FEDERAL LABOR RELATIONS AUTHORITY OALJ 17-02
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547 CHARGING PARTY	Case No. DE-CA-15-0410

Paige A. Swenson
For the General Counsel

Phillip G. Tidmore
For the Respondent

Harley D. Hembd
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On September 1, 2015, the American Federation of Government Employees, Local 1547, (Union/Local 1547) filed an unfair labor practice (ULP) charge against the Department of the Air Force, Luke Air Force Base, Arizona (Respondent), alleging the Respondent violated the Statute by refusing to negotiate with the Union regarding proposals submitted for mid-term bargaining in response to the theft of personally identifiable information (PII) related to bargaining unit

employees which occurred when the PII data of federal employees was stolen from data bases maintained by the Office of Personnel Management (OPM). G.C. Ex. 1(a). After an investigation of the charge, the Denver Regional Director issued a Complaint and Notice of Hearing on February 16, 2016, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain over the identity theft protection proposals submitted by the Union for non-appropriated fund (NAF) employees. G.C. Ex. 1(b). On March 9, 2016, the Respondent filed its Answer to the Complaint denying that there was an obligation to bargain because the matter was outside the Respondent's control, it had no role in the decisions made by the OPM, it did not make any change, and OPM had provided assistance to all impacted federal employees. G.C. Ex. 1(f).

On May 2, 2016, the Respondent filed a Motion for Summary Judgment (Respondent's MSJ). G.C. Ex. 1(g). On May 11, 2016, the General Counsel filed a response to Respondent's MSJ. G.C. Ex. 1(h). On May 17, 2016, the Respondent's MSJ was denied. G.C. Ex. 1(i).

On June 8, 2016, the General Counsel filed a Motion for Summary Judgment (G.C.'s MSJ). G.C. Ex. 1(*l*). On June 13, 2016, the Respondent filed a response to G.C.'s MSJ. G.C. Ex. 1(m). On June 13, 2016, the G.C.'s MSJ was denied. G.C. Ex. 1(n).

A hearing on the matter was conducted on June 15, 2016, in Phoenix, Arizona. All parties were represented and afforded an opportunity to be heard, introduce evidence, and examine witnesses. Both 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 Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain over the Union's proposals. Providing their PII was a condition of employment for bargaining unit employees. Procedures or appropriate arrangements to assist and protect bargaining unit employees who had their PII compromised by an illegal theft thereof was not covered by the parties' collective bargaining agreement (CBA). Bargaining over such matters was not precluded by fiscal or budgetary limitations because the Respondent retains discretion to utilize funds for such measures when they are related to the federal government's failure to safeguard the PII it requires federal employees to provide as part of the employment relationship.

In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of the Air Force is an agency under 5 U.S.C. § 7103(a)(3). G.C. Ex. 1(b), 1(f). At all times material, Kathleen Brocksmith occupied the position of Human Resources Officer for NAF employees at Luke Air Force Base, Arizona (Luke AFB). Brocksmith acted on behalf of the Respondent at all material times.

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a) (4). G.C. Ex. 1(b), 1(f). AFGE is the exclusive representative of a unit of employees appropriate for collective bargaining at Luke AFB. The Union is an agent of AFGE for the purpose of representing employees at Luke AFB.

In 2015, OPM discovered that the PII of millions of current and former federal employees were stolen from data it maintained. https://www.opm.gov/cybersecurity/faqs/. The stolen data included information about NAF bargaining unit employees, collected as part of background investigations, including names and social security numbers, along with criminal, educational, employment, and residency histories. *Id.*

On July 20, 2015, Harley Hembd, the president of the Union sent an email to Brocksmith asking if OPM conducted background checks for NAF employees because he wanted to know if the represented NAF employees were impacted by OPM's failure to protect the PII of federal employees. Tr. 13; G.C. Ex. 2. Later that day, Brocksmith responded that OPM had conducted background checks for NAF employees. G.C. Ex. 2.

One day later, and in response to that reply, Hembd sent a demand to bargain over proposals intended to assist and protect bargaining unit employees whose PII was compromised when OPM failed to properly safeguard the data they provided the Respondent as part of their employment relationship. G.C. Ex. 3, 4. The Union proposed that the Respondent give employees: (1) a letter describing the breach; (2) identity theft training; (3) financial guidance by a financial security specialist; (4) lifetime credit monitoring; (5) assistance securing CSID coverage; (6) administrative time to review for and correct any credit issues that arose as a result of the Data Breach; (7) permission to use government equipment (such as computers and telephones) to perform reviews and correct credit records; (8) regular briefings regarding the Data Breaches; (9) reimbursement for expenses or losses that resulted from the Data Breaches; and (10) training, assistance, and other considerations for employees so they could maintain security clearances while such financial or credit issues were resolved. G.C. Ex. 4. The Union also indicated that both parties should be allowed to submit additional proposals, as needed.

On July 28, 2015, Brocksmith replied that she would review the proposals. G.C. Ex. 5. On August 10, 2015, Brocksmith responded that the Respondent did not have a "duty to bargain" because the Data Breaches did "not affect any NAF BUE condition of employment or working conditions." G.C. Ex. 6. Furthermore, she stated that the Union "does not have a bargaining relationship with OPM" and that it would be "inappropriate" for the Respondent to "engage in bargaining this issue at the local level at Luke AFB under such circumstances."

On August 11, 2015, Hembd replied to Brocksmith. G.C. Ex. 7. He advised Brocksmith to "stop thinking about this matter as bargaining a change", but as a request to bargain over something that is not included in any negotiated agreement. In response to Brocksmith's statement that the Union did not have a bargaining relationship with OPM, Hembd pointed out that the Union's proposals did not ask OPM to do anything. He also stated that the Respondent had responsibility because it required background checks for bargaining unit employees, it collected the PII, and it provided the PII to OPM.

The Respondent did not respond to Hembd's August 11, 2015, e-mail. Tr. 22-23.

Prior to the proposals and email exchanges related to the OPM Data Breaches, the parties agreed upon and executed a CBA in March 28, 2013. Jt. Ex. 1. Sections 4 and 6, within Article 18 of that CBA cover health and retirement benefits for employees, respectively. Although Brocksmith was not involved in the CBA negotiations, she testified that she believed those sections constituted all of the pay and benefits to which NAF bargaining unit employees were entitled. Tr. 33-37. She also indicated that she never agreed to reopen Article 18 to negotiate over additional benefits like identity theft protection. Tr. 33.

Brocksmith stated that some NAF organizations are funded with appropriated funds (Category A), some are funded with NAF and appropriated funds (Category B), and some can only be funded with NAF (Category C). Tr. 34-35. She stated she did not have any authority over the NAF budget or to transfer appropriated funds to NAF organizations. Tr. 34. Finally, she stated that no NAF or appropriated funds were "set aside" to provide identity theft protection. Tr. 33-34.

Brock Henderson, an AFGE National Representative, was the chief negotiator for the Union during the CBA negotiations. Tr. 40. He testified that Article 18 was never intended to limit employees to only those benefits outlined in the health and retirement benefit sections. Tr. 46-47. In addition, Henderson indicated that during the negotiations over Article 18, the parties did not discuss identity theft protection or any of the matters referenced in the Union's July 21, 2015 proposals. Tr. 40-41, 42. Henderson also explained that the purpose of Article 35 in the CBA was to allow the parties to negotiate over matters covered by the CBA if they mutually agreed to reopen the CBA, and that it was not a waiver of the Union's right to bargain midterm. Tr. 41.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated § 7116(a)(1) and (5) when it refused to bargain over the identity theft protections proposed by the Union.

First, the GC contends that identity theft protection is a condition of employment. G.C. Br. at 7. It states that there is a direct connection between the data breaches and the employment relationship because the Respondent required employees to provide personal information and then sent that personal information to OPM as part of the security clearance process. *Id.* at 7-8. Also, it notes that all employees are required to be in financially good standing. *Id.* at 9.

Second, the GC asserts that the Respondent failed to show that the proposals were covered by the CBA or inconsistent with federal law. *Id.* In support, it states that the Article 18, Sections 4 and 6, do not specifically mention identity theft protection or any of the Union's

proposals. *Id.* at 9-10. Furthermore, it notes that Henderson testified that the parties did not discuss identity theft protection during the negotiations and Article 18 was not meant to cover all potential benefits for employees. *Id.* at 11.

Third, the GC contends that Article 35 does not constitute a waiver of the Union's right to submit mid-term proposals. *Id.* at 12. Instead, Article 35 only requires mutual consent to reopen the CBA if the parties want to negotiate a matter covered by the CBA. Article 18 did not cover identity theft protection; therefore, Article 35 does not apply.

Fourth, the GC asserts that the Respondent should not be allowed to raise non-negotiability as a defense since it did not raise the defense when it refused to bargain. *Id.* at 12-15.

As a remedy, the GC seeks an order directing the Respondent to negotiate with the Union. *Id.* at 15. Furthermore, it wants an order directing the Respondent to post a notice, signed by the Base Commander, in all areas where employees are located and to e-mail the notice to bargaining unit employees.

Respondent

The Respondent denies that it violated the Statute because it was not required, or legally permitted, to negotiate with the Union over identity theft protection.

First, the Respondent contends that the Union waived its right to bargain over benefits when it agreed to Article 18. In support, it states that Article 18 covers health and retirement benefits; therefore, those are the only benefits available to employees during the life of the CBA. R. Br. at 26-27, 28. It also alleges that all benefits "could and should" have been included in the CBA negotiations. *Id.* at 28. Furthermore, it states that benefits costs can be expensive; therefore, it is important for those costs to be "nailed down" during the negotiations so that the Respondent does not incur unexpected increases in expenses during the life of the CBA. In addition, the Respondent argues that it was entitled to refuse to bargain over identity theft protection because Article 35 only permits negotiation over matters covered by the CBA if both parties agree. *Id.* at 30, 32.

Second, the Respondent asserts that identity theft protection is not a condition of employment. It states that it did not have anything to do with the data breaches. Furthermore, it claims that Congress gave OPM the authority to address the data breaches as part of Section 632 of Public Law No. 114-113 (Consolidated Appropriations Act of 2016). *Id.* at 32-33. Also, it states that neither the law, nor OPM, gave the Respondent any authority to act on OPM's behalf. *Id.* at 33.

Finally, the Respondent asserts that it was not required to bargain because fiscal law prohibited it from using NAF and appropriated funds for identity theft protection and it did not have any funds to pay for identity theft protection. *Id.* at 33-34.

ANALYSIS

Agencies have a duty to bargain over mid-term union-initiated proposals related to conditions of employment that are not covered by a negotiated agreement. *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50-51 (2000) (*Interior*).

Identity Theft Protection Is a Condition of Employment

Conditions of employment are "personnel policies, practices, and matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14). To determine whether a matter concerns a condition of employment, the Authority considers: (1) whether the matter pertains to bargaining unit employees; and (2) whether there is a direct connection between the matter and the work situation or employment relationship of bargaining unit employees. *Antilles Consol. Educ. Assoc.*, 22 FLRA 235 (1986); *AFGE, Local 1812*, 59 FLRA 447 (2003).

Congress also stated that matters are not a condition of employment "to the extent such matters are specifically provided for by Federal statute." 5 U.S.C. § 7103(a)(14)(C). However, a matter is not excluded from the definition of a condition of employment merely because it is referenced in a statute. *U.S. Dep't of Justice, INS, Wash., D.C.*, 56 FLRA 351, 355 (2000) (*INS*). An agency may refuse to bargain over a proposal that contradicts a federal statute because it has no discretion over the matter. *Id.* For example, a proposal that required an agency to pay the full cost of health and AD&D benefits was not negotiable because it conflicted with statute specifically requiring employees to pay a portion of those benefit costs. *Int'l Bhd. of Elec. Workers, Local 1245*, 31 FLRA 1002, 1003-04 (1988) (*IBEW, Local 1245*); *see also, Am. Fed. of Gov't Employees Council 214, AFL-CIO*, 30 FLRA 1025, 1036 (1988) (*AFGE Council 214*); (proposal requiring agency to give employees a uniform and a uniform allowance conflicted with statute that only allowed the agency to give the uniform or pay a uniform allowance). *Cf.*, *INS*, 56 FLRA at 355 (statute requiring the Attorney General to "establish standards for enforcement activities" did not preclude negotiations over body search policy since the statute did not restrict the Attorney General's discretion). Also, an agency is not required to negotiate if a statute grants the agency unrestricted discretion over a matter. *Am. Fed. of Gov't Employees, Local1547*, 67 FLRA 523, 528 (2014) (*AFGE, Local 1547*). The Authority has found that agencies have exclusive discretion if the law states that the agency may act 'without regard to the provisions of other laws' or 'notwithstanding any other provision of the law.'" *Id.* In summary, if an agency has some discretion, but not total discretion, then it is obligated to bargain to the extent of that discretion.

In this case, the Union submitted proposals regarding identity theft protection because the PII of bargaining unit employees was compromised by the theft of data at OPM. G.C. Ex. 4. The Respondent replied that it did not have a "duty to bargain" because the proposals did not concern a "condition of employment." G.C. Ex. 6. However, bargaining unit employees were impacted by the data breaches; therefore, the first prong is satisfied. Further, there is a direct connection between the matter and employment relationship. The Respondent did not challenge the Union's assertion that the Respondent required bargaining unit employees to provide social security numbers and other personnel information as a condition of their employment or that it

sent that PII to OPM. G.C. Ex. 7. Although the PII was stolen from OPM, OPM would not have had the information but for the Respondent's actions. Put simply, the bargain unit employees' personal information was in the possession of OPM and was stolen from OPM because they worked for the Respondent.

The Respondent also contends that identity theft protection is not a condition of employment because Congress gave OPM the authority to provide identity theft protection when it enacted the Consolidated Appropriations Act of 2016[1]. R. Br. at 32-33. In essence, the Respondent argues that since the statute required OPM to provide some benefits, no other agency is permitted to offer additional benefits. In support, the Respondent cited *IBEW, Local 1245* and *AFGE Council 214. Id.* at 21. However, those cases are readily distinguishable from this case. In those cases, statutes specifically prohibited the agencies from providing the benefits proposed by the unions. In this case, the statute clearly only applied to OPM, and not to other agencies such as the Respondent. There is no evidence that Congress intended to give OPM exclusive authority to offer identity theft protection or to restrict other agencies from offering additional identity theft protection. As such, the Respondent did not need OPM to delegate its authority to provide its employees with additional benefits. Furthermore, the Union's proposals did not conflict with that statute even if the statute applied to the Respondent. The statute only stated that OPM had to provide benefits "not less comprehensive" than it had provided previously; that included "not less than $5,000,000 in identity theft insurance"; and for a period "not less than 10 years." In other words, the statute only set the "minimum" level of benefits.

In summary, identity theft protection concerns bargaining unit employees and it is directly connected to the employment relationship. Furthermore, there is no evidence that the Consolidated Appropriations Act of 2016 prohibited the Respondent from providing additional identity theft protection. Therefore, identity theft protection is a condition of employment.

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[1] Section 632(a) of the Consolidated Appropriations Act of 2016 states:

(a) The Office of Personnel Management shall provide to each affected individual as defined in subsection (b) complimentary identity protection coverage that—

(1) is not less comprehensive than the complimentary identity protection coverage that the Office provided to affected individuals before the date of enactment of this Act;
(2) is effective for a period of not less than 10 years; and
(3) includes not less than $5,000,000 in identity theft insurance.

(b) DEFINITION.—In this section, the term ''affected individual'' means any individual whose Social Security Number was compromised during—
(1) the data breach of personnel records of current and former Federal employees, at a network maintained by the Department of the Interior, that was announced by the Office of Personnel Management on June 4, 2015; or
(2) the data breach of systems of the Office of Personnel Management containing information related to the background investigations of current, former, and prospective Federal employees, and of other individuals.

Fiscal Law Does Not Prohibit Negotiations over Identity Theft Protection

The Respondent argues that it had no duty to bargain because it was not authorized under fiscal law to provide identity theft protection. R. Br. at 33. In its brief, the Respondent cites numerous statutes and case law regarding the proper use of *appropriated funds* including whether appropriated funds could be used by NAF organizations. *Id.* at 21-26, 33-35. It spent very little time, less than three paragraphs, discussing the proper use of *non-appropriated funds*. *Id.* at 24. However, the Union sought identity theft protection for NAF employees; therefore, it is reasonable to focus on whether NAF can be used to provide identity theft protection.

Congress authorized the Department of Defense (DoD) to create regulations regarding the appropriate use of NAF, financial management rules to avoid "waste, loss, and unauthorized use", and penalties if employees fail to follow its regulations. 10 U.S.C. § 2783(a) and (b). Accordingly, the DoD issued an instruction regarding the appropriate use of NAF. DoD Instruction 1015.15, *Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources* (Oct. 31, 2007) (DOD Inst. 1015.15). According to the instruction, DoD components have the authority to create policies to implement the instruction. DoD Inst. 1015.15, section 5.7.1.[2] Therefore, the Respondent clearly has discretion to determine how NAF will be used.

The Respondent provided no evidence that it was prohibited from exercising its discretion to provide identity theft protection benefits.[3] Although Brocksmith stated that NAF was not "set aside" for identity theft protection in the Luke AFB budget (Tr. 33-34), she did not say that the Respondent had no discretion to set aside funds for identity theft protection or that money could not be reallocated to pay for this benefit. Furthermore, some of the proposals do not require the expenditure of funds. For example, the Union proposed that the Respondent provide employees and the Union additional information about the data breaches.

In summary, the Respondent has discretion to use NAF and there is no evidence that the Respondent is prohibited from exercising that discretion to pay for identity theft protection for those employees whose PII was compromised by the theft of information about them. Moreover, some of the Union's proposals would not require the use of NAF. Therefore, fiscal law did not prohibit the Respondent from negotiating with the Union over the Union's proposals.

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[2] Brocksmith testified that certain NAF organizations, Category B and C organizations can be funded with NAF. Tr. 34-35. However, Category A organizations are only funded using appropriated funds. Tr. 34. However, according to DoD Inst. 1015.15, section 6.2.1.1, NAF can be used to support Category A organizations if it would be illegal to use appropriated funds. Therefore, NAF funds can be used to fund all NAF organizations even if the Respondent's assertion is correct that appropriated funds cannot be used for identity theft protections.

[3] There is no evidence that the Respondent (or the DoD) has *exclusive* discretion to determine how to use NAF. Therefore, the Respondent's discretion is subject to its obligation to bargain to the extent required by the Statute. *AFGE, Local 1547*, 67 FLRA at 528.

Identity Theft Protection Is Not Covered by the CBA

Article 35 clearly and unambiguously states that parties must mutually agree to negotiations over matters that are covered by the CBA.[4] The parties do not actually dispute this point. Instead, the Respondent contends that the Union was required, under Article 35, to get the Respondent's consent because identity theft protection is covered by Article 18, Sections 4 and 6. R. Br. at 32. The General Counsel, on the other hand, argues that Article 35 does not apply because Article 18 does not cover identity theft protection. G.C. Br. at 11-12. In other words, the parties' only dispute is whether identity theft protection is covered by Article 18.

At the hearing, the General Counsel asserted that the Respondent should not be allowed to raise defenses that were not included in its prehearing disclosures. Tr. 7-8. A party is required to raise "any and all defenses to the allegations in the complaint" in its prehearing disclosures. 5 C.F.R. § 2423.23(c). Although a party does not waive its right to raise the covered by defense merely because it fails to raise it during negotiations (*EEOC, Wash., D.C.*, 52 FLRA 459, 461 (1996); this does not excuse its failure to comply with the Authority's procedural rules and regulations. In this case, the Respondent did not raise the covered by defense in its prehearing disclosures; therefore, it may not rely upon that doctrine at hearing.

However, even if the Respondent had timely raised the covered by doctrine, Article 18 does not cover identity theft protection; therefore, the Respondent would not have been excused from bargaining even if it had raised the covered by doctrine as a defense. Parties are not required to bargain over a matter that is "covered by" a negotiated agreement. *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993). The Authority applies a two-prong test to determine if a matter is covered by. First, a matter is expressly covered by if a "reasonable reader would conclude that the provision settles the matter in dispute." *Id.* If the matter is not expressly covered by the agreement, then the Authority will consider whether it is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *Id.* Under this second prong, the Authority will consider all record evidence to determine if a reasonable person would have contemplated that the agreement would foreclose further bargaining. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000) (*Customs Service*). The Authority considers whether the contract provision is so detailed and broad that it comprehensively addresses a matter. In *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910-11 (1998), the Authority found that a provision covered all details, including the long term details proposed by the union, because it addressed the manner in which details would be documented, when a temporary promotion would occur during a detail, salaries during details, grievance procedures for detail disputes, uniform requirements during the detail, the length of involuntary details, and the amount of advance notice required for details. On the other hand, a

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[4] Article 35 states, in pertinent part, that:

> Subjects covered by this agreement may be reopened for the purpose of negotiating a supplement only by mutual agreement of the Parties. The Party requesting to readdress a subject must make its request in writing, stipulating the reasons that make an adjustment necessary. The request must contain the Articles and/or issues involved. If it is mutually agreed and legally permissible to readdress the subject matter, negotiations will begin within 30 days of the date of the request. All bargaining proposals must be germane to the reasons stipulated and/or Articles/Issues involved in the request to reopen.

matter that is "tangentially related" to the provision is not covered by it. *Id.* In, *IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 587, 592-93 (2010), the Authority found that a contract provision regarding the release of employees for extended periods of time did not cover the early release of temporary, intermittent employees. In *Customs Service*, the Authority found that a provision covering administrative leave was "extensive"; however, it did not cover administrative leave to attend a three-day sports competition called the Florida Games because the contract provisions clearly had a different purpose. 56 FLRA at 814. One provision allowed up to three hours of administrative leave to allow employees to pursue an individual fitness program and another provision allowed supervisors to give employees up to fifty-nine minutes of administrative leave if they unavoidably tardy from work. *Id.*

Bargaining history and intent are an "integral component" of this test. *Id.* The Authority has repeatedly considered whether a matter was discussed during negotiations. *See, e.g., id.* (no evidence that the parties contemplated administrative leave for the Florida Games during negotiations); *Dep't of the Interior, Geological Survey, Great Lakes Science Ctr., Ann Arbor, Mich.*, 68 FLRA 734 (2015) (no evidence in bargaining history that parties discussed *per diem* rates; therefore, *per diem* rates were not covered by the agreement); *DOJ, Fed. Corr. Complex, Coleman, Fla.*, 69 FLRA 447 (2016) (inter-institutional assignments not "covered by" provision regarding assignments because the parties never considered the matter during negotiations).

The Respondent contends that the Article 18, Sections 4 and 6[5], covered all benefits; therefore, it was not required to bargain over any additional benefits. R. Br. at 26-27, 28. However, sections 4 and 6 are focused, exclusively, on the administration of health and retirement benefits. The mere fact that Article 18 includes provisions that address two benefits does not demonstrate that this was intended to be a comprehensive list of the only benefits available to employees for the life of the agreement. Furthermore, Henderson, the only witness with personal knowledge of the negotiations, confirmed that the parties discussed only health and

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[5] Article 18, Sections 4 and 6:

> Section 4. The NAF Health Benefit Plan (HBP) contained in DoD Inst. 1400.25 volume 1408 dated July 21, 2009 will be followed. Consistent with the Statute, the Employer will give the Union notice and opportunity to bargain over any changes to that document.
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> Section 6. The Employer shall follow the provisions of the centrally managed AF NAF Retirement Plan and AF NAF Employees' 401(K) Savings plan as set forth in the applicable Air Force Instruction. Regular NAF employees excluding off-duty-military (ODM), with thirty days of service or more, are eligible to participate in the 401(K) Savings Plan. With 12 months of regular Air Force Service or more, NAF employees (excluding ODM) are eligible to participate in the Agency's retirement plan. HRO will notify newly eligible regular employees of the 401(K) and retirement plan eligibility requirements and benefits. When an employee elects to participate in the 401(K) and/or retirement plans, HRO will ensure that the employee has the opportunity to complete the appropriate Enrollment Request and Beneficiary Designation Forms. 401(k) plan participants must indicate their desire to participate or not participate and the contribution percentage and investment election they desire. The Union will be notified of any proposed changes to the current 401(k) plan and afforded the opportunity to bargain as appropriate.

retirement benefits and that the parties had no intention of precluding other benefits. Tr. 46-47. Further, he noted that the parties never discussed identity theft protection during the negotiations. Tr. 40-41, 42. In other words, the contract language and the bargaining history support the conclusion that Article 18 does not cover benefits like identity theft protection.

The Respondent also contends that the Union should have raised identity theft protection during the CBA negotiations. R. Br. at 28. However, the Respondent fails to explain how the Union could have foreseen something like the large-scale data theft that occurred years after the parties signed the CBA. As noted by the Authority in *Interior*, "permitting unions to raise issues at the time they arise or become a priority for the parties serves the public interest in a more efficient Government because it will likely lead to more focused negotiations." 56 FLRA, at 52. It explained that this was preferable to forcing the parties to bargain over "remote and secondary issues that do not appear to raise immediate concerns" which would "unnecessarily and inefficiently broaden and prolong term negotiations." The inclusion of a single benefit does not mean all future proposals related to other benefits however unrelated are covered by the agreement, and an interpretation of the covered by doctrine that would yield such a result approaches the absurd.

CONCLUSION

I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain over the identity theft protections proposed by the Union.

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of the Air Force, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain mid-term, to the extent required by the Statute, with the American Federation of Government Employees, Local 1547 (Union) over additional identity theft protection proposals for non-appropriated fund (NAF) employees whose PII was compromised.

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

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

(a) Upon request by the Union, bargain over additional identity theft protection proposals for NAF employees, to the extent required by the Statute.

(b) Post at it facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander, Luke Air Force Base, Arizona, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of the paper Notices, Notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

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

Issued, Washington, D.C., October 27, 2016

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to bargain mid-term, to the extent required by the Statute, with the American Federation of Government Employees, Local 1547 (Union) over identity theft protection proposals for non-appropriated fund (NAF) employees whose PII was compromised.

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

WE WILL, upon request by the Union, bargain over additional identity protections for NAF employees, to the extent required by the Statute.

____
(Agency/Respondent)

Dated: __________________ By: ____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204 and whose telephone number is: (303) 844-5224.