



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-22

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT

RESPONDENT

AND

Case No. WA-CA-15-0044

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 222

CHARGING PARTY

Douglas J. Guerrin
For the General Counsel

Marcus R. Patton
Julia B. Crocker
For the Respondent

Holly Salamido
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On October 29, 2014, the American Federation of Government Employees, Council 222 (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Department of Housing and Urban Development (Respondent/Agency/ HUD). GC Ex. 1(a). After conducting an investigation, the Regional Director of the Washington Region issued a Complaint and Notice of Hearing on March 24, 2016, alleging that the Respondent violated

§ 7116(a)(1) and (5) of the Statute by refusing to bargain over Union proposals concerning health and safety measures relating to the Ebola virus. GC Ex. 1(c). In its Answer to the Complaint, dated April 17, 2015, the Respondent admitted some of the factual allegations, but denied that it violated the Statute. GC Ex. 1(d).

The General Counsel (GC) submitted a Motion for Summary Judgment on June 8, 2015, and the Respondent submitted a Motion for Summary Judgment on June 11, 2015. Because material facts remained in dispute relating to the Union's right to initiate midterm bargaining and to the scope and content of the parties' agreements, both motions for summary judgment were denied. Tr. 8-10. A hearing in the matter was conducted on July 9, 2015, in Washington, D.C. At the hearing, all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel 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 find that the Union's proposals were covered by agreements between the Respondent and the Union. As such, the Respondent did not violate the Statute by refusing to bargain over the Union's proposals. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Exs. 1(c) & 1(d). The American Federation of Government Employees, Council 222, is a labor organization under § 7103(a)(4) of the Statute, and is the exclusive representative of a unit of employees appropriate for bargaining at the Respondent. GC Exs. 1(c) & 1(d).

The parties are operating under a collective bargaining agreement (CBA) implemented in 1998. Tr. 17. (At the time of the hearing, a new collective bargaining agreement had been ratified, but not executed.) Tr. 18. The parties have a number of additional agreements, which are referred to as supplements. Tr. 22.

In late 2007 or early 2008, the Agency provided the Union with a final draft of an Agency policy, Pandemic Planning and Response Guidance (initial Guidance). Tr. 52-53. The initial Guidance pertains primarily to pandemic influenza. *See* Jt. Ex. 4 at 4-5; Tr. 54-55. With regard to its scope, the initial Guidance states: "This is a threat specific document mandated under the national strategy for pandemic influenza. However, the document should be flexible enough to serve as a framework for other specified threats." Jt. Ex. 4 at 5; Tr. 53, 63-64. A final version of the Pandemic Planning and Response Guidance (final Guidance) was issued in April 2009. The final Guidance is discussed below.¹

¹ Where there is no distinction in the record between the initial Guidance and the final Guidance; or in instances where both are applicable, I will refer to the document simply as "the Guidance."

The Agency and the Union bargained over the impact and implementation of the initial Guidance during the week of February 4, 2008. Tr. 21, 52-53. The Agency was represented by Deborah Swann, its chief negotiator, by Jim McMahon, its subject matter expert and the lead developer of the Guidance, and by Linda Hawkins, Director of Policy, Programs, and Advisory Staff who assisted in the development of the Guidance. Tr. 54, 83, 87. The chief negotiator for the Union was Timothy Oravec, assisted by Perry Casper, Council 222 Regional Vice President. Tr. 51, 60.

During bargaining, Oravec raised a question regarding the scope of negotiations, which he recounted at the hearing:

I told them that this – in the [Guidance], it kept saying pandemic influenza. I [said], well, would it cover any other thing? I didn't feel – we didn't feel like this was going to go far enough. We said, what if it was bubonic plague? What if it was cholera? What if there was a pandemic other [than] influenza?

Tr. 54-55.

According to Oravec, Swann responded by saying that “if one of those other things came up, that they would negotiate that later on[,]” and McMahon responded by saying that “this was a threat-specific thing regarding pandemic influenza, as it was stated in the – in the [Guidance].” Tr. 55.

In addition, Oravec testified that he told Swann and McMahon that the Guidance states “it should be a framework,” but that they responded, “it isn't until we make it that. And they refused. So we went with what we went with.” Tr. 56. Perry Casper, similarly testified that Oravec “was asking if this would be a more generalized agreement,” and that Swann and McMahon “wanted to keep it as a specific, threat-specific document and not a generic, generalized document.” Tr. 60, 64-65.

Hawkins remembered the details of this exchange differently, testifying:

[W]e discussed . . . the [Guidance] at length, of course, throughout the negotiations. And there were comments . . . on clarifying exactly . . . what this would cover. And, in fact, there was someone that mentioned, well, you know, what if there's – I don't remember the specific disease; but it was a deadly disease – would this be covered? And, you know, of course, we concluded that it would. . . .

Tr. 86-87.

On April 4, 2008, representatives of the Agency and the Union signed an agreement, Supplement 99.² In describing its scope, Supplement 99 states: “The scope of this supplement relates to the impact and implementation of [the Guidance] for responding at the national level of the [Agency], as well as the program office, regional office, or field office level.” Jt. Ex. 3 at 1. In addition, Supplement 99 states in its first enumerated paragraph that the “primary intent of this Supplement is to protect employees from hazardous conditions in the workplace in the event of a Pandemic outbreak.” *Id.*

As stated above, the Agency issued the final Guidance in April 2009. The final Guidance was issued in connection with the federal government’s planning with regard to pandemic influenza, and the final Guidance refers to pandemic influenza throughout the document. Jt. Ex. 4 at 4-5. Further, the final Guidance lists planning assumptions that are specific to pandemic influenza. *Id.* at 5-6. The final Guidance defines an “[i]nfluenza pandemic” as “[a] worldwide epidemic caused by the emergence of a new or novel influenza strain to which humans have little or no immunity and which develops the ability to infect and be transmitted efficiently and between humans for a sustained period of time in the community.” *Id.* at 42. With respect to previous influenza pandemics, the final Guidance states:

A moderate pandemic, similar to the 1957 and 1968 pandemics, in the absence of intervention, could cause 200,000 deaths and 900,000 hospitalizations in the United States. A severe pandemic influenza virus with similar virulence to the 1918 strain, in the absence of intervention, could cause 1.9 million deaths and almost 10 million hospitalizations in this country over the course of the pandemic.

Id. at 6.

Like the initial Guidance, the final Guidance states that it is a “threat specific document mandated under the national strategy for pandemic influenza[]” and that it should be “flexible enough to serve as a framework for other specified threats.” *Id.* at 5. There are several other points where the Guidance refers to pandemics generally. In this regard, the final Guidance states that it provides a “plan to prepare for, and respond to, a human pandemic.” *Id.* at 4. Similarly, the final Guidance states that one of its goal is to “[c]oordinate a framework for how the [Agency] will protect the health and safety of its employees during a human pandemic,” and will “[c]oordinate how and what the [Agency] will communicate to its stakeholders during a pandemic.” *Id.* at 5.

² Supplement 99 is set out in the Appendix of this decision. Hawkins indicated that working at an alternate work site involves the use of telework, either from an employee’s home or at another government office. Tr. 93-94.

I note that it appears that the initial Guidance and the final Guidance are substantively similar, if not identical. Specifically, Casper was asked to identify Joint Exhibit 4, the final Guidance, and Casper made no distinction between the final Guidance and the initial Guidance. Instead, he answered, "This was the [P]andemic [P]lanning and [R]esponse [G]uidance that was given to the Union in order for us to respond and ask for negotiations on the topic." Tr. 62. In this connection, Casper stated that most Agency policies "are completed and actually go through a clearance process within the Agency before they are given to the Union for the Union to decide whether they're going to . . . demand . . . to negotiate a supplement." Tr. 63.

On November 10, 2009, the Agency and the Union signed a memorandum of understanding (H1N1 MOU) regarding the impact and implementation of the Agency's Interim Guidance for 2009-H1N1 Pandemic Influenza Mitigation. GC Ex. 4.

Supplement 99 was likely forgotten until the fall of 2014, when fears of an Ebola pandemic arose. Between September 30 and October 15, 2014, several people in Dallas, Texas, were diagnosed with Ebola. A. Ex. 1. On October 16, 2014, Lorraine Chambers, a local Union representative in Fort Worth, Texas, contacted Holly Salamido, President of Council 222, stating that there were rumors that an employee might be on an Ebola "watch list" put out by the Centers for Disease Control and Prevention (CDC). Tr. 17-18. (It turned out that no one at HUD was infected with Ebola.) Tr. 100.

D'Andra Hankinson, a Supervisory HR Specialist at the Agency's Fort Worth Regional Office, was alerted on October 16, 2014, to the Union's concerns regarding Ebola. Tr. 96. Hankinson testified that she advised Shirley Henley, the Community Planning and Development Director at Fort Worth, that "pursuant to Article 26 [of the CBA] . . . we have a duty to immediately look into this, to abate the situation, to make sure there's not a threat to employees." Tr. 98. Also that day, Hankinson discussed the matter with representatives of Council 222. Tr. 119.

In addition, Hankinson testified that she was "advising . . . supervisors that . . . admin leave is available for . . . emergency telework[]" under Article 26 of the CBA, the Guidance, Supplement 99, Supplement 93, an agreement negotiated in connection with the Agency's Handbook on Pay, Leave and Other Benefits during Emergency/Disaster Situations (the HR Handbook on Emergencies),³ and the Agency's telework policy. Tr. 99; A. Exs. 6 & 7.

Also on October 16, 2014, Salamido sent an email on behalf of the Union demanding to bargain over "health and safety measures specifically related to the Ebola virus." Jt. Ex. 1 at 1; Tr. 104-05. Salamido submitted the following Union proposals:

1. Pandemic Flu Supplement: All previously negotiated provisions in Supplement 99 relating to Pandemic Flu shall apply to Ebola as well, unless a different specific provision is negotiated. When a specific provision has been

³ Supplement 93 is set out in the Appendix of this decision.

negotiated in this Supplement (e.g. with respect to telework) that provision will control and supersede any provision in Supplement 99.

2. CDC Monitoring: Any employee who is being monitored by the Center for Disease Control (“CDC”) for potential exposure to Ebola will immediately be put in a full-time telework status, and will not be required to report to work until they are cleared by the CDC. Any employee who self-reports that they may have been exposed to the Ebola virus will be permitted to telework on a full time basis until cleared by their doctor, the CDC or other authorized health care professional.

3. Notice of Affected Employees: Management will inform employees, the Council and the appropriate local president of any diagnosed case of Ebola in a HUD employee, within 24 hours of management becoming aware of such case. Names of diagnosed employees will not be disclosed.

4. OPM Communications and Guidance: Management will provide copies to the Council of any and all guidance, communications, or other written material received from OPM or any other federal executive office with respect to Ebola.

5. Telework: Upon diagnosis of a case of Ebola in a HUD office, the existing Telework Policy/Supplement will be suspended in that office, to permit all employees to telework five days per week. Management shall have the burden of affirmatively showing that an employee’s work cannot be performed remotely, and office coverage shall not be considered in this showing. All adverse telework decisions in an office with an affected employee shall be immediately grievable, and such grievances shall be resolved on an abbreviated timeline of five days.

6. Union Pre-Decisional Involvement in Decision-making on Precautionary Measures: The union will be involved in pre-decisional discussions with management concerning precautionary measures and response measures to be taken with regard to Ebola.

Jt. Ex. 1 at 1-2.

That afternoon, Salamido had a meeting with Deputy Chief Human Capital Officer Karen Newton Cole to discuss “protocols and . . . safeguards that would protect the health of our employees and address their concerns” regarding Ebola. Tr. 19. That evening, Salamido sent Cole and others a follow-up email, stating:

I misspoke at the meeting. It is not Article 29 but [A]rticle 26.09⁴ that gives employees a right to decline their tasks, if they have a reasonable belief that, under the circumstances, the task poses an imminent risk of death or bodily harm. Until we can arrive at some agreement or negotiate a supplement, we will instruct our locals to rely on that provision in the event of development of specific Ebola threats.

GC Ex. 1(q), Ex. 13.

On October 21, 2014, Hankinson sent an email to Salamido and others stating that management would not bargain over the Union's proposals, because they were covered by Article 26 of the CBA, the Guidance, and Supplement 99. Jt. Ex. 2.

At the hearing, witnesses elaborated upon a number of issues related to the Union's proposals, including the Union's right to initiate mid-term bargaining. In this regard, Salamido testified that in 2004, she participated in Union initiated mid-term bargaining regarding child care, and that in 2014 there was Union initiated mid-term bargaining over lateral movements within the Agency. Tr. 41, 43-45; *see also* GC Exs. 2 & 3. Similarly, Casper testified that the Union had initiated mid-term bargaining with regard to the Agency's sign-in/sign-out policy, and with regard to the Agency's policy on start times. Tr. 131-32. Asked whether the Agency had previously asserted that it had no obligation to engage in Union initiated mid-term bargaining, Casper stated, "I've never heard that before. I've honestly never heard that before." Tr. 133-34. In addition, Oravec testified that the Union initiated mid-term bargaining with regard to a volunteer policy. Tr. 136. Like Casper, Oravec was unaware of any time when the Agency asserted that the Union could not initiate mid-term bargaining. *Id.*

Casper, who helped negotiate the CBA, acknowledged that Article 5 of the CBA does not specifically allow for Union initiated mid-term bargaining. However, Casper argued that "we don't have to say rights that are given to us . . . we don't have to put them in [a collective bargaining agreement] if we're not removing them. . . ." ⁵ Tr. 67-68.

⁴ Article 26, Section 26.09 of the CBA states:

In the case of imminent danger situations, the persons reporting such situations shall make the reports in the most expeditious manner available. The employee has a right to decline to perform his or her assigned tasks because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm, and that there is insufficient time to effectively seek corrective action through normal hazard reporting and abatement procedures. Management agrees to make every effort to ensure an appropriate response to imminent danger situations.

Jt. Ex. 6 at 144.

⁵ Article 5 addresses mid-term bargaining arising as a result of management-initiated changes. None of the sections of Article 5 specifically pertain to Union initiated mid-term bargaining. Jt. Ex. 5; *see also* Tr. 67-68.

Michael Stein, Acting Director for Employee and Labor Relations at HUD countered that the Union was not allowed to engage in Union initiated mid-term bargaining under Article 5 of the CBA. Tr. 70-71, 74. However, Stein had only been working at HUD for eleven months and when asked whether the Union bargained away the right to engage in Union initiated mid-term bargaining, Stein said, "I can't answer that question because I don't know." Tr. 75-76. Stein also stated that while he was not involved in negotiations over the new, unexecuted collective bargaining agreement, he understood that the Union proposed language specifically allowing for Union initiated mid-term bargaining during bargaining over the new agreement. Stein believed this indicated that the current CBA did not entitle the Union to initiate mid-term bargaining. Tr. 74-77. However, Stein was working for the Department of the Navy when Union initiated mid-term bargaining had occurred at HUD.

The issue of whether the Union's proposals concerned conditions of employment was also raised by Hawkins, who noted that she participated in negotiations over Supplement 99 because the supplement "would impact . . . employees and working conditions. . . ." Tr. 84-85.

Witnesses also discussed the scope and meaning of the Guidance. In this regard, Hawkins was asked to describe the Guidance's intent. She stated, "The intent was any type of a pandemic that impacted any of our offices. You know, it gave instructions to employees . . . as to . . . what they could do, couldn't do, and for the most part . . . protections that we were trying to afford to them." Tr. 88. Hawkins added that Supplement 99 was "for the health and welfare of the employees, as a whole, to protect them against any sort of disease" Tr. 85-86.

Asked whether the Guidance was written so that the Agency would have a specific influenza policy, Hawkins stated:

Not necessarily . . . influenza. It was – you know, that was the scare of the day. . . . So it was to put employees' . . . minds at ease. But it was – it was intended to cover any pandemic. You know, I mean, you certainly don't want to – who know[s], what's going to be here tomorrow? So it was meant for everything.

Tr. 87.

In addition, Hankinson was asked whether the Guidance "would be effective if there was an actual Ebola exposure at HUD?" Tr. 100. Hankinson replied, "Yes." *Id.*

With respect to the negotiations over the Guidance's impact and implementation, Hawkins was asked what types of pandemics were considered. Hawkins replied, "There wasn't a limit. If it was a pandemic and contagious, then it was everything." Tr. 85. Asked to define the term "pandemic," Hawkins stated that a pandemic is "any sort of a disease that is spread over a wide area that could be spread either person to person or airborne." *Id.*

With respect to the meaning and scope of Supplement 99, Salamido testified that Supplement 99 “was intended to address influenza. I think that’s what it addresses. If there was a pandemic of a disease that was totally different, then I think, yes, we would have to renegotiate things that were not covered by Supplement 99.” Tr. 40.

Hawkins acknowledged that the Guidance and Supplement 99 pertain primarily to pandemic influenza, but Hawkins added, “as you can see, and especially in scope, it doesn’t indicate just pandemic influenza. It’s very broad.” Tr. 88-89.

Salamido testified on the meaning of the Union’s proposals. With respect to Proposal 1, she stated:

We wanted to incorporate by reference some very general provisions that were in Supplement 99, so that we did not have to renegotiate general matters such as the availability of IT, information technology, equipment, or overtime. So that was the intent that we could confine our bargaining to the specific protocols and concerns that related to Ebola and not renegotiate general provisions.

Tr. 22.

Asked to explain why the Union felt it needed to address the Ebola virus specifically, Salamido testified:

Well, Ebola was very different. First of all, unlike the flu, Ebola has a very high death rate. At the time CDC was reporting between 70 and 90 percent of people who contracted it died. And one of the very significant differences is that CDC had published – they quarantined people and they had a watch list, so that somebody who was exposed to the Ebola virus – the incubation period is thought to be 21 days. . . . [And] there really was not much certainty as to how the disease was transmitted. According to the CDC website, the virus could live on surfaces for a period of time.

Tr. 23.

With regard to Proposal 2, Salamido testified that the Union was concerned that employees who might be infected with the Ebola virus would “not be required to report to work until they were cleared by the CDC,” and that the Union wanted such employees to be allowed to telework full-time. Tr. 26-27.

With respect to Proposal 3, Salamido testified that the Union submitted the proposal because “we thought that, on a very basic level, because this disease was so deadly, that if there was a diagnosed case of Ebola in a HUD employee . . . that our employees . . . had a right to know that they . . . were in the same work environment[.]” Tr. 26.

With regard to Proposal 4, Salamido testified that the Union “wanted . . . to be provided with copies of whatever guidance was provided by OPM, so that we could formulate proposals and address the health concerns of our employees.” Tr. 27-28.

With respect to Proposal 5, Salamido testified that while the parties had a telework policy and a negotiated agreement on telework (Telework Supplement), the supplement “didn’t cover a situation . . . of the magnitude or severity of the Ebola crisis.” Tr. 28. Salamido testified that the telework supplement “limited telework to three days a week,” and that the Union was “asking that the regular telework supplement or policy be suspended so that employees could telework five days a week.” *Id.* Salamido also testified that while the telework supplement “had language about office coverage,” the Union “felt [that] was not applicable or should be suspended for this situation, since if you had somebody with a diagnosed case . . . office coverage was of a much lesser concern than protecting the health of our employees.” *Id.* Further, Salamido testified the Union was “trying to address when we said that adverse telework decisions would be immediately grievable, [because under] the existing telework policy [it] took some time[”] for an employee to receive permission to telework. Tr. 28-29. Salamido also stated that the Union “put in specific language that management would have . . . the burden of showing the employee could not work remotely.” Tr. 28.

With regard to Proposal 6, Salamido testified, “We wanted to be at the table, to engage in discussions that management was having as to how to address the Ebola crisis,” including “what kind of precautions and measures they would take” Tr. 29

Hankinson testified that the proposals were covered by agreements between the Agency and the Union. With regard to Proposal 1, Hankinson testified that Supplement 99 “already did apply[]” to Ebola. Tr. 105. With respect to Proposal 2, Hankinson testified that the proposal is covered by Article 26 of the CBA, as well as by Supplements 93 and 99. Tr. 105-06. With regard to Proposal 3, Hankinson testified that Article 26 indicates that the Union has “a right to this information and . . . [has] a right to collaborate and . . . be involved in . . . management’s response to this potential crisis.” Tr. 106, 117-18. In addition, Hankinson testified that Proposal 3 is covered by Supplement 99. Tr. 106-07. Hankinson reiterated that Proposal 4 is covered by Supplement 99. Tr. 107. With respect to Proposal 5, Hankinson testified that the proposal is covered by the Agency’s telework policy, as well as by Supplements 63, 93, and 99.⁶ Tr. 107-08. With regard to Proposal 6, Hankinson testified that the proposal is covered by Article 26, as well as by Supplements 63 and 99. Tr. 108-09.

⁶ Supplement 63 is set out in the Appendix of this decision.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain over the Union's proposals. GC Br. at 4. The General Counsel contends that the Union did not waive its statutory right to initiate mid-term bargaining. *Id.* at 10-11. Further, the General Counsel contends that the Union's proposals concern workplace safety and therefore concern conditions of employment. *Id.* at 9 (citing *Library of Cong. v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983) (*LOC*)).

The General Counsel argues that the Union's proposals are not covered by Article 26 of the CBA or Supplement 99. The General Counsel acknowledges that Article 26 of the CBA "addresses general health and safety issues," but asserts that Article 26 does not specifically pertain to "disease outbreaks, . . . let alone . . . Ebola." *Id.* at 12-13. Further, the General Counsel argues that Supplement 99 pertains to "pandemic influenza" and "does not cover Ebola." *Id.* at 13. To support this argument, the General Counsel cites the Guidance (which, it contends, "provides insight into the meaning of Supplement 99"), arguing that the Guidance refers repeatedly to "pandemic influenza." *Id.* (citing Jt. Ex. 4). In addition, the General Counsel argues that the Agency indicated to the Union that negotiations over the Guidance's impact and implementation would address concerns pertaining to pandemic influenza exclusively. *Id.* at 14.

With respect to Supplement 93, the General Counsel argues that the supplement does not use the word "diseases" and therefore does not cover the Union's proposals. *Id.* at 15. With respect to Supplement 63, the General Counsel argues that the Union's proposals do not pertain to continuity of operations procedures. *Id.* Finally, with respect to telework, the General Counsel acknowledges the existence of the Telework Supplement, but argues that the Telework Supplement "differs significantly" from the Union's proposals. *Id.* at 15-16.

Respondent

The Respondent acknowledges that it refused to bargain but claims its refusal was justified, on three grounds. First, the Respondent argues that the Union had no right to initiate mid-term bargaining under Article 5 of the CBA. R. Br. at 1-2. The Respondent contends that the parties have only rarely engaged in mid-term bargaining over Union initiated proposals and that if the CBA entitled the Union to initiate mid-term bargaining, then the Union would not have submitted a provision entitling it to initiate mid-term bargaining during term negotiations for the parties' new (but not yet executed) collective

bargaining agreement.⁷ *Id.* at 4-5. The Respondent also suggests that the Union waived its right to initiate mid-term bargaining, asserting, “When a union discusses and explores the right to initiate midterm bargaining, as it did here, and yields on this right in the final CBA, its right is waived.” *Id.* at 3.

Second, while the Respondent tacitly acknowledges that the Union’s proposals pertained to “health and safety measures related to the Ebola virus,” the Respondent argues that no employees were actually exposed to the Ebola virus. The Respondent contends that the proposals therefore do not concern working conditions. *Id.* at 9. Further, while the Respondent acknowledges that “the de minimis doctrine is generally applied when management initiates changes,” it argues that I should nevertheless apply the doctrine here and find that the proposals have no more than a de minimis effect on conditions of employment. *Id.* at 10.

Third, the Respondent argues that the Union’s proposals are covered by the CBA and by supplements negotiated between the Respondent and the Union. As a general matter, the Respondent argues that the Guidance was intended to be “flexible enough to serve as a framework for . . . specified threats[]” beyond pandemic influenza, and that Supplement 99 was intended to protect employees in the event of any “Pandemic outbreak.” *Id.* at 6. With regard to specific proposals, the Respondent argues that Proposal 1 is covered by Supplement 99, since Supplement 99 already encompasses pandemics beyond pandemic influenza. In addition, the Respondent argues that: Proposal 2, is covered by Article 26, Section 26.09 of the CBA, by Supplement 99, ¶¶6 & 12, and by Supplement 93, ¶14; Proposal 3 is covered by Article 26, Sections 26.08, 26.12, and 26.14, and by Supplement 99, ¶¶2, 30 & 40;⁸ Proposal 4 is covered by Supplement 99, ¶2; Proposal 5 is covered by Supplement 99, ¶6, by Supplement 93, ¶¶14-15, and by Supplement 63, ¶¶21 & 25; Proposal 6 is covered by Article 26, Section 26.06, and by Supplement 63, ¶30. R. Br. at 7-9.

PRELIMINARY MATTER

At the hearing, counsel for the Respondent asked permission to submit additional documents into evidence along with its post-hearing brief. Tr. 134. I ruled that the record would remain open until August 10, 2015, the date post-hearing briefs were due. Tr. 134, 138. The Respondent timely submitted a post-hearing brief, along with an additional exhibit (Agency Exhibit 10, discussed above).

⁷ In this regard, the Respondent timely submitted an exhibit with its post-hearing brief, Agency Exhibit 10, which it claims shows that the Respondent has previously refused to negotiate over a “union midterm proposal.” R. Br. at 4 n.3; Tr. 134, 138. The Respondent provides no context for the exhibit, a February 20, 2014, memorandum from the Agency to AFGE, Local 3917, but it appears that the Agency was refusing to bargain over proposals submitted by Local 3917 on the grounds that they were nonnegotiable, covered by agreements between the parties, and inappropriate for bargaining at the local level. The Agency did not, however, assert that it was refusing to bargain because Local 3917 submitted the proposals mid-term.

⁸ Article 26, Section 26.06, Section 26.12, and Section 26.14 of the CBA are set out in the Appendix of this decision.

On February 29, 2016, the Respondent filed a Supplement Post-Hearing Brief, along with two exhibits (supplemental exhibits), which apparently are articles from the new collective bargaining agreement. The Respondent did not request leave to file the supplemental brief or the supplemental exhibits. On March 2, 2016, the General Counsel countered by filing a Motion to Strike, arguing that the Respondent failed to request leave to submit the supplemental brief and the supplemental exhibits.

The Regulations of the Authority provide that parties may file post-hearing briefs within a time period set by the Judge, and that reply briefs “shall not be filed absent permission of the Judge.” 5 C.F.R. § 2423.33. In addition, § 2429.26(a) of the Authority’s Regulations states: “The Authority or the General Counsel, or their designated representatives, as appropriate, may in their discretion grant leave to file other documents as they deem appropriate.” 5 C.F.R. § 2429.26. In this regard, the Authority has advised that a party seeking to reopen the record to receive new evidence may file a motion with the judge under § 2429.26 of the Authority’s Regulations. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 632, 634, n.31 (2014) (*FCC*).

Here the Respondent failed to file the supplemental brief and the supplemental exhibits by the August 10, 2015, deadline. 5 C.F.R. § 2423.33. Moreover, the Respondent failed to request leave to submit the supplemental brief, and failed to file a motion or otherwise request to reopen the record to add supplemental exhibits. 5 C.F.R. § 2429.26; *FCC*, 67 FLRA at 634, n.31. Accordingly, I grant the General Counsel’s motion to strike the Respondent’s supplemental brief and the attached exhibits and they were not considered.

DISCUSSION

A union may waive its statutory right to initiate mid-term bargaining, either expressly or implicitly. *U.S. Dep’t of the Interior, Wash., D.C.*, 56 FLRA 45, 53-54 (2000) (*Interior*); *Internal Revenue Service*, 29 FLRA 162, 166 (1987) (*IRS*). A union may expressly waive this right by agreeing to a “zipper clause,” a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement. *IRS*, 29 FLRA at 166. A union may also expressly agree not to initiate bargaining over a particular subject. *Id.* Implicit waiver may be established through bargaining history, where evidence shows that the union raised, and the parties fully discussed, a proposal, and that the union then withdrew the proposal in exchange for some other provision. *Headquarters, 127th Tactical Fighter Wing, Mich. Air Nat’l Guard, Selfridge Air Nat’l Guard Base, Mich.*, 46 FLRA 582, 584-85 (1992); *IRS*, 29 FLRA at 166-67.

It is true, as the Respondent claims, that Article 5 of the CBA is silent with regard to whether the Union may initiate mid-term bargaining. However, that silence does not relieve the Agency of its statutory obligation to bargain mid-term over Union initiated proposals. Rather, the Agency must show that the Union waived its right to initiate mid-term bargaining. *Interior*, 56 FLRA at 53-54; *IRS*, 29 FLRA at 166. Here, Article 5 does not contain a provision expressly waiving the Union’s statutory right to initiate mid-term bargaining. In addition, there is no evidence, and the Respondent cites none (R. Br. at 3), showing that the

Union implicitly waived this right during the negotiations that resulted in the current CBA. That the Agency and the Union have previously engaged in mid-term bargaining over Union initiated proposals further indicates that the Union did not waive this right. Tr. 41, 43-45, 131-34, 136; GC Exs. 2 & 3. Finally, the fact that the Union submitted a proposal entitling it to initiate mid-term bargaining during negotiations over the new collective bargaining agreement does not establish that there was a *waiver* of the Union's right to initiate mid-term bargaining in connection with the *current* CBA. Given that the parties have previously negotiated upon matters initiated by the Union mid-term during the term of the current CBA, it is more likely that such an action exhibits a desire to preserve said right in writing to preclude an invalid waiver argument based upon silence.

Based on the foregoing, I find that the Union did not waive its right to initiate mid-term bargaining.

The term "conditions of employment" generally encompasses "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). In order to determine whether a matter concerns a condition of employment, the Authority applies a two-prong test, asking whether the matter pertains to bargaining unit employees, and whether there is a direct connection between the matter and the work situation or employment relationship of unit employees. *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 237 (1986) (*Antilles*). In this regard, the Authority has stated that "[e]mployee safety at the workplace is a general condition of employment." *U.S. Envtl. Prot. Agency, Wash., D.C.*, 38 FLRA 1328, 1330 (1991) (*EPA*); *see also LOC*, 699 F.2d at 1286 ("[F]ew policies and practices could be considered more central to an employee's working conditions than those relating to job safety and office environment.").

With regard to the first prong under *Antilles*, the Union's proposals clearly pertain to bargaining unit employees. With regard to the second prong under *Antilles*, the Union's proposals all pertain to workplace safety concerns relating to Ebola. Tr. 22-23, 26-29. As such, the Union's proposals concern conditions of employment. *EPA*, 38 FLRA at 1330.

The Respondent's claim that no bargaining was required because no one at the office was actually affected by Ebola, is belied by its own issuance of Guidance and negotiating Supplement 99, regarding pandemics. Clearly, pandemics concern conditions of employment, even though such pandemics are unlikely to occur or have an affect upon the Agency. *See AFGE, Local 12*, 60 FLRA 533, 534 (2004) (agency statements acknowledged linkage between employee fitness and job performance). Moreover, Hawkins herself acknowledged that Supplement 99, which the Agency claims encompasses Ebola and other pandemic diseases, "would impact . . . employees and working conditions . . ." Tr. 84-85.

Finally, the Respondent argues that the de minimis doctrine should be applied to find that the Union's proposals do not concern conditions of employment. However, the Authority has established that the de minimis doctrine "does not determine whether a matter concerns a condition of employment." *U.S. Dep't of the Treasury, IRS*, 62 FLRA 411, 414 (2008). Accordingly, I reject the Respondent's argument.

The covered-by doctrine consists of two prongs. Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement. *U.S. Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA*). An exact congruence of language is not required. *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011). Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute. *SSA*, 47 FLRA at 1018. In addition, the Authority has found that the subject matter of a proposal is expressly contained in a contract provision when the proposal would modify or conflict with the express terms of the contract. *Nat'l Fed'n of Fed. Emps., Fed. Dist. 1, Local 1998, IAM&AW*, 66 FLRA 124, 126 (2011) (*NFFE*).

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine, the Authority determines whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *SSA*, 47 FLRA at 1018. In evaluating the second prong of the doctrine, the Authority will examine all record evidence to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000). One of the factors to consider is whether the contract provision "comprehensively addressed" the subject matter at issue. *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 592-93 (2010) (*Treasury*); *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910-11 (1998); *USDA, Forest Serv., Pac. Nw. Region, Portland, Or.*, 48 FLRA 857, 860 (1993).

Much of the parties' dispute regarding the covered-by doctrine boils down to whether matters pertaining to a potential Ebola pandemic are covered by Supplement 99. I find that that the Guidance "provides insight into the meaning of Supplement 99." GC Br. at 13 (citing Jt. Ex. 4). In doing so, I acknowledge that the initial Guidance is not in evidence, and that it is not certain that the initial Guidance, issued prior to bargaining, is identical in all respects to the final Guidance, which was issued after Supplement 99 was issued. Nevertheless, it is undisputed that the scope of the initial Guidance is identical to the scope of the final Guidance. Tr. 53, 63-64. Further, Casper indicated that the initial Guidance and the final Guidance are in fact substantively identical. Tr. 62-63. Accordingly, I find that it is likely that the final Guidance is substantively similar, if not identical, to the initial Guidance, and that the final Guidance can be used to determine the meaning and scope of Supplement 99.

It is clear that the Guidance pertains primarily to "pandemic influenza," as it uses that term repeatedly, including in describing its scope. Jt. Ex. 4 at 4-5. However, while the Guidance states that it is a "threat specific document mandated under the national strategy for pandemic influenza," the Guidance also states that it should be "flexible enough to serve as a framework for other specified threats." *Id.* at 5. Moreover, there are several points where the Guidance refers to pandemics generally. The Guidance states that it provides a "plan to prepare for, and respond to, a human pandemic." *Id.* at 4. Similarly, the Guidance states that one of its goals is to "[c]oordinate a framework for how the [Agency] will protect the health

and safety of its employees during a human pandemic,” and will “[c]oordinate how and what the Department will communicate to its stakeholders during a pandemic.” *Id.* 4 at 5. Accordingly, the plain wording of the Guidance indicates that it applies beyond pandemics related to influenza.

Further, Hawkins, who helped develop the Guidance, testified that the Guidance was “intended to cover any pandemic,” and that the Guidance therefore contained a scope that was “very broad.” I find Hawkins’s testimony on this point to be credible, especially because it is consistent with the Agency’s (and the Union’s) overarching goal of protecting employees against pandemics generally. Tr. 85-89; *see also* Jt. Ex. 3, ¶1.

Moreover, negotiations over the Guidance’s impact and implementation were consistent with the broad scope of the Guidance. Hawkins testified persuasively, that the parties determined that negotiations were not limited to a specific type of virus or pandemic. Tr. 86-87. Further, while Oravec cited the Agency’s refusal to discuss specific diseases as a sign that negotiations concerned pandemic influenza exclusively, the statements he testified to actually indicate that management was focused on following the broad scope of the Guidance. In this regard, McMahon’s statement – that negotiations were a “threat-specific thing regarding pandemic influenza, as . . . stated in the . . . [Guidance]” – shows that management intended to follow the Guidance and thus intended to produce a document flexible enough to apply to threats beyond pandemic influenza. Tr. 55. Similarly, in refusing to discuss cholera or bubonic plague, Swann was simply following the lead of the Guidance, which maintains flexibility by avoiding naming other diseases; instead, it refers broadly to “other specified threats.” Jt. Ex. 4 at 5; Tr. 55. And while Oravec and Casper testified that management stated that negotiations were not supposed to result in a “generalized” document, their testimony on this point was vague (Tr. 56, 64-65), and I give it little weight.

Like the Guidance, Supplement 99 pertains primarily to pandemic influenza, yet retains flexibility to apply to pandemics generally. In this regard, Supplement 99 emphasizes in its first enumerated paragraph that its “primary intent” is to protect against a general type of danger, “hazardous conditions in the workplace,” caused by a general type of threat, “a Pandemic outbreak,” rather than an outbreak of pandemic influenza. Jt. Ex. 3 at 1. Supplement 99 again refers to “Pandemic outbreak” rather than to “pandemic influenza,” when discussing “Imminent Danger” situations. *Id.* at 4. This wording supports a conclusion that Supplement 99 is applicable to pandemics beyond pandemic influenza.

In addition, the record indicates that references in Supplement 99 to the word “pandemic” should be interpreted broadly. In this regard, the Guidance’s definition of pandemic influenza indicates that pandemic is an expansive term – a “worldwide epidemic” caused by an agent “to which humans have little or no immunity and which develops the ability to infect and be transmitted efficiently and between humans for a sustained period of time in the community.” Jt. Ex. 4 at 42. This is consistent with Hawkins’s understanding of a pandemic as “any sort of a disease that is spread over a wide area that could be spread either person to person or airborne.” Tr. 85. I note in this regard that the Agency and the Union thought of the Ebola outbreak in 2014 (and of Ebola outbreaks generally) as threatening or constituting a pandemic. *See* Tr. 17-19, 99-100; Jt. Ex. 1.

Moreover, while Salamido argued that the Agency needed to renegotiate Supplement 99 so that it would apply to Ebola, Salamido tacitly acknowledged that the supplement was intended to apply to more than just pandemic influenza. Specifically, she stated that Supplement 99 would need to be renegotiated to apply to other pandemic diseases, but indicated that further negotiations would be necessary only if those diseases were “totally different” from pandemic influenza. Tr. 40. And while Salamido asserted that Ebola was unlike “the flu,” she did not specifically explain how the threat posed by Ebola is substantively different from the threat posed by pandemic influenza, which has the potential to kill and hospitalize millions worldwide. Tr. 23; Jt. Ex. 4 at 6, 42.

Consistent with the Guidance, discussions during bargaining, Supplement 99, and related testimony, I find that while Supplement 99 does not expressly refer to Ebola, the subject of pandemics, including Ebola, is inseparably bound up with, and thus plainly an aspect of, Supplement 99. Those who negotiated Supplement 99 reasonably should have contemplated that Supplement 99 would foreclose further bargaining over other potential pandemic threats such as Ebola. Accordingly, I find that as a general matter, the Union’s proposals are covered by Supplement 99 under the second prong of the covered-by doctrine.

Having found that Supplement 99 covers a range of pandemics, including an Ebola pandemic, I now address the Union’s specific proposals.

Proposal 1

Proposal 1 requires that Supplement 99 apply to Ebola. Jt. Ex. 1. As discussed above, the subject of Ebola is inseparably bound up with, and thus plainly an aspect of, Supplement 99. Accordingly, I find that Proposal 1 is covered by Supplement 99 under the second prong of the covered-by doctrine.

Proposal 2

Proposal 2 requires that an employee who may have been exposed to Ebola be put in a full-time telework status and not be required to report to work until it would be safe for the employee to do so. Proposal 2 also requires that any employee who self-reports possible exposure to Ebola be allowed to telework full-time until it is determined that the employee is not contagious. Jt. Ex. 1. The Respondent argues that Proposal 2 is covered by Article 26, Section 26.09 of the CBA, as well as by Supplement 99, paragraphs 6 and 12, and by Supplement 93, paragraph 14.

Article 26, Section 26.09 of the CBA provides that in “imminent danger situations,” an employee has a right to decline to perform his or her assigned tasks because of a “reasonable belief that . . . the task poses an imminent risk of death or serious bodily harm,” and further provides that management will make “every effort to ensure an appropriate response to imminent danger situations.” Jt. Ex. 6 at 145. An employee who may have been

exposed to Ebola could reasonably believe that being anywhere other than at an emergency room would risk death or serious injury. Further, an employee in such circumstances would risk causing death or injury to other employees if he or she went to work.

Because Section 26.09 entitles an employee who might be infected with Ebola to stay away from the office, and because Section 26.09 requires the Agency to respond appropriately in such situations and let such an employee telework, Section 26.09 resolves the matter in dispute and thus covers Proposal 2 under the first prong of the covered-by doctrine.

Even if it could be argued that Proposal 2 is not encompassed by the plain wording of Section 26.09, other evidence indicates that Article 26 is broad enough to apply to the threats posed by Ebola. In this regard, Hankinson relied on Article 26 (as well as on Supplement 99 and Supplement 93) when responding to concerns that an employee might have been infected with Ebola. Tr. 98, 99; *see also* Tr. 108. Further, Salamido stated in her email to management that she would instruct locals “to rely on [Section 26.09] in the event of development of specific Ebola threats.” GC Ex. 1(q), Ex. 13; *see also* Jt. Ex. 3, ¶ 38 (“Management recognizes that Section 26.09 of the [CBA] would apply during a Pandemic outbreak.”). Accordingly, I find that Proposal 2 is also covered by Article 26, Section 26.09 of the CBA under the second prong of the covered-by doctrine.

In addition, Supplement 93, paragraph 14 provides that “[i]n an emergency, HUD may approve employees to work at home or an alternate work site.” A. Ex. 7, ¶14; Tr. 106. Of course, an employee infected with a deadly and contagious virus such as Ebola constitutes an “emergency,” and Supplement 93, paragraph 14 allows an employee facing such an emergency to telework. *See* Tr. 93-94. For these reasons, I find that Supplement 93 resolves the matter in dispute and thus covers Proposal 2 under the first prong of the covered-by doctrine.

Moreover, and as discussed above, the subject of Ebola is inseparably bound up with, and thus plainly an aspect of, Supplement 99. As such, Supplement 99 forecloses further bargaining on Ebola, including bargaining over whether employees who might have Ebola can work from home or telework. The fact that Supplement 99 specifically discusses administrative leave in connection with OPM guidance and decisions of HUD, and the fact that Supplement 99 discusses telework in connection with pandemic influenza, a subject that is inseparably bound up with Ebola and other pandemics, further supports a conclusion that Proposal 2 is covered by Supplement 99. Jt. Ex. 3, ¶¶6, 12. Accordingly, I find that Proposal 2 is covered by Supplement 99 under the second prong of the covered-by doctrine.

Proposal 3

Proposal 3 requires that once management learns that an employee has been diagnosed with Ebola, management must share that information with employees and the Union within twenty-four hours. Jt. Ex. 1. The Respondent argues that the proposal is covered by Article 26, Sections 26.08, 26.12, and 26.14 of the CBA, as well as by Supplement 99, paragraphs 2, 30, and 40.

Article 26 of the CBA sets forth a framework regarding the Agency's obligation to provide notices about dangerous working conditions. Specifically, Section 26.08 requires management to timely respond to employee reports of unsafe working conditions and to notify employees when management has determined that an unsafe condition exists. Further, Section 26.08 requires management to immediately inform affected employees when a danger exists that could reasonably be expected to cause death or serious physical harm. Section 26.12 requires that management provide the Union access to records maintained under the Occupational Safety and Health Act. And Section 26.14 requires management to notify the Union of the report of any job-related injury or illness to the Union within three days of management's receipt of the report. *Jt. Ex. 6*. Clearly, Article 26's consideration of notifications with regard to dangerous workplace conditions encompasses the threat posed by an employee coming to work with an infectious and deadly disease like Ebola. As such, Article 26 settles the matter in dispute and thus covers Proposal 3 under the first prong of the covered-by doctrine.

To the extent there is any doubt as to whether the proposal is covered under the first prong of the covered-by doctrine, the fact that Article 26 comprehensively addresses the subjects of notifications concerning dangerous workplace conditions indicates that the subject of Ebola, including a notice about Ebola, is inseparably bound up with, and thus plainly an aspect of, Article 26. *See Treasury*, 64 FLRA at 592-93. Accordingly, I find that Proposal 3 is also covered by Article 26 under the second prong of the covered-by doctrine.

Further, and as discussed above, the subject of Ebola is inseparably bound up with, and thus plainly an aspect of Supplement 99. As such, Supplement 99 forecloses further bargaining on Ebola, including bargaining over Agency notifications regarding employees diagnosed with Ebola. That Supplement 99 specifically discusses communications to employees and the Union in connection with pandemic influenza, a subject that is inseparably bound up with Ebola and other types of pandemics, further supports a conclusion that Proposal 3 is covered by Supplement 99 under the second prong of the covered-by doctrine. *Jt. Ex. 3*, ¶¶2, 30, 40. For these reasons, I find that Proposal 3 is covered by Supplement 99 under the second prong of the covered-by doctrine.

Proposal 4

Proposal 4 requires the Agency to provide copies to the Union of communications from OPM or any other federal executive office with respect to Ebola. *Jt. Ex. 1*. The Respondent argues that Proposal 4 is covered by Supplement 99, paragraph 2.

Again, the subject of Ebola is inseparably bound up with, and thus plainly an aspect of, Supplement 99. As such, Supplement 99 forecloses further bargaining on Ebola, including bargaining over notices concerning Ebola from OPM and other agencies and components of the federal government. Further, and similar to my analysis regarding Proposal 3, the fact that Supplement 99 discusses communications to employees and to the

Union in connection with pandemic influenza, a subject inseparably bound up with Ebola and other pandemics, further supports the conclusion that Proposal 4 is covered by Supplement 99. Jt. Ex. 3, ¶¶2, 30 & 40. Accordingly, I find that Proposal 4 is covered by Supplement 99 under the second prong of the covered-by doctrine.

Proposal 5

Proposal 5 requires that if an employee has been diagnosed with Ebola, then the existing telework policy and the Telework Supplement would be “suspended” in the office where that employee works to permit all employees there to telework five days a week, rather than the maximum of three days a week. Jt. Ex. 1; Tr. 28. Proposal 5 also provides that the Agency has the burden of showing that an employee’s work cannot be performed remotely. Jt. Ex. 1. In addition, Proposal 5 requires that management not consider office coverage, a factor that is usually considered under the parties’ Telework Supplement. Tr. 28. Proposal 5 further requires that adverse telework decisions be immediately grievable, something not required under the telework policy or, presumably, the Telework Supplement. Tr. 28-29. The Respondent argues that Proposal 5 is covered by Supplement 93, paragraphs 14 and 15, by Supplement 63, paragraphs 21 and 25, and by Supplement 99, paragraph 6.

While the telework policy and the Telework Supplement are not in the record, it is undisputed that those two documents govern telework at the Agency (Tr. 28-29; Jt. Ex. 1, ¶5; *see also* GC Br. at 15-16), and it is reasonable to conclude that the Union’s proposal to “suspend[]” the Telework Supplement in certain circumstances would modify or conflict with the supplement. *NFFE*, 66 FLRA at 126. As such, I find that Proposal 5 is covered by the Telework Supplement under the first prong of the covered-by doctrine.

Further, and as discussed above, Supplement 93, paragraph 14 provides that “[i]n an emergency, HUD may approve employees to work at home or an alternate work site” and, thus, to telework. A. Ex. 7, ¶14; Tr. 93-94, 106. An office containing the Ebola virus would certainly constitute an “emergency.” Accordingly, I find that Supplement 93 resolves the matter in dispute and thus covers Proposal 5 under the first prong of the covered-by doctrine. (By contrast, Supplement 93, paragraph 15, pertains to employees working at an alternate HUD office, and is at most tangentially related to the proposal.) A. Ex. 7.

In addition, Supplement 63, paragraph 25 provides that an employee may be authorized to work at home during a continuity of operations event. A. Ex. 9. There was little testimony given on the specific meaning of Supplement 63, but Supplement 99 indicates that a pandemic can constitute a continuity of operations event. Jt. Ex. 3, ¶4. As such, and as Supplement 63 allows employees to work at home during such an event, I find that Supplement 63, paragraph 25 covers Proposal 5 under the second prong of the covered-by doctrine. (By contrast, Supplement 63, paragraph 21, pertains to OSHA standards at HUD offices, and is at most tangentially related to the proposal.) A. Ex. 9.

Finally, as discussed above, the subject of Ebola is inseparably bound up with, and thus plainly an aspect of Supplement 99. As such, Supplement 99 forecloses further bargaining on Ebola, including bargaining over telework in connection with an office where an employee has been diagnosed with Ebola. The fact that Supplement 99 states that employees may be directed to remain at home on administrative leave (presumably in connection with an outbreak of pandemic influenza, a subject inseparably bound up with Ebola and other pandemics) further supports a conclusion that Proposal 5 is covered by Supplement 99. Jt. Ex. 3, ¶6. Accordingly, I find that Proposal 5 is covered by Supplement 99 under the second prong of the covered-by doctrine.

Proposal 6

Proposal 6 requires that the Union will be involved in pre-decisional discussions with management concerning precautionary measures relating to Ebola. Jt. Ex. 1. The Respondent contends that the proposal is covered by Article 26, Section 26.06 of the CBA, and by Supplement 63, paragraph 30.

Article 26, Section 26.06 establishes a health and safety committee made up of representatives of the Agency and the Union. The provision states that duties of the committee include “[r]eviewing Management’s plans for abating hazards,” “[r]eviewing procedures for handling safety and health suggestions and recommendations from employees,” and “[r]eviewing reports of unsafe and unhealthful conditions where the hazard has been disputed.” Jt. Ex. 6 at 144. While it could be argued that Section 26.06 does not expressly provide for pre-decisional discussions, the fact that Section 26.06 establishes a committee of representatives from labor and management to discuss potential hazards (which surely includes the risk of Ebola), and the fact that Section 26.06 discusses this committee in a detailed and comprehensive manner, indicates that Proposal 6’s call for pre-decisional discussions concerning precautionary measures regarding Ebola is inseparably bound up with, and thus plainly an aspect of Section 26.06. *See Treasury*, 64 FLRA at 592-93. Accordingly, I find that Proposal 6 is covered by Article 26, Section 26.06 of the CBA under the second prong of the covered-by doctrine.

Further, Supplement 63, paragraph 30 provides for local bargaining in connection with continuity of operations plans and provides for “involvement of the Union” in all phases of a continuity of operations event. A. Ex. 9. While paragraph 30 and Proposal 6 are not identical, they both pertain to bargaining with regard to the Agency’s response to a continuity of operations event which, as discussed above, can encompass a pandemic outbreak of Ebola. Jt. Ex. 3 at ¶4. Accordingly, I find that Proposal 6 is also covered by Supplement 63 under the second prong of the covered-by doctrine.

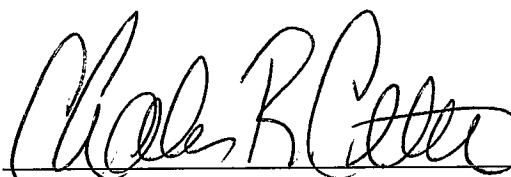
CONCLUSION

As the Union's proposals were covered by agreements between the Respondent and the Union, the Respondent's refusal to bargain did not violate the Statute. Accordingly, I recommend that the Complaint be dismissed.

ORDER

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

Issued, Washington, D.C., April 20, 2016

A handwritten signature in black ink, appearing to read "Charles R. Center". The signature is written in a cursive style with a horizontal line underneath it.

CHARLES R. CENTER
Chief Administrative Law Judge

APPENDIX

As relevant here, Supplement 99 states:

1. Employee Safety: Management agrees that the lives of its employees are valuable. The primary intent of this Supplement is to protect employees from hazardous conditions in the workplace in the event of a Pandemic outbreak.
.....
2. Communications to Employees: Information will be updated daily during a Pandemic Influenza outbreak and/or as often as necessary to keep employees informed about the current status of the Pandemic Influenza outbreak.
.....
4. Declared [Continuity of Operations (COOP)]: If a COOP event is declared due to a Pandemic Influenza outbreak the [Guidance], the Departmental COOP Handbook, and [the CBA] shall be implemented.
.....
6. Alternate Workforce: In accordance with OPM [g]uidance and HUD Delegated Authorities employees may be directed to remain at home on administrative leave.
.....
12. Telework and Remote Access: Both parties agree that telework or remote access will be considered during a declared Pandemic Influenza outbreak.
.....
20. Health and Safety Committees: Management shall utilize, train and provide full involvement of Health and Safety Committee members in the communication of current information regarding a Pandemic Influenza outbreak.
.....
30. Union Notification: At the initiation of a Pandemic Influenza outbreak declaration, Management will notify the affected local AFGE representative as soon as reasonably possible.
.....

38. Imminent Danger: Management recognizes that Section 26.09 of the [CBA] would apply during a Pandemic outbreak.

....

40. Notification to the Union of Persons Affected: Management shall notify the union at the affected local level of any Pandemic Influenza incident within an office in the most expedient manner possible, consistent with the Privacy Act.

Jt. Ex. 3 at 1-4.

Supplement 93 was negotiated in connection with the impact and implementation of the HR Handbook on Emergencies. Supplement 93 states, in pertinent part:

14. Alternate Work Place Options: In an emergency, HUD may approve employees to work at home or an alternate work site. To the maximum extent possible, this allowance should not exceed 5 (five) days.

15. Off-site Workers: Employees that are working at an alternate HUD office at the time their home office is closed are expected to continue working at the alternate site through the duration of their temporary duty, even though local employees are placed on administrative leave. Upon their return to their home office, if local employees remain on administrative leave, the returning employee will be granted the same leave status.

A. Ex. 7 at 2.

Supplement 63 pertains to the Agency's continuity of operations, or COOP, policy. It states, in pertinent part:

21. Minimum Alternate Office Location Standards: Management intends that any alternate HUD office location initiated under COOP will meet minimum Department of Labor, Occupational Safety and Health Administration (OSHA) standards.

....

25. Work-At-Home: An employee may be authorized to work-at-home during a COOP event.

....

30. Local Bargaining: Management agrees that in accordance with Article 5, bargaining shall be conducted at the local level as appropriate. National, HQ, Regional, Field, or other operational office's COOP plans shall be provided to the appropriate AFGE Union organization in a complete or "redacted for

security reasons version” (as management shall determine). The Union agrees the full or “redacted” COOP plans are For Official Use Only, and are not to be redistributed by the union. However, Management agrees, COOP plans may be summarized for the union’s internal purposes or for informational purposes to members. While Union operations are not considered an essential function under the COOP definition, Management recognizes the need for involvement of the Union in all phases of a COOP event.

A. Ex. 9 at 2-3.

Article 26, Section 26.06 of the CBA provides, in pertinent part:

(1) The parties agree to continue Health and Safety Committees with equal numbers of Management and Union representatives in Headquarters and each local office with more than fifty (50) employees. In offices with fewer than fifty (50) employees, safety and health matters shall be addressed at Labor-Management Relations Committee meetings.

(2) Duties of the Safety and Health Committee shall include, but not be limited to the following:

- (a) Monitoring and assisting in the operation of the local safety and health program and making recommendations to the official in charge for improvement.
- (b) Monitoring findings and reports of workplace inspections to confirm that appropriate corrective measures are implemented.
- (c) Participating in inspections of the office
- (d) Reviewing Management’s plans for abating hazards.
- (e) Reviewing responses to reports concerned with allegations of hazardous conditions, alleged safety and health program deficiencies, and allegations of related discrimination. . . .
- (f) Reviewing procedures for handling safety and health suggestions and recommendations from employees.
- (g) Reviewing reports of unsafe and unhealthful conditions where the hazard has been disputed.

Jt. Ex. 6 at 143-44.

Article 26, Section 26.08 of the CBA states, in pertinent part:

- (1) Management agrees to make a timely response to employee reports of unsafe and/or unhealthful working conditions.
- (2) Where the designated Management safety representative determines that an unsafe or unhealthful condition exists, Management shall post notices prominently at or near the location until the cited condition has been corrected and shall make reasonable efforts toward prompt abatement.
- (3) Whenever Management cannot abate such conditions within thirty (30) calendar days, Management shall develop an abatement plan with a timetable of abatement and a summary of interim corrective steps. . . .
- (4) Whenever and as soon as it is concluded on the basis of an inspection that a danger exists which could reasonably be expected to cause death or serious physical harm, the Management safety representative shall immediately inform the affected employees and official in charge of the workplace of the danger.

Article 26, Section 26.12 of the CBA states: "Management shall provide the Union access to records maintained under the Occupational Safety and Health Act, consistent with the Privacy Act. Management shall give the Union President, or designee, a copy of the Department's annual reports to OSHA."

Article 26, Section 26.14 of the CBA states: "Management shall notify the Union of the report of any job-related injury or illness by forwarding a copy of the form 795 to the Union within three (3) days receipt by management."

Jt. Ex. 6 at 144-46.