



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ESTILL, SOUTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3976, AFL-CIO

CHARGING PARTY

Case No. AT-CA-15-0720

Patricia J. Kush
For the General Counsel

Kara J. Berlin
Angie Wiesman
For the Respondent

Louis O. Davis
For the Union

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On July 21, 2014, the Federal Bureau of Prisons executed a three-year, nationwide collective bargaining agreement with the AFGE's Council of Prison Locals. The agreement stipulates that it is applicable to all of the agency's facilities and employees, but it also permits management and unions at each facility to negotiate one local supplemental agreement (LSA), under certain conditions. Among those conditions are that either party serves notice of intent to negotiate within sixty days of receiving the new national

agreement, and that the parties must begin meaningful and substantive negotiations within six months thereafter. In advance of the national contract's execution, both the Bureau and the Council conducted training sessions for managers and local officials, so they would be knowledgeable about the new agreement, including the requirements for negotiating LSAs.

The president of Local 3976, representing employees at FCI Estill, diligently and promptly served notice on local management that it intended to negotiate an LSA, and he submitted proposed ground rules for the negotiations shortly thereafter. He discussed the ground rules with the warden on at least a few occasions in the ensuing months, and counter-proposals were exchanged, but they never did reach a final agreement on ground rules. Moreover, the parties never began substantive negotiations on an LSA, nor did they even discuss the possibility of extending the six-month deadline. Approximately eight months after the Union had served its notice of intent to negotiate an LSA, it told management that it was ready to begin substantive negotiations, but the warden advised the Union that the time for starting those negotiations had passed, and that the Agency would not negotiate one.

The primary question posed by this case is whether the national agreement justified management's refusal to bargain after the six-month deadline had passed, or whether the passage of the deadline was a joint failure of the parties that carried no specific penalty. Because the national agreement permits an LSA to be negotiated only when the specified conditions are met, I conclude that the Union could not demand that bargaining begin months after the window for negotiations had closed.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On July 15, 2015, American Federation of Government Employees, Local 3976, AFL-CIO (the Union or Local 3976), filed an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Estill, South Carolina (the Agency, Respondent, or FCI Estill). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on December 18, 2015, on behalf of the FLRA's General Counsel (GC). The Complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate an LSA with the Union. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on January 12, 2016, admitting some of the factual allegations, but denying that it violated the Statute. GC Ex. 1(c).

A hearing was held in this matter on March 11, 2016, in Estill, South Carolina. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and 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 U.S. Department of Justice (DOJ) is an agency, within the meaning of § 7103(a)(3) of the Statute. GC Exs. 1(b) & 1(c). The Respondent is an activity of DOJ, within the meaning of § 2421.4 of the Authority's Regulations. *Id.* The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (the Council), a labor organization within the meaning of § 7103(a)(4) of the Statute, is the exclusive representative of a nationwide bargaining unit of employees of the Federal Bureau of Prisons (BOP), which is a primary national subdivision of DOJ. *Id.* The BOP and the Council are parties to a nationwide collective bargaining agreement (the Master Agreement) covering the employees in that bargaining unit. Jt. Ex. 1; Tr. 27-28, 99-101. The Union is an agent of the Council for the purpose of representing bargaining unit employees at FCI Estill.

Prior to the current Master Agreement, the parties operated under an agreement whose effective dates were listed as running from March 9, 1998 to March 8, 2001. GC Ex. 9. Sporadically between 2001 and 2014, the BOP and the Council engaged in negotiations for a new Master Agreement, but in the interim, the old agreement continued in full effect. Tr. 78, 112-14. In the spring of 2014, the parties reached agreement on a new Master Agreement, and it took effect on July 21, 2014.¹ Jt. Ex. 1. The instant case arose from a dispute regarding the application and interpretation of Article 9 of the Master Agreement, titled "Negotiations at the Local Level."

The preamble to Article 9 states that the Master Agreement "will be applicable to all Bureau of Prisons managed facilities . . . [and] may be supplemented in local agreements in accordance with this article." Jt. Ex. 1 at 22. Section a of Article 9 provides, as pertinent here: "One supplemental agreement may be negotiated at each institution/facility. . . ." *Id.* Section b provides:

Notwithstanding the provisions of this article, the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with this article and the Master Bargaining Agreement:

1. local supplemental agreements may be negotiated provided either party serves notice of intent to negotiate within sixty (60) days of receipt of the Master Agreement. The receipt date will be the date this Agreement is provided to the local Union President;

.....

¹ Hereafter, all dates are in 2014, unless otherwise noted.

3. the parties must begin meaningful and substantive negotiations within six (6) months of the notice of intent to negotiate;
4. a standard set of ground rules are contained in Appendix A to this Agreement. The local parties may negotiate their own ground rules; however, if they are unable to reach agreement on ground rules during the five (5) months following the date the notice of intent to negotiate is served, they must adopt the standard set of ground rules contained in Appendix A. In such cases, negotiations must commence within thirty (30) calendar days after the expiration of the five (5) month period, and specific proposals for negotiation must be exchanged at least fourteen (14) calendar days prior to the beginning of negotiations

Id. at 22-23. Section c of Article 9 addresses how disputes will be resolved concerning whether a matter is proper for inclusion in a supplemental agreement, and Section d addresses the ratification process at the local level and a review at the national level by both the Council and BOP.

In the spring of 2014, prior to the effective date and publication of the new Master Agreement, officials of both the Council and management conducted training sessions for their local officials, covering such issues as the timeframes for negotiating local supplements. Tr. 59-62, 212. Tony Brown, President of Local 2976 from about 2011 to December of 2015, attended that training. Tr. 59. On July 9, even before the Master Agreement was distributed, Brown wrote to the warden of FCI Estill, Andrew Mansukhani; citing the “tremendous amount of work ahead[]” to prepare for negotiating a local supplemental agreement, Brown asked that he and Union Vice President Louis Davis be placed on official time to start drafting proposals, in addition to their other Union duties. Jt. Ex. 2 at 1. On July 17, the Agency replied to Brown, telling him that he needed to be more specific as to the amount and dates for official time. GC Ex. 2.²

On July 23, Brown sent another letter to the warden “to invoke negotiations on ground rules for Institutional Supplemental Agreement [m]eetings.” Jt. Ex. 3. Brown asked the warden to designate a spokesperson for negotiating ground rules and asked for 80 hours of official time to prepare ground rules proposals. *Id.* Pitt (now signing as Acting LMR Chair) acknowledged Brown’s letter on July 31, granted Brown and two other Union officials a total of 80 hours of official time to draft ground rule proposals, and indicated that “[a]t this time” Robbins would be the management spokesperson for any negotiations. Jt. Ex. 4. On September 25, a different Agency official approved an additional 40 hours of official time for the week of September 29 through October 3. GC Ex. 5 at 1.

² This memo was sent, ostensibly, by Mike Robbins, an associate warden who was chairman of the LMR committee, but it was signed by Marvin Pitt, another associate warden who subsequently took over as LRM chair in October 2014. Tr. 161, 164-65, 184. For most of the latter part of 2014, Robbins was in the process of retiring and was largely absent from the FCI.

At some point after late August, negotiations on ground rules began, but the evidence regarding these negotiations ranges from ambiguous to conflicting to nonexistent. In short, while a considerable amount of testimony was elicited about the negotiations, nothing was proven.

Brown sent a set of nineteen ground rule proposals to Robbins on August 26 (GC Ex. 3), but he never met with either Robbins or Pitt to discuss them. Pitt confirmed that he had no discussions whatsoever with Brown regarding any ground rules. Brown testified that Warden Mansukhani decided to handle the ground rule negotiations himself, and that the two of them had several meetings on the subject between August 2014 and January 2015. Pitt did not believe the warden negotiated ground rules with the Union, because the warden and the two associate wardens would have jointly discussed “[a]nything . . . as serious as” ground rule proposals. Tr. 176; *see also* Tr. 167-68, 187. Nevertheless, Mansukhani confirmed that he and Brown “had discussions” about the ground rules, although he insisted “we didn’t negotiate it. . . . [F]inal authority would be the LMR chair.” Tr. 209, *see also* Tr. 195-96. Neither Brown nor Mansukhani were able even to estimate how many ground rule discussions they had, or when they occurred.

In addition to GC Exhibit 3, the General Counsel introduced two other versions of proposed ground rules – GC Exhibits 4 and 7 – but they remained shrouded in confusion throughout the hearing. Brown identified GC Exhibit 4 as revisions to the Union proposals that were made by the warden and given to Brown by Mansukhani. The warden said that he didn’t make those revisions, but he vaguely recalled his Human Resource Manager emailing a marked-up version of the ground rules to him, and that he may have given that document in turn to Brown. Tr. 194-95. HR Manager Gillian Casstevens confirmed that at some point, she “helped to combine” two ground rule drafts that had been prepared by Brown and Mansukhani. Tr. 154. The Union and the warden “were getting close[]” to an agreement, but the Union never submitted a final draft to management. Tr. 153-54.

Brown identified GC Exhibit 7 as a final version of a ground rules agreement, which was given to him by Pitt’s secretary in late January 2015. Tr. 44-45. Unlike the earlier versions of the proposed agreement, this one had a signature line for Pitt (on behalf of management) and Brown (on behalf of the Union), but it was not dated or signed by either party. According to Brown, Pitt’s secretary told him the agreement was ready for Brown to sign, which he ultimately did, but he didn’t keep a signed copy of the document. *Id.* The warden insisted that neither his secretary nor Pitt’s prepared GC Exhibit 7 or gave it to Brown for signature, and that the parties never reached an agreement on ground rules. Tr. 196-97. In sum, the record contains no documentary evidence that the parties reached a ground rules agreement, and no documents suggesting that the parties even discussed ground rules or substantive proposals between October 4, 2014, and May 12, 2015.

Union President Brown testified that he was on official time almost continually between August 2014 and May 2015. Tr. 33-35, 53. Although he was not allotted a set amount of official time by contract, and he normally had to request official time each pay period from his supervisor, Brown said that starting in about August 2014, the warden put him on official time, and he then did not have to request it specifically. Tr. 34, 63-64. His

time and attendance records show that from July to mid-September, and for one pay period in January 2015, he performed a combination of his regular job and official time. GC Ex. 8. From mid-September 2014 to mid-January 2015, and from late January to April 2015, his time was attributed entirely to official time. *Id.* Brown testified that those time records were prepared by his supervisor, based on an email Brown would send to the supervisor each pay period, accounting for his official time. Tr. 52. During these periods when he was on official time, Brown said that he worked on ground rules and substantive proposals for a local supplemental agreement, as well as the many other types of representational matters that came before the Union. Tr. 63; *see also* Tr. 132.

Despite the language in Article 9, Section b(4) regarding negotiating ground rules within five months (that is, by December 23, 2014), and the language in Article 9, Section b(3) regarding starting substantive negotiations within six months (that is, by January 23, 2015), and despite the imminence of those dates, neither the Union nor the Agency raised the possibility of extending those deadlines. Tr. 68-69, 198, 202-03. December 23 passed without an agreement on ground rules, and January 23 passed without even a procedural discussion of setting a date to begin substantive negotiations. Management was satisfied with the Master Agreement and saw no need to have an LSA; therefore, management never even prepared any substantive proposals and didn't take the initiative to begin substantive negotiations. Tr. 186, 197. Meanwhile, the Union was actively drafting substantive proposals, but because Brown was still working on them, nobody from the Union communicated with the Agency about the LSA until late April of 2015. Tr. 49, 51.

At that time, Brown and Union Vice President Davis met with Pitt and the warden; Brown told them that the Union was close to finishing its draft, and he suggested that they set up a date to begin negotiations. Tr. 49. Mansukhani replied that the Union had "missed the time and that he didn't think he had to bargain." Tr. 50; *see also* Tr. 171-72, 199-200. Brown became angry at the Agency's response, while Davis tried to calm things down, saying, "[W]e know he [Brown] messed up, but can we still negotiate the LSA anyway?" Tr. 200; *see also* Tr. 172. The warden replied, "the time frame's passed . . . we're not going to negotiate a full LSA at this time." Tr. 200. However, he told the Union representatives that if there was anything that "you really feel strongly about . . . , we'll consider it on a case-by-case basis" Tr. 200. On May 12, 2015, Brown hand-delivered the Union's proposals for an LSA, an approximately 175-page document that tracked virtually every article of the Master Agreement. Jt. Ex. 5.³ On May 27, the Agency responded to the Union's proposals by citing the relevant provisions of the Master Agreement regarding the negotiation of ground rules and beginning substantive negotiations on an LSA, and by asserting that the Union had not complied with those requirements; accordingly, the Agency stated that it had no obligation to bargain an LSA. Jt. Ex. 6.

³ The document admitted into evidence represents only a tiny fraction of the full document given to the Agency. Tr. 55.

Witnesses also testified concerning the bargaining history of Article 9 of the Master Agreement. Philip Glover, who was President of the Council from 1997 to 2005 and helped negotiate the 1998 and 2014 agreements, testified that the language of Article 9, Section b was added to the Master Agreement in 1998 and remained unchanged when the current agreement was negotiated. Tr. 79. In fact, the parties didn't even discuss the language of Section b during the negotiations leading up to the 2014 agreement. *Id.* When the language was adopted prior to the 1998 agreement, the parties "wanted a mechanism to get locals and management moving on negotiations. . . . [W]e had had a number of problems with – at the local level with bargaining happening so we were trying to push bargaining along by the parties." Tr. 80-81. But the negotiators did not have much discussion about the consequences of failing to meet any of the time deadlines contained in Section b. Tr. 81. At the hearing, Glover suggested that an aggrieved party could file a grievance over the failure, "but that was about the limit of it." *Id.* Glover noted that Section b used the phrase "the parties" several times in regard to the different stages of negotiating an LSA, and he understood this to mean that it was the joint responsibility of both the Union and management to meet these deadlines. Tr. 83-84.

Christopher Wade, BOP's Chief of Labor Relations and head of the Agency's bargaining team for the 2014 (but not the 1998) Master Agreement, disagreed with Glover and stated that the timelines specified in Section b(1), (3), and (4) are mandatory. Tr. 104-06. Throughout the Master Agreement, the words "must" and "will" are used to indicate the mandatory nature of a provision, in contrast to words like "may" or "encouraged," which are "aspirational" but not mandatory. Tr. 105-06. Thus, pursuant to Article 9, Section b(2), local negotiators are "encouraged" but not required to complete negotiations of supplemental agreements within one year, but pursuant to Section b(3) and (4) they are required to establish ground rules within five months, to submit substantive proposals within fourteen days thereafter, and to begin meaningful and substantive negotiations within six months of the notice of intent. *Id.*

POSITIONS OF THE PARTIES

General Counsel

The GC argues that the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate an LSA with the Union after the Union submitted its proposals to the Respondent on May 12, 2015. The GC asserts two alternative theories for why the Agency was obligated to bargain, even though substantive negotiations had not begun within six months. First, the GC argues that Article 9, Section b establishes a mutual obligation on both management and the Union to follow the various timeframes for negotiating a local supplement; accordingly, the Union alone cannot be blamed or penalized for failure to meet any of those timeframes. GC Br. at 6-9. Alternatively, the GC argues that the Agency tacitly agreed to extend the contractual timeframes by providing Brown with official time throughout the period between July 2014 and May 2015 when Brown was preparing for LSA negotiations. *Id.* at 10-12.

The GC argues that “the parties” became obligated to negotiate an LSA once “either party” (in this case, the Union) served notice of its intent to negotiate within sixty days of receiving the Master Agreement. *Id.* at 6. When other timeframes are identified in Section b, “the parties” are required to take the specified actions, not one party; therefore, the GC infers that no single party can be penalized for failure to meet the deadlines. *Id.* at 7. In this manner, the parties’ entire agreement is taken into account, citing *U.S. Dep’t of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 25 (2000).

The GC further relies on a non-precedential decision I issued in *AFGE, Local 12*, Case No. WA-CO-02-0614 (2004), ALJDR No. 191 (March 25, 2005) (no exceptions filed), which allowed either party to reopen a collective bargaining agreement within a specified window period, and which further required the parties to meet within ten days of reopening to negotiate ground rules. The agency filed a timely notice of reopening, but when a month passed with no ground rules discussions, the union refused to bargain. I interpreted the contract as requiring either party (in that case, the agency) only to serve notice of reopening in order to terminate the contract, at which time the obligation to negotiate ground rules applied equally to both parties; therefore, the failure to meet within ten days did not terminate the bargaining obligation. The GC asserts that the same rationale is applicable in the instant case, and that the obligation to negotiate an LSA continued even after the passage of six months. GC Br. at 8-9. The GC also relies on Glover’s testimony that the timeframes of Article 9, Section b were not intended as strict deadlines, nor was the expiration of a timeframe intended as a waiver of the right to bargain.⁴

Even if the timeframes of Article 9 were meant to be strict deadlines, the GC insists that the actions of Agency officials served to tacitly extend the time for beginning substantive negotiations. Brown advised the warden, the LMR chair, and his supervisors throughout the fall of 2014 and first several months of 2015 that he was actively working on ground rules and substantive proposals for an LSA, and these officials approved official time for him throughout the period. The GC cites *U.S. Dep’t of Defense Dependent Schools*, 55 FLRA 1108, 1111-12 (1999), and *U.S. Dep’t of the Treasury, BEP*, 44 FLRA 926, 931, 938-40 (1992), for the principle that parties can be bound by oral or tacit agreements that they make. GC Br. at 10-11. The GC also faults the Agency for failing to mention anything to the Union about the pending deadlines for agreeing on ground rules and initiating substantive negotiations, or asking the Union if it needed additional time to start negotiations, until the deadlines had expired. *Id.* at 11-12. By approving official time for Brown and by failing to discuss the negotiation deadlines with the Union, the Agency demonstrated its tacit agreement to extend the deadlines.

Therefore, the Agency continued to be obligated to bargain an LSA with the Union, and the GC urges that I order the Agency to bargain over the proposals submitted by the Union in May 2015.

⁴ The GC argues that the cases cited by the Respondent regarding waiver of the right to bargain are inapplicable. Those cases involved a union’s failure to demand bargaining over a unilateral change within established time limits, while the current case involves midterm bargaining. GC Br. at 12.

Respondent

The Respondent asserts that it did not violate the Statute. It argues that the time limits are clearly set forth in Article 9, and the Union did not even come close to meeting them. It points first to the language of Article 9's preamble, which provides that the "Master Agreement may be supplemented in local agreements in accordance with this article." Jt. Ex. 1 at 1. The converse of this rule is that local agreements are not valid if they do not abide by Article 9. In this regard, the parties did not agree on ground rules within five months of the notice of intent to negotiate; the Union did not submit substantive proposals until nearly ten months after the notice; and the Union did not even attempt to begin substantive discussions until nine months after the notice. Thus, under the clear language of the Master Agreement, the Respondent insists that an LSA could not be negotiated. Resp. Br. at 7-9.

The Respondent also articulates this theory in a slightly different way, arguing that the Union waived its right to bargain by failing to submit proposals or begin substantive negotiations within the established time limits. It cites *Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson AFB, Ohio*, 51 FLRA 1532, 1535 (1996), for the principle that it is "incumbent upon the Union to make a timely request to bargain." While the latter case involved bargaining over a change in working conditions, the same principle is applicable here. Resp. Br. at 10.

Finally, Respondent seeks to refute the GC's contention that Brown had been granted "blanket" official time for the entire period of July 2014 to May 2015, in order to prepare for and engage in LSA negotiations, or that the Agency tacitly extended the time deadlines of Article 9 by allowing Brown to work on official time. It notes that there were a wide variety of labor-management issues ongoing throughout this period, and that management did not attempt to distinguish what work Brown was doing in any pay period. If Brown wished to obtain Agency approval of an extension of time to begin LSA negotiations, it was up to him to do so explicitly. *Id.* at 9.

ANALYSIS AND CONCLUSIONS

At the hearing and in their post-hearing briefs, both parties went to considerable lengths to dispute a variety of factual issues, almost all of which are immaterial to the resolution of this case. The testimony produced a dizzying array of contradictions regarding the circumstances and amount of official time granted to Union President Brown, the exchange of ground rule proposals, and the actual negotiations over those ground rules. But in the end, the only question that really matters is how to interpret the time limits for negotiating LSAs, as specified in Article 9, Section b of the Master Agreement. Specifically, was the Agency obligated to bargain with the Union over an LSA in May 2015, even though substantive negotiations on the LSA did not begin within six months of the Union's notice of intent to negotiate?

Despite the smoke created by some of the witnesses' factual disputes, the most important facts are not in dispute. We know that the notice of intent to negotiate an LSA was submitted by the Union on July 23 (Jt. Ex. 3), and that is the starting date for all of the timeframes contained in Section b(3) and (4) of Article 9. We know that the parties did not begin meaningful and substantive negotiations until approximately late April of 2015, when Brown and Davis of the Union met with Mansukhani and Pitt of management, and Brown advised management that the Union would be ready soon to start LSA negotiations. Tr. 49, 171. We know that the Union did not submit any substantive LSA proposals to management until May 12, 2015. Jt. Ex. 5. And we also know that the Union never asked the Agency for an extension of any of the time limits contained in Section b. Tr. 68-69, 198, 202-03.

Based on these undisputed facts, Article 9, Section b(3) required that meaningful and substantive LSA negotiations begin by January 23, 2015. All parties agree that this deadline was not met. Determining the consequences of the failure to meet this deadline requires an interpretation of the Master Agreement, in accordance with the guidelines set forth by the Authority in *Internal Revenue Serv., Wash., D.C.*, 47 FLRA 1091, 1103-11 (1993).

Before doing so, however, it is important to clarify that – notwithstanding the occasional use of the term by the parties⁵ – this case does not involve an alleged waiver of the Union's (i.e. Local 3976's) "right" to negotiate an LSA. Although an exclusive representative does, in a variety of circumstances, have a statutory right to bargain over certain matters,⁶ the Council – not Local 3976 – is the exclusive representative for employees of BOP and FCI Estill. The parties to a nationwide bargaining agreement may authorize local components to bargain locally, but it is up to the parties at the level of exclusive recognition to determine when such local bargaining may occur. *U.S. Dep't of Justice, Fed. BOP, Metro. Det. Ctr., Brooklyn, N.Y.*, 69 FLRA 44, 46, 53 (2015) (*Metro Det. Ctr.*); *U.S. Food & Drug Admin., Ne. & Mid-Atl. Region*, 53 FLRA 1269, 1274 (1998). In our case, the Master Agreement (most specifically in Article 9) sets forth the situations and conditions under which local bargaining is permitted, and the rights of a local union within the Council to bargain exist only as permitted by the Master Agreement.⁷ If Local 3976 has a right to negotiate an LSA, that right must derive from the Master Agreement. If Local 3976 does not have such a right, in the circumstances of this case, it is because the Master Agreement limits the conditions in which an LSA may be negotiated, not because Local 3976 did something to waive the right.

In interpreting the terms of an agreement, those terms should be read within the context of the entire agreement. Elkouri & Elkouri, *How Arbitration Works* 462 (6th ed. 2003). The preamble to Article 9 and the introductory sentence of Section b provide a context for understanding the meaning of the time limits, and these provisions reinforce the

⁵ See, e.g., GC Br. at 6; Resp. Br. at 10.

⁶ E.g., sections 7106(b), 7114, and 7117(a) of the Statute.

⁷ In *Metro Det. Ctr.*, the Authority held that Article 9, Section a of the Master Agreement authorized local bargaining over an apartment building that housed employees working at two BOP facilities and represented by two Council locals. 69 FLRA at 46, 53-54.

principle that local supplements are permitted only within the framework laid down by the Master Agreement. Thus, Article 9's preamble states that the Master Agreement "may be supplemented in local agreements *in accordance with this article.*" Jt. Ex. 1 at 22 (emphasis added). Section a stipulates that only one supplemental agreement may be negotiated per institution; the dependence of local supplements on the Master Agreement is reinforced by the provision in Section a(1) that all local supplements expire at the same time as the Master Agreement. *Id.* Section b starts by reasserting that an LSA may not include any provision that specifically conflicts with the Master Agreement, and it then proceeds to lay out a comprehensive framework for negotiating an LSA. This framework is bolstered by subsequent sections providing mechanisms for resolving any disputes concerning the inclusion of matters in the LSA, ratifying and (if necessary) renegotiating the LSA, and subjecting the LSA to reviews at the national levels of both the Union and the BOP. At all stages of this process, time limits are established. In Section b(2), the local parties are "encouraged to complete negotiations" of the LSA within one year, but the parties "must" agree on ground rules within five months or accept the model ground rules of Appendix A; the parties "must" begin substantive negotiations within six months; and they "must" exchange substantive proposals fourteen days prior to the start of negotiations. *Id.* at 22-23. In the stages of the process after the local parties have agreed on terms of an LSA, Section d provides that the parties "will" take various actions within certain time limits. *Id.* at 24.

From this textual framework, I understand the national parties negotiating Article 9 in 1998 to have intended to set up a narrow framework for local supplements, particularly with regard to the time period for negotiating such agreements. By stating that LSAs expire simultaneously with the Master Agreement, the national parties synchronized local negotiations to start when national negotiations conclude. The clock starts to run when the local union president receives the newly negotiated Master Agreement, and it is clear from the structure of the entire article that the local parties are being pushed to begin and conclude their LSA negotiations as quickly as possible after the Master Agreement has been executed. Since the LSA is going to automatically expire when the Master Agreement expires, the idea is to get the local supplements negotiated as quickly as possible after the Master Agreement goes into effect, and to avoid having local negotiations loom indefinitely throughout the duration of the contract. This impression is bolstered by Glover's testimony concerning the 1998 negotiations and the parties' intent when drafting the language of Article 9, Section b. Because in the past there had been "problems . . . at the local level with bargaining happening[.]" the national parties "wanted a mechanism to get locals and management moving on negotiations." Tr. 80-81. Although Glover also testified that the negotiators didn't really discuss the consequences of a violation of the time limits (Tr. 81), I think he was glossing over the plain meaning of the language used. The negotiators didn't discuss the consequences of a violation because the consequences were clear from the language. Regardless of whether the negotiators explicitly discussed what would happen if the time limits were not met, the language they used and the context of the requirements made the meaning clear.

It is widely accepted that the use of “must” in a contract or statute is a way of emphasizing the mandatory nature of the requirement. Sutherland, *Statutes & Statutory Construction* § 25.4 (7th ed. 2009); *U.S. v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997); *Ass’n of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994); *see also* Chicago Manual of Style § 5.146-5.147 (16th ed. 2010). The Federal Plain Language Guidelines, which are cited at § 3(c) of the Plain Writing Act of 2010⁸ as a model for writing government documents, instruct writers to use “must” for obligations and “may” for discretionary actions. *Id.* at 25. In the Master Agreement, the plain meaning of “must” is reinforced by the explicit contrast between the use of “must” in Section b(3) and (4) and “encouraged” in Section b(2). While the negotiators at the national level understood that substantive negotiations might move slowly, and that it might be unreasonable to require local parties to complete those negotiations on a hard-and-fast deadline, they could at least require the local parties to begin negotiations within a specified time. Particularly in light of the flexibility of the phrase “meaningful and substantive negotiations[,]” it seems quite likely that the parties negotiating the Master Agreement sought to “push” the local parties by setting a firm deadline on the start of the local negotiations.⁹ On the other hand, if a violation of the time limit in b(3) resulted in nothing but the possibility of filing a grievance, the word “must” in that paragraph would mean nothing different than “the parties are encouraged” in b.(2).

Counsel for the General Counsel makes a legitimate point when she contrasts the language of b(1) (“local supplemental agreements may be negotiated provided either party serves notice of intent to negotiate within sixty (60) days of receipt of the Master Agreement[.]”) with the language of b(3) and (4) (“the parties must begin meaningful and substantive negotiations within six (6) months of the notice of intent to negotiate.”). There is some logic to her assertion that the requirements of agreeing on ground rules and beginning substantive negotiations are mutually imposed on both Union and management, because they are phrased in terms of “the parties,” whereas the requirement of serving notice of intent to negotiate is imposed on “either party.” GC Br. at 6-7; Tr. 83-84. But I understand this language differently. Section b(1) refers to “either party” serving notice of intent to negotiate, because LSA negotiations can be *initiated* unilaterally, while the actual negotiations (either on ground rules or substantive terms), by their nature, require both parties to participate. Thus, while FCI Estill management saw no particular need to negotiate an LSA, it was required by Section b(1) to do so, once the Union served its notice of intent on July 23. Going forward after July 23, both the Union and management were bound by the time limits set forth in b(3) and (4), and the Agency would have violated the Statute if it had obstructed the negotiations. But it is not unreasonable to expect the party that initiated LSA negotiations to maintain the initiative, by submitting substantive proposals within five and a half months of the notice of intent and by bringing the parties to the table within six months.

⁸ Public Law No. 111-274, 5 U.S.C. § 301 note.

⁹ *See* Tr. 81. By “flexible,” I mean that it would not take much to satisfy b(3)’s standard of “meaningful and substantive negotiations” As long as the parties begin discussions of their proposals during the six-month window, the standard would be met; but if the failure to meet that deadline has no tangible consequences, then the parties’ intent to “push bargaining along” would be frustrated by endless delay, and the word “must” would lose all meaning.

FCI Estill management was not exempt from the time limits of Section b, but it cannot be faulted for not caring whether the time period for negotiating an LSA “in accordance with this article” expired.¹⁰ When the “window” for beginning substantive negotiations closed on January 23, it closed on both Local 3976 and on the Agency, unless they mutually agreed to an extension; but if only one party wants a supplemental agreement, then that party should act diligently to follow the rules for keeping the window open.

Accordingly, I conclude that Article 9 of the Master Agreement permits local parties to negotiate a supplemental agreement, but only within the time limits specified in Section b. During that time period, the parties must negotiate in good faith, and neither party can obstruct the process. But if substantive LSA negotiations have not begun within six months after service of a notice of intent to negotiate, the window on negotiating an LSA closes, unless both local parties mutually agree to an extension, and neither party can compel the other to negotiate. This allows the parties to close the books on the matter of a local supplement, so that it is not hanging over them indefinitely for the duration of the Master Agreement, and it is in keeping with the national negotiators’ intent “to get locals and management moving on negotiations.” Tr. 80.

Despite having some tantalizing similarities to the current case, the collective bargaining agreement in the *AFGE, Local 12* case cited by the GC was materially different from the BOP-Council contract in dispute now. Both cases involve a contract in which one party invoked a reopening provision in a timely manner and then failed to comply with a time

¹⁰ I emphasize that my decision in this case would be quite different if there were evidence that the Agency obstructed or unreasonably delayed the Union’s efforts to negotiate an LSA, but I find no such evidence here. Indeed, Brown’s testimony concerning the events between August 2014 and May 2015 is so ambiguous and uncertain that it is impossible to attribute any blame to management officials for the failure to meet the various time limits. While I accept Brown’s testimony (confirmed by the warden) that he held direct negotiations on ground rules with the warden, it is impossible to determine when those discussions occurred, when counter-proposals were exchanged, and whether (or when) the parties ever came close to agreeing on ground rules. Thus, I cannot accept the GC’s assertion (GC Br. at 7, 10) that the warden delayed negotiations by failing to respond to the Union’s ground rules proposals. The gap between August 26 (GC Ex. 3) and the “later part of January of 2015” (Tr. 45) is a five-month black hole in which it is unclear whether anything at all happened with regard to the LSA, and Brown’s testimony sheds no light on that void. Moreover, while it is customary for negotiating parties to keep copious notes of meetings and dated copies of draft proposals for just this very reason, the Union here could not date or document any of the events between August 26 and May 12. Regardless of who did or didn’t do what during this time, ground rule negotiations should have ended on December 23, and the ground rules contained in Appendix A of the Master Agreement should have gone into effect. It is therefore immaterial whether a ground rules agreement was signed in late January, as Brown insisted (Tr. 45); the parties should instead have been focusing their efforts between December 23 and January 23 on beginning substantive negotiations. If there were evidence that Brown had made efforts to schedule substantive bargaining prior to January 23, and that the warden or other management officials had stalled Brown’s efforts, such evidence might warrant a finding that the Agency negotiated in bad faith, in violation of the Statute. Even if the time limits of Article 9, Section b are viewed (as I do) as strict deadlines for negotiating an LSA, obstruction is a legitimate basis for extending such deadlines. In our case, however, the record is devoid of evidence of obstruction.

limit for beginning negotiations. In both cases, the contract required “either party” to give notice to the other of its intent to negotiate, but “the parties” are required to begin negotiations by a specified date. But the structural context of the contractual requirements is entirely different in the two cases, and this difference warrants a different outcome. In *AFGE, Local 12*, the reopening provision was part of the “duration” article of the contract: the contract would remain in effect from year to year, unless either party notified the other, at a specified time, of its intent to terminate or reopen it. *Id.*, slip op. at 2-3. As I noted in my decision, that was the only act required to terminate the agreement, after which both parties were under an ongoing, statutory duty to negotiate. *Id.* at 10-11. The time limit for starting negotiations, however, appeared in an appendix to the contract, containing ground rules for negotiations.

In our current case, however, the time limit for serving notice of intent to negotiate an LSA appears in the same section of the same article of the Master Agreement as the time limit for beginning substantive LSA negotiations. Within the text and structural framework of the Master Agreement, violations of Article 9, Section b(1) and (4) are equivalent. Even more significantly, the Union’s notice of intent to negotiate an LSA did not trigger an ongoing, statutory duty to bargain a new agreement, but simply a limited, contractual duty to bargain. As I noted earlier, the authority of the local parties to negotiate an LSA is strictly limited – in both time and subject matter – to the conditions outlined in Article 9 of the Master Agreement. In *AFGE, Local 12*, once the contract was terminated, the parties had no choice but to keep negotiating, regardless of a violation of the ground rules. In our case, any previous LSA between FCI Estill and Local 3976 had already expired when the old Master Agreement expired, but the local parties do not need to have an LSA. The new Master Agreement covers all bargaining unit employees and BOP facilities at the local level, and the preamble of Article 9 makes it clear that negotiating an LSA is simply an option for the local parties, and only when negotiated “in accordance with this article.” *Jt. Ex. 1* at 22. Accordingly, the *AFGE, Local 12* decision does not support the interpretation of the Master Agreement urged by the Union and the GC.

Finally, I reject the General Counsel’s argument that the Agency tacitly agreed to extend the time limits of Article 9 by granting official time to Brown after January 2015. One thing does not flow from the other. Brown’s testimony was far too ambiguous, and lacking in detail, to attribute any particular purpose to the warden’s (or any other Agency official’s) approval of official time. *Tr.* 33-35, 63-65. While I credit Brown that he spoke to Mansukhani about his need for official time to prepare for negotiations, and that Mansukhani “said okay[,]” it appears that this conversation occurred early in the ground rule negotiations, long before Brown would have needed an extension of the contractual time limits. *Tr.* 63. Moreover, there is no indication that the warden approved a specific amount or time period for the official time. It is also clear from Brown’s testimony as a whole that he never actually considered requesting an extension of the time limits. With that in mind, it would be wholly inappropriate to find that the Agency agreed to something that the Union never (even tacitly) requested. Finally, the evidence showed that Brown was working on a wide variety of Union representational activities throughout the period from July 2014 to May 2015. *Tr.* 65, 132. Accordingly, management officials could not reasonably have determined how Brown was

using his official time or understood that Brown's official time was specifically meant to negotiate an LSA. It would be unreasonable to impute, from these facts, an agreement by management to extend the time limits for LSA negotiations.¹¹

For the reasons stated above, I conclude that when Local 3976 officials met with management in April 2015, the permissible time for beginning substantive negotiations for a local supplement had elapsed. A local agreement could no longer be negotiated "in accordance with" Article 9 of the Master Agreement, and the Agency was justified in refusing to bargain one with the Union.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

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

Issued, Washington, D.C., August 19, 2016



RICHARD A. PEARSON
Administrative Law Judge

¹¹ It boggles the mind, and tests the limits of a factfinder's credulity, to imagine that Brown spent all or most of 40 hours a week, for the 37 weeks between August 26 and May 12 drafting the Union's bare-bones ground rules and the lengthier substantive proposals. Yet the GC's argument that management tacitly agreed to extend the contractual time limits by virtue of its approval of Brown's official time is premised on the notion that management must have known that Brown was using his official time primarily to draft LSA proposals. The more plausible conclusion – confirmed by a variety of testimony at the hearing – is that management's oversight of Brown's use of official time was negligently lax, with responsibility diffused among several officials, none of whom wished to probe too deeply into how Brown was accounting for his time. Shining a brighter light on this process now would not flatter either the Union or the Agency. But I would be compounding the problem if I found that management's lack of oversight constituted its agreement to something that neither of the parties had even considered.