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

OALJ 16-44

DEPARTMENT OF HEALTH AND HUMAN SERVICES NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, NATIONAL INSTITUTES OF HEALTH, RESEARCH TRIANGLE PARK, NORTH CAROLINA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2923, AFL-CIO CHARGING PARTY	Case Nos. AT-CA-15-0135 AT-CA-16-0055

Patricia J. Kush
For the General Counsel

Aric Burks
Jemma Robinson
For the Respondent

Edith Lee
For the Charging Party

Before: SUSAN E. JELEN
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.

The American Federation of Government Employees, Local 2923, AFL-CIO (Union) filed unfair labor practice (ULP) charges against the Department of Health and Human Services, National Institute of Environmental Health Sciences, National Institutes of Health, Research Triangle Park, North Carolina (Respondent/NIH) on December 12, 2014 (AT-CA-15-0135) and October 30, 2015 (AT-CA-16-0055). After investigating the charges, the Regional Director of the FLRA's Atlanta Region issued a Consolidated Complaint and Notice of Hearing on February 25, 2016, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain over the Union's travel savings incentive program proposal, and failing and refusing to bargain in good faith with the Union over the proposal. (G.C. Ex. 1(a)). The Respondent timely filed an Answer to the Consolidated Complaint admitting some factual allegations, but denying that it violated the Statute. (G.C. Ex. 1(d)).

A hearing in this matter was held in Raleigh, North Carolina on April 19, 2016, and continued on May 25, 2016, at which time it closed. All parties were afforded an opportunity to be represented and heard, to examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel and Respondent filed timely post-hearing briefs which have been fully considered.[1]

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.[2]

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Exs. 1(c) & (d)). The American Federation of Government Employees, Local 2923, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive collective bargaining representative of a unit of employees appropriate for collective bargaining at the NIH. (G.C. Exs. 1(c) & (d)).

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[1] The General Counsel filed a Motion to Strike portions of the Respondent's brief and the Respondent replied to the motion. I grant the General Counsel's motion in part, and deny it in part. I grant the motion to strike the Respondent's argument that the Union's proposal excessively interferes with its right to determine its mission, organization and number of employees, defenses not raised in its pre-hearing disclosure statement or at the hearing. I deny the portion to strike the Respondent's arguments concerning its budget. The General Counsel concedes that the Respondent raised this issue at the hearing and I find that the matter was fully litigated by both parties. Also, I do not strike the Respondent's argument that the Union's proposal is permissive as it relates to the administrative requirements for establishing the program. This matter was fully litigated as well. I grant the General Counsel's motion to strike facts stated by the Respondent in its brief on pages 3, 4, and 9 that are not contained in the record. Finally, I grant the General Counsel's motion to strike the Respondent's reference to *AFGE*, 65 FLRA 117 (2011) because the record does not establish the case's relevance to issues before me.

[2] The record includes testimony and policies pertaining to the Respondent's budget. This material is relevant to a finding on the negotiability of the Union's proposal only. For reasons I will discuss later in the decision, I will not be making a finding on the negotiability of the Union's proposal. Therefore, I have not included this information in the facts.

This case concerns the parties' dealings over the Union's proposal for a program that would grant a monetary benefit to employees who saved the Respondent travel funds during official travel. In September 2013, Union President Bill Jirles requested to bargain over such a program at the Respondent. (G.C. Ex. 2; Tr. 17). Jirles attached a proposed Memorandum of Agreement (MOA) entitled "Travel Savings Award Program" to his bargaining request. (G.C. Ex. 2; Tr. 18). Citing the National Defense Authorization Act of 2002 and the Government Employees Incentive Awards Act, the Union proposed a travel savings incentive program that would award employees "50 percent of the approved travel savings." (G.C. Ex. 2, MOU at 2).

The Union filed unfair labor practice Case No. WA-CA-15-0147 alleging that the Respondent had refused to bargain concerning the Union's proposed travel savings incentive program based on its assertion that its "current travel policies were sufficient." (G.C. Ex. 3). It is undisputed that the Respondent failed to consider the Union's proposal before the Union filed WA-CA-15-0147. (Tr. 21, Tr. 150). Though that case is not before me, its resolution plays an integral part of the chain of events leading to the subsequent unfair labor practice charges that are the subject of the Consolidated Complaint.

In May 2014, the Respondent entered into a settlement agreement in Case No. WA-CA-15-0147. In the settlement, the Respondent agreed to bargain with the Union over its proposal to establish a travel savings incentive program at the Respondent. (G.C. Ex. 4; Tr. 22). After the settlement, Respondent's representative Lisa Powers contacted Jirles to arrange negotiations on the Union's proposal. (G.C. Ex. 5; R. Ex. 7; Tr. 22-23). Initially, the parties disagreed about whether a mediator should assist in the travel savings incentive program negotiations. (Tr. 23-25; R. Exs. 4, 9, 15). The Union wanted a Federal Mediation and Conciliation Service (FMCS) mediator who regularly worked with the parties to mediate the negotiations. (*Id.*). The Respondent did not want a mediator's assistance because it believed a mediator's participation would only be appropriate if the parties were at impasse. (*Id.*). Ultimately, the parties met without a mediator by teleconference on June 27, 2014. (R. Ex. 7; Tr. 25).

At the June 27, 2014 negotiation session, the Union submitted the MOA it had offered to the Respondent prior to filing Case No. WA-CA-15-0147. (Tr. 107). In response, the Respondent proposed a program that would recognize employees who had saved the Respondent travel funds at its annual award ceremony by reading their names during the event. (R. Ex. 7). The parties did not reach agreement during the teleconference. (Tr. 26).

On July 24, 2014, the Respondent submitted another counter-proposal to the Union's proposed MOA. (R. Ex. 9). Under this counter-proposal, employees who saved the Respondent money by reducing their travel costs would receive recognition in the form of a certificate. (*Id.*). Jirles did not respond to this proposal.[3]

On December 2, 2014, an FMCS mediator met with the parties telephonically. (Tr. 30, 131-33). During the call, the Mediator asked the parties to identify the issues he would be assisting them with at their future mediation session. (*Id.*). When the FMCS Mediator asked the parties whether they would be addressing the travel incentive savings program negotiations at the mediation, the Respondent's representatives declined to include the issue in the parties' future mediation session, stating that it believed mediation was premature.[4] (Tr. 31, 248-49). The Respondent's representatives stated also that the subject was not a mandatory bargaining topic. (*Id.*). Soon thereafter, on December 12, 2014, the Union filed unfair labor practice Case No. AT-CA-15-0135 alleging that the Respondent's statements at the December 2 teleconference amounted to a refusal to bargain its Travel Savings Incentive Program proposal in violation of the Statute. (G.C. Ex. 1(c)).

On May 15, 2015[5], the Respondent entered into a settlement agreement in Case No. AT-CA-15-0135. (G.C. Ex. 1(m)). In the settlement agreement, the Respondent agreed to "bargain . . . over the proposed travel incentive program." (G.C. Ex. 1(m) at 1). On June 18, 2015, Jirles sent an e-mail message to Respondent's representative Marlin Jenkins to

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[3] Jirles testified that the Union's response was delayed by the Respondent's refusal to furnish the Union with information it needed to evaluate the Respondent's counter-proposal and the Union's subsequent unfair labor practice charge concerning the data. (Tr. 27-28). The Respondent provided the information to the Union during the summer of 2015. (Tr. 259).

[4] Jirles testified that the Respondent's representatives stated that the Respondent was "not interested in bargaining" over the Union's proposed travel incentive savings program during this teleconference. (Tr. 31). The Respondent's witness Burr testified that the Respondent's representatives argued against including the Mediator in their bargaining session, but never refused to bargain over the Union's proposed travel savings incentive program. (Tr. 249). Respondent's witness Powers testified that she anticipated that bargaining would continue without the mediator. (*Id.*). I credit Respondent's witnesses' testimony that the Respondent made no general refusal to bargain during this teleconference. The parties had an ongoing disagreement about whether to include the travel savings incentive program in the mediation. It is undisputed that the parties intended to resolve this disagreement during the teleconference and this was the topic of the discussion as it pertained to the travel savings incentive program negotiations. (G.C. Ex. 6; Tr. 28-30, 247-48). I find that to the extent Respondent's representatives expressed disinterest in negotiating over the travel incentive savings program, such comments applied to the topic of the discussion, bargaining with the Mediator's assistance. In reaching this conclusion, I note that by December 2, 2015, the date of the teleconference, the Respondent had submitted two counter-proposals to the Union's proposed MOA; one of its counter-proposals was pending a response from the Union at the time of the teleconference. (Tr. 27-28). It seems unlikely that the Respondent would assert at this juncture that it was not interested in bargaining when it was in fact doing just that.

[5] Hereafter, all dates are 2015 unless stated otherwise.

arrange negotiations pursuant to the settlement. (G.C. Ex. 7). Initially, negotiations appear to have been on track, with the parties working together to schedule a date to commence bargaining. (G.C. Ex. 7). But, things fell apart soon thereafter. When Jirles contacted Jenkins on June 18, 2015, he submitted the MOA that the Union had proposed in 2013, when it first requested to bargain a travel incentive savings program at the Respondent. (G.C. Ex. 7; Tr. 34). Jenkins submitted a counter-proposal to Jirles on behalf of the Respondent on July 6. (G.C. Ex. 7). Accompanying the Respondent's counter-proposal was an e-mail from Jenkins stating that the Union's proposal excessively interfered with management rights and that the Union should "[f]eel free to provide additional proposals" prior to the parties' scheduled meeting. (*Id.*). On July 9, Jirles responded by e-mail, asking Jenkins to clarify whether he was asserting that the entire proposal was non-negotiable, or only certain parts. (G.C. Ex. 7; Tr. 35-36). Jenkins did not respond. (Tr. 36). Jirles reiterated his request for clarification of Respondent's position on July 27, and followed up with e-mails to Respondent on August 5, September 4 and September 22, after receiving no reply. (Tr. 36; G.C. Ex. 7).

On October 30, the Union filed Case No. AT-CA-16-0055, alleging that the Respondent had violated the Statute by refusing to respond to its attempts to bargain the travel saving incentive proposal that it had agreed to negotiate in the AT-CA-15-0135 settlement agreement. (G.C. Ex. 1(b)). The charge cites the Respondent's failure to respond to Jirles' requests that the Respondent clarify Jenkins' statement of non-negotiability and the Respondent's failure to continue negotiations after declaring the Union's proposal non-negotiable. (*Id.*). Finding that the Respondent had failed to comply with the settlement agreement in AT-CA-15-0135, the Atlanta Regional Director set aside the settlement and issued a Consolidated Complaint in that case and AT-CA-16-0055 alleging that the Respondent had violated the Statute by refusing to bargain over the Union's travel savings incentive proposal.[6]

POSITIONS OF THE PARTIES

General Counsel

AT-CA-15-0135

The General Counsel maintains that the Respondent failed to comply with the settlement in this case when it did not clarify its position on the negotiability of the Union's proposal or engage further with the Union on the topic after July 6. (G.C. Br. at 12, 16). Therefore, according to the General Counsel, the Regional Director has appropriately set aside the settlement agreement in this case. (*Id.* at 15-16). Reinstituting its proceedings on refused to bargain on December 2, 2014 over the Union's proposed travel savings incentive

[6] G.C. Ex. 1(c). Under 5 CFR § 2423(12)(a), the settlement agreement is conditional upon the respondent's compliance with the agreement. Accordingly, the settlement agreement in AT-CA-15-0135 states that, "No further action will be taken . . . provided the Charging Party complies with the terms of the Agreement and Notice." (G.C. Ex. 1(m)). By issuing a complaint in AT-CA-15-0135, the Regional Director takes "further action" in the case evidencing his finding of non-compliance with the settlement.

the charge, the General Counsel contends that the Respondent violated the Statute when it proposal. (*Id.* at 10). In this regard, the General Counsel asserts that the Respondent refused to bargain when it asserted that the Union's proposed travel savings incentive program proposal was not a mandatory topic of bargaining. (*Id.*; *citing NTEU*, 64 FLRA 156, 157 (2009)), the General Counsel disputes the Respondent's claim that the proposal is a permissive bargaining topic. (G.C. Br. at 10-11). The General Counsel argues that the travel savings incentive program is a mandatory bargaining topic because it concerns a condition of employment and the Statute does not "explicitly or implicitly give the Respondent a unilateral right to implement a travel incentive policy." (*Id.* at 11).

AT-CA-16-0055

The General Counsel argues in this case that the Respondent violated the Statute by refusing to bargain over the Union's travel savings incentive proposal after it entered into the settlement agreement in AT-CA-15-0135. (*Id.* at 12). This case rests on the General Counsel's position that the Respondent asserted incorrectly that the Union's travel savings incentive proposal is non-negotiable because it excessively interferes with its right to determine its budget. (*Id.* at 12-16). The General Counsel contends that the Respondent's failure to bargain over the Union's proposal for this reason amounts to a failure to bargain in good faith in violation of the Statute. (*Id.*).

The General Counsel maintains that applying the two-part test that the Authority established in *AFGE, AFL-CIO*, 2 FLRA 604, 607-08 (1980) (*AFGE*) and clarified most recently in *Nat'l Assoc. of Gov't Employees, Local R14-52*, 48 FLRA 1198, 1202 (1993) (*NAGE*) demonstrates that the Respondent erroneously defends its refusal to bargain over the Union's proposal based on its right to establish its budget. The General Counsel notes that under part one of the *AFGE*, proposals that "prescribe[ ] particular programs or operations that an agency would include in its budget or . . . the amount to be allocated" are non-negotiable. (G.C. Br. at 13 citing *NAGE*, 48 FLRA at 1202-03). The General Counsel maintains that under this standard, the Union's travel savings proposal is negotiable because it does not refer to the Respondent's budget or require the Respondent to include any item or allocate funds in its budget. (G.C. Br. at 13).

The General Counsel asserts that the Union's travel savings incentive proposal compares favorably to the gainsharing proposal that the Authority found negotiable in *NAGE*. In that case, the Authority concluded that the union's gainsharing proposal did not interfere with management's right to determine its budget because it did not require the agency to include specific items in its budget. (G.C. Br. at 14 *citing NAGE*, 48 FLRA at 1208-09). Because Respondent's witness Powers testified that the Respondent would incur costs implementing the travel savings incentive program, the General Counsel finds it notable that

the Authority found in *NAGE* that "the establishment of an administrative or operational program does not equate to the establishment of a program within the budget itself." (*Id.*; Tr. 161). So, like the proposal the Authority considered in *NAGE*, the General Counsel contends that the Union's proposal is negotiable under part one of the *AFGE* test. (G.C. Br. at 14).

Also, the General Counsel argues that the Respondent has failed to establish that the Union's travel savings incentive proposal excessively interferes with its budget because of the program's cost. (*Id.*). The General Counsel points out that under part two of the *AFGE* test, the Respondent must make a "substantial demonstration" that the Union's proposal would unavoidably increase its costs significantly, and the increased cost would not be "offset by compensating benefits. (*Id.*). The General Counsel argues that the Respondent's "mere assertions" that the Union's travel savings incentive proposal would cost more money than it saves without supporting figures or documents do not meet the *AFGE* standard. (*Id.* at 15). Also, the General Counsel maintains that the Respondent's contentions about the cost of running the travel incentive savings program are spurious because the Union's proposal rewards employees only if the Respondent saves travel money. (*Id.* at 14-15). According to the General Counsel, because the Union's travel savings proposal is negotiable under *AFGE*, the Respondent has violated the Statute by declaring the proposal non-negotiable and refusing to bargain over it. (*Id.* at 16).

Respondent

The Respondent argues it did not violate the Statute because it was not required to bargain over the Union's travel savings incentive proposal for several reasons[7]. The Respondent argues that the Union's proposal excessively interferes with its right to determine its budget because the proposal would require it to exceed fiscal year 2014 Office of Management and Budget (OMB) award caps. (R. Br. at 8, 12, 20). The Respondent cites *Nat'l Labor Relations Bd., Wash., D.C.*, 61 FLRA 41 (2005) and *AFGE, Local 723*, 66 FLRA 639 (2012) in support of this argument. (R. Br. at 20). The Respondent maintains that without authorization, travel savings awards would have to come out of its award budget subject to the cap. (*Id.* at 13-14).

Regarding its argument that the Union's travel savings incentive proposal excessively interferes with its right to determine its budget, the Respondent contends also that the Union must prove that the benefits of its proposal are so great that any interference with management rights is negligible. (*Id.* at 22). The Respondent argues that such a showing is required under *Am. Fed'n of Gov't Emps., Local 1164*, 66 FLRA 112 (2011), and the Union has failed to make it. (R. Br. at 22).

Also, the Respondent maintains that it has not violated the Statute by failing to bargain over the Union's travel incentive savings proposal because the subject matter of the proposal concerns a permissive rather than a mandatory bargaining topic. Relying on *Nat'l*

[7] The Respondent did not address the charges separately.

Weather Serv. Emps. Org., 61 FLRA 241 (2005)[8] the Respondent argues that it may elect whether or not to bargain over the Union's travel savings incentive proposal because the proposal places "absolute requirements" on management for personnel to operate and administer the program. (R. Br. at 8, 20).

With respect to the December 2, 2014, conference call which is the subject of AT-CA-15-0135, the Respondent acknowledges that Powers "accurately stated" at this meeting that the travel savings proposal concerns a permissive topic of bargaining. (R. Br. at 14). But, Respondent states that nevertheless, it "had engaged in bargaining and was continuing to do so." (*Id.* at 15). Also, the Respondent asserts that Jirles' "demand for mediation illustrates that he was not interested in sincerely bargaining the topic" and that Powers maintained during the call that the matter was premature for mediation because the Union had not responded to management's counter-proposal. (*Id.* at 15).

The Respondent asserts that unlike the Union, it has demonstrated good faith in its dealings concerning the Union's travels savings incentive proposal. (*Id.* at 19, 24). In this regard, the Respondent notes that it submitted counter-proposals to the Union's travel savings incentive proposal, and the Union failed to revise its proposal. (*Id.* at 16, 19). Also, the Respondent asserts that the Union's information request related to the travel savings incentive negotiations was "a ploy to delay bargaining and cast . . . management in a negative light", demonstrating its bad faith.[9] (*Id.* at 11-12).

ANALYSIS AND CONCLUSIONS

The General Counsel points out that the Respondent must engage in union-initiated midterm bargaining over subject matter not covered in the parties' collective bargaining agreement. (G.C. Br. at 10). This is true enough but the facts present no disagreement about

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[8] The Authority reviewed this decision upon remand from the U.S. Court of Appeals for the D.C. Circuit finding the proposal under consideration to be negotiable. *See Nat'l Weather Serv. Emps. Org.*, 64 FLRA 569, 571 (2010); *Nat'l Weather Serv. Emps. Org. v. FLRA*, 197 Fed. Appx. 1 (D.C. Cir. July 17, 2006), *reh'g on banc denied* (Dec. 15, 2006).

[9] I reject the Respondent's premise that the Union's submission of the same proposal and exercise of Statutory rights (i.e., filing unfair labor practice charges and requesting information under the Statute) demonstrate its bad faith in this matter. (R. Br. at 16, 19). Also, the Respondent mentioned other alleged incidents of bad faith on the part of the Union in its brief which I find unrelated to the issues raised by the Complaint. (*Id.* at 24-25). Respondent has asked that I grant it a posting remedy for these alleged incidents of misconduct. (*Id.* at 25, 27-28). Though I question whether the Respondent has made this request in jest, I nevertheless affirmatively deny it.

the Respondent's bargaining obligation in a general sense.[10] There is no difference of opinion about whether the Respondent must "come to the table" to bargain over the Union's proposal. *Compare U.S. DOL, OASAM, Dall., Tex.*, 65 FLRA 677, 685-86 (2011) (where the Authority found that the agency violated the Statute by refusing to engage in mid-term bargaining over parking, rejecting the agency's collateral estoppel and "covered by" defenses). It is undisputed that the Respondent reviewed the Union's proposal, asserted that the Union's proposal affects § 7106 management rights and offered counter-proposals. (G.C. Br. at 2, 4, 5, 7; R. Br. at 4-6). The General Counsel argues unfair labor practice violations in AT-CA-15-0135 and AT-CA-16-0055 based on the Respondent's alleged improper declarations concerning the negotiability of the Union's travel savings incentive proposal and failure to bargain relying upon its stance that the proposal is either outside the duty or bargain or negotiable at its election. (G.C. Br. at 11-12, 15).

The Authority addressed whether an agency violates the Statute by declaring a proposal non-negotiable in *Dep't of VA, Wash., D.C.*, 53 FLRA 236 (1997) (*VA*). In that case, the Authority affirmed its finding in *Decision on Petition for Amendment of Rules*, 23 FLRA 405, 407-08 (1986) *aff'd sub nom. NLRBU v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987) that an agency violates the Statute by refusing to bargain over a specific proposal in two situations only: (1) in connection with a unilateral change in working conditions; and (2) where the proposal that the agency refuses to bargain over is substantially identical to one that the Authority has previously found negotiable under the Statute. *VA*, 53 FLRA at 240. The General Counsel alleges neither of these scenarios in this case, or any other bargaining obligation dispute.

AT-CA-16-0055

The General Counsel argues in AT-CA-16-0055 that the Respondent violated the Statute by incorrectly declaring the Union's travel savings incentive proposal non-negotiable because it excessively interferes with management rights, then failing to clarify its statement of non-negotiability or continue bargaining after it declared the proposal non-negotiable. (G.C. Ex. 1(b), G.C. Br. at 12-13, 16). The Respondent's declaration of non-negotiability did not violate the Statute. (*Id.*). As the Authority noted in *VA*, an agency merely exercises its rights under § 7117(c) when it declares a proposal non-negotiable. (*Id.*). Moreover, I am unaware of any precedent that would support a finding that an agency's failure to return to

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[10] Section 2424.2 of the Authority's Rules and Regulations defines a bargaining obligation dispute as follows:

> (a) Bargaining obligation dispute means a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable. Examples of bargaining obligation disputes include disagreements between an exclusive representative and an agency concerning agency claims that:
> (1) A proposal concerns a matter that is covered by a collective bargaining agreement; and
> (2) Bargaining is not required over a change in bargaining unit employees' conditions of employment because the effect of the change is de minimis.

bargaining after declaring a proposal non-negotiable or clarify its statement of non-negotiability constitutes a failure to bargain in good faith in violation of the Statute, and the General Counsel has cited none.[11] Therefore, I conclude that the General Counsel has failed to establish that the Respondent engaged in unfair labor practice conduct in violation of the Statute in this case. *VA*, 53 FLRA at 240-41.

AT-CA-15-0135

To set aside the May 2015 settlement agreement, the General Counsel must show that there has not been good faith compliance with the settlement. *See VA Admin. Med. Ctr., Bath, N.Y.*, 12 FLRA 552, 565-66 (1983). The settlement agreement in AT-CA-15-0135 required the Respondent to bargain over the Union's proposed travel incentive program. (G.C. Ex. 1(m)). After entering into the settlement, the Respondent's representative Jenkins worked with Jirles to schedule a date to negotiate over the proposal. (G.C. Ex. 7; G.C. Br. at 16). Jenkins submitted a counter-proposal to the Union's proposed MOA on July 6. (*Id.*). When Jenkins submitted the Respondent's counter-proposal, he declared the Union's MOA non-negotiable because the Respondent believed the Union's proposal excessively interferes with management rights. (G.C. Ex. 7). Jenkins invited the Union to submit another proposal before the parties met. (*Id.*). The Union did not. Jirles asked Jenkins to clarify the Respondent's statement of non-negotiability. (*Id.*). The Respondent did not.

The General Counsel asserts that this chain of events demonstrates that the Respondent failed to comply with the settlement and allows it to reinstitute the proceedings in AT-CA-15-0135. (G.C. Br. at 15-16). I find that these facts fall short of establishing that the Respondent failed to comply with the settlement in this case requiring it to bargain over the travel savings incentive program. The Respondent agreed to negotiate with the Union; entertained the Union's proposal and submitted a counter-proposal. These actions, in my view, demonstrate substantial good faith compliance with the settlement agreement requiring it to negotiate over the Union's proposal negating the Regional Director's ability to set aside the settlement agreement. The Respondent exercised its rights under § 7117(c) of the Statute when it asserted that the Union's travel savings incentive proposal was non-negotiable. (*Id.*). While I do not condone the Respondent's failure to communicate further with the Union on the matter after declaring the Union's proposal non-negotiable, I do not find the Respondent's conduct evidences non-compliance with the settlement after making its position on the Union's proposal clear and receiving no changes to the proposal.[12] Accordingly, I conclude that setting aside the settlement agreement in AT-CA-15-0135 is unwarranted and dismiss the part of the Consolidated Complaint applicable to this charge.

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[11] Counsel for the General Counsel suggests in her brief that the Union could not file a negotiability appeal because the Respondent failed to clarify its statement of non-negotiability. (G.C. Br. at 12, n.25). But, a union is not left without recourse if an agency fails to respond to its request for a written statement of non-negotiability. Under § 2424.11(a) of the Authority's Rules and Regulations, a union may file a negotiability appeal if an agency fails to respond to its request for a written statement of non-negotiability. 5 C.F.R. § 2424.11(a).

[12] I am not suggesting that the Union was required to make any changes or even needed to.

As stated above, I do not find the necessary non-compliance with the settlement in AT-CA-15-0135 that would allow the General Counsel to revive the Complaint in this case. But, even if the General Counsel could successfully reinstate the Complaint in this case, I would dismiss the case on its merits because like AT-CA-16-0055, the facts of the case fail to establish unfair labor practice conduct. In AT-CA-15-0135 the General Counsel argues that Respondent's representatives' statement at the December 2, 2014 teleconference with the FMCS Mediator that the Union's travel savings incentive proposal concerns a permissive bargaining topic amounts to a refusal to bargain. (G.C. Br. at 10, 12).[13]

The General Counsel's case in AT-CA-15-0135 rests upon the Respondent's assertion that the Union's proposal concerns a permissive bargaining topic. (G.C. Br. at 3 nn.3, 10-12). Notably, the Authority has not found that an agency acts at its peril when declaring proposals non-negotiable or permissively negotiable under § 7117(c) of the Statute.[14] Here, the General Counsel relies heavily upon its argument that the Respondent erroneously declared that the Union's proposal concerns a permissive bargaining topic. (G.C. Ex. 1(c); G.C. Br. at 3 n.3, 10-12). But, a disagreement about whether the Union's travel savings incentive proposal concerns a permissive bargaining topic under § 7106(b)(1) still amounts to a negotiability dispute. The Authority's Rules and Regulations define a negotiability dispute as "a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. . . . including disagreement with an agency contention that a proposal is bargainable only at its election." 5 C.F.R. § 2424.2(c). Therefore, the Respondent's assertion that the Union's proposal is negotiable at its election dwells in the realm of negotiability along with the Respondent's statement that the proposal excessively interferes with management rights. (*Id.*). Thus, like AT-CA-16-0055, the General Counsel has failed to establish that the Respondent engaged in unfair labor practice conduct in violation of the Statute. *VA*, 53 FLRA at 240.

CONCLUSION

In the Consolidated Complaint, the General Counsel presents a path to ULP violations based upon negotiability determinations that § 7105(a)(2)(E) of the Statute imbues in the Authority to resolve only. *See U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, 58 FLRA 750, 755 (2003) (only the Authority may resolve an allegation during collective bargaining that the duty to bargain does not extend to any matter). In finding no violation when considering an indistinguishable legal argument under similar facts, the Authority noted in *VA* that, "The Authority has never relied on a general negotiability principle to conclude that an agency committed an unfair labor practice by

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[13] I reject the General Counsel's argument that the Respondent did not "further engage in negotiations after December 2, 2014 . . . [in] violation of Section 7116(a)(1) and (5) of the Statute." (G.C. Br. at 12).

[14] Under § 7116(c) the exclusive representative may raise questions of negotiability to the Authority when "an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter . . . . " 5 U.S.C. § 7116(c)(1).

refusing to bargain over a specific proposal." *VA*, 53 FLRA at 241. Consistent with the Authority's determination in that case and current Authority precedent, I find that the General Counsel failed to establish that the Respondent violated the Statute.

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

ORDER

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

Issued, Washington, D.C., September 21, 2016

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge