FEDERAL LABOR RELATIONS AUTHORITY OALJ 22-10
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

PENSION BENEFIT GUARANTY CORPORATION, WASHINGTON, DC RESPONDENT AND INDEPENDENT UNION OF PENSION EMPLOYEES FOR DEMOCRACY AND JUSTICE CHARGING PARTY	Case No. WA-CA-20-0196

Douglas J. Guerrin
For the General Counsel

Alexander Kopit
Scott Hagood
For the Respondent

Valda Johnson
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The Agency and the Union are parties to a memorandum of understanding (MOU) that requires the Agency to deduct Union dues, and remit them to the Union, on a biweekly basis. Under the MOU, there are three tiers or deduction amounts, which are based on a member's pay grade. The GC and the Union argue that the Agency repudiated the MOU by failing to increase the amount of dues withheld when employees were promoted. The Agency counters that the MOU requires the Union to notify it when an employee's dues should be increased, and that it could not increase the amount of dues withheld without receiving written authorization from the employee.

We are presented with two main questions: first, whether the Union's unfair labor practice charge was timely filed, and second, whether the Agency's refusal to adjust the amount withheld from members who had been promoted amounted to a repudiation of the MOU.

On the first question, I find that the Union first received clear and unequivocal notice of the Agency's alleged repudiation in January of 2020; therefore, the charge filed in March of 2020 was well within the six-month limitations period of the Statute.

On the second question, I find that the Agency's conduct was based on a reasonable interpretation of the MOU, and that its alleged breach does not go to the heart of the agreement. I therefore conclude that the Agency did not repudiate the MOU.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) 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 March 24, 2020, the Independent Union of Pension Employees for Democracy and Justice (the Union) filed a ULP charge against the Pension Benefit Guaranty Corporation, Washington, DC (the Agency or Respondent).[1] After investigating the charge, the Regional Director of the FLRA's Washington Region issued a Complaint and Notice of Hearing on September 27, 2021, on behalf of the Acting General Counsel (GC), alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by repudiating the terms of a memorandum of understanding with regard to the withholding of Union dues.

On October 25, 2021, the Respondent filed its Answer to the Complaint, denying it violated the Statute. Simultaneously, Respondent filed a Motion for Summary Judgment (Resp. MSJ), arguing that there were no material facts in dispute and that it was entitled to judgment in its favor. The GC filed an Opposition to the Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment (GC MSJ), agreeing that there were no material facts in dispute and asking that judgment be entered in the GC's favor. Respondent filed an Opposition to the GC's Cross Motion for Summary Judgment (Resp. Opp'n). In order to consider the motions, I issued an order on December 6, 2021, indefinitely postponing the hearing.

[1] The charge is dated March 23, 2020, but it was not received, and thus not filed, until March 24, 2020. GC Ex. 1(a); GC MSJ at 2-3; 5 C.F.R. § 2423.6(a) (charged deemed filed when received by Regional Director).

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, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). The parties in this case have submitted exhibits in support of their motions, and after reviewing these documents fully, I agree that there is no genuine issue of material fact in this case. Therefore, it is appropriate to decide the case on the motions for summary judgment, and the hearing is hereby canceled. Below I will summarize the material facts that are not in dispute and make the following conclusions of law and recommendations.

FINDINGS OF FACT

The Respondent, Pension Benefit Guaranty Corporation, Washington, DC, is an agency within the meaning of 5 U.S.C. § 7103(a)(3). The Charging Party, the Independent Union of Pension Employees for Democracy and Justice, is the exclusive representative of a unit of the Respondent's employees, and is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4). The Agency and a predecessor union entered into a collective bargaining agreement (CBA) that went into effect on May 3, 2011. In November 2011, the Union became the exclusive representative of unit employees. On May 2, 2015, the CBA expired. Since that time, the Agency and the Union have continued to follow the terms of the expired agreement while negotiating a new CBA. *See* Resp. MSJ at 3; GC Ex. 2 at 1.

In 2012, the Agency and the Union signed a memorandum of understanding (MOU) concerning dues deductions. GC Ex. 3; Resp. Ex. B. In order to understand the parties' dispute, it is necessary to review several sections of the MOU.

I begin with the agreement's purpose. As stated in the preamble, the parties entered into the MOU to establish a dues withholding account and structure for bargaining unit employees to join the Union and pay Union dues through an automatic payroll deduction. *Id.* at 1. Section 1 of the MOU, titled "Purpose," requires that "Union dues . . . be deducted from the pay of eligible employees . . . who voluntarily authorize such deductions." *Id.*

Under Section 4 of the MOU, titled "Authorization," the Union is responsible for providing members the allotment form (Standard Form 1187 or SF-1187), certifying the amount of its dues, and educating its members on the program for allotment for payment of dues.[2] *Id.* Section 4 provides that once the Union has certified and authorized an SF-1187 and submitted it to the Agency's Human Resources Department (HRD), the "dues withholding will take effect . . . and will continue in effect until the allotment is terminated" under Section 7 of the MOU.[3] *Id.* at 1-2.

---

[2] With the Respondent's agreement, the GC submitted into the record the SF-1187s for several employees. Section A of the forms reflects the Union's three-tiered dues structure.

[3] Under Section 7 of the MOU, allotments are terminated when (a) the CBA no longer applies to the employee, (b) the employee is suspended or expelled from the Union, or (c) when the employee

The parties' dispute revolves around the meaning of Sections 5 and 6 of the MOU. Section 5, titled "Amount of Deduction," states:

> The amount to be withheld each pay period shall be the amount of the regular Union dues of the member. . . . [T]he Union certifies that its dues structure is a three-tier system. Tier 1 ($8.00) covers employees at the GS-4 through GS-10 level; Tier 2 ($10.00) covers employees at the GS-11 through GS-12 level, and Tier 3 ($12.00) covers employees at the GS-13 level and above. The current bi-weekly dues deduction amount will continue until such time as notice of change in the amount of dues is given to the HRD.

Id. at 2. Section 6, titled "Changes in Allotment," states:

> [The Union] will notify the HRD in writing of any changes in the dues structure or dues amounts. The Employer will make every attempt to ensure that the changes take effect . . . no later than fifteen (15) calendar days after the notice of the change. Only one change may be made in any 12-month period.

Id. The Agency is required under Section 8 of the MOU to remit to the Union on a biweekly basis the total amount of Union dues deducted for all employee-members, and to provide the Union a biweekly dues withholding report, which includes the names of members and the dues withholding amount deducted from their pay for that pay period. *Id.* at 3.

Between 2013 and March 2019, the Agency periodically notified the Union whether any employees had been promoted or demoted. GC MSJ at 4; *see also* GC Exs. 4(a)-(f). For instance, on June 11, 2013, the Agency advised the Union by email that an employee's promotion was about to go into effect and that the employee's dues withholding would therefore be raised to $12.00 per pay period. *See* GC Ex. 4(b). Similarly, Valda Johnson, the Union's President and one of the Union representatives who negotiated the MOU, was told in 2015 that the Agency had forgotten to adjust an employee's dues withholdings after the employee was promoted, and that the Agency had corrected the error after being alerted to it by the Union. GC Ex. 2 at 5; *see also* GC Ex. 4(c).

On September 16, 2019, HR Specialist Loraine Johnson sent the Union dues reports for several recent pay periods. *See* GC Ex. 5 at 1. After comparing these reports and other records, Valda Johnson "realized that a large number of employees' dues withholding did not match their Grade level." GC Ex. 2 at 3. In response, she sent an email to Agency officials on September 30, 2019, advising them that the Union had just completed an audit of dues records. GC Ex. 5 at 1; Resp. Ex. D at 1. She noted that a number of Union members who had been promoted over the last several years had not seen their dues deductions increase with their pay, even though the Agency was supposed to "monitor . . . changes in the grades

---

revokes his or her dues withholdings. GC Ex. 3 at 2-3.

of . . . members to take out the correct amount of dues." *Id*. Valda Johnson added that "[t]his has happened before" and the Agency "[had] to pay the dues amounts that were lost." She also attached a copy of an August 30, 2018 dues report, which showed the amount of dues deducted from each member's pay for the pay period. Handwritten notes on the report indicated that there were withholding errors for twenty-four employees, including twenty-three employees who had been promoted[4] and from whom the Agency was withholding two dollars too little. GC Ex. 5 at 2-4; *see also* GC MSJ at 5.

After repeated prodding from the Union for a response, Supervisory HR Specialist John McLemore emailed Valda Johnson on January 15, 2020. GC Ex. 6; Resp. Ex. H at 2. McLemore wrote that the Agency had "completed our review" of the matter and that, under Sections 5 and 6 of the MOU, "the Union was required to notify the agency of any changes in the bi-weekly dues amount." *Id*. Because there was "no record of the Union notifying the agency of any changes in dues amounts prior to your September 30, 2019 email," McLemore stated, management "did not have the authority to make such changes to the listed employees dues deduction without written notification from the union." GC Ex. 6 at 2; Resp. Ex. H at 2. This was the first time the Agency had made such an assertion. *See* GC MSJ at 5; GC Ex. 6 at 1-2. In addition, McLemore indicated that Valda Johnson's September 30, 2019 email was insufficient to trigger a change in dues withholdings going forward, because doing so would be contrary to an established past practice; rather, the Union would need to inform members of the "tiered dues allotment process" set forth in Section 4 of the MOU before dues deductions could be increased. GC Ex. 6 at 2; Resp. Ex. H at 2.

Valda Johnson replied on January 16, 2020, asserting that McLemore's interpretation of the MOU was incorrect; that Section 5 of the MOU "states what each member will pay based on his/her grade;" and that Section 6 requires the Union to notify HRD "when the overall 'dues structure' changes." GC Ex. 6 at 1; Resp. Ex. H at 1. Further, she stated, "There is no language there that refers to 'when an employee get promoted or when his grade changes' because that is presumed in the logical and intuitive understanding of Section 5." *Id.* Johnson also asserted that the same issue had previously arisen and been resolved. In addition, Johnson told McLemore that the Union "notified you over six months ago about the promotions of Union members. You have known for months, and I gave deference because Loraine [Johnson] was out sick." *Id.* Finally, Johnson asserted that the Union was asking the Agency to abide by the MOU, and that there was no need for any negotiations. *Id.* The Agency and the Union did not discuss the matter subsequently. *See* GC Ex. 2 at 4.

The Union filed the ULP charge in this case on March 24, 2020, alleging, among other things, that the Agency had failed to update the amount of dues withheld for employees who had been promoted, in violation of the MOU. The Union further alleged that the Agency's conduct violated § 7116(a)(1), (2), (4), (7) & (8) of the Statute. GC Ex. 1(a). While the charge was being investigated, the Agency responded in a position statement dated April 28, 2020, in which it noted the possibility that the Union was alleging repudiation of the MOU; the Agency insisted, however, that it was complying with the agreement. GC Ex. 7 at 4-6.

---

[4] The notes indicated that dues for one of the twenty-four employees were being improperly withheld because that employee had withdrawn from the Union. *See* GC Ex. 5 at 3.

In its complaint, dated September 27, 2021, the GC alleges that since September 30, 2019, the Respondent has refused to abide by the terms of Section 5 of the MOU, thereby repudiating the MOU, in violation of § 7116(a)(1) and (5) of the Statute. GC Ex. 1(b) at 1-2.

POSITIONS OF THE PARTIES

General Counsel

To begin, the GC argues that the Union's ULP charge was timely filed, even though the Union had been regularly receiving dues reports for several years, and even though some of the employees at issue had been promoted (without their dues increasing) as early as 2015. The GC notes that the MOU requires the Agency to withhold dues in specific amounts every two weeks; every time the Agency remitted incorrect dues to the Union, it was violating the MOU. GC MSJ at 6. Citing precedent of the National Labor Relations Board (the Board or NLRB), the GC argues that a "new repudiation" of the MOU has been occurring "every two weeks" when the Respondent "fails to comply with the [MOU's] dues structure" and "remits to the Union an improper amount." *Id*. at 6-7 (citing *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994); *Farmingdale Iron Works, Inc.*, 249 NLRB 98, 99 (1980) *enfd.* 661 F.2d 910 (2d Cir. 1981)). The GC denies that the complaint is based on a "continuing violation" theory; rather, it is based on the language of the MOU, which requires the Agency to take specific actions at regular intervals, each of which gives rise to a new claim. *Id*. at 7.

Next, the GC argues that the ULP charge satisfies the requirements set forth in § 2423.4(a)(5) of the Authority's Rules and Regulations and was sufficient to inform the Respondent of the allegations it was facing, even though the charge did not use the word "repudiation" or allege a violation of § 7116(a)(5) of the Statute. The GC notes in this regard that the Respondent recognized an implicit repudiation allegation in the charge and addressed the issue in its position statement. GC Ex. 7 at 5; GC MSJ at 8-9 (citing *U.S. DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery, Pa.* 40 FLRA 449, 455 (1991) (*Allenwood*), *rev'd as to other matters sub nom. U.S. DOJ v. FLRA*, 988 F.2d 1267 (D.C. Cir. 1993)).

Turning to the merits of the complaint and the first prong of the Authority's repudiation test, the GC asserts that the Agency refused to comply with Section 5 of the MOU, that this began when the Agency "stopped adjusting the dues amounts for employees who changed grades," and that the Agency's breach was clear and patent. GC MSJ at 11-12, 17, 19. The GC argues in this regard that Section 5 of the MOU "states the amount of dues that shall be paid by Union members," and that this amount is "set as a three-tiered system based on the . . . employee's GS pay grade." *Id.* at 12. The GC contends that because Section 5 establishes a three-tiered system, "it follows that employees who move up or down the GS pay scale are not required to take any action, such as filing a new SF-1187, to adjust their dues amounts." *Id*. The GC adds that until some point in 2019, the Respondent operated in accordance with the GC's and the Union's understanding of the MOU. *Id.*

With respect to Section 6 of the MOU, requiring the Union to notify HRD of any "changes in the dues structure or dues amounts", the GC argues that "the correct reading of

the meaning of the 'dues structure' language is a reference to the tiers themselves," and that the "rational[] reading" of the "dues amounts" language is that the Union "must tell management if the amount of dues in individual tiers change, for example taking Tier 1 from $8 to $9 per pay period." *Id.* at 14. The GC contends that it "makes no . . . sense for the Union to have to notify HRD of changes in employees' GS pay scale since it would be HRD that processed such changes in the first place." *Id.* at 13-14.

Regarding the second prong of the repudiation test, the GC submits that the Respondent's breach goes to the heart of the agreement, arguing that the breach concerns the processing of Union dues, which is the "sole basis of the MOU." *Id.* at 16. The GC rejects the Respondent's argument that the Union's interpretation of the MOU would render it unlawful and unenforceable. For the Agency to increase an employee's dues withholding when he or she is promoted, the Agency is simply carrying out the employee's original authorization, as reflected in his or her SF-1187. The Union membership approved the MOU's dues structure when the MOU was negotiated, and employees were fully aware of the tiered structure when they signed SF-1187s. *Id*. at 14. Cases cited by the Respondent to support its position are factually and legally inapplicable, the GC asserts. *Id.* at 14-16.

In order to remedy the Respondent's ULP, the GC requests that the Agency be required to reimburse the Union for the underpaid dues dating back to September 24, 2019, six months prior to the filing of the Union's ULP charge.

Respondent

The Respondent asserts that the Union filed its ULP charge too late, thus barring the issuance of a complaint under § 7118(a)(4)(A) of the Statute. Respondent points out that the Union was on notice since 2015 that members' dues withholdings did not automatically increase with their pay grades; that the Union's dues audit was based on data from August of 2018; and that Valda Johnson told McLemore in her January 16, 2020 email that the Union had notified him over six months earlier about the promotion of Union members. Since the Union had notice of the Agency's objectionable conduct more than six months prior to March 24, 2020, the charge was time-barred. Resp. MSJ at 7-8; Resp. Opp'n at 1-2.

Responding to the GC's contention that a new ULP was committed every two weeks, the Respondent insists this argument is based on a "continuing violation" theory, which the Authority has refused to apply to the calculation of the limitations period for most ULP charges. Resp. Opp'n at 2-3 (citing *EEOC, Wash., D.C.*, 53 FLRA 487, 493-96 (1997) (*EEOC*)). Further, the Respondent argues that there is no need to rely on NLRB precedent, because the Authority has "addressed continuing violations . . . and . . . rejected such an approach." *Id.* (citing *NAIL, Local 5*, 70 FLRA 550, 551 (2018)). To the extent that reliance on NLRB precedent is warranted, Respondent argues that the Board holds that repudiation of an agreement is not a continuing violation. Resp. Opp'n at 3 (citing *St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1129 (2004); *MBC Headwear, Inc.*, 315 NLRB at 428).

In addition, the Respondent insists that the charge is deficient, and that the allegations in the complaint do not bear a relationship to the charge, because the complaint makes a § 7116(a)(5) allegation not made in the ULP charge. *See* Resp. MSJ at 8-9.

Turning to the merits, the Respondent argues it did not breach, much less repudiate, the MOU. Citing Section 5 ("The current bi-weekly dues deduction amount will continue until . . . notice of change in the amount of dues is given to the HRD") and Section 6 ("[The Union] will notify the HRD in writing of any changes in . . . dues amounts"), the Respondent argues that the MOU "places the onus on the Union to notify HRD if an employee's dues withholding needs to change in any way," and that the Agency needed "explicit authorization to increase the dues withholding from the identified [employees]." *Id.* at 10, 14. Further, the Respondent asserts that nothing in the MOU places responsibility on the Agency to increase an employee's dues withholding without the employee's authorization. *Id.* at 10. As for the GC's claim that the Respondent had for years initiated changes in employee dues withholding upon the employee's promotion, the Respondent notes that the GC produced only one email indicating the Agency increased an employee's dues withholding on its own. *Id.* at 6.

To the extent there was a breach, the Respondent argues that the breach was based on a reasonable interpretation of the MOU and therefore was not a repudiation. Resp. MSJ at 13-15 (citing *U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 60 FLRA 844, 848-50 (2005)). It argues that its reading of the MOU -- making the Union responsible for communicating with members about the "internal Union business" of dues and notifying HRD of any needed changes -- is reasonable. Resp. Opp'n at 4-5. Respondent adds that at most only a portion of the MOU was breached, and that this portion, requiring the Agency to increase an employee's dues withholding when promoted or demoted, is not the heart of the agreement. Resp. MSJ at 16; Resp. Opp'n at 9.

In addition, the Respondent argues that if the GC's and Union's interpretation of the MOU is correct, then the MOU is unenforceable, because it would unlawfully require the Agency to increase an employee's dues withholding even when the amount is more than the amount the employee authorized on his or her SF-1187. Resp. MSJ at 15; *see also id.* at 10-13 (citing § 7115 of the Statute; *AFGE, Council 214, AFL-CIO v. FLRA*, 835 F.2d 1458, 1460-61 (D.C. Cir. 1987) (*Council 214*); *AFGE, AFL-CIO, Local 1816 v. FLRA*, 715 F.2d 224, 228 (5th Cir. 1983); *Fed. Emps. Metal Trades Council, AFL-CIO, Mare Island Naval Shipyard*, 47 FLRA 1289, 1294 (1993); *Dep't of the Air Force, HQ Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 31 FLRA 1197, 1198-99 (1988)).

ANALYSIS AND CONCLUSIONS

The Union's ULP charge was timely filed.

Section 7118(a)(4) of the Statute provides that "no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority," except in certain situations not applicable here. *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 736 (2015) (*Great Lakes*) (quoting 5 U.S.C. § 7118(a)(4)). Frequently, as in our case, the crucial issue in timeliness disputes is determining when the alleged ULP "occurred." *See*

Fed. Educ. Ass'n v. FLRA, 927 F.3d 514, 519 (D.C. Cir. 2019) (*FEA*). That determination, in turn, depends on the type of unfair labor practice that is alleged.

For example, when an agency is charged with unilaterally changing conditions of employment, the Authority has held that the six-month limitations period "runs from the date on which the charging party has 'clear and unequivocal notice of unilateral implementation' of a change in working conditions." *Great Lakes*, 68 FLRA at 736 (quoting *U.S. DOJ, INS, Wash., D.C.*, 55 FLRA 93, 96 (1999)). For charges alleging that a party refused to comply with an arbitration award, the Authority has modified its standard for identifying the start of the limitations period. Prior to 2005, the Authority held that because the parties to an arbitration are obligated to comply with the award when it becomes final, the limitations period should also run from that date. *EEOC*, 53 FLRA 492-93. In *U.S. Dep't of the Treasury, IRS*, 59 FLRA 282, 287-88 (2003) (*IRS 1*), the Authority reaffirmed its *EEOC* holding, explicitly rejecting the charging party's argument that the ULP "occurs" when a party refuses to comply with the award, not when the award was issued. But on appeal, the D.C. Circuit agreed with the charging party, explaining that the Authority's rule "confuses the onset of the obligation with the onset of the failure to fulfill that obligation." *NTEU v. FLRA*, 392 F.3d 498, 501 (D.C. Cir. 2004). On remand, the Authority adopted the court's approach for determining the start of the 7118(a)(4)(A) limitations period in cases of noncompliance with an award – "when a party expressly notifies a party that it will not comply with the obligations required by an award" -- and it has continued to apply that standard. *U.S. Dep't of the Treasury, IRS*, 61 FLRA 146, 150 (2005) (*IRS 2*); *see also U.S. Dep't of Defense Educ. Activity*, 70 FLRA 654, 655 (2018) (*DoDEA*), *rev'd on other grounds* in *FEA*.

I set out the lengthy history of the *IRS* decisions here, because both parties in our case have sought to analogize the precedent regarding arbitration noncompliance ULPs to contract repudiation ULPs. Both sides also cite aspects of the *EEOC* decision (the precedent for the *IRS* decisions) in order to support or reject the theory of continuing ULP violations. The parties resort to analogies because the Authority has not explicitly defined when the repudiation of a contract or MOU "occurs," for purposes of § 7118(a)(4). Despite this gap in the case law, I believe the Authority has adequately articulated the approach for determining the limitations period for the various types of unfair labor practices, including the specific ULP alleged here.

Thus in the *Great Lakes* decision I cited earlier, the Authority utilized this analytical approach when it identified the start of the limitations period as the date when the charging parties receives "clear and unequivocal notice" of the allegedly unlawful action. 68 FLRA at 736. While that case involved a unilateral change in conditions of employment, the analytical approach can be equally appropriate for other types of ULPs. In arbitration noncompliance cases, the date the ULP occurs depends on how the respondent refuses to comply, but when the party expressly refuses, the Authority looks to the date "when . . . one party expressly notifies the other that it will not comply with the obligations required by an award." *DoDEA*, 70 FLRA at 655 (citing *IRS 2*). Although the Court of Appeals in *FEA* rejected the Authority's factual determination of when this notification occurred, the *FEA* court and both the majority and dissent in *DoDEA* agreed on the legal standard (quoted above) for starting the limitations period. *Compare* 927 F.3d at 520 *with* 70 FLRA at 655

(majority opinion) *and* 70 FLRA at 656-57 (dissenting opinion); *see also* 70 FLRA at 665-66 (ALJ opinion). In all these situations, the crucial factor is when the charging party receives "clear and unequivocal notice" that the other party has violated the Statute.

The Authority has not explicitly addressed the question of when the limitations period begins for a contract repudiation, but an Administrative Law Judge did, in a case that was not appealed to the Authority. *Dep't of the Air Force, Air Force Reserve Command, Robins AFB, Georgia*, Case No. AT-CA-80669 (May 25, 1999), ALJ Dec. Rep. No. 142, 1999 WL 551369 (*Robins AFB*). There, the agency negotiated a parking plan with the union and almost immediately reneged on it. The union didn't file a ULP charge until a year later, after the agency refused the union's second demand to negotiate. While the union argued that each refusal to negotiate constituted a separate ULP, the judge rejected this, ruling that the limitations period started when the agency unilaterally terminated application of the parking plan. *Id*., slip op. at 3-4.

Although I believe the FLRA case law adequately points us to the correct standard for identifying the date that repudiation of an agreement occurs, decisions of the National Labor Relations Board reinforce this standard.[5] In *A & L Underground*, 302 NLRB 467, 468 (1991), the Board held that when a party totally repudiates an agreement, the other party must file its ULP charge within six months of "its receipt of clear and unequivocal notice of total contract repudiation." It repeatedly emphasized that the notice of repudiation must be "clear and unequivocal" to start the limitations period, but it explained that "it is at the moment of that repudiation that the unfair labor practice . . . fundamentally occurs." *Id*. at 469. Citing *Farmingdale Iron Works, Inc*., 249 NLRB 98 (1980), the Board explained that while a company's episodic failures to make benefit fund contributions may have violated the agreement, the company did not repudiate the agreement (and the limitations period for repudiation did not begin) until it notified the union that it had no obligation whatever to make contributions. 302 NLRB at 469 (citing 249 NLRB at 98-99, 105-06). Once repudiation was clearly communicated, however, subsequent failures to contribute do not constitute new ULPs or trigger new limitations periods. *Id*.; *see also St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1127 (2004), where the Board elaborated on this point.

Looking at the entire case law, the NLRB decisions make explicit the rule that is implicit in the FLRA decisions. The 7118(a)(4) limitations period begins when the charging party has received clear and unequivocal notice of the particular action or conduct that constitutes the alleged statutory violation. In our case, the complaint alleges that the Respondent "repudiated" the MOU. GC Ex. 1(b) at ¶ 8. As I will discuss at greater length later, repudiating an agreement is qualitatively different from merely violating it, and proving repudiation involves specific elements of proof that are not required to establish that a party breached the agreement. *Dep't of Defense, Warner Robins Air Logistics Ctr., Robins AFB,*

[5] When Authority case law on an issue is largely undeveloped, the Authority will look to NLRB decisions, if the statutory provisions are analogous. *U.S. Army Armament Research Dev. & Eng'g Ctr., Picatinny Arsenal, N.J.*, 52 FLRA 527, 533 (1996). The Authority has recognized that § 7118(a)(4) of the Statute is substantially identical to the limitations provision of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and the Authority has used NLRB decisions on this issue to guide its own application of § 7118(a)(4). *See EEOC*, 53 FLRA at 494.

Ga., 40 FLRA 1211, 1218-19 (1991) (*Warner Robins*). Accordingly, the MOU in our case would not have been repudiated merely by a single instance of failing to deduct the correct amount of an employee's union dues, nor by a few separate instances of such conduct. Repudiation could only have occurred when the Respondent clearly and unequivocally notified the Union that it would not comply with the Union's interpretation of the MOU.[6]

Looking now at the facts of this case, the date the alleged repudiation occurred is clear. Contrary to the Respondent's arguments, the individual instances in 2018 or 2019, when it failed to increase an employee's dues deductions after being promoted, did not repudiate the MOU; they simply represented the Agency's understanding of what the MOU required -- regardless of whether that understanding was right or wrong. To the extent that a repudiation occurred, it only occurred after the Union advised Agency officials of the "proper" meaning of Sections 5 and 6 of the MOU, when the Agency in turn advised the Union explicitly that it disagreed with that interpretation and would not comply with it. This occurred when McLemore sent the Union his January 15, 2020 email. Regardless of when the Union became aware of the allegedly incorrect deductions, the Union had no way of knowing whether those deductions were simply oversights on the Agency's part or a conscious rejection of Sections 5 and 6 of the MOU. It was only when Valda Johnson wrote McLemore that it was the Agency's obligation to increase an employee's dues when he or she is promoted, and McLemore insisted that it was the Union's obligation to request such an increase, that the Agency's rejection of the Union's position became clear and unequivocal.

Therefore, the Agency's alleged repudiation of the MOU occurred on January 15, 2020, and the Union had six months from then to file its ULP charge. Since the charge was filed on March 24, 2020, it was timely filed.

The charge and complaint are not deficient.

The Respondent asserts that the charge filed by the Union was deficient, and that the allegations in the complaint do not bear a relationship to the charge, because the complaint makes a § 7116(a)(5) allegation not made in the ULP charge.

Section 2423.4(a)(5) of the Authority's Regulations requires that a ULP charge contain "[a] clear and concise statement of the facts alleged to constitute an unfair labor

[6] From this discussion, it should be evident that the theory of continuing violations is not applicable (for 7118(a)(4) purposes) to cases of repudiation. While the Authority in *EEOC* specifically rejected the theory in arbitration noncompliance cases, and expressed dislike of the principle in general, it did not reject its applicability entirely. *See* 53 FLRA at 493-96. The ALJ in *Robins AFB*, citing *EEOC*, went further and stated that repudiation of a contract or MOU is not a continuing violation. 1999 WL 551369, slip op. at 3. To the extent that the continuing violation theory has any ongoing applicability, it may be suggested by the Authority's favorable discussion of the NLRB's decision in *A & L Underground*, 302 NLRB at 469, where the Board distinguished (for statute of limitations purposes) between a party's periodic violations of an agreement and its repudiation of the agreement itself. Individual breaches of an agreement may arguably start the running of separate limitations periods, but once the agreement has been repudiated, subsequent actions do not initiate new limitations periods. *Id*.

practice, a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Statute, and the date and place of occurrence of the particular acts[.]" 5 C.F.R. § 2423.4(a)(5). Section 2423.20(a)(3) and (4) of the Regulations requires a complaint issued by a regional director to set forth, among other things, "[t]he facts alleged to constitute an unfair labor practice[]" and "[t]he particular sections of [the Statute] and the rules and regulations involved[.]"

The Authority has long held that: (1) the ULP charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued; (2) a charge is sufficient in an administrative proceeding if it informs the alleged violator of the general nature of the violation charged against him; and (3) where a procedural defect exists concerning the charge, a respondent must be prejudiced by the alleged defect in order for the Authority to decline to resolve the allegedly defective claim. *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 886 (2015) (*VA*) (citing *Allenwood*, 40 FLRA at 455). The Authority has repeatedly held that a complaint complies with these requirements "if the allegations in the complaint bear a relationship to the charge and are closely related to the events complained of in the charge." *Allenwood*, 40 FLRA at 455. However, the Authority "does not even judge the *complaint* based on rigid pleading requirements." *VA,* 68 FLRA at 886 (alterations omitted).

Although the Union's ULP charge does not use the word "repudiation" or specifically allege that § 7116(a)(5) was violated, the charge clearly meets the Authority's standards. By alleging that the Agency was advised on September 30, 2019 that it "had failed . . . to update the [dues] amounts withheld for certain employees" it had promoted "in accordance with the Dues Withholding [MOU]," the charge made plain that the Agency was being accused of unlawfully breaching the MOU. Rather than being prejudiced by the absence of the word "repudiation" in the charge, the Agency recognized that the charge implicitly accused it of repudiating the MOU, and the Agency addressed the issue directly in its position statement. GC Ex. 7 at 4-6.

Additionally, the allegations in the complaint are closely related to the events complained of in the charge, as both the charge and the complaint allege the Agency had been failing, since September 30, 2019, to comply with the MOU with respect to dues deductions. *See Allenwood*, 40 FLRA at 450, 455 (charge adequate, and complaint closely related to events cited in charge, even though charge, unlike complaint, did not reference a September information request or a violation of § 7114(b)(4)).

For these reasons, I find the charge and the complaint are not deficient.

The Respondent did not repudiate the MOU.

The Authority has long held that while "not every breach of contract is necessarily a violation of the Statute . . . the repudiation of an agreement does violate the Statute." *Warner Robins*, 40 FLRA at 1218-19. To determine whether a breach of an agreement amounts to repudiation, the Authority utilizes a two-pronged analysis. *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 862-63 (1996) (*Scott AFB*). The first prong asks whether the breach was "clear and patent" and requires the Authority to

analyze the clarity of the provision that the charged party allegedly breached. The Authority will not find a repudiation where a party acts in accordance with a reasonable interpretation of an unclear contractual term. *U.S. Dep't of Justice, Fed. BOP*, 68 FLRA 786, 788 (2015). The second prong asks whether the breached provision goes to the heart of the parties' agreement. In this analysis, the Authority focuses on the importance of the provision that was allegedly breached relative to the agreement in which it is contained. The more important the provision to the parties' agreement, the more likely its breach amounts to repudiation of the contract. *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 882-83 (D.C. Cir. 2020), *aff'g in part and rev'g in part* 71 FLRA 380 (2019). Where the meaning of a particular term in an agreement is unclear, a party's action in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement. *Id*. at 883.

Upon thorough consideration of the parties' arguments and the disputed terms, I find that the Respondent acted in accordance with a reasonable interpretation of ambiguous contractual terms and thus did not repudiate the MOU.

I begin with Section 5 of the MOU. That section states: "[t]he amount to be withheld each pay period shall be the amount of the regular Union dues of the member"; it sets forth the dues deduction amount per pay period for each tier in the three-tier system; and it provides that "[t]he current bi-weekly dues deduction amount will continue until such time as notice of change in the amount of dues is given to the HRD."

I agree that it is reasonable to interpret Section 5 in a manner consistent with the GC's and the Union's interpretation: (1) the Agency is required to adjust the amount of dues withheld when an employee is promoted (or demoted) to a new dues tier; to do otherwise would violate the above requirement that the Agency withhold an employee's regular Union dues; (2) while Section 5 requires that "[t]he current bi-weekly dues deduction amount will continue until such time as notice of change in the amount of dues is given to the HRD," the phrases "[t]he current bi-weekly dues deduction amount" and the "amount of dues" refer to the dollar amount in a given tier, meaning that Section 5 requires notice from the Union only when the Union seeks to change the amount in a tier.

I disagree, however, that that is the only reasonable reading of the provision. Section 5 does not precisely define "current bi-weekly dues deduction amount" and "amount of dues," and those phrases are ambiguous enough to reasonably permit an alternative interpretation like the one proposed by the Respondent: While the Agency is obligated to withhold an employee's regular Union dues, and while an employee's regular Union dues are defined by the three-tier system, Section 5 can be understood to place the obligation on the Union to notify the Agency of a change in an individual employee's dues before the Agency can make such a change. The provision, after all, requires the Agency to continue an employee's dues deduction amount until "notice of change in the amount of dues is given to HRD." Although HRD maintains all employee pay and promotion records, it would be illogical for HRD to be required to "give notice" to itself that an employee's promotion gives rise to a dues increase.

The disputed wording in Section 6 is similarly ambiguous. Section 6 provides that

"[the Union] will notify the HRD in writing of any changes in the dues structure or dues amounts." The GC and the Union interpret Section 6 as requiring notice when there is a change in "dues structure," i.e., a change in the three-tier system, or a change in "dues amounts," i.e., a change in the amount of a given tier. The Respondent counters that "dues amounts" refers to the amount of dues withheld from an individual employee. I find that the phrase "dues amounts" is ambiguous and reasonably susceptible to the two interpretations offered here.

The GC's arguments to the contrary are not persuasive. The GC contends that "it follows" from the existence of the three-tier system set forth in Section 5 that the Union was not required to provide notice in order for the Respondent to adjust an employee's withholding amount when the employee was promoted or demoted. The GC argues that the Union correctly interprets "dues amounts" in Section 6 to refer to the amount of dues in individual tiers. As indicated above, I agree that the GC has presented "a" reasonable interpretation of Sections 5 and 6, but it has not demonstrated that this is the "only" reasonable interpretation, and it has failed to show the Respondent's interpretation is so detached from the wording of the MOU as to render it unreasonable.

The GC asserts that it "makes no . . . sense" for the Union to have to notify HRD about grade changes since the Agency would already have that information. But the Respondent's reading of the MOU is far from irrational. For example, requiring Union notice prior to Agency action could serve a beneficial purpose, like lessening the likelihood that an Agency error would lead to an unwarranted reduction in an employee's dues withholdings. Moreover, while the Agency's access to HR information might make it easier for it to adjust an employee's withholdings on its own, there is no indication that it would be especially difficult for the Union to keep track of members' promotions and notify the Agency that those employees' dues needed to be adjusted. Indeed, it would be fairly easy for the Union to do so, given the Agency's practice of informing the Union when bargaining unit employees are promoted.

Finally, the GC argues that until some point in 2019, the Respondent operated in accordance with the interpretation espoused by the GC and the Union. That is plainly not the case. While the record shows two instances where the Respondent apparently adjusted an employee's dues withholding on its own, the record reveals numerous other instances where the Respondent has acted in accordance with its interpretation of the MOU by failing, in the absence of Union notice, to adjust the withholdings of at least twenty-three promoted employees since as early as 2015.

For the reasons stated above, I conclude that the Respondent acted in accordance with a reasonable interpretation of the MOU's ambiguous contractual terms. As such, I find that the Respondent did not repudiate the MOU.

In light of this conclusion, it is unnecessary to determine whether the allegedly breached provision goes to the heart of the MOU. *E.g.*, *Scott AFB,* 51 FLRA at 864. Were it necessary to consider that issue, however, I would find that the Agency's insistence that the Union notify it when an employee's dues withholding should be changed does not go to the heart of the MOU. *See, e.g., Laughlin AFB, Del Rio, Tex*., 52 FLRA 413, 419 (1996)

(despite violating settlement agreement, agency demonstrated an "ongoing commitment . . . to honor its obligations under the agreement"); *U.S. Dep't of Justice, U.S. INS, U.S. Border Patrol, Wash., D.C.*, 41 FLRA 154, 171-72 (1991) (contractual requirement to advise employees of their right to union representation at interrogations "facilitates an important Union representational responsibility, [but] it does not . . . go to the core of the contractual relationship.") (internal quote and citation omitted). At all times relevant to this case, the Agency has continued to withhold dues from all employees who have signed SF 1187 forms, to transmit those dues to the Union, and to provide the Union with periodic dues reports. The employees affected by the dispute represent a relatively small subset of the overall group whose dues are deducted. The underlying purpose of the MOU is to utilize the Agency's payroll system to enable the Union to collect dues, in accordance with the wishes of employees; that process has continued to function, notwithstanding the parties' disagreement on the interpretation of Sections 5 and 6.

In this respect, our case is different from those cases in which the violation negated the basic purpose of the agreement. *See, e.g.*, *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 52 FLRA 225, 230-32 (1996) (agency's failure to maintain indoor smoking facilities until negotiations over outdoor smoking facilities were completed nullified the sole purpose of the agreement); *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 355, 357-58 (2009) (negotiated drug policy's primary purpose was to encourage rehabilitation, and agency's termination of employees while they were in rehabilitation negated that concept). While the MOU in our case only covers dues deductions, and the Agency's interpretation of Sections 5 and 6 results in the Union receiving less money than it is entitled to, the Agency's actions have not disrupted the overall functioning of the dues deduction system or called into question the Agency's adherence to the agreement.

Finally, while it is not material to the resolution of this complaint, I believe it is important to reject the Respondent's challenge to the lawfulness of the Union's interpretation of the MOU.[7] Respondent argues that if it were required to initiate increases in employee dues withholding, it would be deducting dues without the employee's permission. Resp. MSJ at 11-12. This is both factually and legally incorrect. The SF-1187s admitted in the record clearly show that when employees signed their dues withholding authorizations, the form showed that the dues were $8 per pay period for GS 4-10, $10 for GS 11 and 12, and $12 for GS 13 and above. Thus when the Union demanded that the Agency automatically increase employees' dues withholding when they were promoted, the Union was simply asking the Agency to comply with the employee's prior authorization. None of the cases cited by the Respondent support the contention that such an action is unlawful. While it is unlawful for an agency to utilize current dues to recoup prior overpayments, that is not what Agency was being asked to do here, and that principle does not justify the Agency's refusal to increase dues withholding for employees who have already authorized them. *See Council 214*, 835 F.2d at 1460-61.

[7] By addressing this issue now, it is my hope that it will not distract the parties from resolving their legitimate dispute as to whether the MOU requires the Union to notify the Agency of an employee's promotion in order to increase the dues withholding.

Since I have concluded that the Respondent did not repudiate the MOU, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaint in Case No. WA-CA-20-0196 be, and hereby is, dismissed.

Issued, Washington, D.C.
June 7, 2022

Richard A. Pearson
RICHARD A. PEARSON
Administrative Law Judge