed to arbitration.

   (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights under the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Proceed to arbitration concerning the grievance over Carissa Tompkins' removal, after receiving notice from the Union of its desire to proceed to arbitration.

   (b) Post at the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri, the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Respondent's Medical Center Director and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

   (c) In addition to physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Agency's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees.

   (d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C.
June 21, 2023

LEISHA SELF

Digitally signed by LEISHA SELF
Date: 2023.06.21 15:08:09 -04'00'

LEISHA A. SELF
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to arbitrate the grievant's grievance after receiving notice from the American Federation of Government Employees, Local 2338, AFL-CIO of its desire to proceed to arbitration.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

WE WILL arbitrate the grievant's grievance.

_____
(Respondent/Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, by mail: 224 S. Michigan Ave., Suite 445, Chicago, IL 60604 or by telephone: (872) 627-0020.